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Contents

Federal Register

Vol. 88, No. 1

Tuesday, January 3, 2023

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

7 CFR

Proposed Rules:

920.....16
985.....18

10 CFR

Proposed Rules:

30.....25
40.....25
50.....25
70.....25
72.....25

12 CFR

1083.....1

14 CFR

Proposed Rules:

61.....34
63.....34
65.....34

15 CFR

6.....3

16 CFR

Proposed Rules:

456.....248

17 CFR

Proposed Rules:

240.....128
242.....128

21 CFR

101.....6
876.....8

33 CFR

Proposed Rules:

165.....35

40 CFR

Proposed Rules:

180.....38
721.....41

47 CFR

73.....10

Proposed Rules:

73.....42

50 CFR

648.....11

Rules and Regulations

Federal Register

Vol. 88, No. 1

Tuesday, January 3, 2023

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1083

Civil Penalty Inflation Adjustments

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Consumer Financial Protection Bureau (Bureau) is adjusting for inflation the maximum amount of each civil penalty within the Bureau's jurisdiction. These adjustments are required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act), as amended by the Debt Collection Improvement Act of 1996 and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The inflation adjustments mandated by the Inflation Adjustment Act serve to maintain the deterrent effect of civil penalties and to promote compliance with the law.

DATES: This final rule is effective January 15, 2023.

FOR FURTHER INFORMATION CONTACT: Adrien Fernandez, Counsel, Thomas Dowell, Senior Counsel, Office of Regulations, at (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Inflation Adjustment Act,[1] as amended by the Debt Collection Improvement Act of 1996 [2] and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,[3] directs Federal agencies to adjust the civil penalty amounts within their jurisdiction for inflation not later than July 1, 2016, and then not later than January 15 every year thereafter.[4] Each agency was required to make the 2016 one-time catch-up adjustments through an interim final rule published in the **Federal Register**. On June 14, 2016, the Bureau published its interim final rule (IFR) to make the initial catch-up adjustments to civil penalties within the Bureau's jurisdiction.[5] The June 2016 IFR created a new part 1083 and in 1083.1 established the inflation-adjusted maximum amounts for each civil penalty within the Bureau's jurisdiction.[6] The Bureau finalized the IFR on January 31, 2019.[7]

The Inflation Adjustment Act also requires subsequent adjustments to be made annually, not later than January 15, and notwithstanding section 553 of the Administrative Procedure Act (APA).[8] The Bureau annually adjusted its civil penalty amounts, as required by the Act, through rules issued in January 2017, January 2018, January 2019, January 2020, January 2021, and January 2022.[9]

Specifically, the Act directs Federal agencies to adjust annually each civil penalty provided by law within the jurisdiction of the agency by the ''cost-of-living adjustment.'' [10] The ''cost-of-living adjustment'' is defined as the percentage (if any) by which the Consumer Price Index for all-urban consumers (CPI–U) for the month of October preceding the date of the adjustment, exceeds the CPI–U for October of the prior year.[11] The Director of the Office of Management and Budget (OMB) is required to issue guidance (OMB Guidance) every year by December 15 to agencies on implementing the annual civil penalty inflation adjustments. Pursuant to the Inflation Adjustment Act and OMB Guidance, agencies must apply the multiplier reflecting the ''cost-of-living adjustment'' to the current penalty amount and then round that amount to the nearest dollar to determine the annual adjustments.[12] The adjustments are designed to keep pace with inflation so that civil penalties retain their deterrent effect and promote compliance with the law.[13]

For the 2023 annual adjustment, the multiplier reflecting the ''cost-of-living adjustment'' is 1.07745.

II. Adjustment

Pursuant to the Inflation Adjustment Act and OMB Guidance, the Bureau multiplied each of its civil penalty amounts by the ''cost-of-living adjustment'' multiplier and rounded to the nearest dollar.[14] The new penalty amounts that apply to civil penalties assessed after January 15, 2023, are as follows:

[1] Public Law 101–410, 104 Stat. 890.

[2] Public Law 104–134, sec. 31001(s)(1), 110 Stat. 1321, 1321–373.

[3] Public Law 114–74, sec. 701, 129 Stat. 584, 599.

[4] Section 1301(a) of the Federal Reports Elimination Act of 1998, Public Law 105–362, 112 Stat. 3293, also amended the Inflation Adjustment Act by striking section 6, which contained annual reporting requirements, and redesignating section 7 as section 6, but did not alter the civil penalty adjustment requirements; 28 U.S.C. 2461 note.

[5] 81 FR 38569 (June 14, 2016). Although the Bureau was not obligated to solicit comments for the interim final rule, the Bureau invited public comment and received none.

[6] *See* 12 CFR 1083.1.

[7] 84 FR 517 (Jan. 31, 2019).

[8] Inflation Adjustment Act section 4, codified at 28 U.S.C. 2461 note. As discussed in guidance issued by the Director of the Office of Management and Budget (OMB), the APA generally requires notice, an opportunity for comment, and a delay in effective date for certain rulemakings, but the Inflation Adjustment Act provides that these procedures are not required for agencies to issue regulations implementing the annual adjustment. *See* Memorandum for the Heads of Exec. Dep'ts & Agencies from Shalanda D. Young, Director, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Off. of Mgmt. & Budget (Dec. 15, 2022), *available at https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf.*

[9] 82 FR 3601 (Jan. 12, 2017); 83 FR 1525 (Jan. 12, 2018); 84 FR 517 (Jan. 31, 2019); 85 FR 2012 (Jan. 14, 2020); 86 FR 3767 (Jan. 15, 2021).

[10] Inflation Adjustment Act sections 4 and 5, codified at 28 U.S.C. 2461 note.

[11] Inflation Adjustment Act sections 3 and 5, codified at 28 U.S.C. 2461 note.

[12] Inflation Adjustment Act section 5, codified at 28 U.S.C. 2461 note; *see also* Memorandum for the Heads of Exec. Dep'ts & Agencies from Shalanda D. Young, Director, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Off. of Mgmt. & Budget (Dec. 15, 2022), *available at https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf.*

[13] *See* Inflation Adjustment Act section 2, codified at 28 U.S.C. 2461 note.

[14] Inflation Adjustment Act section 4, codified at 28 U.S.C. 2461 note.

Law	Penalty description	Penalty amounts established under 2021 final rule	OMB ''cost-of-living adjustment'' multiplier	New penalty amount
Consumer Financial Protection Act, 12 U.S.C. 5565(c)(2)(A)	Tier 1 penalty	$6,323	1.07745	$6,813
Consumer Financial Protection Act, 12 U.S.C. 5565(c)(2)(B)	Tier 2 penalty	31,616	1.07745	34,065
Consumer Financial Protection Act, 12 U.S.C. 5565(c)(2)(C)	Tier 3 penalty	1,264,622	1.07745	1,362,567
Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1717a(a)(2)	Per violation	2,203	1.07745	2,374
Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1717a(a)(2)	Annual cap	2,202,123	1.07745	2,372,677
Real Estate Settlement Procedures Act, 12 U.S.C. 2609(d)(1)	Per failure	103	1.07745	111
Real Estate Settlement Procedures Act, 12 U.S.C. 2609(d)(1)	Annual cap	207,183	1.07745	223,229
Real Estate Settlement Procedures Act, 12 U.S.C. 2609(d)(2)(A).	Per failure, where intentional.	207	1.07745	223
SAFE Act, 12 U.S.C. 5113(d)(2)	Per violation	31,928	1.07745	34,401
Truth in Lending Act, 15 U.S.C. 1639e(k)(1)	First violation	12,647	1.07745	13,627
Truth in Lending Act, 15 U.S.C. 1639e(k)(2)	Subsequent violations	25,293	1.07745	27,252

III. Procedural Requirements

A. Administrative Procedure Act

Under the APA, notice and opportunity for public comment are not required if the Bureau finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest.[15] The adjustments to the civil penalty amounts are technical and non-discretionary, and they merely apply the statutory method for adjusting civil penalty amounts. These adjustments are required by the Inflation Adjustment Act. Moreover, the Inflation Adjustment Act directs agencies to adjust civil penalties annually notwithstanding section 553 of the APA,[16] and OMB Guidance reaffirms that agencies need not complete a notice-and-comment process before making the annual adjustments for inflation.[17] For these reasons, the Bureau has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary. The amendments therefore are adopted in final form.

Section 553(d) of the APA generally requires publication of a final rule not less than 30 days before its effective date, except (1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretive rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.[18] At minimum, the Bureau believes the annual adjustments to the civil penalty amounts in § 1083.1(a) fall under the third exception to section 553(d). The Bureau finds that there is good cause to make the amendments effective on January 15, 2022. The amendments to § 1083.1(a) in this final rule are technical and non-discretionary, and they merely apply the statutory method for adjusting civil penalty amounts and follow the statutory directive to make annual adjustments each year. Moreover, the Inflation Adjustment Act directs agencies to adjust the civil penalties annually notwithstanding section 553 of the APA,[19] and OMB Guidance reaffirms that agencies need not provide a delay in effective date for the annual adjustments for inflation.[20]

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required.[21] As noted previously, the Bureau has determined that it is unnecessary to publish a general notice of proposed rulemaking for this final rule. Accordingly, the RFA's requirement relating to an initial and final regulatory flexibility analysis do not apply.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995,[22] the Bureau reviewed this final rule. The Bureau has determined that this rule does not create any new information collections or substantially revise any existing collections.

D. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Bureau will submit a report containing this rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule taking effect. The Office of Information and Regulatory Affairs (OIRA) has designated this rule as not a ''major rule'' as defined by 5 U.S.C. 804(2).

IV. Signing Authority

Senior Advisor Brian Shearer, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, a Bureau Federal Register Liaison, for purposes of publication in the **Federal Register**.

List of Subjects in 12 CFR Part 1083

Administrative practice and procedure, Consumer protection, Penalties.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends 12 CFR part 1083, as set forth below:

PART 1083—CIVIL PENALTY ADJUSTMENTS

■ 1. The authority citation for part 1083 continues to read as follows:

Authority: 12 U.S.C. 2609(D); 12 U.S.C. 5113(D)(2); 12 U.S.C. 5565(C); 15 U.S.C. 1639E(K); 15 U.S.C. 1717A(A); 28 U.S.C. 2461 NOTE.

■ 2. Section 1083.1 is revised to read as follows:

[15] 5 U.S.C. 553(b)(B).

[16] Inflation Adjustment Act section 4, codified at 28 U.S.C. 2461 note.

[17] Memorandum for the Heads of Exec. Dep'ts & Agencies from Shalanda D. Young, Director, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Off. of Mgmt. & Budget (Dec. 15, 2022), *available at https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf.*

[18] 5 U.S.C. 553(d).

[19] Inflation Adjustment Act section 4, codified at 28 U.S.C. 2461 note.

[20] Memorandum for the Heads of Exec. Dep'ts & Agencies from Shalanda D. Young, Director, Implementation of Penalty Inflation Adjustments for 2023, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Off. of Mgmt. & Budget (Dec. 15, 2022), *available at https://www.whitehouse.gov/wp-content/uploads/2022/12/M-23-05-CMP-CMP-Guidance.pdf.*

[21] 5 U.S.C. 603(a), 604(a).

[22] 44 U.S.C. 3506; 5 CFR part 1320.

§ 1083.1 Adjustment of civil penalty amounts.

(a) The maximum amount of each civil penalty within the jurisdiction of the Consumer Financial Protection Bureau to impose is adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. 2461 note), as follows:

TABLE 1 TO PARAGRAPH (a)

Law	Penalty description	Adjusted maximum civil penalty amount
12 U.S.C. 5565(c)(2)(A)	Tier 1 penalty	$6,813
12 U.S.C. 5565(c)(2)(B)	Tier 2 penalty	34,065
12 U.S.C. 5565(c)(2)(C)	Tier 3 penalty	1,362,567
15 U.S.C. 1717a(a)(2)	Per violation	2,374
15 U.S.C. 1717a(a)(2)	Annual cap	2,372,677
12 U.S.C. 2609(d)(1)	Per failure	111
12 U.S.C. 2609(d)(1)	Annual cap	223,229
12 U.S.C. 2609(d)(2)(A)	Per failure, where intentional	223
12 U.S.C. 5113(d)(2)	Per violation	34,401
15 U.S.C. 1639e(k)(1)	First violation	13,627
15 U.S.C. 1639e(k)(2)	Subsequent violations	27,252

(b) The adjustments in paragraph (a) of this section shall apply to civil penalties assessed after January 15, 2023, whose associated violations occurred on or after November 2, 2015.

Laura Galban,

Federal Register Liaison, Consumer Financial Protection Bureau.

[FR Doc. 2022–28442 Filed 12–30–22; 8:45 am]

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DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 6

[Docket No. 221222–0281]

RIN 0605–AA65

Civil Monetary Penalty Adjustments for Inflation

AGENCY: Office of the Chief Financial Officer and Assistant Secretary for Administration, Department of Commerce.

ACTION: Final rule.

SUMMARY: This final rule is being issued to adjust for inflation each civil monetary penalty (CMP) provided by law within the jurisdiction of the United States Department of Commerce (Department of Commerce). The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, required the head of each agency to adjust for inflation its CMP levels in effect as of November 2, 2015, under a revised methodology that was effective for 2016 which provided for initial catch up adjustments for inflation in 2016, and requires adjustments for inflation to CMPs under a revised methodology for each year thereafter. The Department of Commerce's 2023 adjustments for inflation to CMPs apply only to CMPs with a dollar amount, and will not apply to CMPs written as functions of violations. The Department of Commerce's 2023 adjustments for inflation to CMPs apply only to those CMPs, including those whose associated violation predated such adjustment, which are assessed by the Department of Commerce after the effective date of the new CMP level.

DATES: This rule is effective January 15, 2023.

FOR FURTHER INFORMATION CONTACT: Stephen M. Kunze, Deputy Chief Financial Officer and Director for Financial Management, Office of Financial Management, at (202) 482–1207, Department of Commerce, 1401 Constitution Avenue NW, Room D200, Washington, DC 20230. The Department of Commerce's Civil Monetary Penalty Adjustments for Inflation are available for downloading from the Department of Commerce, Office of Financial Management's website at the following address: *http://www.osec.doc.gov/ofm/OFM_Publications.html.*

SUPPLEMENTARY INFORMATION:

Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410; 28 U.S.C. 2461), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134), provided for agencies' adjustments for inflation to CMPs to ensure that CMPs continue to maintain their deterrent value and that CMPs due to the Federal Government were properly accounted for and collected.

A CMP is defined as any penalty, fine, or other sanction that:

1. Is for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; and,

2. Is assessed or enforced by an agency pursuant to Federal law; and,

3. Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74) further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 to improve the effectiveness of CMPs and to maintain their deterrent effect. This amendment (1) required agencies to adjust the CMP levels in effect as of November 2, 2015, with initial catch up adjustments for inflation through a final rulemaking to take effect no later than August 1, 2016; and (2) requires agencies to make subsequent annual adjustments for inflation to CMPs that shall take effect not later than January 15. The Department of Commerce's 2022 adjustments for inflation to CMPs were published in the **Federal Register** on January 4, 2022, and the new CMP levels became effective January 15, 2022.

The Department of Commerce's 2023 adjustments for inflation to CMPs apply only to CMPs with a dollar amount, and will not apply to CMPs written as functions of violations. These 2023

adjustments for inflation apply only to those CMPs, including those whose associated violation predated such adjustment, which are assessed by the Department of Commerce after the effective date of the new CMP level.

This regulation adjusts for inflation CMPs that are provided by law within the jurisdiction of the Department of Commerce. The actual CMP assessed for a particular violation is dependent upon a variety of factors. For example, the National Oceanic and Atmospheric Administration's (NOAA) Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (Penalty Policy), a compilation of NOAA internal guidelines that are used when assessing CMPs for violations for most of the statutes NOAA enforces, will be interpreted in a manner consistent with this regulation to maintain the deterrent effect of the CMPs. The CMP ranges in the Penalty Policy are intended to aid enforcement attorneys in determining the appropriate CMP to assess for a particular violation. NOAA's Penalty Policy is maintained and made available to the public on NOAA's Office of the General Counsel, Enforcement Section website at: *http://www.gc.noaa.gov/enforce-office.html.*

The Department of Commerce's 2023 adjustments for inflation to CMPs set forth in this regulation were determined pursuant to the methodology prescribed by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which requires the maximum CMP, or the minimum and maximum CMP, as applicable, to be increased by the cost-of-living adjustment. The term ''cost-of-living adjustment'' is defined by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. For the 2023 adjustments for inflation to CMPs, the cost-of-living adjustment is the percentage for each CMP by which the Consumer Price Index for the month of October 2022 exceeds the Consumer Price Index for the month of October 2021.

Classification

Pursuant to 5 U.S.C. 553(b)(3)(B), there is good cause to issue this rule without prior public notice or opportunity for public comment because it would be unnecessary. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701(b)) requires agencies to make annual adjustments for inflation to CMPs notwithstanding section 553 of title 5, United States Code. Additionally, the methodology used for adjusting CMPs for inflation is given by statute, with no discretion provided to agencies regarding the substance of the adjustments for inflation to CMPs. The Department of Commerce is charged only with performing ministerial computations to determine the dollar amounts of adjustments for inflation to CMPs. Accordingly, prior public notice and an opportunity for public comment are not required for this rule. For the same reasons, there is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

Regulatory Analysis

E.O. 12866, Regulatory Review

This rule is not a significant regulatory action as that term is defined in Executive Order 12866.

Regulatory Flexibility Act

Because notice of proposed rulemaking and opportunity for comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

List of Subjects in 15 CFR Part 6

Civil monetary penalties, Law enforcement.

Dated: December 23, 2022.

Stephen M. Kunze,

Deputy Chief Financial Officer and Director for Financial Management, Department of Commerce.

Authority and Issuance

■ For the reasons stated in the preamble, the Department of Commerce revises 15 CFR part 6 to read as follows:

PART 6—CIVIL MONETARY PENALTY ADJUSTMENTS FOR INFLATION

Sec.

Authority: Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–134, 110 Stat. 1321 (31 U.S.C. 3701 note); Sec. 701 of Pub. L. 114–74, 129 Stat. 599 (28 U.S.C. 1 note; 28 U.S.C. 2461 note).

§ 6.1 Definitions.

(a) The *Department of Commerce* means the United States Department of Commerce.

(b) *Civil Monetary Penalty* means any penalty, fine, or other sanction that:

(1) Is for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; and

(2) Is assessed or enforced by an agency pursuant to Federal law; and

(3) Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

§ 6.2 Purpose and scope.

The purpose of this part is to make adjustments for inflation to civil monetary penalties, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410; 28 U.S.C. 2461), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74), of each civil monetary penalty provided by law within the jurisdiction of the United States Department of Commerce (Department of Commerce).

§ 6.3 Adjustments for inflation to civil monetary penalties.

The civil monetary penalties provided by law within the jurisdiction of the Department of Commerce, as set forth in paragraphs (a) through (f) of this section, are hereby adjusted for inflation in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, from the amounts of such civil monetary penalties that were in effect as of January 15, 2022, to the amounts of such civil monetary penalties, as thus adjusted. The year stated in parenthesis represents the year that the civil monetary penalty was last set by law or adjusted by law (excluding adjustments for inflation).

(a) *United States Department of Commerce.* (1) 31 U.S.C. 3802(a)(1), Program Fraud Civil Remedies Act of 1986 (1986), violation, maximum from $12,537 to $13,508.

(2) 31 U.S.C. 3802(a)(2), Program Fraud Civil Remedies Act of 1986 (1986), violation, maximum from $12,537 to $13,508.

(3) 31 U.S.C. 3729(a)(1)(G), False Claims Act (1986); violation, minimum from $12,537 to $13,508; maximum from $25,076 to $27,018.

(b) *Bureau of Economic Analysis.* 22 U.S.C. 3105(a), International Investment and Trade in Services Act (1990); failure to furnish information, minimum from $5,179 to $5,580; maximum from $51,796 to $55,808.

(c) *Bureau of Industry and Security.* (1) 15 U.S.C. 5408(b)(1), Fastener Quality Act (1990), violation, maximum from $51,796 to $55,808.

(2) 22 U.S.C. 6761(a)(1)(A), Chemical Weapons Convention Implementation Act (1998), violation, maximum from $42,163 to $45,429.

(3) 22 U.S.C. 6761(a)(l)(B), Chemical Weapons Convention Implementation Act (1998), violation, maximum from $8,433 to $9,086.

(4) 50 U.S.C. 1705(b), International Emergency Economic Powers Act (2007), violation, maximum from $330,947 to $356,579.

(5) 22 U.S.C. 8142(a), United States Additional Protocol Implementation Act (2006), violation, maximum from $34,265 to $36,919.

(6) 50 U.S.C. 4819, Export Controls Act of 2018 (2018), violation, maximum from $328,121 to $353,534.

(d) *Census Bureau.* (1) 13 U.S.C. 304, Collection of Foreign Trade Statistics (2002), each day's delinquency of a violation; total of not to exceed maximum per violation, from $1,525 to $1,643; maximum per violation, from $15,256 to $16,438.

(2) 13 U.S.C. 305(b), Collection of Foreign Trade Statistics (2002), violation, maximum from $15,256 to $16,438.

(e) *International Trade Administration.* (1) 19 U.S.C. 81s, Foreign Trade Zone (1934), violation, maximum from $3,198 to $3,446.

(2) 19 U.S.C. 1677f(f)(4), U.S.-Canada Free Trade Agreement Protective Order (1988), violation, maximum from $230,107 to $247,929.

(f) *National Oceanic and Atmospheric Administration.* (1) 51 U.S.C. 60123(a), Land Remote Sensing Policy Act of 2010 (2010), violation, maximum from $12,646 to $13,625.

(2) 51 U.S.C. 60148(c), Land Remote Sensing Policy Act of 2010 (2010), violation, maximum from $12,646 to $13,625.

(3) 16 U.S.C. 773f(a), Northern Pacific Halibut Act of 1982 (2007), violation, maximum from $264,759 to $285,265.

(4) 16 U.S.C. 783, Sponge Act (1914), violation, maximum from $1,891 to $2,037.

(5) 16 U.S.C. 957(d), (e), and (f), Tuna Conventions Act of 1950 (1962):

(i) Violation of 16 U.S.C. 957(a), maximum from $94,487 to $101,805.

(ii) Subsequent violation of 16 U.S.C. 957(a), maximum from $203,511 to $219,273.

(iii) Violation of 16 U.S.C. 957(b), maximum from $3,198 to $3,446.

(iv) Subsequent violation of 16 U.S.C. 957(b), maximum from $18,898 to $20,362.

(v) Violation of 16 U.S.C. 957(c), maximum from $407,024 to $438,548.

(6) 16 U.S.C. 957(i), Tuna Conventions Act of 1950,[1] violation, maximum from $207,183 to $223,229.

(7) 16 U.S.C. 959, Tuna Conventions Act of 1950,[2] violation, maximum from $207,183 to $223,229.

(8) 16 U.S.C. 971f(a), Atlantic Tunas Convention Act of 1975,[3] violation, maximum from $207,183 to $223,229.

(9) 16 U.S.C. 973f(a), South Pacific Tuna Act of 1988 (1988), violation, maximum from $575,266 to $619,820.

(10) 16 U.S.C. 1174(b), Fur Seal Act Amendments of 1983 (1983), violation, maximum from $27,384 to $29,505.

(11) 16 U.S.C. 1375(a)(1), Marine Mammal Protection Act of 1972 (1972), violation, maximum from $31,980 to $34,457.

(12) 16 U.S.C. 1385(e), Dolphin Protection Consumer Information Act,[4] violation, maximum from $207,183 to $223,229.

(13) 16 U.S.C. 1437(d)(1), National Marine Sanctuaries Act (1992), violation, maximum from $195,054 to $210,161.

(14) 16 U.S.C. 1540(a)(1), Endangered Species Act of 1973:

(i) Violation as specified (1988), maximum from $57,527 to $61,982.

(ii) Violation as specified (1988), maximum from $27,612 to $29,751.

(iii) Otherwise violation (1978), maximum from $1,891 to $2,037.

(15) 16 U.S.C. 1858(a), Magnuson-Stevens Fishery Conservation and Management Act (1990), violation, maximum from $207,183 to $223,229.

(16) 16 U.S.C. 2437(a), Antarctic Marine Living Resources Convention Act of 1984,[5] violation, maximum from $207,183 to $223,229.

(17) 16 U.S.C. 2465(a), Antarctic Protection Act of 1990,[6] violation, maximum from $207,183 to $223,229.

(18) 16 U.S.C. 3373(a), Lacey Act Amendments of 1981 (1981):

(i) 16 U.S.C. 3373(a)(1), violation, maximum from $29,614 to $31,908.

(ii) 16 U.S.C. 3373(a)(2), violation, maximum from $740 to $797.

(19) 16 U.S.C. 3606(b)(1), Atlantic Salmon Convention Act of 1982,[7] violation, maximum from $207,183 to $223,229.

(20) 16 U.S.C. 3637(b), Pacific Salmon Treaty Act of 1985,[8] violation, maximum from $207,183 to $223,229.

(21) 16 U.S.C. 4016(b)(1)(B), Fish and Seafood Promotion Act of 1986 (1986); violation, minimum from $1,253 to $1,350; maximum from $12,537 to $13,508.

(22) 16 U.S.C. 5010, North Pacific Anadromous Stocks Act of 1992,[9] violation, maximum from $207,183 to $223,229.

(23) 16 U.S.C. 5103(b)(2), Atlantic Coastal Fisheries Cooperative Management Act,[10] violation, maximum from $207,183 to $223,229.

(24) 16 U.S.C. 5154(c)(1), Atlantic Striped Bass Conservation Act,[11] violation, maximum from $207,183 to $223,229.

(25) 16 U.S.C. 5507(a), High Seas Fishing Compliance Act of 1995 (1995), violation, maximum from $179,953 to $193,890.

(26) 16 U.S.C. 5606(b), Northwest Atlantic Fisheries Convention Act of 1995,[12] violation, maximum from $207,183 to $223,229.

(27) 16 U.S.C. 6905(c), Western and Central Pacific Fisheries Convention Implementation Act,[13] violation, maximum from $207,183 to $223,229.

(28) 16 U.S.C. 7009(c) and (d), Pacific Whiting Act of 2006,[14] violation, maximum from $207,183 to $223,229.

(29) 22 U.S.C. 1978(e), Fishermen's Protective Act of 1967 (1971):

(i) Violation, maximum from $31,980 to $34,457.

(ii) Subsequent violation, maximum from $94,487 to $101,805.

(30) 30 U.S.C. 1462(a), Deep Seabed Hard Mineral Resources Act (1980), violation, maximum, from $81,540 to $87,855.

(31) 42 U.S.C. 9152(c), Ocean Thermal Energy Conversion Act of 1980 (1980), violation, maximum from $81,540 to $87,855.

(32) 16 U.S.C. 1827a, Billfish Conservation Act of 2012,[15] violation, maximum from $207,183 to $223,229.

(33) 16 U.S.C. 7407(b), Port State Measures Agreement Act of 2015,[16] violation, maximum from $207,183 to $223,229.

(34) 16 U.S.C. 1826g(f), High Seas Driftnet Fishing Moratorium Protection Act,[17] violation, maximum from $207,183 to $223,229.

(35) 16 U.S.C. 7705, Ensuring Access to Pacific Fisheries Act,[18] violation, maximum from $207,183 to $223,229.

(36) 16 U.S.C. 7805, Ensuring Access to Pacific Fisheries Act,[19] violation, maximum from $207,183 to $223,229.

(g) *National Technical Information Service.* 42 U.S.C. 1306c(c), Bipartisan Budget Act of 2013 (2013), violation, minimum from $1,075 to $1,158; maximum total penalty on any person for any calendar year, excluding willful or intentional violations, from $268,694 to $289,504.

(h) *Office of the Under Secretary for Economic Affairs.* 15 U.S.C. 113, Concrete Masonry Products Research, Education, and Promotion Act of 2018, (newly reported penalty), violation, maximum $5,000.

[1] This National Oceanic and Atmospheric Administration maximum civil monetary penalty, as prescribed by law, is the maximum civil monetary penalty per 16 U.S.C. 1858(a), Magnuson-Stevens Fishery Conservation and Management Act civil monetary penalty (paragraph (f)(15) of this section).

[2] See footnote 1.

[3] See footnote 1.

[4] See footnote 1.

[5] See footnote 1.

[6] See footnote 1.

[7] See footnote 1.

[8] See footnote 1.

[9] See footnote 1.

[10] See footnote 1.

[11] See footnote 1.

[12] See footnote 1.

[13] See footnote 1.

[14] See footnote 1.

[15] See footnote 1.

[16] See footnote 1.

[17] See footnote 1.

[18] See footnote 1.

[19] See footnote 1.

§ 6.4 Effective date of adjustments for inflation to civil monetary penalties.

The Department of Commerce's 2023 adjustments for inflation made by § 6.3, of the civil monetary penalties there specified, are effective on January 15, 2023, and said civil monetary penalties, as thus adjusted by the adjustments for inflation made by § 6.3, apply only to those civil monetary penalties, including those whose associated violation predated such adjustment, which are assessed by the Department of Commerce after the effective date of the new civil monetary penalty level, and before the effective date of any future adjustments for inflation to civil monetary penalties thereto made subsequent to January 15, 2023 as provided in § 6.5.

§ 6.5 Subsequent annual adjustments for inflation to civil monetary penalties.

The Secretary of Commerce or his or her designee by regulation shall make subsequent adjustments for inflation to the Department of Commerce's civil monetary penalties annually, which shall take effect not later than January 15, notwithstanding section 553 of title 5, United States Code.

[FR Doc. 2022–28363 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–DP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2000–N–0011]

Uniform Compliance Date for Food Labeling Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or we) is establishing January 1, 2026, as the uniform compliance date for food labeling regulations that are published on or after January 1, 2023, and on or before December 31, 2024. We periodically announce uniform compliance dates for new food labeling requirements to minimize the economic impact of labeling changes.

DATES: This rule is effective January 3, 2023. Either electronic or written comments on the final rule must be submitted by March 6, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 6, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2000–N–0011 for ''Uniform Compliance Date for Food Labeling Regulations.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' We will review this copy, including the claimed confidential information, in our consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments, and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Philip L. Chao, Center for Food Safety and Applied Nutrition (HFS–24), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2378.

SUPPLEMENTARY INFORMATION:

I. Background

We periodically issue regulations requiring changes in the labeling of food. If the compliance dates of these labeling changes were not coordinated, the cumulative economic impact on the food industry of having to respond separately to each change would be substantial. Therefore, we periodically have announced uniform compliance dates for new food labeling requirements (see *e.g.,* the **Federal Register** of October 19, 1984 (49 FR 41019); December 24, 1996 (61 FR 67710); December 27, 1996 (61 FR 68145); December 23, 1998 (63 FR 71015); November 20, 2000 (65 FR 69666); December 31, 2002 (67 FR 79851); December 21, 2006 (71 FR 76599); December 8, 2008 (73 FR 74349); December 15, 2010 (75 FR 78155); November 28, 2012 (77 FR 70885); December 10, 2014 (79 FR 73201); November 25, 2016 (81 FR 85156); December 20, 2018 (83 FR 65294); and January 6, 2021 (86 FR 462)). Use of a uniform compliance date provides for an orderly and economical industry adjustment to new labeling requirements by allowing sufficient lead time to plan for the use of existing label inventories and the development of new labeling materials.

II. Analysis of Environmental Impact

We have determined under 21 CFR 25.30(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

III. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

IV. Economic Analysis of Impacts

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all 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, and other advantages; distributive impacts; and equity). We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The establishment of a uniform compliance date does not in itself lead to costs or benefits. We will assess the costs and benefits of the uniform compliance date in the regulatory impact analyses of the labeling rules that take effect at that date.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the final rule does not impose compliance costs on small entities, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $165 million, using the most current (2021) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

V. Federalism

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. We have determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we have concluded that the rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

VI. Conclusion

This action is not intended to change existing requirements for compliance dates contained in final rules published before January 1, 2023. Therefore, all final rules published by FDA in the **Federal Register** before January 1, 2023, will still go into effect on the date stated in the respective final rule. We generally encourage industry to comply with new labeling regulations as quickly as feasible, however. Thus, when industry members voluntarily change their labels, it is appropriate that they incorporate any new requirements that have been published as final regulations up to that time.

In rulemaking that began with publication of a proposed rule on April 15, 1996 (61 FR 16422), and ended with a final rule on December 24, 1996 (61 FR 67710) (together ''the 1996 rulemaking''), we provided notice and an opportunity for comment on the practice of establishing uniform compliance dates by issuance of a final rule announcing the date. We received

no comments objecting to this practice during the 1996 rulemaking, nor have we received comments objecting to this practice since we published a uniform compliance date final rule on January 6, 2021 (86 FR 462). (To the contrary, of the four comments received to the docket in 2021, only two comments that addressed our practice of issuing final rules announcing uniform compliance dates, and both comments expressed general support.) Therefore, we find good cause to dispense with issuance of a proposed rule inviting comment on the practice of establishing the uniform compliance date because such prior notice and comment are unnecessary. Interested parties will have an opportunity to comment on the compliance date for each individual food labeling regulation as part of the rulemaking process for that regulation. Consequently, FDA finds any further advance notice and opportunity for comment unnecessary for establishment of the uniform compliance date. Nonetheless, under 21 CFR 10.40(e)(1), we are providing an opportunity for comment on whether the uniform compliance date established by this final rule should be modified or revoked.

In addition, we find good cause for this final rule to become effective on the date of publication of this action. A delayed effective date is unnecessary in this case because the establishment of a uniform compliance date does not impose any new regulatory requirements on affected parties. Instead, this final rule provides affected parties with notice of our policy to identify January 1, 2026, as the compliance date for final food labeling regulations that require changes in the labeling of food products and that publish on or after January 1, 2023, and on or before December 31, 2024, unless special circumstances justify a different compliance date. Thus, affected parties do not need time to prepare before the rule takes effect. Therefore, we find good cause for this final rule to become effective on the date of publication of this action.

The new uniform compliance date will apply only to final FDA food labeling regulations that require changes in the labeling of food products and that publish on or after January 1, 2023, and on or before December 31, 2024. Those regulations will specifically identify January 1, 2026, as their compliance date. All food products subject to the January 1, 2026, compliance date must comply with the appropriate regulations when initially introduced into interstate commerce on or after January 1, 2026. If any food labeling regulation involves special circumstances that justify a compliance date other than January 1, 2026, we will determine for that regulation an appropriate compliance date, which will be specified when the final regulation is published.

Dated: December 16, 2022.

Robert M. Califf,

Commissioner of Food and Drugs.

[FR Doc. 2022–27902 Filed 12–30–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 876

[Docket No. FDA–2022–N–3207]

Medical Devices; Gastroenterology-Urology Devices; Classification of the Gastrointestinal Lesion Software Detection System

AGENCY: Food and Drug Administration, HHS.

ACTION: Final amendment; final order.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is classifying the gastrointestinal lesion software detection system into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the gastrointestinal lesion software detection system's classification. We are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients' access to beneficial innovative devices.

DATES: This order is effective January 3, 2023. The classification was applicable on April 9, 2021.

FOR FURTHER INFORMATION CONTACT: Pramodh Kariyawasam, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2536, Silver Spring, MD 20993–0002, 301–348–1911, *Pramodh.Kariyawasam@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Upon request, FDA has classified the gastrointestinal lesion software detection system as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients' access to beneficial innovation, in part by placing the device into a lower device class than the automatic class III assignment.

The automatic assignment of class III occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device (see 21 U.S.C. 360c(f)(1)). We refer to these devices as ''postamendments devices'' because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act (see 21 U.S.C. 360c(i)) to a predicate device that does not require premarket approval. We determine whether a new device is substantially equivalent to a predicate device by means of the procedures for premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807).

FDA may also classify a device through ''De Novo'' classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act. Section 207 of the Food and Drug Administration Modernization Act of 1997 (Pub. L. 105–115) established the first procedure for De Novo classification. Section 607 of the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144) modified the De Novo application process by adding a second procedure. A device sponsor may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA is required to classify the device by written order within 120 days. The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Although the device was automatically placed within class III, the De Novo classification is considered to be the initial classification of the device.

When FDA classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of that type, including for 510(k)s (see section 513(f)(2)(B)(i) of the FD&C Act). As a result, other device sponsors do not have to submit a De Novo request or premarket approval application to market a substantially equivalent device (see section 513(i) of the FD&C Act, defining ''substantial equivalence''). Instead, sponsors can use the less-burdensome 510(k) process, when necessary, to market their device.

II. De Novo Classification

On November 30, 2020, FDA received Cosmo Artificial Intelligence—AI, LTD's request for De Novo classification of the GI Genius. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act.

We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see 21 U.S.C. 360c(a)(1)(B)). After review of the information submitted in the request, we determined that the device can be classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on April 9, 2021, FDA issued an order to the requester classifying the device into class II. In this final order, FDA is codifying the classification of the device by adding 21 CFR 876.1520.[1] We have named the generic type of device gastrointestinal lesion software detection system, and it is identified as a computer-assisted detection device used in conjunction with endoscopy for the detection of abnormal lesions in the gastrointestinal tract. This device with advanced software algorithms brings attention to images to aid in the detection of lesions. The device may contain hardware to support interfacing with an endoscope.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1.

TABLE 1—GASTROINTESTINAL LESION SOFTWARE DETECTION SYSTEM RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures
Algorithm failure leading to: • False positives resulting in unnecessary patient treatment; or • False negatives resulting in delayed patient treatment.	Clinical performance testing; Non-clinical performance testing; Software verification, validation, and hazard analysis; and Labeling.
Failure to identify lesions, resulting in delayed patient treatment, due to software/hardware failure including: • Incompatibility with hardware and/or data source. • Inadequate mapping of software architecture. • Degradation of image quality. • Prolonged delay of real-time endoscopic video.	Software verification, validation, and hazard analysis; Non-clinical performance testing; Labeling; Electromagnetic compatibility (EMC); and Electrical safety, thermal safety, mechanical safety testing.
False positive or false negative due to user overreliance on the device	Labeling, and Usability assessment.

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness. For a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k) of the FD&C Act.

III. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IV. Paperwork Reduction Act of 1995

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations and guidance. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in 21 CFR part 860, subpart D, regarding De Novo classification have been approved under OMB control number 0910–0844; the collections of information in 21 CFR part 814, subparts A through E, regarding premarket approval, have been approved under OMB control number 0910–0231; the collections of information in part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 820, regarding quality system regulation, have been approved under OMB control number 0910–0073; and the collections of information in 21 CFR parts 801, regarding labeling, have been approved under OMB control number 0910–0485.

List of Subjects in 21 CFR Part 876

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 876 is amended as follows:

[1] FDA notes that the Action caption for this final order is styled as ''Final amendment; final order,'' rather than ''Final order.'' Beginning in December 2019, this editorial change was made to indicate that the document ''amends'' the Code of Federal Regulations. The change was made in accordance with the Office of Federal Register's (OFR) interpretations of the Federal Register Act (44 U.S.C. chapter 15), its implementing regulations (1 CFR 5.9 and parts 21 and 22), and the Document Drafting Handbook.

PART 876—GASTROENTEROLOGY-UROLOGY DEVICES

■ 1. The authority citation for part 876 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Add § 876.1520 to subpart B to read as follows:

§ 876.1520 Gastrointestinal lesion software detection system.

(a) *Identification.* A gastrointestinal lesion software detection system is a computer-assisted detection device used in conjunction with endoscopy for the detection of abnormal lesions in the gastrointestinal tract. This device with advanced software algorithms brings attention to images to aid in the detection of lesions. The device may contain hardware to support interfacing with an endoscope.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) Clinical performance testing must demonstrate that the device performs as intended under anticipated conditions of use, including detection of gastrointestinal lesions and evaluation of all adverse events.

(2) Non-clinical performance testing must demonstrate that the device performs as intended under anticipated conditions of use. Testing must include:

(i) Standalone algorithm performance testing;

(ii) Pixel-level comparison of degradation of image quality due to the device;

(iii) Assessment of video delay due to marker annotation; and

(iv) Assessment of real-time endoscopic video delay due to the device.

(3) Usability assessment must demonstrate that the intended user(s) can safely and correctly use the device.

(4) Performance data must demonstrate electromagnetic compatibility and electrical safety, mechanical safety, and thermal safety testing for any hardware components of the device.

(5) Software verification, validation, and hazard analysis must be provided. Software description must include a detailed, technical description including the impact of any software and hardware on the device's functions, the associated capabilities and limitations of each part, the associated inputs and outputs, mapping of the software architecture, and a description of the video signal pipeline.

(6) Labeling must include:

(i) Instructions for use, including a detailed description of the device and compatibility information;

(ii) Warnings to avoid overreliance on the device, that the device is not intended to be used for diagnosis or characterization of lesions, and that the device does not replace clinical decision making;

(iii) A summary of the clinical performance testing conducted with the device, including detailed definitions of the study endpoints and statistical confidence intervals; and

(iv) A summary of the standalone performance testing and associated statistical analysis.

Dated: December 27, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–28494 Filed 12–30–22; 8:45 am]

BILLING CODE 4164–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 22–456; DA 22–1340; FR ID 120701]

Television Broadcasting Services Chicago, Illinois

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In an Order adopted on December 16, 2022, the Media Bureau, Video Division amended its regulations to reflect the termination of the incentive auction channel sharing arrangement between noncommercial educational television stations WYCC, Chicago, Illinois and WTTW, Chicago, Illinois.

DATES: Effective January 3, 2023.

FOR FURTHER INFORMATION CONTACT: Joyce Bernstein, Media Bureau, at (202) 418–1647 or *Joyce.Bernstein@fcc.gov.*

SUPPLEMENTARY INFORMATION: In 2012, Congress passed the Spectrum Act that authorized the Commission to reorganize the ultra-high frequency (UHF) band using a two-sided incentive auction that reallocated broadcast television spectrum for mobile broadband services. The incentive auction permitted television stations to accept several bid options in exchange for money, including: (1) relinquishing all usage rights with respect to a particular television channel, *i.e.,* permanently going off the air; and (2) relinquishing usage rights with respect to their channel in order to share a television channel with another licensee and continue broadcasting over a shared channel (channel sharing bid). In order to manage television spectrum, channels for full power television stations in the United States, its territories, and possessions are listed and codified in Part 73 of the Commission's rules. Full power television stations may only be constructed on channels designated in the codified Table of TV Allotments and only in the communities listed therein. Pursuant to the Commission's channel sharing procedures, when a CSA is implemented, both stations are issued licenses indicating that the stations are sharing spectrum, and the letter ''S'' or ''*S'' is included in the Table of TV Allotments to denote that a channel sharee (the station that has relinquished its channel) is allotted to that community. The asterisk indicates that at least one of the sharing stations was or is operating on a channel reserved for noncommercial educational (NCE) use. When a CSA is dissolved in a community and a sharee station does not enter into a new CSA, the sharee station may request, and the Media Bureau may grant, cancellation of the sharee station's license. In that case, the ''S'' or ''*S'' designation in the Table of TV Allotments is no longer accurate.

College District #508, County of Cook (CD #508), the former licensee of NCE television station WYCC, channel *21, was a winning license relinquishment bidder in the incentive auction and later entered into a CSA with Window to the World Communication, Inc. (Window to the World), the licensee of NCE television station WTTW, indicating that CD #508 would share WTTW's channel. Shortly thereafter, CD #508 filed an application to assign the license of WYCC to Window to the World, and that transaction was consummated on April 20, 2018. In May 2022, Window to the World filed an application for modification of its licenses to ''modify the WTTW license to dissolve the channel share such that the WTTW license has the full channel capacity. The WYCC license authorization is being surrendered to the FCC per the terms of the FCC rules on channel sharing.'' In June 2022, Window to the World submitted an application to surrender the license of WYCC. The Bureau granted the modification of license on May 18, 2022 and per Window to the World's request, cancelled the WYCC license on June 27, 2022.

The channels in the Table of TV Allotment under Chicago, Illinois presently reads as follows: ''12, 19, 22, 23, 24, *25, 33, 34, S, *S.'' Because the CSA was dissolved, WYCC's spectrum

usage rights reverted to WTTW pursuant to the CSA, and the Media Bureau canceled the WYCC license in June 2022. Therefore, the ''*S'' designation in the Table of TV Allotments for Chicago, Illinois, which was included to reflect the sharing status of channel *25, is no longer accurate, and is deleted under delegated authority. The Bureau finds good cause to make this revision to the Table of TV Allotments without notice and comment. Section 553(b)(3)(B) of the Administrative Procedure Act provides that notice and comment are not required when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. In this case, notice and comment is unnecessary because the Bureau is amending the Table to reflect final actions previously taken in cancelling the WYCC license, as requested by the station's licensee, and allowing that station's spectrum usage rights to revert to WTTW, consistent with the CSA and section 73.3700(h)(2) of the Commission's rules. Accordingly, the relinquished usage rights are not available to any other person without the consent of Window to the World, which has not been given. In addition, given that the amendments to the Table reflect final actions the Bureau has previously taken, we find good cause to make these changes effective immediately upon publication in the **Federal Register** pursuant to section 553(d)(3) of the Administrative Procedure Act. An ''S'' remains accurate in the Table under Chicago, Illinois because there is a remaining sharee station in Chicago, commercial station WSNS–TV, which is sharing channel 33 with WMAQ–TV, Chicago.

This is a synopsis of the Commission's *Order,* MB Docket No. 22–456; DA 22–1340, adopted December 16, 2022, and released December 16, 2022. The full text of this document is available for download at *https://www.fcc.gov/edocs.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, do not apply to this proceeding.

The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

Final Rule

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICE

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

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. In § 73.622(j), amend the Table of Allotments, under Illinois, by revising the entry for Chicago to read as follows:

§ 73.622 Digital television table of allotments.

* * * * *

(j) * * *

Community	Channel No.
* * * * *	
ILLINOIS	
* * * * *	
Chicago	12, 19, 22, 23, 24, *25, 33, 34, S.
* * * * *	

[FR Doc. 2022–28333 Filed 12–30–22; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 221223–0282]

RIN 0648–BL83

Fisheries of the Northeastern United States; Final 2023 Summer Flounder, Scup, and Black Sea Bass Specifications

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

ACTION: Final rule.

SUMMARY: NMFS announces 2023 specifications for the summer flounder, scup, and black sea fisheries. The implementing regulations for the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan require us to publish specifications for the upcoming fishing year for each of these species. This action is intended to inform the public of the specifications for the start of the 2023 fishing year for summer flounder, scup, and black sea bass. This rule also implements a change to the regulations to facilitate states' participation in a Wave 1 (February) recreational black sea bass fishery.

DATES: This rule is effective January 1, 2023.

ADDRESSES: A Supplemental Information Report (SIR) was prepared for the 2023 summer flounder, scup, and black sea bass specifications and a Categorical Exclusion (CE) was prepared for the administrative change for the Wave 1 black sea bass fishery. A copy of the SIR is available online at *https://www.mafmc.org/supporting-documents* or upon request from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901.

FOR FURTHER INFORMATION CONTACT: Laura Hansen, Fishery Management Specialist, *Laura.Hansen@noaa.gov,* (978) 281–9225.

SUPPLEMENTARY INFORMATION:

General Background

The Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission cooperatively manage the summer flounder, scup, and black sea bass fisheries. The Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) outlines the Council's

process for establishing specifications. The FMP requires NMFS to set an acceptable biological catch (ABC), annual catch limit (ACL), annual catch targets (ACT), commercial quotas, recreational harvest limits (RHL), and other management measures, for 1 to 3 years at a time. The specifications here reflect the recently revised commercial and recreational allocations, which were approved by the Council and Board in December 2021. On November 17, 2022, we published a final rule (87 FR 68925) implementing the revised allocations. This action sets the ABCs, as well as the recreational and commercial ACLs, ACTs, commercial quotas, and RHLs for all three species, for 2023, consistent with the recommendations made by the Commission's Summer Flounder, Scup, and Black Sea Bass Board and Council at their joint August 2022 meeting.

Final 2022–2023 Specifications

Final specifications for summer flounder, scup, and black sea bass are outlined in Table 1.

TABLE 1—2023 SUMMER FLOUNDER, SCUP, AND BLACK SEA BASS SPECIFICATIONS

[Million lb/metric tons (mt)]

	Summer flounder	Scup	Black sea bass
Overfishing Limit (OFL)	34.98 lb (15,867 mt)	30.09 lb (13,649 mt)	17.01 lb (7,716 mt)
Acceptable Biological Catch (ABC)	33.12 lb (15,023 mt)	29.67 lb (13,458 mt)	16.66 lb (7,557 mt)
Commercial ACL = Commercial Annual Catch Target (ACT)	18.21 lb (8,260 mt)	19.29 lb (8,750 mt)	7.50 lb (3,402 mt)
Commercial Quota	15.27 lb (6,926 mt)	14.01 lb (6,355 mt)	4.80 lb (2,177 mt)
Recreational ACL = Recreational ACT	14.90 lb (6,759 mt)	10.39 lb (4,713 mt)	9.16 lb (4,155 mt)
Recreational Harvest Limit	10.62 lb (4,817 mt)	9.27 lb (4,205 mt)	6.57 lb (2,980 mt)

Summer Flounder Specifications

The Council and Board approved a revised summer flounder commercial quota of 15.27 million lb (6,926 mt) and a revised RHL of 10.62 million lb (4,817 mt) for 2023. These specifications reflect the summer flounder allocations resulting from Amendment 22, which allocates 55 percent of the ABC to the commercial sector and 45 percent to the recreational sector beginning in 2023.

The final state summer flounder commercial quotas take into account any overages that occurred during the 2022 or current fishing year, through October 31, as described at 50 CFR 648.103(b)(2). The final 2023 state-by-state summer flounder commercial quotas are provided in Table 2.

TABLE 2—FINAL 2023 SUMMER FLOUNDER STATE-BY-STATE COMMERCIAL QUOTAS

State	Quota (lb)	Quota (mt)
ME	23,598	10.70
NH	19,100	8.66
MA	1,358,834	616.36
RI	2,205,205	1,000.26
CT	923,031	418.68
NY	1,437,768	652.16
NJ	2,304,717	1,045.40
DE	652	0.30
MD	902,214	409.24
VA	2,743,231	1,244.31
NC	3,328,558	1,509.81
Total	15,246,909	6,915.88

This action makes no changes to the current commercial management measures, including the minimum fish size (14-inch (36-cm) total length), gear requirements, and possession limits. Changes to 2023 recreational management measures (bag limits, size limits, and seasons) are not considered in this action. Recreational management measures for 2023 will be decided on and finalized later this year through a separate rulemaking.

Scup Specifications

The Council and Board approved a revised scup commercial quota of 14.01 million lb (6,355 mt) and a revised RHL of 9.27 million lb (4,205 mt) for 2023 (Table 1). These revisions reflect the scup allocations resulting from Amendment 22, which allocates 65 percent of the ABC to the commercial sector and 35 percent to the recreational sector beginning in 2023.

The commercial scup quota is divided into three commercial fishery quota periods, as outlined in Table 3.

TABLE 3—COMMERCIAL SCUP QUOTA ALLOCATIONS FOR 2023 BY QUOTA PERIOD

Quota period	Percent share	lb	mt
Winter I	45.11	6,319,911	2,867
Summer	38.95	5,456,895	2,475
Winter II	15.94	2,233,194	1,013
Total	100	14,010,000	6,355

The current quota period possession limits are not changed by this action, and are outlined in Table 4.

TABLE 4—COMMERCIAL SCUP POSSESSION LIMITS BY QUOTA PERIOD

Quota period	Percent share	Federal possession limits (per trip)	
		lb	kg
Winter I	45.11	50,000	22,680
Summer	38.95	N/A	N/A
Winter II	15.94	12,000	5,443
Total	100.0	N/A	N/A

The Winter I possession limit will drop to 1,000 lb (454 kg) when 80 percent of that period's allocation is landed. If the Winter I quota is not fully harvested, the remaining quota is transferred to Winter II. The Winter II possession limit may be adjusted (in association with a transfer of unused Winter I quota to the Winter II period) via notice in the **Federal Register**. The regulations at 50 CFR 648.122(d) specify that the Winter II possession limit increases consistent with the increase in the quota, as described in Table 5.

TABLE 5—POTENTIAL INCREASE IN WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF UNUSED SCUP ROLLED OVER FROM WINTER I TO WINTER II

Initial Winter II possession limit		Rollover from Winter I to Winter II		Increase to initial Winter II possession limit		Final Winter II possession limit after rollover from Winter I to Winter II	
lb	kg	lb	kg	lb	kg	lb	kg
12,000	5,443	0–499,999	0–226,796	0	0	12,000	5,443
12,000	5,443	500,000–999,999	226,796–453,592	1,500	680	13,500	6,123
12,000	5,443	1,000,000–1,499,999	453,592–680,388	3,000	1,361	15,000	6,804
12,000	5,443	1,500,000–1,999,999	680,389–907,184	4,500	2,041	16,500	7,484
12,000	5,443	2,000,000–*2,500,000	907,185–1,133,981	6,000	2,722	18,000	8,165

*This process of increasing the possession limit in 1,500 lb (680 kg) increments would continue past 2,500,000 lb (1,122,981 kg), but we end here for the purpose of illustration.

This action proposes no changes to the 2023 commercial management measures for scup, including the minimum fish size (9-inch (22.9-cm) total length), gear requirements, and quota period possession limits. As with summer flounder and black sea bass, potential changes to the recreational measures (bag limits, size limits, and seasons) for 2023 will be considered later this year.

Black Sea Bass Specifications

The Council and Board approved a revised black sea bass commercial quota of 4.80 million lb (2,177 mt) and a revised RHL of 6.57 million lb (2,980 mt) for 2023. As with the other species, these specifications reflect the black sea bass allocations resulting from Amendment 22, which allocates 45 percent of the ABC to the commercial sector and 55 percent to the recreational sector beginning in 2023. The revised RHL also incorporates a change in the recreational discards projection method. The Council and Board considered input from the Monitoring Committee on two potential methods for projecting recreational dead discards and, ultimately, recommended using an average of the two approaches (2.59 million lb (1,175 mt)). The first method sets projected 2023 recreational dead discards to the most recent 3-year average (*i.e.,* 3.04 million lb (1,379 mt)). The second method is the same used to project recreational discards for 2021 and 2022 and this method relies on a proportional average of 2.14 million lb (989 mt). The first method does not rely on an assumption that catch will be equal to the ACL and results in a higher estimate than the second method. The Council and Board agreed that it is very challenging to predict future dead discards, especially given that recent dead discards are not currently available by weight, but by numbers of fish. To generate discard estimates, an ad hoc approach was used that applies the mean weight of a discarded fish from 2019 to the number of dead discards. The 2020 and 2021 estimated discards were 3,476,690 lb (1,577 mt) and 4,195,397 lb (1,903 mt) respectively. The Council and Board also agreed that discards in 2023 could fall between the estimates generated by the two approaches; therefore, they settled on an average of these two approaches. We solicited comments on the merits of and the rationale for the average approach in the proposed rule (87 FR 74591), but did not receive any comments related to the methods for calculating dead recreational dead discards for black sea bass. Therefore, we are approving the discard approach and specifications, as recommended by the Council and Board. The 2023 black sea bass specifications are outlined in Table 6.

TABLE 6—2023 BLACK SEA BASS SPECIFICATIONS

2023 Specifications	Million lb	mt
OFL	17.01	7,716
ABC	16.66	7,557
Commercial ACL = ACT	7.50	3,401
Projected commercial dead discards	2.70	1,224
Commercial quota	4.80	2,177
Recreational ACL = ACT	9.16	4,156
Projected recreational dead discards	2.59	1,175
RHL	6.57	2,981

Black Sea Bass February Wave 1 Fishery

We are modifying the process for the optional black sea bass February recreational opening to specify that vessels landing black sea bass in a state with an approved Wave 1 recreational fishery are subject to the state regulations during that Wave 1 fishery. The Council and Board made this change to address challenges with the process used to waive Federal waters recreational black sea bass measures starting with the introduction of conservation equivalency to the fishery in 2022.

Comments and Responses

We received two relevant comments on the proposed specifications. One comment was not relevant to this action or applicable to the proposed measures, and is not discussed further.

The first relevant comment was in support of the summer flounder quotas. They also stated that black sea bass specifications should increase due to the expanded population of the species. We are implementing the summer flounder, scup and black sea bass specifications as proposed. These catch limits are based on the best available science. The results of the 2021 management track assessments for summer flounder, scup, and black sea bass were used in conjunction with the Mid-Atlantic Council's risk policy to set the appropriate levels of removal for each stock based on the recommendations of its Scientific and Statistical Committee.

The second relevant comment was submitted by the State of New York and the New York State Department of Environmental Conservation (hereinafter referenced as ''New York''). New York's comment comprises a cover letter and seven attachments. The attachments were the comment letters and supporting documents that New York previously submitted in response to the proposed rule for the 2020–2021 Summer Flounder, Scup, Black Sea Bass, and Bluefish Specifications (84 FR 36046, July 26, 2019), the proposed rule for Amendment 21 to the FMP (85 FR 48660, August 12, 2020), and the proposed rule for 2022–2023 Summer Flounder, Scup, and Black Sea Bass specifications (86 FR 67014, November 24, 2021). Similar to arguments made in ongoing litigation, New York contends that the revised allocations and resulting quotas are not in accordance with Magnuson-Stevens Act's National Standards 2, 4, 5, and 7. NMFS' responses to New York's previously submitted comments can be found in the final rules for those two actions (84 FR 54041, October 9, 2019, and 85 FR 80661, December 14, 2020) and are not repeated here. The state commercial summer flounder allocation formula is established in the regulations at 50 CFR 648.102(c), and as such must be followed in setting the quotas in this specifications action. Deviating from this formula would require a rulemaking to modify the current regulations, which is beyond the scope of this action.

Changes From the Proposed Rule

As described in the proposed rule, the summer flounder specifications in this final rule incorporate overage information to calculate the final state quotas that was not available previously. To calculate overages, complete landings data through October 31, 2022, is needed. This data was not yet available prior to the preparation of the proposed rule. Incorporating this overage information is required and formulaic.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

The Assistant Administrator for Fisheries finds that the need to implement these measures in a timely manner constitutes good cause, under the authority contained in 5 U.S.C. 553(d)(3), to waive the 30-day delay in effective date of this action. This action implements 2023 specifications for the summer flounder, scup, and black sea bass fisheries. Due to a Court order, these specifications should be effective by the start of the fishing year on January 1, 2023.

This rule is being issued at the earliest possible date. Preparation of the final rule is also dependent on the analysis of commercial summer flounder landings for the prior fishing year (2021) and the current fishing year through October 31, 2022, to determine whether any overages have occurred and adjustments are needed to the final state quotas. This process is codified in the summer flounder regulations and, therefore, cannot be performed earlier because complete data is not available until, at the earliest, October 31. Annual publication of the summer flounder quotas prior to the start of the fishing year, by December 31, is required by Court Order in *North Carolina Fisheries Association* v. *Daley.*

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

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

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

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

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

Dated: December 23, 2022.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, NMFS amends 50 CFR part 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.145, revise paragraph (a) to read as follows:

§ 648.145 Black sea bass possession limit.

(a) During the recreational fishing season specified at § 648.146, no person shall possess more than 5 black sea bass in, or harvested from, the EEZ per trip unless that person is the owner or operator of a fishing vessel issued a black sea bass moratorium permit, or is issued a black sea bass dealer permit, unless otherwise specified in the conservation equivalent measures described in § 648.151. Vessels landing black sea bass in a state with an approved Wave 1 recreational fishery are subject to the state regulations regarding possession limit during that Wave 1 fishery. Persons aboard a commercial vessel that is not eligible for a black sea bass moratorium permit may not retain more than 5 black sea bass during the recreational fishing season specified at § 648.146. The owner, operator, and crew of a charter or party boat issued a black sea bass moratorium permit are subject to the possession limit when carrying passengers for hire or when carrying more than five crew members for a party boat, or more than three crew members for a charter boat. This possession limit may be adjusted pursuant to the procedures in § 648.142. However, possession of black sea bass harvested from state waters above this possession limit is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area provided they follow the provisions at § 648.150 and abide by state regulations.

* * * * *

■ 3. Revise § 648.146 to read as follows:

§ 648.146 Black sea bass recreational fishing season.

Vessels that are not eligible for a black sea bass moratorium permit under § 648.4(a)(7), and fishermen subject to the possession limit specified in § 648.145(a), may only possess black sea bass from May 15 through October 8, unless otherwise specified in the conservation equivalent measures described in § 648.151 or unless this time period is adjusted pursuant to the procedures in § 648.142. However, possession of black sea bass harvested from state waters outside of this season is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area provided they follow the provisions at § 648.151 and abide by state regulations. Vessels landing black sea bass in a state with an approved Wave 1 recreational fishery are subject to the state regulations regarding fishing season during that Wave 1 fishery.

■ 4. In § 648.147 revise paragraph (b) to read as follows:

§ 648.147 Black sea bass size requirements.

* * * * *

(b) *Party/Charter permitted vessels and recreational fishery participants.* The minimum fish size for black sea bass is 14 inches (35.56 cm) total length for all vessels that do not qualify for a black sea bass moratorium permit, and for party boats holding a black sea bass moratorium permit, if fishing with passengers for hire or carrying more than five crew members, and for charter boats holding a black sea bass moratorium permit, if fishing with more than three crew members, unless otherwise specified in the conservation equivalent measures as described in § 648.151. However, possession of smaller black sea bass harvested from state waters is allowed for state-only permitted vessels when transiting Federal waters within the Block Island Sound Transit Area provided they follow the provisions at § 648.151 and abide by state regulations. Vessels landing black sea bass in a state with an approved Wave 1 recreational fishery are subject to the state regulations regarding size requirements during that Wave 1 fishery.

* * * * *

[FR Doc. 2022–28353 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 88, No. 1

Tuesday, January 3, 2023

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 920

[Doc. No. AMS–SC–22–0058]

Kiwifruit Grown in California; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Kiwifruit Administrative Committee (Committee) to increase the assessment rate established for the 2022–23 and subsequent fiscal periods. The assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by February 2, 2023.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments must be submitted to the Docket Clerk electronically by email: *MarketingOrderComment@usda.gov* or via the internet at: *https://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments submitted in response to this proposed rule will be included in the record and will be made available to the public and can be viewed at: *https://www.regulations.gov.* Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Kathie Notoro, Marketing Specialist, or Gary D. Olson, Regional Director, Western Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (559) 487–5903, or email: *Kathie.Notoro@usda.gov* or *GaryD.Olson@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 920, as amended (7 CFR part 920), regulating the handling of kiwifruit grown in California. Part 920 (referred to as ''the Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Committee locally administers the Order and is comprised of growers operating within the area of production, and a public member.

The Agricultural Marketing Service (AMS) is issuing this proposed rule in conformance with Executive Orders 12866 and 13563. 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This proposed rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. AMS has determined that this proposed rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, California kiwifruit handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate as proposed herein would be applicable to all assessable kiwifruit beginning on August 1, 2022, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

The Order authorizes the Committee, with the approval of AMS, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are familiar with the Committee's needs and with the costs for goods and services in their local area and are able to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting, and all directly affected persons have an opportunity to participate and provide input.

This proposed rule would increase the assessment rate established for the 2022–23 and subsequent fiscal periods from $0.025 to $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit handled. The proposed higher rate is the result of the significantly smaller expected 2022 kiwifruit crop. The higher rate would allow the Committee to fund 2022–23 fiscal

period budgeted expenditures without depleting its financial reserve.

For the 2018–19 and subsequent fiscal periods, the Committee recommended, and AMS approved, an assessment rate that would continue in effect from fiscal period to fiscal period unless modified, suspended, or terminated by AMS upon recommendation and information submitted by the Committee or other information available to AMS.

The Committee met on July 26, 2022, and unanimously recommended 2022–23 fiscal period expenditures of $132,200 and an assessment rate of $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit handled to fund Committee expenses. In comparison, last year's budgeted expenditures were $101,200. The proposed assessment rate of $0.035 is $0.010 more than the rate currently in effect. The Committee recommended increasing the assessment rate due to a much lower expected volume of kiwifruit produced as a result of strong north winds and late spring frosts during the growing season. The abnormal weather impacted the crop in varying degrees throughout the state, from an estimated 100 percent crop loss of some blocks in the north to lesser effect in the south. In addition, the Committee's budget increased $31,000 over the previous year to cover increased management costs and the cost of the Committee hosting the International Kiwifruit Organization this year in Sacramento.

The Committee's crop estimate for the 2022–23 fiscal period of 3,181,818 9-kilo volume-fill containers or equivalent, multiplied by the current assessment rate of $0.025 per container, would not generate sufficient assessment income to fund anticipated expenses. The proposed assessment rate of $0.035 per 9-kilo volume-fill container or equivalent would generate assessment income of approximately $111,364. Assessment income at the proposed rate, combined with $20,816 in financial reserve funds and interest income, should provide sufficient funds for the Committee to meet its budgeted expenses while maintaining its financial reserve within the limit authorized under the Order (§ 920.42).

Major expenditures recommended by the Committee for the 2022–23 fiscal period include: $90,000 for management expenses; $25,000 for the International Kiwifruit Organization (IKO) membership and hosting, planning, and staffing of the IKO conference to be held in Sacramento; and $9,700 for administrative expenses. Major budgeted expenses for the 2021–22 fiscal period were $80,000 for management expenses, $8,700 for administrative expenses, and $7,500 for financial audits.

The assessment rate recommended by the Committee was derived by reviewing anticipated expenses, expected shipments of California kiwifruit, and the level of funds in reserve. Kiwifruit shipments for the year are estimated at 3,181,818 9-kilo volume-fill containers, which should provide $111,364 in assessment income at the $0.035 rate. Anticipated income derived from handler assessments, along with $20 in interest income and $20,816 from the Committee's authorized financial reserve, should provide sufficient funding to cover budgeted expenses. The Committee anticipates that $53,749 would remain in the financial reserve at the end of 2022–23 fiscal period on July 31, 2023, which would be within the maximum amount permitted by the Order of approximately one fiscal period's expenses (§ 920.42).

The proposed assessment rate would continue in effect indefinitely unless modified, suspended, or terminated by AMS upon recommendation and information submitted by the Committee or other available information.

Although this assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each fiscal period to recommend a budget of expenses and consider recommendations for modification of the assessment rate. Dates and times of Committee meetings are available from the Committee or AMS. Committee meetings are open to the public and interested persons may express their views at these meetings. AMS evaluates Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2022–23 budget, and those for subsequent fiscal periods, are reviewed and, as appropriate, approved by AMS.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are 124 kiwifruit growers in the production area and 20 handlers subject to regulation under the Order. Small agricultural growers are defined by the Small Business Administration (SBA) as those having annual receipts less than $3,000,000, and small agricultural service firms are defined as those whose annual receipts are less than $30,000,000 (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), total California kiwifruit production reported for the 2022 season was 39,940 tons, with an average price of $2,440 per ton, or $1.22 per pound ($2,440 per ton divided by 2,000 pounds per ton). Based on the kiwifruit production and price information from NASS, as well as the total number of California kiwifruit growers, average annual grower revenue is approximately $785,916 (39,940 tons multiplied by $2,440 per ton divided by 124 growers), which is less than the $3,000,000 SBA threshold. Thus, the majority of California kiwifruit growers may be classified as small businesses.

In addition, according to AMS Market News data, the reported average terminal market price for California kiwifruit for 2021 was $24.23 per 9-kilo container. After converting the NASS 2021 California kiwifruit production estimate of 39,940 tons to 9-kilo containers (39,940 tons times 2,000 pounds divided by 19.8 pounds per 9-kilo container yields 4,034,343 containers) and multiplying that quantity by $24.23, the total value of the 2021 California kiwifruit shipments is estimated to be $97,752,141. Dividing this figure by the 20 regulated handlers yields estimated average annual handler receipts of $4,887,607, well below the $30 million SBA threshold for small agricultural service firms. Therefore, using the above data, the majority of handlers of California kiwifruit may be classified as small businesses.

This proposal would increase the assessment rate collected from handlers for the 2022–23 and subsequent fiscal periods from $0.025 to $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit. The Committee unanimously recommended 2022–23 expenditures of $132,200 and an assessment rate of $0.035 per 9-kilo volume-fill container. The proposed assessment rate of $0.035 is $0.010 higher than the 2021–22 fiscal period rate. The quantity of assessable kiwifruit for the 2022–23 fiscal period is estimated at 3,181,818 9-kilo volume-fill containers. Thus, the $0.035 rate should

provide $111,364 in assessment income (3,181,818 9-kilo volume-fill containers multiplied by $0.035). Income derived from handler assessments, along with the Committee's financial reserve funds and interest income, would be adequate to cover budgeted expenses, while maintaining its financial reserve within the maximum amount permitted by the Order of approximately one fiscal period's expenses (§ 920.42).

Major expenditures recommended by the Committee for the 2022–23 fiscal period include: $90,000 for management expenses; $25,000 for the International Kiwifruit Organization (IKO) membership and hosting, planning, and staffing of the IKO conference to be held in Sacramento; and $9,700 for administrative expenses. Budgeted expenses for the 2021–22 fiscal period were $80,000 for management expenses, $8,700 for administrative expenses, and $7,500 for financial audits.

Prior to arriving at the recommended assessment rate, the Committee considered alternative levels of assessment, including maintaining the current assessment rate, but ultimately determined that such alternative rates would not generate sufficient revenue to meet budgeted expenses. The recommended assessment rate of $0.035 per 9-kilo container or equivalent of assessable kiwifruit was derived by considering anticipated expenses, the projected volume of assessable kiwifruit, the Committee's financial reserve, and additional pertinent factors.

According to NASS data, the 2021 season average grower price was $2,440 per ton, or $24.16 per 9-kilo container ($2,440 divided by 2,000 pounds times 19.8 pounds (9 kilograms equals approximately 19.8 pounds)). At the proposed assessment rate of $0.035 per 9-kilo container, assessments as a percentage of revenue would be approximately 0.145 percent ($0.035 divided by $24.16).

This action would increase the assessment obligation imposed on handlers. While assessments impose additional costs on handlers, the costs are minimal and uniform on all handlers. Some of the additional costs may be passed on to growers. However, these costs are expected to be offset by the benefits derived by the operation of the Order.

The Committee's meeting was widely publicized throughout the California kiwifruit industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the July 26, 2022, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by the Office of Management and Budget (OMB) and assigned OMB No. 0581–0189 Fruit Crops. No changes in those requirements would be necessary as a result of this proposed rule. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large California kiwifruit handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying 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.

AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendations submitted by the Committee and other available information, AMS has determined that this proposed rule is consistent with and will effectuate the purposes of the Act.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 920

Kiwifruit, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 920 as follows:

PART 920—KIWIFRUIT GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 920.213 is revised to read as follows:

§ 920.213 Assessment rate.

On and after August 1, 2022, an assessment rate of $0.035 per 9-kilo volume-fill container or equivalent of kiwifruit is established for kiwifruit grown in California.

Melissa R. Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2022–28369 Filed 12–30–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 985

[Doc. No. AMS–SC–22–0070]

Marketing Order Regulating the Handling of Spearmint Oil Produced in the Far West; Salable Quantities and Allotment Percentages for the 2023–2024 Marketing Year

AGENCY: Agricultural Marketing Service, Department of Agriculture (USDA).

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Far West Spearmint Oil Administrative Committee (Committee) to establish salable quantities and allotment percentages for Class 1 (Scotch) and Class 3 (Native) spearmint oil produced in Washington, Idaho, Oregon, and designated parts of Nevada and Utah (the Far West) for the 2023–2024 marketing year.

DATES: Comments must be received by February 2, 2023.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments must be submitted by mail to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938 or electronically by Email: *MarketingOrderComment@usda.gov* or internet: *https://www.regulations.gov.* Comments should reference the

document number and the date and page number of this issue of the **Federal Register** and can be viewed at: *https://www.regulations.gov.* All comments submitted in response to this proposed rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Joshua R. Wilde, Marketing Specialist, or Gary D. Olson, Regional Director, Western Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326–2724, or Email: *Joshua.R.Wilde@usda.gov* or *GaryD.Olson@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 985, as amended (7 CFR part 985), regulating the handling of spearmint oil produced in the Far West. Part 985, (referred to as ''the Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Committee locally administers the Order and comprises spearmint oil producers operating within the area of production, and a public member.

The Agricultural Marketing Service (AMS) is issuing this proposed rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This proposed rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. AMS has determined that this proposed rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule is not intended to have retroactive effect.

Under the Order now in effect, salable quantities and allotment percentages may be established for classes of spearmint oil produced in the Far West. This proposed rule would establish salable quantities and allotment percentages for Scotch and Native spearmint oil for the 2023–2024 marketing year, which begins on June 1, 2023.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

Pursuant to the requirements in § 985.50 of the Order, the Committee meets each year to consider supply and demand of spearmint oil and to adopt a marketing policy for the ensuing marketing year. In determining such marketing policy, the Committee considers several factors, including, but not limited to, the current and projected supply of oil, estimated future demand, production costs, and producer prices for both classes of spearmint oil. Input from spearmint oil handlers and producers are considered as well.

Pursuant to the provisions in § 985.51, when the Committee's marketing policy considerations indicate a need to establish or to maintain stable market conditions through volume regulation, the Committee subsequently recommends to AMS the establishment of a salable quantity and allotment percentage for such class or classes of oil for the upcoming marketing year. Recommendations for volume control are intended to ensure market requirements for Far West spearmint oil are satisfied and orderly marketing conditions are maintained.

Salable quantity represents the total quantity of each class of oil (Scotch or Native) which handlers may purchase from, or handle on behalf of, producers during a given marketing year. The allotment percentage for each class of spearmint oil is the salable quantity for that class oil divided by the total of all producers' allotment base for the same class of oil. A producer's allotment base is their calculated share of the spearmint oil market based on a statistical representation of past spearmint production and sales. In order to account for changes in production and demand over time, the Committee periodically reviews and adjusts each producer's allotment base in accordance with a formula prescribed by the Committee and approved by AMS. Each producer's annual allotment of the salable quantity is calculated by multiplying their respective allotment base for each class of spearmint oil by the allotment percentage for that class of spearmint oil. The total allotment base is revised each year on June 1 to account for producer allotment base being lost as a result of the ''bona fide effort'' production provision of § 985.53(e) and additional base made available pursuant to the provisions of § 985.153.

Salable quantities and allotment percentages are established at levels intended to maintain orderly marketing conditions while also ensuring that markets are adequately supplied. Further, Committee recommendations for volume control are made in advance of the upcoming marketing year in which the regulations are to be effective, thereby allowing producers ample time to adjust their production decisions accordingly.

The Committee met on October 12, 2022, to consider its marketing policy for the 2023–2024 marketing year. At that meeting, the Committee determined that, based on the current market and supply conditions, volume regulation for both classes of oil would be necessary. The Committee recommended, with a vote of six in favor and one opposed, a salable quantity and allotment percentage for Scotch spearmint oil of 772,704 pounds and 34 percent, respectively. The member voting in opposition to the

recommendation supported volume regulation but favored a salable quantity and allotment percent lower than what was recommended. In addition, the Committee unanimously recommended a salable quantity and allotment percentage for Native spearmint oil of 1,034,492 pounds and 40 percent, respectively.

This proposed action would establish the amount of Scotch and Native spearmint oil that handlers may purchase from, or handle on behalf of, producers during the 2023–2024 marketing year, which begins on June 1, 2023. Salable quantities and allotment percentages have been in effect each season since the Order's inception in 1980.

Scotch Spearmint Oil

The Committee recommended a Scotch spearmint oil salable quantity of 772,704 pounds and an allotment percentage of 34 percent for the 2023–2024 marketing year. The proposed salable quantity of 772,704 pounds is 59,876 pounds less than the salable quantity of 832,580 pounds established for the 2022–2023 marketing year. The recommended 34 percent allotment percentage for the 2023–2024 marketing year is three percent less than the percentage in effect the previous marketing year.

The total allotment base for the coming marketing year is estimated to be 2,272,660 pounds. This figure represents a one-percent increase over the revised 2022–2023 marketing year total allotment base of 2,250,124 pounds. The proposed salable quantity (772,704 pounds) is the product of total allotment base (2,272,660 pounds) times the proposed allotment percentage (34 percent).

The Committee considered several factors in making its recommendation, including the current and projected future supply, estimated future demand, production costs, and producer prices. The Committee's recommendation also accounts for the established acreage of Scotch spearmint, consumer demand, existing carry-in, reserve pool volume, and increased production in competing markets.

According to the Committee, as costs of production have increased and spearmint oil prices have decreased, many producers have forgone new plantings of Scotch spearmint. This has resulted in a significant decline in production of Scotch spearmint oil in recent years. Production has decreased from 1,113,346 pounds produced in 2016 to an estimated 576,692 pounds of Scotch spearmint production in 2021.

Industry reports indicate that trade demand for Far West Scotch spearmint oil, which has been declining since the 2014–2015 marketing year, has begun to stabilize. Sales of Far West Scotch spearmint oil declined from 1,060,232 pounds during the 2014–2015 marketing year to 488,484 pounds in the 2020–2021 marketing year, before notably rebounding to 667,793 pounds in the 2021–2022 marketing year, the last full year of available data. The Committee indicates that the downward pressure on trade demand for Scotch spearmint oil from the Far West has lessened as production of Scotch spearmint oil in competing markets, most notably by Canadian producers, has leveled off in recent years.

Given the anticipated market conditions for the coming year, the Committee estimates that Scotch spearmint oil trade demand for the 2023–2024 marketing year will be 635,000 pounds, which is 15,000 pounds lower than the prior year estimate and slightly higher than the 5-year moving sales average of 618,834 pounds. Should the proposed volume regulation levels prove insufficient to adequately supply the market, the Committee has the authority to recommend intra-seasonal increases of the salable quantity and allotment percentage, as it has in previous marketing years.

The Committee calculated the minimum salable quantity of Scotch spearmint oil that would be required during the 2023–2024 marketing year (368,471 pounds) by subtracting the estimated salable carry-in on June 1, 2023, (266,529 pounds) from the estimated trade demand (635,000 pounds). This minimum salable quantity represents the estimated minimum amount of Scotch spearmint oil that would be needed to satisfy estimated trade demand for the coming year. To ensure that the market would be fully supplied, the Committee recommended a 2023–2024 marketing year salable quantity of 772,704 pounds. The recommended salable quantity, combined with an estimated 266,529 pounds of salable carry-in from the previous year, would yield a total available supply of 1,039,233 pounds of Scotch spearmint oil for the 2023–2024 marketing year. With the recommended salable quantity and current market environment, the Committee estimates that as much as 404,233 pounds of salable Scotch spearmint oil could be carried into the 2023–2024 marketing year.

Salable carry-in is the primary measure of excess spearmint oil supply under the Order, as it represents overproduction in prior years that is currently available to the market without restriction. Under volume regulation, spearmint oil that is designated as salable continues to be available to the market until it is sold and may be marketed at any time at the discretion of the owner.

The Committee estimates that there will be 266,529 pounds of salable carry-in of Scotch spearmint oil on June 1, 2023. If current market conditions are maintained and the Committee's projections are correct, salable carry-in would increase to 404,233 pounds at the beginning of the 2024–2025 marketing year. This level would be above the quantity that the Committee generally considers favorable (150,000 pounds). However, the Committee believes that, given the current economic conditions in the Scotch spearmint oil industry, some Scotch spearmint oil producers may not produce their annual allotment for the 2023–2024 marketing year. Further, the Committee estimates that as much as 287,480 pounds of the 2022–2023 marketing year annual allotment may not be filled by producers. While the Committee has not projected unused base allotment for the upcoming 2023–2024 marketing year, it anticipates that the actual quantity of Scotch spearmint oil carried into the 2024–2025 marketing year will be much less than the quantity calculated above (404,233 pounds).

Spearmint oil held in reserve is oil that has been produced in excess of a producer's annual allotment, either in the current marketing year or in prior years, and is restricted from freely entering the market. After December 1 of each marketing year, reserve pool oil is not available to the market in the current marketing year without an increase in the salable quantity and allotment percentage. The Order does include provision for reserve oil to be released for limited market development projects, with approval of the Secretary, but this provision is rarely utilized.

Oil held in the reserve pool is another indicator of excess supply. Scotch spearmint oil held in reserve was 23,667 pounds as of May 31, 2022, down from 72,361 pounds as of May 31, 2021. This quantity of reserve pool oil should be an adequate buffer to supply the market, if necessary, should the industry experience an unexpected increase in demand.

The Committee recommended an allotment percentage of 34 percent for the 2023–2024 marketing year for Scotch spearmint oil. During its October 12, 2022, meeting, the Committee calculated an initial allotment percentage by dividing the minimum

required salable quantity (368,471 pounds) by the total estimated allotment base (2,272,660 pounds), resulting in 16.2 percent. However, producers and handlers at the meeting indicated that the computed percentage (16.2 percent) might not adequately satisfy potential 2023–2024 marketing year Scotch spearmint oil market demand and may also result in a less than desirable carry-in for the subsequent marketing year. After deliberation, the Committee recommended an allotment percentage of 34 percent. The total estimated allotment base (2,272,660 pounds) for the 2023–2024 marketing year, multiplied by the recommended allotment percentage (34 percent), yields 772,704 pounds, which is the recommended salable quantity for the 2023–2024 marketing year.

The 2023–2024 marketing year computational data for the Committee's recommendations is detailed below.

(A) *Estimated carry-in of Scotch spearmint oil on June 1, 2023: 266,529 pounds.* This figure is the difference between the 2022–2023 marketing year total available supply of 901,529 pounds and the revised 2022–2023 marketing year estimated trade demand of 635,000 pounds.

(B) *Estimated trade demand of Scotch spearmint oil for the 2023–2024 marketing year: 635,000 pounds.* This figure was established at the Committee meeting held on October 12, 2022.

(C) *Minimum salable quantity of Scotch spearmint oil required from the 2023–2024 marketing year production: 368,471 pounds.* This figure is the difference between the estimated 2023–2024 marketing year trade demand (635,000 pounds) and the estimated carry-in on June 1, 2022 (266,529 pounds). This salable quantity represents the minimum amount of Scotch spearmint oil that would be needed to satisfy estimated demand for the coming year.

(D) *Total estimated Scotch spearmint oil allotment base of for the 2023–2024 marketing year: 2,272,660 pounds.* This figure represents a one-percent increase over the 2022–2023 marketing year total actual allotment base of 2,250,158 pounds, as prescribed by § 985.53(d). The one-percent increase equals 22,502 pounds. This total estimated allotment base is revised each year on June 1 in accordance with § 985.53(e).

(E) *Computed Scotch spearmint oil allotment percentage for the 2023–2024 marketing year: 16.2 percent.* This percentage is computed by dividing the minimum required salable quantity (368,471) by the total estimated allotment base (2,272,660 pounds).

(F) *Recommended Scotch spearmint oil allotment percentage for the 2023–2024 marketing year: 34 percent.* This is the Committee's recommendation and is based on the computed allotment percentage (16.2 percent) and input from producers and handlers at the October 12, 2022, meeting. The recommended 34 percent allotment percentage reflects the Committee's belief that the computed percentage (16.2 percent) may not adequately supply the anticipated 2023–2024 marketing year Scotch spearmint oil market demand.

(G) *Recommended Scotch spearmint oil salable quantity for the 2023–2024 marketing year: 772,704 pounds.* This figure is the product of the recommended salable allotment percentage (34 percent) and the total estimated allotment base (2,272,660 pounds) for the 2023–2024 marketing year.

(H) *Estimated total available supply of Scotch spearmint oil for the 2023–2024 marketing year: 1,039,233 pounds.* This figure is the sum of the 2023–2024 marketing year recommended salable quantity (772,704 pounds) and the estimated carry-in on June 1, 2023 (266,529 pounds).

For the reasons stated above, the Committee believes that the recommended salable quantity and allotment percentage would adequately satisfy trade demand, would result in a reasonable carry-in for the following year, and would contribute to the orderly marketing of Scotch spearmint oil.

Native Spearmint Oil

The Committee recommended a Native spearmint oil salable quantity of 1,034,492 pounds and an allotment percentage of 40 percent for the 2023–2024 marketing year. These figures are, respectively, 66,777 pounds and 3 percentage points lower than the levels established for the 2022–2023 marketing year. The Committee utilized handlers' estimated trade demand of Native spearmint oil for the coming year, historical and current Native spearmint oil production, inventory statistics, and international market data obtained from consultants for the spearmint oil industry to arrive at these recommendations.

The Committee anticipates that 2022 Native spearmint oil production will total 941,026 pounds, down slightly from the previous year's production of 985,797 pounds. Committee records indicate that spearmint-producing acres in the Far West have declined from a recent high of 9,013 acres in 2019 to an estimated 6,078 acres of Native spearmint production in 2022.

Additionally, sales of Native spearmint oil fell from 1,076,906 pounds in the 2020–2021 marketing year to 988,536 pounds for the 2021–2022 marketing year, the last full year of reported sales. This sales figure represents a 10-year low. However, the Committee expects a moderate rebound from this low, estimating trade demand for Native spearmint oil at 1,150,000 pounds for the 2023–2024 marketing year, which would be in line with the 3-year sales average of 1,132,567 pounds.

The Committee expects that 308,440 pounds of salable Native spearmint oil from prior years will be carried into the 2023–2024 marketing year. This amount is down from the 357,066 pounds of salable oil carried into the 2022–2023 marketing year but still above the level that the Committee generally considers favorable.

Further, the Committee estimates that there will be 1,093,144 pounds of Native spearmint oil in the reserve pool at the beginning of the 2023–2024 marketing year. This figure is 125,978 pounds lower than the quantity of reserve pool oil held by producers at the beginning of the previous marketing year but still well above the level that the Committee believes is optimal. Generally, reserve pool oil has been increasing over the past several marketing years, climbing from 996,050 pounds of Native reserve oil at the start of the 2016–2017 marketing year to the 1,093,144 expected for the 2023–2024 marketing year.

The Committee expects end users of Native spearmint oil to continue to rely on Far West production as their primary source of high-quality Native spearmint oil. Overseas production of Native spearmint has declined in recent years. As a result, U.S. exports of Native spearmint oil have been steadily increasing since 2018. However, increased domestic production of Native spearmint from regions outside of the Far West production area has created additional domestic competition for market share. For example, there were fewer than 2,000 acres of Native spearmint production in the U.S. Midwest region in 2016, compared to over 10,000 acres of Native spearmint oil production in the Far West. However, 2022 Native spearmint acreage estimates show that Far West acreage has declined to approximately 6,078 acres, compared to Native spearmint producing acreage of around 4,300 acres in the Midwest. This situation has contributed to declining trade demand for Far West Native

spearmint oil and led to downward pressure on producer prices.

The Committee chose to be cautiously optimistic in the establishment of its trade demand estimate for the 2023–2024 marketing year to ensure that the market would be adequately supplied. At the October 12, 2022, meeting, the Committee estimated the 2023–2024 marketing year Native spearmint oil trade demand to be 1,150,000 pounds. This figure is based on input provided by producers at nine production area meetings held in early October 2022, as well as estimates provided by handlers and other meeting participants. This figure represents a decrease of 50,000 pounds from the previous year's original estimated trade demand for the 2022–2023 marketing year. The average estimated trade demand for Native spearmint oil derived from the area producer meetings was 1,124,857 pounds, whereas the handlers' estimates ranged from 850,000 to 1,250,000 pounds. The average of Native spearmint oil sales over the last three years is 1,132,567 pounds. The quantity marketed over the most recent full marketing year, 2021–2022, was 988,536 pounds.

The estimated June 1, 2023, carry-in of 308,440 pounds of Native spearmint oil, plus the recommended 2023–2024 marketing year salable quantity of 1,034,932 pounds, would result in an estimated total available supply of 1,342,932 pounds of Native spearmint oil during the 2023–2024 marketing year. With the corresponding estimated trade demand of 1,150,000 pounds, the Committee projects that 192,932 pounds of oil will be carried into the 2024–2025 marketing year. This would result in a year-over-year decrease in carryover of 115,508 pounds. The Committee estimates that there will be 1,093,144 pounds of Native spearmint oil held in the reserve pool at the beginning of the 2023–2024 marketing year. Should the industry experience an unexpected increase in trade demand, oil in the Native spearmint oil reserve pool could be released through an intra-seasonal increase in the salable quantity and allotment percentage to satisfy that demand.

The Committee recommended a Native spearmint oil allotment percentage of 40 percent for the 2023–2024 marketing year. During its October 12, 2022, meeting, the Committee calculated an initial allotment percentage of 32.5 percent by dividing the minimum required salable quantity to satisfy estimated trade demand (841,560 pounds) by the total allotment base (2,586,229 pounds). However, producers and handlers at the meeting expressed concern that the computed percentage of 32.5 percent may not adequately supply the potential 2023–2024 marketing year Native spearmint oil market demand. Further, it could result in a less than adequate carry-in for the subsequent marketing year. After deliberation, the Committee increased its allotment percentage recommendation to 40 percent. The total estimated Native spearmint oil allotment base (2,586,229 pounds) multiplied by the recommended salable allotment percentage (40 percent) yields 1,034,492 pounds, the recommended Native spearmint oil salable quantity for the 2023–2024 marketing year.

The 2023–2024 marketing year computational data for the Committee's recommendation is further outlined below.

(A) *Estimated carry-in of Native spearmint oil on June 1, 2023: 308,440 pounds.* This figure is the difference between the 2022–2023 marketing year total available supply of 1,458,440 pounds and the revised 2022–2023 marketing year estimated trade demand of 1,150,000 pounds.

(B) *Estimated trade demand of Native spearmint oil for the 2023–2024 marketing year: 1,150,000 pounds.* This estimate was established by the Committee at its October 12, 2022, meeting.

(C) *Minimum salable quantity of Native spearmint oil required from the 2023–2024 marketing year production: 841,560 pounds.* This figure is the difference between the 2023–2024 marketing year estimated trade demand (1,150,000 pounds) and the estimated carry-in on June 1, 2023 (308,440 pounds). This is the minimum amount of Native spearmint oil that the Committee believes would be required to meet the anticipated 2023–2024 marketing year trade demand.

(D) *Total estimated allotment base of Native spearmint oil for the 2023–2024 marketing year: 2,586,229 pounds.* This figure represents a one-percent increase over the 2022–2023 marketing year actual total allotment base of 2,560,623 pounds as prescribed in § 985.53(d). The one-percent increase equals 25,606 pounds of oil. This estimate is revised each year on June 1, to adjust for the bona fide effort production provisions of § 985.53(e).

(E) *Computed Native spearmint oil allotment percentage for the 2023–2024 marketing year: 32.5 percent.* This percentage is calculated by dividing the required minimum salable quantity (841,560 pounds) by the total estimated allotment base (2,586,229 pounds) for the 2023–2024 marketing year.

(F) *Recommended Native spearmint oil allotment percentage for the 2023–2024 marketing year: 40 percent.* This is the Committee's recommendation based on the computed allotment percentage (32.5 percent) and input from producers and handlers at the October 12, 2022, meeting. The recommended 40 percent allotment percentage is also based on the Committee's belief that the computed percentage (32.5 percent) may not adequately supply the potential market for Native spearmint oil in the 2023–2024 marketing year or allow for sufficient salable Native spearmint oil to be carried into the beginning of the 2024–2025 marketing year.

(G) *Recommended Native spearmint oil 2023–2024 marketing year salable quantity: 1,034,492 pounds.* This figure is the product of the recommended allotment percentage (40 percent) and the total estimated allotment base (2,586,229 pounds).

(H) *Estimated available supply of Native spearmint oil for the 2023–2024 marketing year: 1,342,932 pounds.* This figure is the sum of the 2023–2024 marketing year recommended salable quantity (1,034,492 pounds) and the estimated carry-in on June 1, 2023 (308,440 pounds). This amount could be increased, as needed, through an intra-seasonal increase in the salable quantity and allotment percentage.

The Committee's recommended Scotch and Native spearmint oil salable quantities and allotment percentages of 772,704 pounds and 34 percent, and 1,034,492 pounds and 40 percent, respectively, would match the available supply of each class of spearmint oil to the estimated demand of each, thus avoiding extreme fluctuations in inventories and prices. This proposed rule is similar to regulations issued in prior seasons.

The salable quantities in this proposed rule are not expected to cause a shortage of either class of spearmint oil. Any unanticipated or additional market demand for either class of spearmint oil which may develop during the marketing year could be satisfied by an intra-seasonal increase in the salable quantity and corresponding allotment percentage. The Order contains a provision in § 985.51 for intra-seasonal increases to allow the Committee the flexibility to respond quickly to changing market conditions.

Under volume regulation, producers who produce more than their annual allotments during the marketing year may transfer such excess spearmint oil to producers who have produced less than their annual allotment. In addition, on December 1 of each year, producers who have not transferred their excess

spearmint oil to other producers must place their excess spearmint oil production into the reserve pool to be released in the future. Each producer controls the disposition of their respective reserve pool spearmint oil, in accordance with market needs and the Order's volume regulation provisions, and under the Committee's oversight.

In conjunction with the issuance of this proposed rule, AMS has reviewed the Committee's marketing policy statement for the 2023–2024 marketing year. The Committee's marketing policy statement, a requirement whenever the Committee recommends volume regulation, meets the requirements of §§ 985.50 and 985.51.

The establishment of the proposed salable quantities and allotment percentages would allow for anticipated market needs. In determining anticipated market needs, the Committee considered historical sales, as well as changes and trends in production and demand. This proposal would also provide producers with information regarding the amount of spearmint oil that should be produced for the 2023–2024 and subsequent marketing years to meet anticipated market demand.

Initial Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 40 producers of Scotch spearmint oil and 94 producers of Native spearmint oil operating within the regulated production area. In addition, there are approximately 8 spearmint oil handlers (both Scotch and Native spearmint) subject to regulation under the Order. Small agricultural service firms are defined by the Small Business Administration (SBA) as those having annual receipts of less than $30,000,000, and small agricultural producers of spearmint oil are defined as those having annual receipts of less than $2,250,000 (13 CFR 121.201).

The Committee reported that recent producer prices for spearmint oil have ranged from $18.50 to $22.00 per pound. The National Agricultural Statistics Service (NASS) reported that the 2021 U.S. season average spearmint oil producer price per pound was $15.80. Spearmint oil utilization for the 2021–2022 marketing year, as reported by the Committee, was 667,793 pounds and 988,536 pounds for Scotch and Native spearmint oil, respectively, for a total of 1,656,329 pounds. Multiplying $15.80 per pound by 2021–2022 marketing year spearmint oil utilization of 1,656,329 pounds yields a crop value estimate of about $26.17 million.

Given the accounting requirements for the volume regulation provisions of the Order, the Committee maintains accurate records of each producer's production and sales. Using the $15.80 average spearmint oil price and Committee production data for each producer, the Committee estimates that 39 of the 40 Scotch spearmint oil producers and all of the 94 Native spearmint oil producers could be classified as small entities under the SBA definition.

There is no third-party or governmental entity that collects and reports spearmint oil prices received by spearmint oil handlers. However, the Committee estimates an average spearmint oil handling markup at approximately 20 percent of the price received by producers. Twenty percent of the 2021 producer price ($15.80) is $3.16, which results in a handler Free on Board (f.o.b.) price per pound estimate of $18.96 ($15.80 + $3.16).

Multiplying this estimated handler f.o.b. price by the 2020–2021 marketing year total spearmint oil utilization of 1,656,329 pounds results in an estimated handler-level spearmint oil value of $31.4 million. Dividing this figure by the number of handlers (8) yields estimated average annual handler receipts of about $3.9 million, which is well below the SBA threshold for small agricultural service firms.

Furthermore, using confidential data compiled by the Committee on the pounds of spearmint oil handled by each handler and the abovementioned estimated handler price per pound, the Committee reported that it is not likely that any of the eight handlers had 2021–2022 marketing year spearmint oil sales that exceeded SBA's $30-million threshold.

Therefore, in view of the foregoing, the majority of producers of spearmint oil may be classified as small entities, and all of the handlers of spearmint oil may be classified as small entities.

This proposed rule would establish the quantity of spearmint oil produced in the Far West, by class, which handlers may purchase from, or handle on behalf of, producers during the 2023–2024 marketing year. The Committee recommended this proposed action to help maintain stability in the spearmint oil market by matching supply to estimated demand, thereby avoiding extreme fluctuations in supplies and prices. Establishing quantities that may be purchased from or handled on behalf of producers during the marketing year through volume regulation allows producers to coordinate their spearmint oil production with the expected market demand. Authority for this proposal is provided in §§ 985.50, 985.51, and 985.52 of the Order.

The Committee estimates the total trade demand for the 2023–2024 marketing year for both classes of oil at 1,785,000 pounds. In addition, the Committee expects that the combined salable carry-in for both classes of spearmint oil will be 574,969 pounds. As such, the combined required salable quantity for the 2023–2024 marketing year is estimated to be 1,210,031 pounds (1,785,000 pounds trade demand less 574,969 pounds carry-in). Under volume regulation, total sales of spearmint oil by producers for the 2023–2024 marketing year would be held to 2,382,165 pounds (the recommended salable quantity for both classes of spearmint oil of 1,807,196 pounds plus 574,969 of carry-in).

This total available supply of 2,382,165 pounds should be more than adequate to supply the 1,785,000 pounds of anticipated total trade demand for spearmint oil. In addition, as of May 31, 2022, the total reserve pool for both classes of spearmint oil stood at 1,242,789 pounds. That quantity is expected to remain relatively unchanged over the course of the 2022–2023 marketing year, with current Committee reserve pool estimates totaling 1,130,893 pounds. Should trade demand increase unexpectedly during the 2023–2024 marketing year, reserve pool spearmint oil could be released into the market to supply that increase in demand.

The recommended allotment percentages, upon which 2023–2024 marketing year annual producer allotments are based, are 34 percent for Scotch spearmint oil and 40 percent for Native spearmint oil. Without volume regulation, producers would not be held to these allotment levels and would be able to sell unrestricted quantities of spearmint oil.

The AMS econometric model used to evaluate the Far West spearmint oil market estimated that the season average producer price per pound (from both classes of spearmint oil) would decline about $2.65 per pound without volume regulation. The surplus situation for the spearmint oil market that would exist without volume regulation in the 2023–2024 marketing year also would likely dampen prospects for improved producer prices in future years because of the excessive buildup in stocks.

In addition, spearmint oil prices would likely fluctuate with greater amplitude in the absence of volume regulation. The coefficient of variation, or CV (a standard measure of variability), of Far West spearmint oil producer prices for the period 1980–2021 (the years in which the Order has been in effect), is 25 percent, compared to 49 percent for the 20-year period (1960–1979) immediately prior to the establishment of the Order. Since higher CV values correspond to greater variability, this is an indicator of the price-stabilizing impact of the Order.

The use of volume regulation allows the industry to fully supply spearmint oil markets while avoiding the negative consequences of over-supplying these markets. The use of volume regulation is believed to have little or no effect on consumer prices of products containing spearmint oil and would not result in fewer retail sales of such products.

The Committee discussed alternatives to the recommendations contained in this proposed rule for both classes of spearmint oil. The Committee rejected the idea of not regulating volume for either class of spearmint oil because of the severe, price-depressing effects that are more likely to occur without volume regulation. The Committee also discussed and considered salable quantities and allotment percentages that were above and below the levels that were eventually recommended for both classes of spearmint oil. Ultimately, the action recommended by the Committee was to slightly reduce the allotment percentage and salable quantity for both Scotch spearmint oil and Native spearmint oil from the levels established for the 2022–2023 marketing year.

As noted earlier, the Committee's recommendation to establish salable quantities and allotment percentages for both classes of spearmint oil was made after careful consideration of all available information including: (1) The estimated quantity of salable oil of each class held by producers and handlers; (2) the estimated demand for each class of oil; (3) the prospective production of each class of oil; (4) the total of allotment bases of each class of oil for the current marketing year and the estimated total of allotment bases of each class for the ensuing marketing year; (5) the quantity of reserve oil, by class, in storage; (6) producer prices of oil, including prices for each class of oil; and (7) general market conditions for each class of oil, including whether the estimated season average price to producers is likely to exceed parity.

Based on its review, the Committee believes that the salable quantities and allotment percentages recommended would achieve the objectives sought. The Committee also believes that, should there be no volume regulation in effect for the upcoming marketing year, the Far West spearmint oil industry would return to the pronounced cyclical price patterns that occurred prior to the promulgation of the Order. As previously stated, annual salable quantities and allotment percentages have been issued for both classes of spearmint oil since the Order's inception. The salable quantities and allotment percentages proposed herein are expected to facilitate the goal of maintaining orderly marketing conditions for Far West spearmint oil for the 2023–2024 and future marketing years.

This proposed rule would establish the salable quantities and allotment percentages for Scotch and Native spearmint oil produced in the Far West during the 2023–2024 marketing year. Costs to producers and handlers, large and small, resulting from this proposal are expected to be offset by the benefits derived from a more stable market and increased returns. The benefits of this proposed rule are expected to be equally available to all producers and handlers regardless of their size.

The Committee's meeting was widely publicized throughout the spearmint oil industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the October 12, 2022, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and informational impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0178, Vegetable and Specialty Crops. No changes are necessary in those requirements as a result of this proposed action. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large Far West spearmint oil handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying 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.

AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *https://www.ams.usda.gov/rules-regulations/moa/small-businesses.* Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendations submitted by the Committee and other available information, AMS has determined that this proposed rule is consistent with and will effectuate the purposes of the Act.

A 30-day comment period is provided to allow interested persons to respond to this proposal. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 985

Marketing agreements, Oils and fats, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, Agriculture Marketing Service proposes to amend 7 CFR part 985 as follows:

PART 985—MARKETING ORDER REGULATING THE HANDLING OF SPEARMINT OIL PRODUCED IN THE FAR WEST

■ 1. The authority citation for 7 CFR part 985 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Add § 985.238 to read as follows:

§ 985.238 Salable quantities and allotment percentages—2023–2024 marketing year.

The salable quantity and allotment percentage for each class of spearmint oil during the marketing year beginning on June 1, 2023, shall be as follows:

(a) Class 1 (Scotch) oil—a salable quantity of 772,704 pounds and an allotment percentage of 34 percent.

(b) Class 3 (Native) oil—a salable quantity of 1,034,492 pounds and an allotment percentage of 40 percent.

Melissa R. Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2022–28391 Filed 12–30–22; 8:45 am]

BILLING CODE 3410–02–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 40, 50, 70, and 72

[NRC–2017–0021]

RIN 3150–AJ92

Alternatives to the Use of Credit Ratings

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule and draft interim staff guidance; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations for approved financial assurance mechanisms for decommissioning, specifically for parent and self-company guarantees that require bond ratings issued by credit rating agencies. This proposed rule would implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 that directed agencies to amend their regulations to remove any reference to or requirement of reliance on credit ratings. This proposed rule affects applicants and licensees who are required to provide decommissioning financial assurance. The NRC invites public comment on this proposed rule and associated draft guidance, and will hold a public meeting to promote full understanding of the contemplated action and facilitate public comment.

DATES: Submit comments by March 20, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received before this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject); however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2017–0021. Address questions about NRC Dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Gregory Trussell, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6244; email: *Gregory.Trussell@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2017–0021 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–2017–0021.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' 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. eastern time, Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2017–0021 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 [1] (The Dodd-Frank Act'' or ''Act'') to ''promote the financial stability of the United States by improving accountability and transparency in the financial system.'' [2] In the Act, Congress finds that ''ratings on structured financial products have proven to be inaccurate'' and that ''[t]his inaccuracy contributed significantly to the mismanagement of risks by financial institutions and investors, which in turn adversely impacted the health of the economy.'' [3] Section 939A of the Act directs Federal agencies to review regulations that require the use of an assessment of the creditworthiness of a security or money market instrument and modify any regulations identified by the review to remove ''any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of [creditworthiness] as each respective agency shall determine as appropriate for such regulations.'' [4]

As directed by section 939A of the Dodd-Frank Act, the NRC reviewed its regulations for any references to, or requirements regarding, credit ratings. Appendices A, C, and E to part 30 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Rules of General Applicability to Domestic Licensing of Byproduct Material,'' require specified bond ratings from Moody's or Standard and Poor's to satisfy certain decommissioning financial assurance requirements for materials, power reactor, and non-power reactor applicants and licensees. In accordance with the Dodd-Frank Act, the NRC is proposing to amend these appendices by removing these requirements and relying instead on newly established criterion for creditworthiness that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed. Other regulations that cite or reference these appendices also would be affected by this proposed rule, including §§ 30.35(f)(2), 40.36(e)(2), 50.75(e)(1)(iii)(c), 70.25(f)(2), and 72.30(e)(2).

The NRC published an advance notice of proposed rulemaking (ANPR) in the **Federal Register** on December 21, 2020 (85 FR 82950). The ANPR identified alternative approaches for assessing a licensee's creditworthiness and requested comment on alternative approaches. The NRC held a public meeting on February 8, 2021, to facilitate comments on the ANPR. The NRC received six comments. Of those six comments, four were in scope and supportive of the NRC's approach described in the ANPR, one was partially in scope and not in support, and one was out of scope. The NRC analyzed the comments and considered them in the development of this proposed rule (NRC–2017–0021).

III. Discussion of Changes

Applicants and licensees must demonstrate reasonable assurance that funds will be available when needed for decommissioning in order to obtain and maintain a reactor license and certain materials licenses.[5] Under the current regulations, this demonstration may be made by prepayment of funds or by payment of funds into an external sinking fund, a surety method, insurance, or other guarantee method, including a letter of credit, a parent company guarantee, or a self-guarantee.[6] For each licensee or applicant from whom the NRC accepts a parent company guarantee or self-guarantee to provide financial assurance, there exist two alternative financial tests: one test for an entity that issues bonds and has a bond rating issued by a credit rating agency, and a second test for an entity without bond ratings.

For each entity (a company, a parent company, or a non-profit college, university, or hospital) from whom the NRC accepts a parent company guarantee or self-guarantee to provide decommissioning funding financial assurance, financial tests exist in appendices A, C, D, and E to 10 CFR part 30.

A parent company guarantee must be provided by the parent company of the licensee. Under the current regulations, the parent company must meet one of the two financial tests specified in appendix A to 10 CFR part 30. These two financial tests, as discussed in the following paragraphs, differ in that one includes a bond rating criterion while the other does not.

For financial test one, the parent company must have the following: (1) two of the following three ratios: a ratio of total liabilities to total net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; (2) net working capital and tangible net worth, each at least six times the amount of decommissioning funds being assured by the parent company guarantee for the total of all nuclear facilities or parts thereof (or prescribed amount, if certification is used); (3) tangible net worth of at least $21 million; and (4) assets located in the United States amounting to at least 90 percent of total assets or at least six times the current decommissioning cost estimates (or prescribed amount, if applicable).

For financial test two, the parent company must have the following: (1) a current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, A, or BBB, as issued by Standard & Poor's, or Aaa, Aa, A, or Baa, as issued by Moody's; (2) total net worth at least six times the amount of decommissioning funds being assured by a parent company guarantee for the total of all nuclear facilities or parts thereof (or prescribed amount, if certification is used); (3) tangible net worth of at least $21 million; and (4) assets located in the United States amounting to at least 90 percent of total assets or at least six times the current decommissioning cost.

A self-guarantee is a guarantee provided by the licensee. Under current regulations, the licensee must meet the financial tests specified in appendices C, D, and E to 10 CFR part 30. The financial test alternatives consider accounting ratios, net worth, assets, operating revenues, and bond rating data relative to fixed criteria. The licensee's financial statements must have been prepared in accordance with generally accepted accounting principles applicable to the United States, and an independent certified public accountant must have verified the accuracy of the financial test data relative to the audited financial statements. A self-guarantee may not be used in combination with other financial assurance mechanisms, except a sinking fund, and may not be used in cases in which a licensee has a parent company holding majority control of its voting stock.

[1] Public Law 111–203.

[2] Public Law 111–203, Preamble.

[3] Public Law 111–203, Sec. 931(5).

[4] Public Law 111–203, Sec. 939A(b).

[5] Section 182.a. of the Atomic Energy Act of 1954, as amended, provides that ''Each application for a license . . . shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant . . . as the Commission may deem appropriate for the license.''

[6] Sections 30.35(f), 40.36(e), 50.75(e), 70.25(f), and 72.30(e).

The NRC's regulations for self-guarantees apply to three general categories of licensees: (1) commercial companies that issue bonds. Self-guarantees by these licensees are regulated under appendix C, ''Criteria Relating to Use of Financial Tests and Self-Guarantees for Providing Reasonable Assurance of Funds for Decommissioning,'' to 10 CFR part 30; (2) commercial companies that do not issue bonds. Self-guarantees by these licensees are regulated under appendix D, ''Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Assurance of Funds for Decommissioning by Commercial Companies That Have no Outstanding Rated Bonds,'' to 10 CFR part 30; and (3) nonprofit colleges, universities, and hospitals. Self-guarantees by these licensees are regulated under appendix E, ''Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Assurance of Funds for Decommissioning by Nonprofit Colleges, Universities, and Hospitals,'' to 10 CFR part 30.

Under the current regulations specified in appendix C to 10 CFR part 30, the financial test for commercial companies that issue bonds is that the licensee must have the following: (1) tangible net worth calculated to exclude the net book value of the nuclear facility and site and any intangible assets of at least $21 million and total net worth at least 10 times the amount of decommissioning funds being assured (or prescribed amount if a certification is used) for all decommissioning activities for which the company is responsible as a self-guaranteeing licensee; (2) assets located in the United States amounting to at least 90 percent of total assets or at least 10 times the current decommissioning cost estimates (or prescribed amount if a certification is used) for all decommissioning activities for which the company is responsible as a self-guaranteeing licensee; and (3) a current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, or A, as issued by Standard & Poor's, or Aaa, Aa, or A, as issued by Moody's.

Under the current regulations specified in appendix D to 10 CFR part 30, the financial test for commercial companies that do not issue bonds is that the licensee must have the following: (1) tangible net worth of at least $21 million and total net worth of at least 10 times the amount of decommissioning funds being assured (or prescribed amount if a certification is used) for all decommissioning activities for which the company is responsible as a self-guaranteeing licensee (or the current amount required if certification is used); (2) assets located in the United States amounting to at least 90 percent of total assets or at least 10 times the amount of funds being assured (or prescribed amount if a certification is used) for all decommissioning activities for which the company is responsible as a self-guaranteeing licensee for the total of all nuclear facilities or parts thereof (or the current amount required if certification is used); and (3) ratio of cash flow divided by total liabilities greater than 0.15 and a ratio of total liabilities divided by total net worth less than 1.5.

Under the current regulations specified in appendix E to 10 CFR part 30, the financial test for nonprofit colleges and universities that issue bonds is that the licensee must have a current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, or A, as issued by Standard & Poor's, or Aaa, Aa, or A, as issued by Moody's.

The financial test for nonprofit colleges and universities that do not issue bonds is that the licensee must have unrestricted endowment consisting of assets located in the United States of at least $50 million or at least 30 times the current decommissioning cost estimates (or prescribed amount if a certification is used), whichever is greater, for all decommissioning activities for which the college or university is responsible as a self-guaranteeing licensee for the total of all nuclear facilities or parts thereof (or the current amount required if certification is used).

Under the current regulations, the financial test for nonprofit hospitals that issue bonds is that the licensee must have a current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, or A, as issued by Standard & Poor's, or Aaa, Aa, or A, as issued by Moody's.

The financial test for nonprofit hospitals that do not issue bonds is that the licensee must have the following: (1) total revenues less total expenditures divided by total revenues must be equal to or greater than 0.04; (2) long-term debt divided by net fixed assets must be less than or equal to 0.67; (3) (current assets and depreciation fund) divided by current liabilities must be greater than or equal to 2.55; and (4) operating revenues must be at least 100 times the total current decommissioning cost estimate (or the current amount required if certification is used) for all decommissioning activities for which the hospital is responsible as a self-guaranteeing license.

This proposed rule would remove from NRC regulations those financial tests that rely, in part, on credit ratings and substitute newly established standards of creditworthiness. The NRC would perform an independent review to evaluate a licensee's creditworthiness. The NRC would seek to determine the licensee's risk of default based on the NRC's review of financial data. This review could include evaluation of financial data available from the licensee, open sources, and third parties, and may include credit ratings.

Specifically, this proposed rule would—

(1) For use of parent company guarantees, revise paragraphs II.A.2(i) and B of appendix A to 10 CFR part 30 to remove bond rating requirements and rely instead on a new criterion: creditworthiness that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed.

(2) For use of self-guarantees for commercial companies, revise paragraphs II.A.3 and B.2 of appendix C to 10 CFR part 30 to remove bond rating requirements and rely instead on new creditworthiness criteria that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed.

(3) For use of self-guarantees for nonprofit colleges, universities, and hospitals, revise paragraphs II.A.(1) and B of appendix E to 10 CFR part 30 to remove bond rating requirements and rely instead on new creditworthiness criteria that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed.

(4) Change the title of appendix D to 10 CFR part 30 to read ''Alternative Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Assurance of Funds for Decommissioning by Commercial Companies.'' The title change removes the term, ''That Have no Outstanding Rated Bonds'' and provides for alternative criteria to appendix C for commercial companies.

(5) Revise the reporting requirement in paragraph III.E.(1) of appendix C to 10 CFR part 30 from 20 to 90 days, that at any time the licensee becomes aware of information that is material to its capacity to provide full and timely payment of the amount guaranteed, the licensee will notify the Commission in writing. The 20-day reporting requirement was based on bond ratings, which would be removed as a result of the proposed rule, and the 90-day

requirement conforms to existing reporting requirements in Appendices A and D to 10 CFR part 30.

(6) Revise the reporting requirement in paragraph III.E.(1) of appendix E to 10 CFR part 30 from 20 to 90 days, that at any time the licensee becomes aware of information that is material to its capacity to provide full and timely payment of the amount guaranteed, the licensee will notify the Commission in writing. The 20-day reporting requirement was based on bond ratings, which would be removed as a result of the proposed rule, and the 90-day requirement conforms to existing reporting requirements in Appendices A and D to 10 CFR part 30.

IV. Specific Requests for Comments

The NRC is seeking advice and recommendations from the public on this proposed rule. We are particularly interested in comments and supporting rationale from the public on the following:

(1) Would this proposed rule present additional risk to the public regarding reasonable assurance that NRC licensees have adequate funding to decommission their facilities? If yes, please explain.

(2) Does the draft guidance effectively communicate the necessary information to be submitted to the NRC that will enable the NRC to effectively determine a licensee's creditworthiness?

(3) Does the draft regulatory analysis capture all of the NRC and licensee costs required by this proposed rule?

(4) One commenter on the ANPR argues that section 939A of the Dodd-Frank Act is focused on ''issue'' credit ratings of specific financial obligations, such as long- and short-term bonds, rather than ''issuer'' credit ratings or corporate family ratings, and that the statute does not preclude the use of ''issuer'' or corporate family credit ratings in Federal regulations. Should the NRC interpret the statute and implementing regulations as making this distinction? Does the statute permit NRC to use ''issuer'' or corporate family credit ratings in part 30? If so, should the NRC do so?

Commenters are encouraged to provide specific suggestions and the basis for those suggestions.

V. Discussion of Proposed Amendments by Section

The following paragraphs describe the specific changes proposed by this rulemaking.

Section 30.35 Financial Assurance and Recordkeeping for Decommissioning

The NRC is proposing to revise the fourth sentence of paragraph (f)(2) introductory text to reference appendix C or D to 10 CFR part 30, and remove the sentence concerning commercial companies that do not issue bonds.

Appendix A to 10 CFR Part 30—Criteria Relating to Use of Financial Tests and Parent Company Guarantees for Providing Reasonable Assurance of Funds for Decommissioning

The NRC is proposing to amend appendix A to 10 CFR part 30 by revising paragraphs II.A.2(i) and B by removing the bond rating criteria and replacing it with a new creditworthiness requirement.

Appendix C to 10 CFR Part 30—Criteria Relating to Use of Financial Tests and Self Guarantees for Providing Reasonable Assurance of Funds for Decommissioning

The NRC is proposing to amend appendix C to 10 CFR part 30 by revising paragraphs II.A.3 and B.2 and III.E to replace the bond rating criteria with a new creditworthiness requirement. In addition, the NRC is proposing to further revise paragraph III.E to change the written notification requirement from 20 days to 90 days and to make conforming changes.

Appendix D to 10 CFR Part 30—Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Assurance of Funds for Decommissioning by Commercial Companies That Have No Outstanding Rated Bonds

The NRC is proposing to revise the title of appendix D to 10 CFR part 30 to read ''Alternative Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Assurance of Funds for Decommissioning by Commercial Companies.'' The title change removes the term, ''That Have no Outstanding Rated Bonds'' and provides for alternative criteria to appendix C for commercial companies.

Appendix E to 10 CFR Part 30—Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Assurance of Funds for Decommissioning by Nonprofit Colleges, Universities, and Hospitals

The NRC is proposing to reorder and revise paragraphs II.A.(1) and (2) and II.B.(1) and (2), and revise paragraphs II.C.(1) and III.E to replace the bond rating criteria with a new creditworthiness requirement. In addition, the NRC is proposing to further revise paragraph III.E to change the written notification requirement from 20 days to 90 days and to make conforming changes.

Section 40.36 Financial Assurance and Recordkeeping for Decommissioning

The NRC is proposing to revise the fourth sentence of paragraph (e)(2) introductory text to reference appendix C or D to 10 CFR part 30, and remove the sentence concerning commercial companies that do not issue bonds.

Section 50.75 Reporting and Recordkeeping for Decommissioning

The NRC is proposing to revise the first sentence of paragraph (e)(1)(iii)(C) to reference appendix C or D to 10 CFR part 30, and remove from the paragraph the sentence concerning commercial companies that do not issue bonds.

Section 70.25 Financial Assurance and Recordkeeping for Decommissioning

The NRC is proposing to revise the fourth sentence of paragraph (f)(2) introductory text to reference appendix C or D to 10 CFR part 30.

Section 72.30 Financial Assurance and Recordkeeping for Decommissioning

The NRC is proposing to revise the fourth sentence of paragraph (e)(2) introductory text to reference appendix C or D to 10 CFR part 30, and remove the sentence concerning commercial companies that do not issue bonds.

VI. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This proposed rule would not affect any ''small entities'' as defined by the Regulatory Flexibility Act or the size standards established by the NRC (§ 2.810).

VII. Regulatory Analysis

The NRC has prepared a regulatory analysis on this regulation. The analysis examines the costs and benefits of the alternatives considered by the NRC. The conclusion from the analysis is that this proposed rule and associated guidance would result in a cost to the industry (NRC-licensees) and the NRC of $1,150,000 using a 7-percent discount rate and $1,340,000 using a 3-percent discount rate. Though the regulatory

analysis indicates the proposed rule is not cost-beneficial, the NRC plans to proceed with the proposed rule because it is required by statute. The changes in the proposed rule were chosen as the most cost-effective method for complying with the statute. The NRC requests public comment on the draft regulatory analysis. The regulatory analysis is available in ADAMS.

VIII. Backfitting and Issue Finality

The NRC has not prepared a backfit analysis for this proposed rule because the proposed requirements are mandated by Congress and, therefore, exempt from the NRC's provisions in §§ 50.109, 70.76, 72.62, 76.76, and issue finality regulations in 10 CFR part 52.

IX. Cumulative Effects of Regulation

The NRC is following its Cumulative Effects of Regulation (CER) process by engaging with external stakeholders throughout this proposed rule and related regulatory activities. Public involvement has included public meetings and opportunity to respond to NRC's Advance Notice of Proposed Rulemaking.

The NRC held a public meeting on October 30, 2019, where the NRC presented an analysis of the Dodd-Frank Act and its impact on the NRC regulations. The NRC's initial rulemaking approach would have removed the provisions in appendices A, C, and E to 10 CFR part 30 that relied on bond/credit rating and instead relied exclusively on existing financial ratio metrics. Industry participants shared a view that the NRC's initial rulemaking approach would have a substantial negative impact on the availability of parent company guarantees and self-guarantees (Summary of Public Meeting to Discuss the Alternatives to the Use of Credit Ratings Proposed Rule, October 30, 2019).[7]. Participants recommended that the NRC examine approaches taken by other Federal agencies for implementing the Dodd-Frank Act requirements, which could help identify alternative approaches for assessing a licensee's creditworthiness for purposes of determining a licensee's ability to rely on a guarantee mechanism for decommissioning. In evaluating potential approaches, the NRC determined that it would be beneficial to solicit additional stakeholders' views on the approaches when developing this proposed rule.

The NRC published an ANPR in the **Federal Register** on December 21, 2020 (85 FR 82950). The NRC held a second public meeting on February 8, 2021, to help facilitate comments for the ANPR. The ANPR identified alternative approaches for assessing a licensee's creditworthiness and requested comment on the alternative approaches.

Another opportunity for public comment is provided to the public at this proposed rule stage. The NRC is issuing draft implementing guidance for comment with this proposed rule to support more informed external stakeholder feedback. Further, the NRC will conduct another public meeting during the comment period for this proposed rule.

The effective date of the final rule would be 60-days from publication. Licensees or applicants seeking to initiate use of a guarantee mechanism after the effective date would submit information that demonstrates creditworthiness consistent with the final rule. Licensees currently using a guarantee mechanism would submit information that demonstrates creditworthiness consistent with the final rule when each licensee submits its annual documentation required to maintain its eligibility to use a guarantee mechanism.

The NRC is requesting CER feedback on the following questions:

1. In light of any current or projected CER challenges, does this proposed rule's effective date provide sufficient time to implement the proposed requirements, including changes to programs and procedures?

2. If CER challenges currently exist or are expected, what should be done to address them? For example, if more time is required for implementation of the new requirements, what period of time is sufficient?

3. Do other (NRC or other agency) regulatory actions (*e.g.,* orders, generic communications, license amendment requests inspection findings of a generic nature) influence the implementation of this proposed rule's requirements?

4. Are there unintended consequences? Does this proposed rule create conditions that would be contrary to its purpose and objectives? If so, what are the unintended consequences, and how should they be addressed?

5. Please comment on the NRC's cost and benefit estimates in the draft regulatory analysis that supports this proposed rule.

X. Plain Writing

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

XI. Environmental Assessment and Final Finding of No Significant Environmental Impact

The proposed action is the amendment of the NRC regulations, appendices A, C, D, and E to 10 CFR part 30, which concern the NRC's criteria relating to the use of financial tests and self- and parent-company guarantees for providing reasonable assurance of funds for decommissioning. In accordance with the Dodd-Frank Act, the NRC is proposing to amend these appendices to remove the requirements that rely on bond ratings and rely instead on newly established criteria for creditworthiness.

The newly established criteria for creditworthiness would not lead to any increase in the effect on the environment of decommissioning activities.

Therefore, the Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in subpart A of 10 CFR part 51, that this proposed rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, as a result, an environmental impact statement is not required. No other agencies or persons were contacted in making this determination. The NRC is not aware of any other documents related to the environmental impact of this action. The foregoing constitutes the environmental assessment and finding of no significant impact for this proposed rule.

XII. Paperwork Reduction Act Statement

This proposed rule contains a new or amended collection of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq). This proposed rule has been submitted to the Office of Management and Budget for review and approval of the information collection(s).

Type of submission: Revision.

[7] This document is one of the documents available as part the package identified as ''Alternatives to the Use of Credit Ratings October 30, 2019, Public Meeting, dated October 30, 2019'' in the ''Availability of Documents'' section of this rulemaking.

The title of the information collection: Alternatives to the Use of Credit Ratings.

How often the collection is required or requested: Annually.

Who will be required or asked to respond: Applicants and licensees who relied on bond ratings of their financial instrument for financial assurance will now have to submit information to demonstrate that an alternative financial test is met.

An estimate of the number of annual responses:

Part 30: 6
Part 40: 3
Part 50: 5
Part 70: 7

The estimated number of annual respondents:

Part 30: 6
Part 40: 3
Part 50: 5
Part 70: 7

An estimate of the total number of hours needed annually to comply with the information collection requirement or request:

Part 30: 646
Part 40: 323
Part 50: 538
Part 70: 754

Abstract: The NRC is proposing to amend its regulations for approved financial assurance mechanisms for decommissioning, specifically for parent and self-company guarantees that require bond ratings issued by credit rating agencies. This proposed rule would implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 that directed agencies to amend their regulations to remove any reference to or requirement of reliance on credit ratings. This proposed rule affects applicants and licensees who are required to provide decommissioning financial assurance.

The NRC is seeking public comment on the potential impact of the information collection(s) contained in this proposed rule and on the following issues:

1. Is the proposed information collection necessary for the proper performance of the functions of the NRC, including whether the information will have practical utility?

2. Is the estimate of the burden of the proposed information collection accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the proposed information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the Office of Management and Budget (OMB) clearance package and proposed rule are available in ADAMS under Accession No. ML21306A357 or can be obtained free of charge by contacting 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.* You may obtain information and comment submissions related to the OMB clearance package by searching on *https://www.regulations.gov* under Docket ID NRC–2017–0021.

You may submit comments on any aspect of these proposed information collection(s), including suggestions for reducing the burden and on the above issues, by the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2017–0021.
- *Mail comments to:* FOIA, Library, and Information Collections Branch, Office of the Chief Information Officer, Mail Stop: T6–A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 or to the OMB reviewer at: OMB Office of Information and Regulatory Affairs (3150–0017, 3150–0020, 3150–0011, 3150–0009), Attn: Desk Officer for the Nuclear Regulatory Commission, 725 17th Street NW, Washington, DC 20503; email: *oira_submission@omb.eop.gov.*

Submit comments by February 2, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

Public Protection Notification

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

XII. Compatibility of Agreement State Regulations

Under the ''Agreement State Program Policy Statement'' approved by the Commission on October 2, 2017, and published in the **Federal Register** on October 18, 2017 (82 FR 48535), NRC program elements (including regulations) required for adequacy and having a particular health and safety component are those designated as Categories A, B, C, D, NRC, or Health and Safety (H&S). Compatibility Category A are those program elements that are basic radiation protection standards and scientific terms and definitions that are necessary to understand radiation protection concepts. An Agreement State should adopt Category A program elements in an essentially identical manner in order to provide uniformity in the regulation of agreement material on a nationwide basis. Compatibility Category B are those program elements that apply to activities that have direct and significant effects in multiple jurisdictions. An Agreement State should adopt Category B program elements in an essentially identical manner. Compatibility Category C are those program elements that do not meet the criteria of Category A or B, but the essential objectives of which an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a national basis. An Agreement State should adopt the essential objectives of the Category C program elements. Compatibility Category D are those program elements that do not meet any of the criteria of Category A, B, or C, above, and thus, do not need to be adopted by Agreement States for purposes of compatibility. Compatibility Category NRC are those program elements that address areas of regulation that cannot be relinquished to the Agreement States under the Atomic Energy Act of 1954, as amended, or provisions of 10 CFR. These program elements should not be adopted by the Agreement States. Compatibility Category H&S are program elements that are required because of a particular health and safety role in the regulation of agreement material within the State and should be adopted in a manner that embodies the essential objectives of the NRC program. The NRC is not proposing to change the existing compatibility category designations. The compatibility category designations are listed in the following table:

COMPATIBILITY TABLE FOR THE PROPOSED RULE

Section	Change	Subject	Compatibility	
			Existing	New
30.35(f)(2)	Amend	Methods for financial assurance	D	D
Part 30 Appendix A	Amend	Parent company guarantee	D	D
Part 30 Appendix C	Amend	Self-guarantee with bonds	D	D
Part 30 Appendix D	Amend & Redesignate	Company self-guarantee	D	D
Part 30 Appendix E	Amend & Redesignate	Self-guarantee nonprofits	D	D
40.36(e)(2)	Amend	Methods for financial assurance	D	D
50.75(e)(1)	Amend	Surety as bond or letter of credit	NRC	NRC
70.25(f)(2)	Amend	Methods for financial assurance	D	D
72.30(e)(2)	Amend	Methods for financial assurance	NRC	NRC

The NRC invites comment on the compatibility category designations in this proposed rule and suggests that commenters refer to Handbook 5.9 of Management Directive 5.9, ''Adequacy and Compatibility of Program Elements for Agreement State Programs,'' for more information. The NRC encourages anyone interested in commenting on the compatibility category designations in any manner to do so during the comment period.

XIV. Availability of Guidance

The NRC is issuing for comment ''Draft Interim Staff Guidance on Removal of Bond Ratings from Parent and Self-Guarantees, Decommissioning Financial Assurance,'' to support implementation of the requirements in this proposed rule. The guidance document is available in ADAMS. You may obtain information and comment submissions related to the draft guidance by searching on *https://www.regulations.gov* under Docket ID NRC–2017–0021.

You may submit comments on the draft regulatory guidance by the methods outlined in the **ADDRESSES** section of this document.

XV. Public Meeting

The NRC will conduct a public meeting on this proposed rule for the purpose of facilitating the submittal of comments and answering questions from the public on the proposed requirements.

The NRC will announce the location, time, and agenda of the meeting on the NRC's public meeting web page at least 10 calendar days before the meeting. Stakeholders should monitor the NRC's public meeting website for information about the public meeting at: *https://www.nrc.gov/public-involve/public-meetings/index.cfm.* A copy of the meeting notice will be posted to docket NRC–2017–0021 on *www.Regulations.gov.*

XVI. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Document	ADAMS accession No./ **Federal Register** citation
Alternatives to the Use of Credit Ratings October 30, 2019, Public Meeting, dated October 30, 2019	ML19276F011 (package).
Advance Notice of Proposed Rulemaking, ''Alternatives to the Use of Credit Ratings,'' dated December 21, 2020	85 FR 82950.
Alternatives to the Use of Credit Ratings (Frank-Dodd Act) Advance Notice of Proposed Rulemaking February 8, 2021, Public Meeting, dated February 12, 2021.	ML21028A334 (package).
Draft Interim Staff Guidance on Removal of Bond Ratings from Parent and Self-Guarantees, Decommissioning Financial Assurance, dated April 28, 2022.	ML21306A361.
Regulatory Analysis for Proposed Rule: Alternatives to the Use of Credit Ratings, dated December, 2022	ML22354A032.
OMB Clearance Package, dated April 28, 2022	ML21306A357 (package).

List of Subjects

10 CFR Part 30

Byproduct material, Criminal penalties, Government contracts, Intergovernmental relations, Isotopes, Nuclear energy, Nuclear materials, Penalties, Radiation protection, Reporting and recordkeeping requirements, Whistleblowing.

10 CFR Part 40

Criminal penalties, Exports, Government contracts, Hazardous materials transportation, Hazardous waste, Nuclear energy, Nuclear materials, Penalties, Reporting and recordkeeping requirements, Source material, Uranium, Whistleblowing.

10 CFR Part 50

Administrative practice and procedure, Antitrust, Backfitting, Classified information, Criminal penalties, Education, Emergency planning, Fire prevention, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Penalties, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements, Whistleblowing.

10 CFR Part 70

Classified information, Criminal penalties, Emergency medical services, Hazardous materials transportation, Material control and accounting, Nuclear energy, Nuclear materials, Packaging and containers, Penalties, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material, Whistleblowing.

10 CFR Part 72

Administrative practice and procedure, Hazardous waste, Indians, Intergovernmental relations, Nuclear energy, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974,

as amended; and 5 U.S.C. 552 and 553, the NRC is proposing to amend 10 CFR parts 30, 40, 50, 70, and 72 as follows:

PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

■ 1. The authority citation for part 30 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 11, 81, 161, 181, 182, 183, 184, 186, 187, 223, 234, 274 (42 U.S.C. 2014, 2111, 2201, 2231, 2232, 2233, 2234, 2236, 2237, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); 44 U.S.C. 3504 note.

■ 2. In § 30.35, revise paragraph (f)(2) introductory text to read as follows:

§ 30.35 Financial assurance and recordkeeping for decommissioning.

* * * * *

(f) * * *

(2) *A surety method, insurance, or other guarantee method.* These methods guarantee that decommissioning costs will be paid. A surety method may be in the form of a surety bond or letter of credit. A parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix A of this part. For commercial companies, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix C or D of this part. For nonprofit entities, such as colleges, universities, and nonprofit hospitals, a guarantee of funds by the applicant or licensee may be used if the guarantee and test are as contained in appendix E of this part. Except for an external sinking fund, a parent company guarantee or a guarantee by the applicant or licensee may not be used in combination with any other financial methods used to satisfy the requirements of this section. A guarantee by the applicant or licensee may not be used in any situation where the applicant or licensee has a parent company holding majority control of the voting stock of the company. Any surety method or insurance used to provide financial assurance for decommissioning must contain the following conditions:

* * * * *

■ 3. In appendix A to part 30, revise sections II.A.2(i) and B to read as follows:

Appendix A to Part 30—Criteria Relating to Use of Financial Tests and Parent Company Guarantees for Providing Reasonable Assurance of Funds for Decommissioning

* * * * *

II. * * *

A. * * *

2. * * *

(i) Creditworthiness that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed, if necessary; and

* * * * *

B. The parent company's independent certified public accountant must compare the data used by the parent company in the financial test, which is derived from the independently audited, year-end financial statements for the latest fiscal year, with the amounts in such financial statement. The accountant must evaluate the parent company's off-balance sheet transactions and provide an opinion on whether those transactions could materially adversely affect the parent company's ability to pay for decommissioning costs. The accountant must verify that the information provided to demonstrate passage of the financial test meets the requirements of paragraph A of this section. In connection with the auditing procedure, the licensee must inform the NRC within 90 days of any matters coming to the auditor's attention which cause the auditor to believe that the data specified in the financial test should be adjusted and that the company no longer passes the test.

* * * * *

■ 4. In appendix C to part 30, revise paragraphs II.A.3, II.B.2 and III.E to read as follows:

Appendix C to Part 30—Criteria Relating to Use of Financial Tests and Self Guarantees for Providing Reasonable Assurance of Funds for Decommissioning

* * * * *

II. * * *

A. * * *

(3) Creditworthiness that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed, if necessary.

B. * * *

(2) The company's independent certified public accountant must compare the data used by the company in the financial test, which is derived from the independently audited, year-end financial statements for the latest fiscal year, with the amounts in such financial statement. The accountant must evaluate the company's off-balance sheet transactions and provide an opinion on whether those transactions could materially adversely affect the company's ability to pay for decommissioning costs. The accountant must verify that the information provided to demonstrate passage of the financial test meets the requirements of paragraph A of this section. In connection with the auditing procedure, the licensee must inform the NRC within 90 days of any matters coming to the auditor's attention which cause the auditor to believe that the data specified in the financial test should be adjusted and that the company no longer passes the test.

* * * * *

III. * * *

E. (1) If, at any time, the licensee becomes aware of information that is material to its capacity to provide full and timely payment of the amount guaranteed, the licensee will notify the Commission in writing within 90 days.

(2) If the licensee no longer has adequate capacity to provide full and timely payment of the amount guaranteed, the licensee no longer meets the requirements of section II.A of this appendix.

* * * * *

■ 5. Revise the heading of appendix D to part 30 to read as follows:

Appendix D to Part 30—Alternative Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Assurance of Funds for Decommissioning by Commercial Companies

* * * * *

■ 6. In appendix E to part 30, revise sections II.A.(1) and (2), II.B.(1) and (2), II.C.(1), and III.E to read as follows:

Appendix E to Part 30—Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Assurance of Funds for Decommissioning by Nonprofit Colleges, Universities, and Hospitals

* * * * *

II. * * *

A. * * *

(1) An unrestricted endowment(s) consisting of assets located in the United States of at least $50 million, or at least 30 times the total current decommissioning cost estimate (or the current amount required if certification is used), whichever is greater, for all decommissioning activities for which the college or university is responsible as a self-guaranteeing licensee.

(2) Creditworthiness that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed, if necessary.

B. * * *

(1) For applicants or licensees:

(a) (Total revenues less total expenditures) divided by total revenues must be equal to or greater than 0.04.

(b) Long term debt divided by net fixed assets must be less than or equal to 0.67.

(c) (Current assets and depreciation fund) divided by current liabilities must be greater than or equal to 2.55.

(d) Operating revenues must be at least 100 times the total current decommissioning cost

estimate (or the current amount required if certification is used) for all decommissioning activities for which the hospital is responsible as a self-guaranteeing license.

(2) Creditworthiness that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed, if necessary.

C. * * *

(1) The licensee's independent certified public accountant must compare the data used by the licensee in the financial test, which is derived from the independently audited, year-end financial statements for the latest fiscal year, with the amounts in such financial statement. The accountant must evaluate the licensee's off-balance sheet transactions and provide an opinion on whether those transactions could materially adversely affect the licensee's ability to pay for decommissioning costs. The accountant must verify that the information provided to demonstrate passage of the financial test meets the requirements of section II of this appendix. In connection with the auditing procedure, the licensee must inform the NRC within 90 days of any matters coming to the auditor's attention which cause the auditor to believe that the data specified in the financial test should be adjusted and that the licensee no longer passes the test.

* * * * *

III. * * *

E. (1) If, at any time, the licensee becomes aware of information that is material to its capacity to provide full and timely payment of the amount guaranteed, the licensee will notify the Commission in writing within 90 days.

(2) If the licensee no longer has adequate capacity to provide full and timely payment of the amount guaranteed, the licensee no longer meets the requirements of section II.A of this appendix.

* * * * *

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

■ 7. The authority citation for part 40 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 62, 63, 64, 65, 69, 81, 83, 84, 122, 161, 181, 182, 183, 184, 186, 187, 193, 223, 234, 274, 275 (42 U.S.C. 2092, 2093, 2094, 2095, 2099, 2111, 2113, 2114, 2152, 2201, 2231, 2232, 2233, 2234, 2236, 2237, 2243, 2273, 2282, 2021, 2022); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Uranium Mill Tailings Radiation Control Act of 1978, sec. 104 (42 U.S.C. 7914); 44 U.S.C. 3504 note.

■ 8. In § 40.36, revise paragraph (e)(2) introductory text to read as follows:

§ 40.36 Financial assurance and recordkeeping for decommissioning.

* * * * *

(e) * * *

(2) *A surety method, insurance, or other guarantee method.* These methods guarantee that decommissioning costs will be paid. A surety method may be in the form of a surety bond or letter of credit. A parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix A to 10 CFR part 30. For commercial companies, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix C or D to 10 CFR part 30. For nonprofit entities, such as colleges, universities, and nonprofit hospitals, a guarantee of funds by the applicant or licensee may be used if the guarantee and test are as contained in appendix E to 10 CFR part 30. Except for an external sinking fund, a parent company guarantee or guarantee by the applicant or licensee may not be used in combination with any other financial methods used to satisfy the requirements of this section. A guarantee by the applicant or licensee may not be used in any situation where the applicant or licensee has a parent company holding majority control of the voting stock of the company. Any surety method or insurance used to provide financial assurance for decommissioning must contain the following conditions:

* * * * *

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

■ 9. The authority citation for part 50 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 11, 101, 102, 103, 104, 105, 108, 122, 147, 149, 161, 181, 182, 183, 184, 185, 186, 187, 189, 223, 234 (42 U.S.C. 2014, 2131, 2132, 2133, 2134, 2135, 2138, 2152, 2167, 2169, 2201, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2239, 2273, 2282); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Nuclear Waste Policy Act of 1982, sec. 306 (42 U.S.C. 10226); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C. 3504 note; Sec. 109, Pub. L. 96–295, 94 Stat. 783.

■ 10. In § 50.75, revise paragraph (e)(1)(iii)(C) to read as follows:

§ 50.75 Reporting and recordkeeping for decommissioning planning.

* * * * *

(e) * * *

(1) * * *

(iii) * * *

(C) For commercial companies, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix C or D to 10 CFR part 30. For non-profit entities, such as colleges, universities, and non-profit hospitals, a guarantee of funds by the applicant or licensee may be used if the guarantee and test are as contained in appendix E to 10 CFR part 30. A guarantee by the applicant or licensee may not be used in any situation in which the applicant or licensee has a parent company holding majority control of voting stock of the company.

* * * * *

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

■ 11. The authority citation for part 70 continues is revised to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 57(d), 108, 122, 161, 182, 183, 184, 186, 187, 193, 223, 234, 274, 1701 (*42 U.S.C. 2071, 2073, 2077(d), 2138, 2152, 2201, 2232, 2233, 2234, 2236, 2237, 2243, 2273, 2282, 2021, 2297f*); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (*42 U.S.C. 5841, 5842, 5846, 5851*); Nuclear Waste Policy Act of 1982, secs. 135, 141 *(42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note.*

■ 12. In § 70.25, revise paragraph (f)(2) introductory text to read as follows:

§ 70.25 Financial assurance and recordkeeping for decommissioning.

* * * * *

(f) * * *

(2) *A surety method, insurance, or other guarantee method.* These methods guarantee that decommissioning costs will be paid. A surety method may be in the form of a surety bond or letter of credit. A parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix A to 10 CFR part 30. For commercial companies, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix C or D to 10 CFR part 30. For nonprofit entities, such as colleges, universities, and nonprofit hospitals, a guarantee of funds by the applicant or licensee may be used if the guarantee and test are as contained in appendix E to 10 CFR part 30. Except for an external sinking fund, a parent company guarantee or a guarantee by the applicant or licensee may not be used in combination with any other financial methods used to satisfy the requirements of this section. A guarantee by the applicant or licensee may not be used in any situation where the applicant or licensee has a parent company holding majority control of the voting stock of the company. Any surety method or insurance used to provide financial assurance for

decommissioning must contain the following conditions:

* * * * *

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH–LEVEL RADIOACTIVE WASTE, AND REACTOR–RELATED GREATER THAN CLASS C WASTE

■ 13. The authority citation for part 72 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 223, 234, 274 (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2210e, 2232, 2233, 2234, 2236, 2237, 2238, 2273, 2282, 2021); Energy Reorganization Act of 1974, secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); National Environmental Policy Act of 1969 (42 U.S.C. 4332); Nuclear Waste Policy Act of 1982, secs. 117(a), 132, 133, 134, 135, 137, 141, 145(g), 148, 218(a) (42 U.S.C. 10137(a), 10152, 10153, 10154, 10155, 10157, 10161, 10165(g), 10168, 10198(a)); 44 U.S.C. 3504 note.

■ 14. In § 72.30, revise paragraph (e)(2) introductory text to read as follows:

§ 72.30 Financial assurance and recordkeeping for decommissioning.

* * * * *

(e) * * *

(2) *A surety method, insurance, or other guarantee method.* These methods guarantee that decommissioning costs will be paid. A surety method may be in the form of a surety bond or letter of credit. A parent company guarantee of funds for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix A to 10 CFR part 30. For commercial companies, a guarantee of funds by the applicant or licensee for decommissioning costs based on a financial test may be used if the guarantee and test are as contained in appendix C or D to 10 CFR part 30. Except for an external sinking fund, a parent company guarantee or a guarantee by the applicant or licensee may not be used in combination with other financial methods to satisfy the requirements of this section. A guarantee by the applicant or licensee may not be used in any situation where the applicant or licensee has a parent company holding majority control of the voting stock of the company. Any surety method or insurance used to provide financial assurance for decommissioning must contain the following conditions:

* * * * *

Dated: December 19, 2022.

For the Nuclear Regulatory Commission.

Brooke P. Clark,

Secretary of the Commission.

[FR Doc. 2022–27935 Filed 12–30–22; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 61, 63, and 65

[Docket No. FAA–2022–1463]

RIN 2120–AL74

Airman Certification Standards and Practical Test Standards for Airmen; Incorporation by Reference

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

ACTION: Extension of comment period.

SUMMARY: This action extends the comment period for the notice of proposed rulemaking Airman Certification Standards and Practical Test Standards for Airmen; Incorporation by Reference, which published in the **Federal Register** on December 12, 2022.

DATES: The comment period for the notice of proposed rulemaking was opened on December 12, 2022 and was scheduled to close on January 11, 2023. The comment period is extended for an additional 30 days or a total of 60 days from the original publication date in the **Federal Register** to February 10, 2023.

ADDRESSES: Send comments identified by docket number FAA–2022–1463 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://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: 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 *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *https://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, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Daron Malmborg, Airman Testing Standards Branch, AFS–630, Federal Aviation Administration, P.O. Box 25082, Oklahoma City, OK 73125; (405) 954–4151; *AFS630comments@faa.gov.*

SUPPLEMENTARY INFORMATION: See the ''Additional Information'' section for information on how to comment on this proposal and how the FAA will handle comments received. The ''Additional Information'' section also contains related information about the docket, privacy, the handling of proprietary or confidential business information. In addition, there is information on obtaining copies of related rulemaking documents.

Executive Summary

The subject rulemaking proposes several amendments to parts 61, 63, and 65 of Title 14 of the Code of Federal Regulations (14 CFR) by incorporating by reference (IBR) the Airman Certification Standards (ACS) and Practical Test Standards (PTS). The ACSs and PTSs are currently utilized as the practical test testing standard for airman certificates and ratings. The FAA notes that there are no major substantive changes proposed to the testing standards that are already in use or the process by which the practical test is conducted. Rather, the FAA proposed the rulemaking to bring the ACSs and PTSs into the FAA regulations through the proper notice and comment process required by the Administrative Procedure Act (APA),[1] as discussed in section III.A. of the previously published preamble.

Extension of Comment Period

The FAA has determined that extension of the comment period is consistent with the public interest, and that good cause exists for taking this action. Accordingly, the comment period for FAA–2022–1463 is extended for an additional 30 days or a total of 60 days from the original publication date

[1] 5 U.S.C. 551–559.

in the **Federal Register** to February 10, 2023.

Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

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

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 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 the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

B. Electronic Access and Filing

A copy of the notice of proposed rulemaking (NPRM), all comments received, any final rule, and all background material may be viewed online at *https://www.regulations.gov* using the docket number listed above. A copy of this rule will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *https://www.federalregister.gov* and the Government Publishing Office's website at *https://www.govinfo.gov.* A copy may also be found at the FAA's Regulations and Policies website at *https://www.faa.gov/regulations_policies.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or notice number of this rulemaking. All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

Authority

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106, describes the authority of the FAA Administrator to promulgate regulations and rules. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

The proposed rulemaking was promulgated under the authority granted to the Administrator in 49 U.S.C. Subtitle VII, Part A, Subpart iii, Chapter 401, Section 40113 (prescribing general authority of the Administrator of the FAA with respect to aviation safety duties and powers to prescribe regulations) and Subpart III, Chapter 447, Sections 44701 (general authority of the Administrator to promote safe flight of civil aircraft in air commerce by prescribing regulations and setting minimum standards for other practices, methods, and procedures necessary for safety in air commerce and national security), 44702 (general authority of the Administrator to issue airman certificates), and 44703 (general authority of the Administrator to prescribe regulations for the issuance of airman certificates when the Administrator finds, after investigation, that an individual is qualified for and physically able to perform the duties related to the position authorized by the certificate). The subject rulemaking proposal was previously issued within the scope of that authority.

This extension to the comment period for the aforementioned rulemaking is issued under authority provided by 49 U.S.C. 106(f), 44701(a), and 44703 in Washington, DC, on December 23, 2023.

Brandon Roberts,

Executive Director, Office of Rulemaking.

[FR Doc. 2022–28378 Filed 12–30–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2022–0895]

RIN 1625–AA00

Safety Zone; Potomac River, Between Charles County, MD and King George County, VA

AGENCY: Coast Guard, DHS.

ACTION: Supplemental notice of proposed rulemaking; re-opening of public comment period.

SUMMARY: On November 8, 2022, the Coast Guard published a notice of proposed rulemaking to establish a temporary safety zone from February 1, 2023 through February 14, 2023, to provide for the safety of life on certain waters of the Potomac River during demolition operations at the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge. The Coast Guard is publishing this revised notice of proposed rulemaking because the bridge contractor has changed the scheduled dates and location sequence in which the explosives demolition will occur. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before February 2, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2022–0895 using the Federal Decision Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email MST2 Courtney Perry, Sector Maryland-NCR, Waterways Management Division, U.S. Coast Guard: telephone 410–576–2596, email *D05-DG-SectorMD-NCR-Prevention-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

The Coast Guard published an NPRM on November 8, 2022 (87 FR 67430), proposing to establish a safety zone for demolition operations at the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge on the Potomac River, from 12:01 a.m. on February 1, 2023, to 11:59 p.m. on February 14, 2023. After publication of that notice, the Coast Guard was informed by the bridge contractor that the scheduled dates and location sequence in which the explosives demolision will occur has been changed. Instead of using explosives to demolish the old bridge from February 1, 2023 through February 14, 2023, the bridge contractor has decided to start to use explosives to demolish the old bridge over navigable waters from March 1, 2023 through March 17, 2023. Therefore, the dates of the safety zone is changed. Additionally, instead of using explosives to demolish the segment of the old bridge over waters that include the steel truss sections between Piers 13 and 16 (including the main span over the Federal navigation channel) first in the explosives demolition sequence, the bridge contractor has decided to start to use explosives to demolish the segment of the old bridge over waters that include the steel truss sections between Piers 8 and 13 (outside and to the west of the Federal navigation channel) and conduct associated debris removal and hydrographic surveying equipment. Therefore, the location of Area 1 of the safety zone is changed. These are the only changes from the original proposal published on November 8. We are issuing this supplemental proposal to amend the safety zone to account for the change in the scheduled dates, and the location of Area 1 of the safety zone, and to re-open the comment period to account for this change.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters outside and to the west of the Federal navigation channel at the old Governor Harry W. Nice/Senator Thomas ''Mac'' Middleton Memorial (US–301) Bridge before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

III. Discussion of Proposed Rule

The COTP is proposing to establish a safety zone from 12:01 a.m. on March 1, 2023, to 11:59 p.m. on March 17, 2023. The safety zone would cover the following areas:

Area 1. All navigable waters of the Potomac River, encompassed by a line connecting the following points beginning at 38°21′48.14″ N, 076°59′40.45″ W, thence south to 38°21′37.90″ N, 076°59′38.25″ W, thence west to 38°21′35.18″ N, 076°59′59.06″ W, thence north to 38°21′45.57″ N, 077°00′01.84″ W, and east back to the beginning point, located between Charles County, MD, and King George County, VA.

Area 2. All navigable waters of the Potomac River, within 1,500 feet of the explosives barge located in approximate position 38°21′21.47″ N, 076°59′45.40″ W.

The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled demolition and debris removal. Except for marine equipment and vessels operated by Skanska-Corman-McLean, Joint Venture, or its subcontractors, no vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The term designated representative also includes an employee or contractor of Skanska-Corman-McLean, Joint Venture for the sole purposes of designating and establishing safe transit corridors, to permit passage into or through the safety zone, or to notify vessels and individuals that they have entered the safety zone and are required to leave.

The COTP will notify the public that the safety zone will be enforced by all appropriate means to the affected segments of the public, as practicable, in accordance with 33 CFR 165.7(a). Such means of notification will also include, but are not limited to, Broadcast Notice to Mariners. Vessels or persons violating this rule are subject to the penalties set forth in 46 U.S.C. 70036 (previously codified in 33 U.S.C. 1232) and 46 U.S.C. 70052 (previously codified in 50 U.S.C. 192). The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location and time of year of the safety zone. The temporary safety zone is approximately 600 yards in width and 400 yards in length. This safety zone would impact a small designated area of the Potomac River for 17 total days, but we anticipate that there would be no vessels that are unable to conduct business. Excursion vessels and commercial fishing vessels are not impacted by this rulemaking. Excursion vessels do not operate in this area, and commercial fishing vessels are not impacted because of their draft. Some towing vessels may be impacted, but bridge project personnel have been conducting outreach throughout the project in order to coordinate with those vessels. This safety zone would be established outside the normal recreational boating season for this area, which occurs during the summer season. Additionally, vessel traffic, including recreational vessels, not required to use the navigation channel would be able to safely transit around the safety zone. Such vessels may be able to transit to the east or the west of the Federal navigation channel, as similar vertical clearance and water depth exist under the next bridge span to the east and west. Moreover, the Coast Guard would issue Local Notices to Mariners and a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The

term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone lasting 17 total days that would prohibit entry within a portion of the Potomac River. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

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

V. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2022–0895 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

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

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–0895 to read as follows:

§ 165.T05–0895 Safety Zone; Potomac River, Between Charles County, MD and King George County, VA.

(a) *Location.* The following areas are a safety zone: These coordinates are based on datum NAD 83.

(1) *Area 1.* All navigable waters of the Potomac River, encompassed by a line connecting the following points beginning at 38°21′48.14″ N, 076°59′40.45″ W, thence south to 38°21′37.90″ N, 076°59′38.25″ W, thence west to 38°21′35.18″ N, 076°59′59.06″ W, thence north to 38°21′45.57″ N, 077°00′01.84″ W, and east back to the beginning point, located between Charles County, MD, and King George County, VA.

(2) *Area 2.* All navigable waters of the Potomac River within 1,500 feet of the explosives barge located in approximate position 38°21′21.47″ N, 076°59′45.40″ W.

(b) *Definitions.* As used in this section—

Captain of the Port (COTP) means the Commander, U.S. Coast Guard Sector Maryland-National Capital Region.

Designated representative means any Coast Guard commissioned, warrant, or petty officer, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Maryland-National Capital Region (COTP) in the enforcement of the safety zone. The term also includes an employee or contractor of Skanska-Corman-McLean, Joint Venture for the sole purposes of designating and establishing safe transit corridors, to permit passage into or through the safety zone, or to notify vessels and individuals that they have entered the safety zone and are required to leave.

Marine equipment means any vessel, barge or other equipment operated by Skanska-Corman-McLean, Joint Venture, or its subcontractors.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, except for marine equipment, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP, Skanska-Corman-McLean, Joint Venture, or the COTP's designated representative. If a vessel or person is notified by the COTP, Skanska-Corman-McLean, Joint Venture, or the COTP's designated representative that they have entered the safety zone without permission, they are required to immediately leave in a safe manner following the directions given.

(2) Mariners requesting to transit any of these safety zone areas must first contact the Skanska-Corman-McLean, Joint Venture designated representative, the on-site project manager by telephone number 785–953–1465 or on Marine Band Radio VHF–FM channels 13 and 16 from the pusher tug Miss Stacy. If permission is granted, mariners must proceed at their own risk and strictly observe any and all instructions provided by the COTP, Skanska-Corman-McLean, Joint Venture, or designated representative to the mariner regarding the conditions of entry to and exit from any area of the safety zone. The COTP or the COTP's representative can be contacted by telephone number 410–576–2693 or on Marine Band Radio VHF–FM channel 16 (156.8 MHz).

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue marine information broadcasts on VHF–FM marine band radio announcing specific enforcement dates and times.

(d) *Enforcement officials.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

(e) *Enforcement period.* This section will be enforced from 12:01 a.m. on March 1, 2023, to 11:59 p.m. on March 17, 2023.

Dated: December 27, 2022.

David E. O'Connell,

Captain, U.S. Coast Guard, Captain of the Port Maryland-National Capital Region.

[FR Doc. 2022–28497 Filed 12–30–22; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2020–0053; FRL–9410–08–OCSPP]

Receipt of a Pesticide Petition Filed for Residues of Pesticide Chemicals in or on Various Commodities November 2022

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petition and request for comment.

SUMMARY: This document announces the Agency's receipt of an initial filing of a pesticide petition requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before February 2, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2020–0053, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (BPPD) (7511M), main telephone number: (202) 566–1400, email address: *BPPDFRNotices@epa.gov;* or Dan Rosenblatt, Registration Division (RD) (7505T), main telephone number: (202) 566–2875, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. 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:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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/comments.html.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the Agency taking?

EPA is announcing receipt of a pesticide petition filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the request before responding to the petitioner. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petition described in this document contains data or information prescribed in FFDCA section 408(d)(2), 21 U.S.C. 346a(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition that is the subject of this document, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for this petition is available at *https://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

A. Notice of Filing—Amended Tolerance Exemptions for Non-Inerts (Except PIPS)

PP 2E8988. EPA–HQ–OPP–2022–0940. The Interregional Research Project Number 4 (IR–4), North Carolina State University, 1730 Varsity Drive, Suite 210, Venture IV, Raleigh, NC 27606, on behalf of Arizona Cotton Research and Protection Council, 3721 East Wier Avenue, Phoenix, Arizona 85040–2933, requests to amend an exemption from the requirement of a tolerance in 40 CFR 180.1206 for residues of the fungicide *Aspergillus flavus* strain AF36 in or on all food and feed commodities of cotton, corn, pistachio, almond, and fig. The petitioner believes no analytical method is needed because it is expected that, when used as proposed, *Aspergillus flavus* strain AF36 will not result in residues that are of toxicological concern. *Contact:* BPPD.

B. Amended Tolerances for Non-Inerts

1. *PP 2E8982.* EPA–HQ–OPP–2022–0300. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests to remove the tolerances in 40 CFR 180.572 for residues of bifenazate in or on bean, dry seed; cotton, undelinted seed; fruit, stone, group 12 except plum; grape; longan; lychee; nut, tree, group 14; okra; pea and bean, succulent shelled, subgroup 6B; pistachio; plum; soybean, succulent shelled; spanish lime; strawberry; and vegetable, legume, edible-podded, subgroup 6A. Adequate analytical methods for determining bifenazate in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

2. *PP 2E8994.* EPA–HQ–OPP–2022–0384. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests to remove the tolerances in 40 CFR 180.635 for residues of spinetoram in or on asparagus, and spice, subgroup 19B, except black pepper. Adequate analytical methods for determining spinetoram in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

C. Amended Tolerances for Non-Inerts

1. *PP* 2E8982. EPA–HQ–OPP–2022–0300. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests to remove the tolerances in 40 CFR 180.572 for residues of bifenazate in or on bean, dry seed; cotton, undelinted seed; fruit, stone, group 12 except plum; grape; longan; lychee; nut, tree, group 14; okra; pea and bean, succulent shelled, subgroup 6B; pistachio; plum; soybean, succulent shelled; spanish lime; strawberry; and vegetable, legume, edible-podded, subgroup 6A. Adequate analytical methods for determining bifenazate in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

2. *PP 2E8993.* EPA–HQ–OPP–2022–0386. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests to remove the tolerances in 40 CFR 180.495 for residues of spinosad in or on asparagus, and spice, subgroup 19B, except black pepper. Adequate analytical methods for determining spinosad in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

3. *PP 2E8994.* EPA–HQ–OPP–2022–0384. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests to remove the tolerances in 40 CFR 180.635 for residues of spinetoram in or on asparagus, and spice, subgroup 19B, except black pepper. Adequate analytical methods for determining spinetoram in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

4. *PP 2E9000.* EPA–HQ–OPP–2022–0832. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests to remove the tolerances in 40 CFR 180.613 for residues of flonicamid

in or on fruit, stone group 12–12, at 0.6 parts per million (ppm), pea and bean, dried shelled, except soybean, subgroup 6C at 3.0 ppm, pea and bean, succulent shelled, subgroup 6B at 7.0 ppm, and vegetable, legume, edible podded, subgroup 6A at 4.0 ppm. Adequate analytical methods for determining flonicamid in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

D. Notice of Filing—New Tolerance Exemptions for Non-Inerts (Except PIPS)

1. *PP 2F9025.* EPA–HQ–OPP–2022–0914. Oro-Agri Inc., 2788 S Maple Ave., Fresno, CA 93725 requests to establish an exemption from the requirement of a tolerance in 40 CFR part 180 for residues of the fungicide, insecticide and acaricide sweet orange oil in or on all food commodities. The analytical method, gas chromatography, is available to EPA for the detection and measurement of the pesticide residues. *Contact:* BPPD.

2. *PP 2G9024.* EPA–HQ–OPP–2022–0932. GreenLightBiosciences, Inc., 200 Boston Ave., Suite 1000, Medford, MA 02155, requests to establish an exemption from the requirement of a tolerance in 40 CFR part 180 for residues of the double-stranded RNA insecticide Ledprona (CAS No. 2433753–68–3) in or on all agricultural commodities and food products. The petitioner believes no analytical method is needed because based on the low toxicity demonstrated in the available toxicological data and given that a temporary exemption from the requirement for establishing a tolerance for residues is being proposed. *Contact:* BPPD.

E. New Tolerance Exemptions for Inerts (Except PIPS)

1. *PP IN–11624.* EPA–HQ–OPP–2022–0942. Technology Sciences Group Inc., 1150 18th Street NW, Suite 1000, Washington, DC 20036, on behalf of Veto-Pharma SAS12–14 Rue de la Croix-Martre 91120 Palaiseau, France, requests to establish an exemption from the requirement of a tolerance in 40 CFR 180.910 for residues of erucamide (CAS Reg. No.112–84–5) as a lubricant inert ingredient limited to 0.3% by weight in pesticide formulations when applied on the raw agricultural commodities honey and honeycomb. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

2. *PP IN–11711.* EPA–HQ–OPP–2022–0921. Delta Analytical Corporation, 12510 Prosperity Drive, Suite 160, Silver Spring, MD 20904 on behalf of Borchers Americas, Inc., 811 Sharon Drive, Westlake, OH 44145 requests to establish an exemption from the requirement of a tolerance for residues for Oxirane, 2-methyl-, polymer with oxirane, ether with 1,2,3-propanetriol (3:1) (CAS Reg. No. 9082–00–2) with a minimum number average molecular weight (in amu) of 6,175 when used as a pesticide inert ingredient (wetting agent) in pesticide formulations under 40 CFR 180.960. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

3. *PP IN–11727.* EPA–HQ–OPP–2022–0931. Nouryon Chemicals LLC, c/o Keller and Heckman LLP, 1001 G Street NW, Suite 500 West, Washington, DC 20001, requests to establish an exemption from the requirement of a tolerance for residues of 2-propenoic acid, methyl-, polymer with butyl 2-propenoate and methyl 2-methyl-2-propenoate compd. with 2-amino-2-methyl-1-propanol (CAS Reg. No. 1203962–19–9), with a minimum number average molecular weight of 22,700 daltons, when used as an inert ingredient in pesticide formulations under 40 CFR 180.960. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

4. *PP IN–11729.* EPA–HQ–OPP–2022–0935. Nouryon Chemicals LLC, c/o Keller and Heckman LLP, 1001 G Street NW, Suite 500 West, Washington, DC 20001, requests to establish an exemption from the requirement of a tolerance for residues of propanoic acid, 3-hydroxy-2- (hydroxymethyl)-2-methyl-, polymer with 2-amino-2-methyl-1-1propanol, a-hydro-ω-hydroxypoly[oxy(methyl-1,2-ethanediyl)], 5-isocyanato-1-(isocyanatomethyl)-1,3,3-trimethylcyclohexane and methyloxirane polymer with oxirane ether with 4,4′-(1-methylethylidene)bis[phenol] (2:1), polyethylene-polypropylene glycol 2-aminopropyl Me ether-blocked, compds. with 2-amino-2-methyl-1-propanol (CAS Reg. No. 515152–49–5), with a minimum number average molecular weight of 6,800 daltons, when used as an inert ingredient in pesticide formulations under 40 CFR 180.960. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

F. New Tolerance Exemptions for PIPS

PP 2F9010. EPA–HQ–OPP–2022–0939. Pioneer HiBred International, Inc., 7100 NW 62 Avenue P.O. Box 1000, Johnston, IA 50131–1000, requests to establish an exemption from the requirement of a tolerance in 40 CFR part 174 for residues of the plant-incorporated protectant (PIP) ingredient ophioglossum pendulum IPD079Ea protein in or on corn. The analytical method A validated ELISA was used to determine the concentration of IPD079Ea protein in maize tissues, including grain and forage is available to EPA for the detection and measurement of the pesticide residues. *Contact:* BPPD.

G. New Tolerances for Non-Inerts

1. *PP 1E8966.* EPA–HQ–OPP–2022–0069. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of Trinexapac-ethyl in or on the raw agricultural commodity clover, forage at 8 ppm and clover, hay at 15 ppm. As a result of feeding clover that has been treated with trinexapac-ethyl to livestock, the following tolerances are proposed in livestock commodities: Cattle, fat and cattle, meat at 0.03 ppm; cattle, meat byproducts at 0.1 ppm; egg at 0.01 ppm; goat, fat and goat, meat at 0.03 ppm; goat, meat byproducts at 0.1 ppm; hog, meat byproducts at 0.1 ppm; milk at 0.01 ppm; horse, meat at 0.03 ppm; poultry, fat and poultry, meat at 0.01 ppm; poultry, meat byproducts at 0.1 ppm; sheep, fat and sheep, meat at 0.03 ppm; and sheep, meat byproducts at 0.1 ppm. Adequate analytical methods for determining trinexapac-ethyl in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

2. *PP 2E8982.* EPA–HQ–OPP–2022–0300. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing tolerances for residues of bifenazate: Hydrazine carboxylic acid, 2-(4-methoxy-1,1′-biphenyl-3-yl)1-methylethyl ester in or on the raw agricultural commodities of banana at 3 ppm; bushberry subgroup 13–07B at 3 ppm; cherry subgroup 12–12A at 2.5 ppm; cottonseed subgroup 20C at 0.75 ppm; nut, tree, group 14–12 at 0.2 ppm; peach subgroup 12–12B at 2.5 ppm;

plantain at 3 ppm, plum subgroup 12–12C at 0.2 ppm; tropical and subtropical, small fruit, inedible peel, subgroup 24A at 5 ppm; edible podded bean subgroup 6–22A at 6 ppm, edible podded pea subgroup 6–22B at 6 ppm; succulent shelled bean subgroup 6–22C at 0.7 ppm; succulent shelled pea subgroup 6–22D at 0.7 ppm; and pulses, dried shelled bean, except soybean, subgroup 6–22E at 0.6 ppm. Adequate analytical methods for determining bifenazate in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

3. *PP 2E8993.* EPA–HQ–OPP–2022–0386. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing tolerances for residues of spinosad in or on the raw agricultural commodities stalk and stem vegetable subgroup 22A at 0.4 ppm and spice group 26 at 1.7 ppm. Adequate analytical methods for determining spinosad in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

4. *PP 2E8994.* EPA–HQ–OPP–2022–0384. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing tolerances for residues of spinetoram in or on the raw agricultural commodities of stalk and stem vegetable subgroup 22A at 0.4 ppm and spice group 26 at 1.7 ppm. Adequate analytical methods for determining spinetoram in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

5. *PP 1F8976.* EPA–HQ–OPP–2022–0455. UPL Delaware Inc., and UPL NA Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide carboxin in or on crop subgroup 6–22F: Pulses, dried shelled pea at .2 ppm; pea, dry, forage at 0.4 ppm; and pea, dry, hay at 2 ppm. The GLC/MSD method and the Colorimetric Method is used to measure and evaluate the chemical Carboxin. *Contact:* RD.

6. *PP 2E9000.* EPA–HQ–OPP–2022–0832. IR–4, North Carolina State University, 1730 Varsity Drive, Venture IV, Suite 210, Raleigh, NC 27606, requests, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing tolerances for residues of the insecticide flonicamid and its metabolites and degradates determined by measuring flonicamid [N-(cyanomethyl)-4-(trifluoromethyl)- 3-pyridinecarboxamide] and its metabolites TFNA (4-trifluoromethylnicotinic acid), TFNA–AM (4-trifluoromethyl-nicotinamide), and TFNG [N-(4-trifluoromethylnicotinoyl)glycine], calculated as the stoichiometric equivalent of flonicamid in or on the raw agricultural commodities: Bushberry crop subgroup 13–07B at 1.5 ppm; caneberry crop subgroup 13–07A at 3 ppm; cherry subgroup 12–12A at 0.6 ppm; corn, sweet, kernel plus cob with husks removed at 0.4 ppm; corn, sweet, forage at 9 ppm; corn, sweet, stover at 20 ppm; peach crop subgroup 12–12B at 1.5 ppm; plum subgroup 12–12C at 0.6 ppm; pomegranate at 0.5 ppm; prickly pear, fruit at 2 ppm; prickly pear, pads at 3 ppm; edible podded bean subgroup 6–22A and edible podded pea subgroup 6–22B at 4 ppm; succulent shelled bean subgroup 6–22C; and succulent shelled pea subgroup 6–22D at 7 ppm; and pulses, dried shelled bean (except soybean) subgroup 6–22E and pulses, dried shelled pea subgroup 6–22F at 3 ppm. Adequate analytical methods for determining flonicamid in/on appropriate raw agricultural commodities and processed commodities have been developed and validated. *Contact:* RD.

7. *PP 2F9026.* EPA–HQ–OPP–2022–0871. Bayer Crop Science LP, 800 N Lindbergh Blvd., St. Louis, MO 63167, requests to establish a tolerance in 40 CFR part 180 for residues of the insecticide, spidoxamat, in or on the raw agricultural commodities of citrus fruit (CG 10–10) at 0.8 ppm, pome fruit (CG 11–10) at 0.3 ppm, stone fruit, except apricot (CG 12–12, except Apricot) at 1.0 ppm, apricot at 6.0 ppm, small fruit vine climbing subgroup, except fuzzy kiwifruit (CG 13–07F) at 0.9 ppm, tree nuts, except pistachio (CG 14–12, except pistachio) at 0.02 ppm, and pistachio at 0.8 ppm. Solvent extraction, filtration followed by the addition of isotopically label-internal standards and quantitation by high performance liquid chromatography-electropspray ionization/tandem mass spectrometry (HPLS/MS/MS) are used to measure and evaluate the chemical Spidoxamat. *Contact:* RD.

Authority: 21 U.S.C. 346a.

Dated: December 19, 2022.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2022–28524 Filed 12–30–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2021–0847; FRL–9972–04–OCSPP]

40 CFR Part 721

Significant New Use Rules on Certain Chemical Substances (22–1.5e); Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: EPA issued a document in the **Federal Register** of December 2, 2022, proposing significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for chemical substances that were the subject of premanufacture notices (PMNs) and are also subject to Orders issued by EPA pursuant to TSCA. This document extends the comment period for 14 days, from January 3, 2023 to January 17, 2023, in response to stakeholder requests for more time to determine if and to what extent they may be affected by the proposed SNURs.

DATES: The comment period for the proposed rulemaking that published on December 2, 2022, at 87 FR 74072, is extended. Comments must be received on or before January 17, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2021–0847, through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

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: This document extends the public comment period established in the proposed rule that published in the **Federal Register** of December 2, 2022 (87 FR 74072; FRL–9972–01–OCSPP), and the correction that published in the **Federal Register** of December 15, 2022 (87 FR 76957; FRL–9972–03–OCSPP), in which EPA proposed SNURs under TSCA for chemical substances that were the subject of PMNs and are also subject to Orders issued by EPA pursuant to TSCA. EPA is hereby extending the comment period, which was set to end on January 3, 2023, to January 17, 2023.

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 21, 2022.

Tala Henry,

Deputy Director, Office of Pollution Prevention and Toxics.

[FR Doc. 2022–28468 Filed 12–30–22; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 22–435; RM–11940; DA 22–1279; FR ID 119885]

Television Broadcasting Services Odessa, Texas

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by Gray Television Licensee, LLC (Petitioner), the licensee of KOSE–TV, channel 7, Odessa, Texas. The Petitioner requests the substitution of channel 31 for channel 7 at Odessa in the Table of Allotments.

DATES: Comments must be filed on or before February 2, 2023 and reply comments on or before February 17, 2023.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 45 L Street NE, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the Petitioner as follows: Joan Stewart, Esq., Wiley Rein LLP, 2050 M Street NW, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Joyce Bernstein, Media Bureau, at (202) 418–1647; or Joyce Bernstein, Media Bureau, at *Joyce.Bernstein@fcc.gov.*

SUPPLEMENTARY INFORMATION: In support, the Petitioner states that the proposed channel substitution serves the public interest because it will resolve significant over-the-air reception problems in KOSA–TV's existing service area. The Petitioner further states that the Commission has recognized the deleterious effects manmade noise has on the reception of digital VHF signals, and that the propagation characteristics of these channels allow undesired signals and noise to be receivable at relatively farther distances compared to UHF channels and nearby electrical devices can cause interference. According to the Petitioner, although the proposed channel 31 facility would result in a slight reduction in the predicted population served, once terrain-limited coverage predications are taken into account, the proposed channel 31 facility will result in a loss of service to 36 people, a number which the Commission considers *de minimis.*

This is a synopsis of the Commission's *Notice of Proposed Rulemaking,* MB Docket No. 22–435; RM–11940; DA 22–1279, adopted December 9, 2022, and released December 9, 2022. The full text of this document is available for download at *https://www.fcc.gov/edocs.* To request materials in accessible formats (braille, large print, computer diskettes, or audio recordings), please send an email to *FCC504@fcc.gov* or call the Consumer & Government Affairs Bureau at (202) 418–0530 (VOICE), (202) 418–0432 (TTY).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, do not apply to this proceeding.

Members of the public should note that all *ex parte* contacts are prohibited from the time a Notice of Proposed Rulemaking is issued to the time the matter is no longer subject to Commission consideration or court review, *see* 47 CFR 1.1208. There are, however, exceptions to this prohibition, which can be found in Section 1.1204(a) of the Commission's rules, 47 CFR 1.1204(a).

See Sections 1.415 and 1.420 of the Commission's rules for information regarding the proper filing procedures for comments, 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

Proposed Rule

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. In § 73.622 in paragraph (j), amend the Table of TV Allotments under Texas by revising the entry for Odessa to read as follows:

§ 73.622 Table of TV Allotments.

* * * * *

(j) * * *

Community	Channel no.
* * * * * * *	
TEXAS	
* * * * * * *	
Odessa	9, 15, 23, *28, 30, 31
* * * * * * *	

[FR Doc. 2022–28352 Filed 12–30–22; 8:45 am]
BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 88, No. 1
Tuesday, January 3, 2023

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2021–0021]

Notice of Availability of an Environmental Assessment and Finding of No Significant Impact for Release of *Ganaspis brasiliensis* for Biological Control of Spotted-wing Drosophila in the Contiguous United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared a final environmental assessment and finding of no significant impact relative to permitting the release of the insect *Ganaspis brasiliensis* for the biological control of spotted-wing Drosophila (*Drosophila suzukii*) in the contiguous United States. Based on our finding of no significant impact, we have determined that an environmental impact statement need not be prepared.

FOR FURTHER INFORMATION CONTACT: Dr. Robert S. Pfannenstiel, Acting Assistant Director, Pests, Pathogens, and Biocontrol Permits, Permitting and Compliance Coordination, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1231; (301) 851–2198; email: *Bob.Pfannenstiel@usda.gov.*

SUPPLEMENTARY INFORMATION:

The Animal and Plant Health Inspection Service (APHIS) is issuing permits for the release of the insect *Ganaspis brasiliensis* in the contiguous United States for the biological control of spotted-wing Drosophila (*Drosophila suzukii*) (SWD).

SWD is native to East Asia. It was first detected in California, Italy, and Spain in 2008. It has since established in most fruit-growing regions in North America. SWD lays eggs inside ripening fruits. Feeding by SWD larvae results in the degradation of fruits, and the puncturing of the fruit skin may also provide a gateway for secondary bacterial and fungal infections.

On July 16, 2021, we published in the **Federal Register** (86 FR 37732–37733, Docket No. APHIS–2021–0021) a notice [1] in which we announced the availability, for public review and comment, of an environmental assessment (EA) that examined the potential environmental impacts associated with the release of the insect *Ganaspis brasiliensis* in the continental United States for the biological control of spotted-wing Drosophila (*Drosophila suzukii*). Comments on the notice were required to be received on or before August 16, 2021. We received six comments on the EA by that date. All of the comments were in favor of the proposed release and did not raise any substantive issues.

In this document, we are advising the public of our finding of no significant impact (FONSI) regarding the release of the insect *Ganaspis brasiliensis* (Hymenoptera: Figitidae) for biological control of spotted-wing Drosophila, *Drosophila suzukii* (Diptera: Drosophilidae) in the contiguous United States. We are limiting this finding to the contiguous United States, as our assessment does not extend to the State of Alaska. Our finding, which is based on the EA, reflects our determination that release of *Ganaspis brasiliensis* for the biological control of spotted-wing Drosophila (*Drosophila suzukii*) in the contiguous United States will not have a significant impact on the quality of the human environment. Based on this finding, we have issued permits for the release of *Ganaspis brasiliensis* for the biological control of spotted-wing Drosophila (*Drosophila suzukii*) in the contiguous United States.

The final EA and FONSI may be viewed on the *Regulations.gov* website (*see* footnote 1). Copies of the final EA and FONSI are also available for public inspection at 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 799–7039 to facilitate entry into the reading room. In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

The final EA and FONSI have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*); (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508); (3) USDA regulations implementing NEPA (7 CFR part 1b); and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 27th day of December 2022.

Anthony Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2022–28530 Filed 12–30–22; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice, supporting documents, and the comments we received, go to *http://www.regulations.gov* and enter APHIS–2021–0021 in the Search field.

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–224–2022]

Foreign-Trade Zone 40—Cleveland, Ohio; Application for Subzone Expansion; Swagelok Company; Valley City, Ohio

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Cleveland Cuyahoga County Port Authority, grantee of FTZ 40, requesting an expansion of Subzone 40I on behalf of Swagelok Company (Swagelok) in Valley City, Ohio. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on December 28, 2022.

Subzone 40I currently consists of the following sites: *Site 1* (70 acres) 29500 Solon Rd. & 29495 FA Lennon Dr., Solon, Cuyahoga County; *Site 2* (13.3 acres) 31400 Aurora Rd., Solon, Cuyahoga County; *Site 3* (5 acres) 29500 Ambina Dr., Solon, Cuyahoga County; *Site 4* (7.82 acres) 26651 & 26653 Curtiss Wright Parkway, Willoughby Hills, Cuyahoga County; *Site 5* (16.8 acres) 318,348, & 358 Bishop Rd., Highland

Heights, Cuyahoga County; *Site 6* (23.95 acres) 6050, 6060, & 6100 Cochran Rd., Solon, Cuyahoga County; *Site 7* (3 acres) 29900 Solon Industrial Parkway, Solon, Cuyahoga County; *Site 8* (5 acres) 32550 Old South Miles Rd., Solon, Cuyahoga County; *Site 9* (9.5 acres) 15400 Foltz Parkway, Strongsville, Cuyahoga County; *Site 10* (8.87 acres), 935 N Freedom St., Ravenna, Portage County; and, *Site 11* (2.394 acres), 1924 East 337th St., Eastlake, Lake County.

The proposed expanded subzone would include the following additional site: *Site 12* (16.824 acres), 5370 Wegman Dr., Valley City, Medina County. No authorization for additional production activity has been requested at this time. The subzone would be subject to the existing activation limit of FTZ 40.

In accordance with the FTZ Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is February 13, 2023. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to February 27, 2023.

A copy of the application will be available for public inspection in the ''Online FTZ Information Section'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov.*

Dated: December 28, 2022.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2022–28534 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–181–2022]

Approval of Subzone Status; Voestalpine High Performance Metals LLC; South Boston, Virginia

On September 29, 2022, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Capital Region Airport Commission, grantee of FTZ 207, requesting subzone status subject to the existing activation limit of FTZ 207, on behalf of voestalpine High Performance Metals LLC, in South Boston, Virginia.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (87 FR 60371, October 5, 2022). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR 400.36(f)), the application to establish Subzone 207E was approved on December 28, 2022, subject to the FTZ Act and the Board's regulations, including section 400.13, and further subject to FTZ 207's 2,000-acre activation limit.

Dated: December 28, 2022.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2022–28533 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–825]

Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India: Final Results of Countervailing Duty Administrative Review; 2020; Correction

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Notice; correction.

SUMMARY: The U.S. Department of Commerce (Commerce) published a notice in the **Federal Register** of December 12, 2022, in which Commerce announced the final results of the 2020 administrative review of the countervailing duty (CVD) order on polyethylene terephthalate film, sheet, and strip (PET film) from India. This notice contained an incorrect company name for one producer or exporter in the list of subsidy rates.

FOR FURTHER INFORMATION CONTACT: Richard Roberts, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3464.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of December 12, 2022, in FR Doc 2022–26875, on page 76025, in the second column, we are correcting the listed company name ''Polyplex USA'' in the table of the ''Final Results of Administrative Review'' to state the correct company name ''Polyplex Corporation Ltd.''

Background

On December 12, 2022, Commerce published in the **Federal Register** the final results of the 2020 administrative review of the CVD order on PET film from India.[1] Under the ''Final Results of Administrative Review'' section, Commerce incorrectly stated the company name ''Polyplex USA.'' The company ''Polyplex USA'' should instead state the correct company name ''Polyplex Corporation Ltd.''

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(l), 751(a)(2)(B), and 777(i) of the Tariff Act of 1930, as amended.

Dated: December 27, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2022–28476 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review and Join Annual Inquiry Service List

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, Office of AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with 19 CFR

[1] *See Polyethylene Terephthalate Film, Sheet, and Strip (PET film) from India: Final Results of Countervailing Duty Administrative Review; 2020,* 87 FR 76024 (December 12, 2022).

351.213, that the Department of Commerce (Commerce) conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

All deadlines for the submission of comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting date.

Respondent Selection

In the event Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review. We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 35 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. Commerce invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the review.

In the event Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, Commerce finds that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of a review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to a review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection. Parties are requested to: (a) identify which companies subject to review previously were collapsed; and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete a Quantity and Value Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of a proceeding where Commerce considered collapsing that entity, complete quantity and value data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that requests a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.[1] Section 773(e) of the Act states that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(2)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial Section D responses.

Opportunity to Request A Review: Not later than the last day of January 2023,[2] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in January for the following periods:

Antidumping Duty Proceedings	
BELARUS: Carbon and Alloy Steel Wire Rod, A–822–806	1/22–12/31/22
BRAZIL: Prestressed Concrete Steel Wire Stand, A–351–837	1/22–12/31/22
CANADA: Softwood Lumber, A–122–857	1/22–12/31/22
GERMANY: Forged Steel Fluid End Blocks, A–428–847	1/22–12/31/22
INDIA: Prestressed Concrete Steel Wire Strand, A–533–828	1/22–12/31/22
Polyester Textured Yarn, A–533–885	1/22–12/31/22
ITALY: Forged Steel Fluid End Blocks, A–475–840	1/22–12/31/22
MEXICO: Prestressed Concrete Steel Wire Strand, A–201–831	1/22–12/31/22
REPUBLIC OF KOREA: Prestressed Concrete Steel Wire Strand, A–580–852	1/22–12/31/22
THE RUSSIAN FEDERATION: Carbon and Alloy Steel Wire Rod, A–821–824	1/22–12/31/22
REPUBLIC OF SOUTH AFRICA: Ferrovanadium, A–791–815	1/22–12/31/22
THAILAND: Prestressed Concrete Steel Wire Strand, A–549–820	1/22–12/31/22

[1] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

[2] Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when Commerce is closed.

THE PEOPLE'S REPUBLIC OF CHINA: Calcium Hypochlorite, A–570–008	1/22–12/31/22
Carbon and Certain Alloy Steel Wire Rod, A–570–012	1/22–12/31/22
Certain Crepe Paper Products, A–570–895	1/22–12/31/22
Ferrovanadium, A–570–873	1/22–12/31/22
Certain Folding Gift Boxes, A–570–866	1/22–12/31/22
Certain Hardwood Plywood Products, A–570–051	1/22–12/31/22
Polyester Textured Yarn, A–570–097	1/22–12/31/22
Potassium Permanganate, A–570–001	1/22–12/31/22
Wooden Bedroom Furniture, A–570–890	1/22–12/31/22
UNITED ARAB EMIRATES: Carbon and Alloy Steel Wire Rod, A–520–808	1/22–12/31/22
Countervailing Duty Proceedings	
ARGENTINA: Biodiesel, C–357–821	1/22–12/31/22
CANADA: Softwood Lumber, C–122–858	1/22–12/31/22
GERMANY: Forged Steel Fluid End Blocks, C–428–848	1/22–12/31/22
INDIA: Polyester Textured Yarn, C–533–886	1/22–12/31/22
Forged Steel Fluid End Blocks, C–533–894	1/22–12/31/22
INDONESIA: Biodiesel, C–560–831	1/22–12/31/22
ITALY: Forged Steel Fluid End Blocks, C–475–841	1/22–12/31/22
THE PEOPLE'S REPUBLIC OF CHINA: Calcium Hypochlorite, C–570–009	1/22–12/31/22
Carbon and Certain Alloy Steel Wire Rod, C–570–013	1/22–12/31/22
Circular Welded Carbon Quality Steel Line Pipe, C–570–936	1/22–12/31/22
Forged Steel Fluid End Blocks, C–570–116	1/22–12/31/22
Certain Hardwood Plywood Products, C–570–052	1/22–12/31/22
Oil Country Tubular Goods, C–570–944	1/22–12/31/22
Polyester Textured Yarn, C–570–098	1/22–12/31/22
Certain Tool Chests and Cabinets, C–570–057	1/22–12/31/22
Suspension Agreements	
THE RUSSIAN FEDERATION: Certain Cut To Length Carbon Steel Plate, A–821–808	1/22–12/31/22

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which was produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Note that, for any party Commerce was unable to locate in prior segments, Commerce will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), and *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), Commerce clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders.[3]

Commerce no longer considers the non-market economy (NME) entity as an exporter conditionally subject to an antidumping duty administrative reviews.[4] Accordingly, the NME entity will not be under review unless Commerce specifically receives a request for, or self-initiates, a review of the NME entity.[5] In administrative reviews of antidumping duty orders on merchandise from NME countries where a review of the NME entity has not been initiated, but where an individual exporter for which a review was initiated does not qualify for a separate rate, Commerce will issue a final decision indicating that the company in question is part of the NME entity. However, in that situation, because no review of the NME entity was conducted, the NME entity's entries were not subject to the review and the rate for the NME entity is not subject to change as a result of that review (although the rate for the individual exporter may change as a function of the finding that the exporter is part of the NME entity). Following initiation of an antidumping administrative review when there is no review requested of the NME entity, Commerce will instruct CBP to liquidate entries for all exporters not named in the initiation notice, including those that were suspended at the NME entity rate.

All requests must be filed electronically in Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) on Enforcement and Compliance's ACCESS

[3] *See* the Enforcement and Compliance website at *https://www.trade.gov/us-antidumping-and-countervailing-duties.*

[4] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[5] In accordance with 19 CFR 351.213(b)(1), parties should specify that they are requesting a review of entries from exporters comprising the entity, and to the extent possible, include the names of such exporters in their request.

website at *https://access.trade.gov.*[6] Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[7]

Commerce will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of January 2023. If Commerce does not receive, by the last day of January 2023, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, Commerce will instruct CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period of the order, if such a gap period is applicable to the period of review.

Establishment of and Updates to the Annual Inquiry Service List

On September 20, 2021, Commerce published the final rule titled ''*Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*'' in the **Federal Register**.[8] On September 27, 2021, Commerce also published the notice entitled ''*Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions*'' in the **Federal Register**.[9] The *Final Rule* and *Procedural Guidance* provide that Commerce will maintain an annual inquiry service list for each order or suspended investigation, and any interested party submitting a scope ruling application or request for circumvention inquiry shall serve a copy of the application or request on the persons on the annual inquiry service list for that order, as well as any companion order covering the same merchandise from the same country of origin.[10]

In accordance with the *Procedural Guidance,* for orders published in the **Federal Register** before November 4, 2021, Commerce created an annual inquiry service list segment for each order and suspended investigation. Interested parties who wished to be added to the annual inquiry service list for an order submitted an entry of appearance to the annual inquiry service list segment for the order in ACCESS, and on November 4, 2021, Commerce finalized the initial annual inquiry service lists for each order and suspended investigation. Each annual inquiry service list has been saved as a public service list in ACCESS, under each case number, and under a specific segment type called ''AISL-Annual Inquiry Service List.'' [11]

As mentioned in the *Procedural Guidance,* beginning in January 2022, Commerce will update these annual inquiry service lists on an annual basis when the *Opportunity Notice* for the anniversary month of the order or suspended investigation is published in the **Federal Register**.[12] Accordingly, Commerce will update the annual inquiry service lists for the above-listed antidumping and countervailing duty proceedings. All interested parties wishing to appear on the updated annual inquiry service list must take one of the two following actions: (1) new interested parties who did not previously submit an entry of appearance must submit a new entry of appearance at this time; (2) interested parties who were included in the preceding annual inquiry service list must submit an amended entry of appearance to be included in the next year's annual inquiry service list. For these interested parties, Commerce will change the entry of appearance status from ''Active'' to ''Needs Amendment'' for the annual inquiry service lists corresponding to the above-listed proceedings. This will allow those interested parties to make any necessary amendments and resubmit their entries of appearance. If no amendments need to be made, the interested party should indicate in the area on the ACCESS form requesting an explanation for the amendment that it is resubmitting its entry of appearance for inclusion in the annual inquiry service list for the following year. As mentioned in the *Final Rule,*[13] once the petitioners and foreign governments have submitted an entry of appearance for the first time, they will automatically be added to the updated annual inquiry service list each year.

Interested parties have 30 days after the date of this notice to submit new or amended entries of appearance. Commerce will then finalize the annual inquiry service lists five business days thereafter. For ease of administration, please note that Commerce requests that law firms with more than one attorney representing interested parties in a proceeding designate a lead attorney to be included on the annual inquiry service list.

Commerce may update an annual inquiry service list at any time as needed based on interested parties' amendments to their entries of appearance to remove or otherwise modify their list of members and representatives, or to update contact information. Any changes or announcements pertaining to these procedures will be posted to the ACCESS website at *https://access.trade.gov.*

Special Instructions for Petitioners and Foreign Governments

In the *Final Rule,* Commerce stated that, ''after an initial request and placement on the annual inquiry service list, both petitioners and foreign governments will automatically be placed on the annual inquiry service list in the years that follow.'' [14] Accordingly, as stated above and pursuant to 19 CFR 351.225(n)(3), the petitioners and foreign governments will not need to resubmit their entries of appearance each year to continue to be included on the annual inquiry service list. However, the petitioners and foreign governments are responsible for making amendments to their entries of appearance during the annual update

[6] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[7] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[8] *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws,* 86 FR 52300 (September 20, 2021) (*Final Rule*).

[9] *See Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions,* 86 FR 53205 (September 27, 2021) (*Procedural Guidance*).

[10] *Id.*

[11] This segment has been combined with the ACCESS Segment Specific Information (SSI) field which will display the month in which the notice of the order or suspended investigation was published in the **Federal Register**, also known as the anniversary month. For example, for an order under case number A–000–000 that was published in the **Federal Register** in January, the relevant segment and SSI combination will appear in ACCESS as ''AISL-January Anniversary.'' Note that there will be only one annual inquiry service list segment per case number, and the anniversary month will be pre-populated in ACCESS.

[12] *See Procedural Guidance,* 86 FR at 53206.

[13] *See Final Rule,* 86 FR at 52335.

[14] *Id.*

to the annual inquiry service list in accordance with the procedures described above.

This notice is not required by statute but is published as a service to the international trading community.

Dated: December 19, 2022.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2022–28519 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is initiating a changed circumstances review (CCR) to determine if Stemco Vehicle Technology (Suzhou) Co., Ltd. (Stemco) is the successor-in-interest to GGB Bearing Technology (Suzhou) Co., Ltd. (GGB) in the context of the antidumping duty (AD) order on tapered roller bearings and parts thereof, finished and unfinished (TRBs) from the People's Republic of China (China). We preliminarily determine that Stemco is the successor-in-interest to GGB.

DATES: Applicable January 3, 2023.

FOR FURTHER INFORMATION CONTACT: Alex Wood or Andrew Hart 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) 482–1959 or (202) 482–1058, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 15, 1987, Commerce published in the **Federal Register** the AD order on TRBs from China.[1] On November 14, 2022, Stemco requested that Commerce conduct an expedited changed circumstances review, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), 19 CFR 351.216, and 19 CFR 351.221(c)(3), to confirm that Stemco is the successor-in-interest to GGB for the purposes of determining AD cash deposits and liabilities.[2] In its submission, Stemco notes that, in 2022, the Timken Company (the petitioner) purchased GGB's main business but transferred the TRBs production and selling division to Stemco.[3]

Scope of the Order

Merchandise covered by the *Order* are tapered roller bearings and parts thereof, finished and unfinished, from China; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use. These products are currently classifiable under Harmonized Tariff Schedule of the United States (HTSUS) item numbers 8482.20.00, 8482.91.00.50, 8482.99.15, 8482.99.45, 8483.20.40, 8483.20.80, 8483.30.80, 8483.90.20, 8483.90.30, 8483.90.80, 8708.70.6060, 8708.99.2300, 8708.99.4850, 8708.99.6890, 8708.99.8115, and 8708.99.8180. Although the HTSUS item numbers are provided for convenience and customs purposes, the written description of the scope of the *Order* is dispositive.

Initiation and Preliminary Results of CCR

Pursuant to section 751(b)(1) of the Act, Commerce will conduct a CCR upon receipt of information concerning or a request from an interested party for a review of an AD order that shows changed circumstances sufficient to warrant a review of the order. The information Stemco submitted supporting its claim that it is the successor-in-interest to GGB demonstrates changed circumstances sufficient to warrant such a review.[4] Therefore, in accordance with section 751(b)(1)(A) of the Act and 19 CFR 351.216(d) and (e), we are initiating a CCR based upon the information contained in Stemco's submission.

Section 351.221(c)(3)(ii) of Commerce's regulations permits Commerce to combine the notice of initiation of a CCR and the notice of preliminary results if Commerce concludes that expedited action is warranted.[5] In this instance, because the record contains information necessary to make a preliminary finding, we find that expedited action is warranted and have combined the notice of initiation and the notice of preliminary results.[6]

In this CCR, pursuant to section 751(b) of the Act, Commerce conducted a successor-in-interest analysis. In making a successor-in-interest determination, Commerce examines several factors, including, but not limited to, changes in the following: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base.[7] While no single factor or combination of factors will necessarily provide a dispositive indication of a successor-in-interest relationship, Commerce generally will consider the new company to be the successor to the previous company if the new company's resulting operation is not materially dissimilar to that of its predecessor.[8] Thus, if the record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, Commerce may assign the new company the cash deposit rate of its predecessor.[9]

[1] *See Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China,* 52 FR 22667 (June 15, 1987), as amended by *Tapered Roller Bearings from the People's Republic of China; Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order in Accordance with Decision Upon Remand,* 55 FR 6669 (February 26, 1990) (*Order*).

[2] *See* Stemco's Letter, ''Stemco's Request for a Changed Circumstances Review in Tapered Roller Bearings from the People's Republic of China, Case No. A–570–601,'' dated November 14, 2022 (CCR Request).

[3] *Id.* at 4.

[4] *See* 19 CFR 351.216(d).

[5] *See* 19 CFR 351.221(c)(3)(ii); *see also Certain Pasta from Italy: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review,* 80 FR 33480, 33480–41 (June 12, 2015) (*Pasta from Italy Preliminary Results*), unchanged in *Certain Pasta from Italy: Final Results of Changed Circumstances Review,* 80 FR 48807 (August 14, 2015) (*Pasta from Italy Final Results*).

[6] *See, e.g., Pasta from Italy Preliminary Results,* 80 FR 33480–41, unchanged in *Pasta from Italy Final Results,* 80 FR 48807.

[7] *See, e.g., Ball Bearings and Parts Thereof from France: Final Results of Changed—Circumstances Review,* 75 FR 34688 (June 18, 2010), and accompanying Issues and Decision Memorandum at Comment 1; and *Certain Frozen Warmwater Shrimp from India: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review,* 81 FR 75376 (October 31, 2016) (*Shrimp from India Preliminary Results*), unchanged in *Certain Frozen Warmwater Shrimp from India: Notice of Final Results of Antidumping Duty Changed Circumstances Review,* 81 FR 90774 (December 15, 2016) (*Shrimp from India Final Results*).

[8] *See, e.g., Shrimp from India Preliminary Results,* 81 FR 75377, unchanged in *Shrimp from India Final Results,* 81 FR 90774.

[9] *Id.; see also Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber from Japan,* 67 FR 58, 59 (January 2, 2002); *Ball Bearings and Parts Thereof from France: Final Results of Changed-Circumstances Review,* 75 FR 34688, 34689 (June 18, 2010); and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Preliminary Results of Antidumping Duty Changed Circumstances Review,* 63 FR 14679 (March 26, 1998), unchanged in *Circular Welded Non-Alloy*

Continued

In accordance with 19 CFR 351.216, we preliminarily determine that Stemco is the successor-in-interest to GGB. Record evidence that Stemco submitted indicates that it operates as essentially the same business entity as GGB with respect to the subject merchandise.[10]

For our complete successor-in-interest analysis, *see* the Preliminary Decision Memorandum.[11] A list of the topics discussed in the Preliminary Decision Memorandum is included as the appendix to this notice. The Preliminary Decision Memorandum is a public document and made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Commerce will issue its final results of the review in accordance with the time limits set forth in 19 CFR 351.216(e).

Public Comment

In accordance with 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the case briefs, in accordance with 19 CFR 351.309(d). Parties who submit case or rebuttal briefs are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[12] All comments are to be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the established deadline.[13] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[14]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request via ACCESS within 30 days of publication of this notice. Hearing requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Oral presentations at the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing, in accordance with 19 CFR 351.310(d).

Consistent with 19 CFR 351.216(e), we will issue the final results of this CCR no later than 270 days after the date on which this review was initiated, or within 45 days if all parties agree to our preliminary finding.

This notice is published in accordance with sections 751(b)(1) and 777(i) of the Act and 351.221(b) and 351.221(c)(3).

Dated: December 27, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2022–28531 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) has received requests to conduct administrative reviews of various antidumping duty (AD) and countervailing duty (CVD) orders with November anniversary dates. In accordance with Commerce's regulations, we are initiating those administrative reviews.

DATES: Applicable January 3, 2023.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

Commerce has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various AD and CVD orders with November anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting time.

Notice of No Sales

With respect to antidumping administrative reviews, if a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (POR), it must notify Commerce within 30 days of publication of this notice in the **Federal Register**. All submissions must be filed electronically at *https://access.trade.gov,* in accordance with 19 CFR 351.303.[1] Such submissions are subject to verification, in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy must be served on every party on Commerce's service list.

Respondent Selection

In the event Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the POR. We intend to place the CBP data on the record within five days of publication of the initiation notice and to make our decision regarding respondent selection within 35 days of publication of the initiation **Federal Register** notice. Comments regarding the CBP data and respondent selection should be submitted within seven days after the placement of the CBP data on the record of this review. Parties wishing to submit rebuttal comments should submit those comments within five days after the deadline for the initial comments.

In the event Commerce decides it is necessary to limit individual examination of respondents and

Steel Pipe from Korea; Final Results of Antidumping Duty Changed Circumstances Review, 63 FR 20572 (April 27, 1998) (in which Commerce found that a company which only changed its name and did not change its operations is a successor-in-interest to the company before it changed its name).

[10] *See* CCR Request.

[11] *See* Memorandum, ''Initiation and Preliminary Results of Changed Circumstances Review,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[12] *See* 19 CFR 351.309(c)(2).

[13] *See* 19 CFR 351.303(b).

[14] *See Temporary Rule Modifying AD/CVD Service Requirements Due to Covid–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[1] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

conduct respondent selection under section 777A(c)(2) of the Act, the following guidelines regarding collapsing of companies for purposes of respondent selection will apply. In general, Commerce has found that determinations concerning whether particular companies should be ''collapsed'' (*e.g.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this AD proceeding (*e.g.,* investigation, administrative review, new shipper review, or changed circumstances review). For any company subject to this review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection.

Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value (Q&V) Questionnaire for purposes of respondent selection, in general, each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where Commerce considered collapsing that entity, complete Q&V data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of a particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.[2] Section 773(e) of the Act states that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(2)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial responses to section D of the questionnaire.

Separate Rates

In proceedings involving non-market economy (NME) countries, Commerce begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is Commerce's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, Commerce analyzes each entity exporting the subject merchandise. In accordance with the separate rates criteria, Commerce assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a Separate Rate Application or Certification, as described below. For these administrative reviews, in order to demonstrate separate rate eligibility, Commerce requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on Commerce's website at *https://access.trade.gov/Resources/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [3] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[4] should timely file a Separate Rate Application to demonstrate eligibility for a separate

[2] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

[3] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently completed segment of the proceeding in which they participated.

[4] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

rate in this proceeding. The Separate Rate Application will be available on Commerce's website at *https://access.trade.gov/Resources/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Application, refer to the instructions contained in the application. Separate Rate Applications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

Exporters and producers must file a timely Separate Rate Application or Certification if they want to be considered for individual examination. Furthermore, exporters and producers who submit a Separate Rate Application or Certification and subsequently are selected as mandatory respondents will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following AD and CVD orders and findings. We intend to issue the final results of these reviews not later than November 30, 2023.

	Period to be reviewed
AD Proceedings	
ARMENIA: Certain Aluminum Foil, A–831–804	5/4/21–10/31/22
Rusal Armenal Closed Joint Stock Company.	
AUSTRIA: Strontium Chromate, A–433–813	11/1/21–10/31/22
Habich GmbH.	
BRAZIL: Aluminum Foil, A–351–856	5/4/21–10/31/22
CBA Itapissuma Ltda.	
Companhia Brasileira de Alumínio.	
FRANCE: Strontium Chromate, A–427–830	11/1/21–10/31/22
Société Nouvelle des Couleurs Zinciques.	
GERMANY: Thermal Paper, A–428–850	5/12/21–10/31/22
Koehler Oberkirch GmbH.	
Koehler Paper SE.	
Matra Atlantic GmbH.	
Papierfabrik August Koehler SE.	
Matra Americas LLC.	
INDIA: Welded Stainless Pressure Pipe, A–533–867	11/1/21–10/31/22
Apex Tubes Private Ltd.	
Apurvi Industries.	
Arihant Tubes.	
Divine Tubes Pvt. Ltd.	
Heavy Metal & Tubes.	
Hindustan Inox Limited.	
J.S.S. Steelitalia Ltd.	
Jindal Saw Limited.	
Linkwell Seamless Tubes Private Limited.	
Maxim Tubes Company Pvt. Ltd.	
MBM Tubes Pvt. Ltd.	
Mukat Tanks & Vessel Ltd.	
Neotiss Ltd.	
Prakash Steelage Ltd.	
Quality Stainless Pvt. Ltd.	
Raajratna Metal Industries Ltd.	
Ratnadeep Metal & Tubes Ltd.	
Ratnamani Metals & Tubes Ltd.	
Remi Edelstahl Tubulars.	
Seth Steelage Pvt. Ltd.	
Shubhlaxmi Metals & Tubes Private Limited.	
SLS Tubes Pvt. Ltd.	
Steamline Industries Ltd.	
INDONESIA: Monosodium Glutamate, A–560–826	11/1/21–10/31/22
PT. Cheil Jedang Indonesia.	
PT. Miwon Indonesia (aka PT. Daesang Ingredients Indonesia).	
MEXICO: Steel Concrete Reinforcing Bar, A–201–844	11/1/21–10/31/22
Aceros Especiales Simec Tlaxcala, S.A. de C.V.	
Compania Siderurgica del Pacifico S.A. de C.V.	
Deacero S.A.P.I. de C.V.	
Fundiciones de Acero Estructurales, S.A. de C.V.	
Gerdau Corsa, S.A.P.I. de C.V.	
Grupo Chant, S.A.P.I. de C.V.	
Grupo Acerero S.A. de C.V.	
Grupo Simec S.A.B. de C.V.	
I.N.G.E.T.E.K.N.O.S. Estructurales, S.A. de C.V.	
Operadora de Perfiles Sigosa, S.A. de C.V.	
Orge S.A. de C.V.	
Perfiles Comerciales Sigosa, S.A. de C.V.	
RRLC S.A.P.I. de C.V.	

	Period to be reviewed
Sidertul S.A. de C.V.	
Siderurgica del Occidente y Pacifico S.A. de C.V.	
Siderurgicos Noroeste, S.A. de C.V.	
Simec International S.A. de C.V.	
Simec International 6 S.A. de C.V.	
Simec International 7, S.A. de C.V.	
Simec International 9 S.A. de C.V.	
OMAN: Aluminum Foil, A–523–815	5/4/21–10/31/22
Oman Aluminium Rolling Company.	
REPUBLIC OF KOREA: Circular Welded Non-Alloy Steel Pipe, A–580–809	11/1/21- 10/31/22
Aju Besteel.	
Bookook Steel.	
Chang Won Bending.	
Dae Ryung.	
Daewoo Shipbuilding & Marine Engineering.	
Daiduck Piping.	
Dong Yang Steel Pipe.	
Dongbu Steel.	
EEW Korea Company.	
Histeel.	
Husteel Co., Ltd.	
Hyundai RB.	
Hyundai Steel (Pipe Division).	
Hyundai Steel Company.	
Kiduck Industries.	
Kum Kang Kind.	
Kumsoo Connecting.	
Miju Steel Mfg.	
NEXTEEL Co., Ltd.	
Samkand M & T.	
Seah FS.	
SeAH Steel Corporation.	
Steel Flower.	
YCP Co., Ltd.	
REPUBLIC OF KOREA: Thermal Paper Products, A–580–911	5/12/21–10/31/22
Hansol Paper Company.	
Hansol Paper Co., Ltd.	
RUSSIA: Aluminum Foil, A–821–828	5/4/21–10/31/22
JSC Rusal Sayanal.	
JSC United Company Rusal—Trading House.	
JSC Ural Foil.	
RTI Limited.	
Rusal Marketing GmbH.	
Rusal Products GmbH.	
RusalTrans LLC.	
SPAIN: Methionine,[5] A–469–822	3/4/21–8/31/22
THE PEOPLE'S REPUBLIC OF CHINA: Diamond Sawblades and Parts Thereof, A–570–900	11/1/21–10/31/22
ASHINE Diamond Tools Co., Ltd.	
Bosch Power Tools China Co Ltd.	
Bosun Tools Co., Ltd.	
Chengdu Huifeng New Material Technology Co. Ltd.	
Danyang City Ou Di Ma Tools Co., Ltd.	
Danyang Hantronic Import & Export Co., Ltd.	
Danyang Huachang Diamond Tool Manufacturing Co., Ltd.	
Danyang Like Tools Manufacturing Co., Ltd.	
Danyang NYCL Tools Manufacturing Co., Ltd.	
Danyang Realsharp Tools Co., Ltd.	
Danyang Tongyu Tools Co., Ltd.	
Danyang Tsunda Diamond Tools Co., Ltd.	
Danyang Weiwang Tools Manufacturing Co., Ltd.	
Diamond Tools Technology (Thailand) Co., Ltd.	
Fujian Quanzhou Aotu Precise Machine Co., Ltd.	
Guangdong Sun Rising Tools Co., Ltd.	
Guilin Tebon Superhard Material Co., Ltd.	
Hailian Saw Technology Co., Ltd.	
Hangzhou Deer King Industrial and Trading Co., Ltd.	
Hangzhou Kingburg Import & Export Co., Ltd.	
Hangzhou Xinweiye Tools Co., Ltd.	
Hebei XMF Tools Group Co., Ltd.	
Henan Huanghe Whirlwind International Co., Ltd.	
Hong Kong Hao Xin International Group Limited.	
Hubei Changjiang Precision Engineering Materials Technology Co., Ltd.	
Hubei Sheng Bai Rui Diamond Tools Co., Ltd.	

	Period to be reviewed
Husqvarna (Hebei) Co., Ltd.	
Huzhou Gu's Import & Export Co., Ltd.	
Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd.	
Jiangsu Fengtai Diamond Tools Co., Ltd.	
Jiangsu Huachang Diamond Tools Manufacturing Co., Ltd.	
Jiangsu Inter-China Group Corporation.	
Jiangsu Jinfeida Power Tools.	
Jiangsu Yaofeng Tools Co., Ltd.	
Jiangsu Youhe Tool Manufacturer Co., Ltd.	
Orient Gain International Limited.	
Pantos Logistics (HK) Company Limited.	
Protec Tools Co., Ltd.	
Pujiang Talent Diamond Tools Co., Ltd.	
Qingdao Hyosung Diamond Tools Co., Ltd.	
Qingdao Shinhan Diamond Industrial Co., Ltd.	
Qingyuan Shangtai Diamond Tools Co., Ltd.	
Quanzhou Sunny Superhard Tools Co., Ltd.	
Quanzhou Zhongzhi Diamond Tool Co., Ltd.	
Rizhao Hein Saw Co., Ltd.	
Saint-Gobain Abrasives (Shanghai) Co., Ltd.	
Shanghai Jingquan Industrial Trade Co., Ltd.	
Shanghai Starcraft Tools Co. Ltd.	
Shanghai Vinon Tools Industrial Co.	
Sino Tools Co., Ltd.	
Suzhou Blade Tech Tool Co Ltd.	
Tangshan Metallurgical Saw Blade Co., Ltd.	
Weihai Xiangguang Mechanical Industrial Co., Ltd.	
Wuhan Baiyi Diamond Tools Co., Ltd.	
Wuhan Sadia Trading Co., Ltd.	
Wuhan Wanbang Laser Diamond Tools Co., Ltd.	
Wuhan ZhaoHua Technology Co., Ltd.	
Xiamen ZL Diamond Technology Co., Ltd.	
Zhejiang Shall Tools Co., Ltd.	
Zhejiang Wanli Tools Group Co., Ltd.	
Zhenjiang Luckyway Tools Co., Ltd.	
ZL Diamond Technology Co., Ltd.	
ZL Diamond Tools Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Fresh Garlic, A–570–831	11/1/21–10/31/22
Jining Huahui International Co., Ltd.	
Jining Huahui International Trade Co.	
Laiwu Ever Green Food Co., Ltd.	
Laiwu Manhing Vegetables Fruits Corp.	
Laiwu Taifeng Foods Co., Ltd.	
Ningbo Raffini Import & Export Co., Ltd.	
Qingdao Muyi International Trading Co., Ltd.	
Shandong Bairun Food Co., Ltd.	
Shanghai Yongtie Enterprise Management.	
Zhengzhou Harmoni Spice Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Forged Steel Fittings, A–570–067	11/1/21–10/31/22
Both-Well (Taizhou) Steel Fittings Co., Ltd.	
Cixi Baicheng Hardware Tools, Ltd.	
Dalian Guangming Pipe Fittings Co., Ltd.	
Eaton Hydraulics (Luzhou) Co., Ltd.	
Eaton Hydraulics (Ningbo) Co., Ltd.	
Jiangsu Forged Pipe Fittings Co., Ltd.	
Jiangsu Haida Pipe Fittings Group Co.	
Jinan Mech Piping Technology Co., Ltd.	
Jining Dingguan Precision Parts Manufacturing Co., Ltd.	
Lianfa Stainless Steel Pipes & Valves (Qingyun) Co., Ltd.	
Luzhou City Chengrun Mechanics Co., Ltd.	
Ningbo HongTe Industrial Co., Ltd.	
Ningbo Long Teng Metal Manufacturing Co., Ltd.	
Ningbo Save Technology Co., Ltd.	
Ningbo Zhongan Forging Co., Ltd.	
Q.C. Witness International Co., Ltd.	
Qingdao Bestflow Industrial Co., Ltd.	
Shanghai Lon Au Stainless Steel Materials Co., Ltd.	
Witness International Co., Ltd.	
Xin Yi International Trade Co., Limited.	
Yancheng Boyue Tube Co., Ltd.	
Yancheng Haohui Pipe Fittings Co., Ltd.	
Yancheng Jiuwei Pipe Fittings Co., Ltd.	
Yancheng Manda Pipe Industry Co., Ltd.	

	Period to be reviewed
Yingkou Guangming Pipeline Industry Co., Ltd.	
Yuyao Wanlei Pipe Fitting Manufacturing Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Polyethylene Terephthalate (Pet) Film, A–570–924	11/1/21–10/31/22
Fuwei Films (Shandong) Co., Ltd.	
Shaoxing Xiangyu Green Packing Co., Ltd.	
Sichuan Dongfang Insulating Material Co., Ltd.	
Tianjin Wanhua Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Seamless Refined Copper Pipe and Tube, A–570–964	11/1/21–10/31/22
Guangdong Carrier Heating, Ventilation & Air Conditioning Company Limited.	
ICOOL International (Hongkong) Limited.	
Ningbo Kingkong Climate Technology Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Steel Racks,[6] A–570–088	9/1/21–8/31/22
Ningbo Xinguang Rack Co., Ltd.	
TURKEY: Aluminum Foil, A–489–844	9/23/21–10/31/22
Assan Aluminyum Sanayi ve Ticaret A.S., Kibar Dis Ticaret A.S., and Ispak Esnek Ambalaj Sanayi A.S.	
ASAS Aluminyum Sanayi ve Ticaret A.S.	
Ilda Pack Ambalaj.	
Panda Aluminyum A.S.	
CVD Proceedings	
INDIA: Welded Stainless Pressure Pipe, C–533–868	1/1/21–12/31/21
Hindustan Inox Limited.	
Jindal Saw Limited.	
Prakash Steelage Ltd.	
Seth Steelage Pvt. Ltd.	
OMAN: Aluminum Foil, C–523–816	3/5/21–12/31/21
Oman Aluminium Rolling Company LLC.	
THE PEOPLE'S REPUBLIC OF CHINA: Chlorinated Isocyanurates, C–570–991	1/1/21–12/31/21
Henan Zerui New Material.	
Heze Huayi Chemical Co., Ltd.	
Jinchang International Forwarding.	
Juancheng Kangtai Chemical Co., Ltd.	
Qingdao Fortune Logistics Co., Ltd.	
Qingdao Kingnod Group Co., Ltd.	
Shanghai Sumiso International Logis.	
Sincere Cooperation Material.	
THE PEOPLE'S REPUBLIC OF CHINA: Forged Steel Fittings, C–570–068	1/1/21–12/31/21
Both-Well Taizhou Steel Fittings Co., Ltd.	
Jiangsu Forged Pipe Fittings Co., Ltd.	
Lianfa Stainless Steel Pipes & Valves (Qingyun) Co., Ltd.	
Xin Yi International Trade Co., Limited.	
Yingkou Guangming Pipeline Industry Co., Ltd.	
TURKEY: Aluminum Foil, C–489–845	3/5/21–12/31/21
ASAS Alüminyum Sanayi ve Ticaret A.Ş.	
Assan Aluminyum Sanayi ve Ticaret A.S., Ispak Esnek Ambalaj Sanayi A.S., and Kibar Dis Ticaret A.S. (collectively, "Assan").	
Ilda Pack Ambalaj.	
John Good Denizcilik Tas.Ve.	
Panda Alüminyum.	
Seherli Danismanlik A.S.	
TURKEY: Steel Concrete Reinforcing Bar, C–489–819	1/1/21–12/31/21
Ans Kargo Lojistik Tas ve Tic.	
Baykan Dis Ticaret.	
Colakoglu Dis Ticaret A.S., Colakoglu Metalurji A.S., and their Cross-Owned Affiliates Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S., and its Cross-Owned Affiliates Kaptan Demir Celik Endustrisi ve Ticaret A.S., Kaptan Metal Dis Ticaret ve Nakliyat A.S., and their Cross-Owned Affiliates.	
Kibar dis Ticaret A.S.	
Meral Makina Iml Ith Ihr Gida.	
Sami Soybas Demir Sanayi ve Ticaret.	
Yucel Boru Ihracat Ithalat ve Pazarlama.	

[5] In the initiation notice that published on November 3, 2022 (87 FR 66275), Commerce listed the wrong period of review for the case above. The correct period of review is listed in this notice.

[6] The company listed below was inadvertently omitted from the initiation notice that published on November 3, 2022 (87 FR 66275).

Suspension Agreements

None.

Duty Absorption Reviews

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an AD order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), Commerce, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether AD duties have been absorbed by an exporter or producer

subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Gap Period Liquidation

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant ''gap'' period of the order (*i.e.,* the period following the expiry of provisional measures and before definitive measures were put into place), if such a gap period is applicable to the POR.

Administrative Protective Orders and Letters of Appearance

Interested parties must submit applications for disclosure under administrative protective orders in accordance with the procedures outlined in Commerce's regulations at 19 CFR 351.305. Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Factual Information Requirements

Commerce's regulations identify five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). These regulations require any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The regulations, at 19 CFR 351.301, also provide specific time limits for such factual submissions based on the type of factual information being submitted. Please review the *Final Rule,*[7] available at *www.govinfo.gov/content/pkg/FR-2013-07-17/pdf/2013-17045.pdf,* prior to submitting factual information in this segment. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[8]

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information using the formats provided at the end of the *Final Rule.*[9] Commerce intends to reject factual submissions in any proceeding segments if the submitting party does not comply with applicable certification requirements.

Extension of Time Limits Regulation

Parties may request an extension of time limits before a time limit established under part 351 expires, or as otherwise specified by Commerce.[10] In general, an extension request will be considered untimely if it is filed after the time limit established under part 351 expires. For submissions which are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10 a.m. on the due date. Examples include, but are not limited to: (1) case and rebuttal briefs, filed pursuant to 19 CFR 351.309; (2) factual information to value factors under 19 CFR 351.408(c), or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2), filed pursuant to 19 CFR 351.301(c)(3) and rebuttal, clarification and correction filed pursuant to 19 CFR 351.301(c)(3)(iv); (3) comments concerning the selection of a surrogate country and surrogate values and rebuttal; (4) comments concerning CBP data; and (5) Q&V questionnaires. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. This policy also requires that an extension request must be made in a separate, stand-alone submission, and clarifies the circumstances under which Commerce will grant untimely-filed requests for the extension of time limits. Please review the *Final Rule,* available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm,* prior to submitting factual information in these segments.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: December 22, 2022.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2022–28518 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–DS–P

[7] *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* the frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[8] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 41363 (July 10, 2020).

[9] *See* section 782(b) of the Act; *see also Final Rule;* and the frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[10] *See* 19 CFR 351.302.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–427–602, A–428–602, A–475–601, A–588–704]

Brass Sheet and Strip From France, Germany, Italy, and Japan: Final Results of the Expedited Fifth Sunset Review of the Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of these expedited sunset reviews, the U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) orders on brass sheet and strip from France, Germany, Italy and Japan would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Reviews'' section of this notice.

DATES: Applicable January 3, 2023.

FOR FURTHER INFORMATION CONTACT: Whitley Herndon, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202)–482–6274.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2022, Commerce published the notice of initiation of the fifth sunset review of the AD orders on brass sheet and strip from France,

Germany, Italy, and Japan [1] pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2]

On September 16, 2022, Aurubis Buffalo, Inc., Heyco Metals, Inc., PMX Industries Inc., and Wieland Holdings Inc. (collectively, the domestic interested parties) notified Commerce of their intent to participate within the 15-day period specified in 19 CFR 351.218(d)(1)(i).[3] The domestic interested parties claimed interested party status under section 771(9)(C) of the Act as producers of domestic like product in the United States.

On October 3, 2022, Commerce received complete substantive responses to the *Notice of Initiation* with respect to the *Orders* from the domestic interested parties within the 30-day period specified in 19 CFR 351.218(d)(3)(i).[4] Commerce did not receive a substantive response from any other interested parties with respect to the *Orders* covered by these sunset reviews. On October 25, 2022, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from respondent interested parties in any of these sunset reviews.[5] As a result, pursuant to section 751(c)(3)(8) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted expedited (120-day) sunset reviews of the *Orders.*

Scope of the Orders

The scope of the *Orders* is brass sheet and strip from France, Germany, Italy, and Japan. For a complete description of the scope of the *Orders, see* Appendix II to this notice.

Analysis of Comments Received

A complete discussion of all issues raised in these sunset reviews is provided in the accompanying Issues and Decision Memorandum.[6] A list of the issues discussed in the Issues and Decision Memorandum is attached at Appendix I to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Results of Sunset Reviews

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Orders* would likely lead to a continuation or recurrence of dumping and that the magnitude of the dumping margins likely to prevail would be weighted-average margins up to 42.24 percent for France, up to 55.60 percent for Germany, up to 22.00 percent for Italy, and up to 57.98 percent for Japan.

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return/destruction or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing the results in accordance with sections 751(c), 752(c), and 771(i)(1) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2).

Dated: December 22, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

Appendix II

Scope of the Orders

The product covered by the *Orders* is brass sheet and strip, other than leaded and tinned brass sheet and strip, from France, Germany, Italy, and Japan. The chemical composition of the covered product is currently defined in the Copper Development Association (''C.D.A.'') 200 Series or the Unified Numbering System (''U.N.S.'') C2000.

The *Orders* do not cover products the chemical compositions of which are defined by other C.D.A. or U.N.S. series. In physical dimensions, the product covered by the *Orders* has a solid rectangular cross section over 0.006 inches (0.15 millimeters) through 0.188 inches (4.8 millimeters) in finished thickness or gauge, regardless of width. Coiled, wound-on-reels (traverse wound), and cut-to-length products are included.

The merchandise is currently classified under Harmonized Tariff Schedule of the United States (''HTSUS'') item numbers 7409.21.00 and 7409.29.00.

Although the HTSUS item numbers are provided for convenience and customs

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[1] *See Antidumping Order: Brass Sheet and Strip from France,* 52 FR 6995 (March 6, 1987); *Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Brass Sheet and Strip from the Federal Republic of Germany,* 52 FR 35750 (September 23, 1987), amended in *Final Determination of Sales at Less Than Fair Value and Amendment to Antidumping Duty Order: Brass Sheet and Strip from the Federal Republic of Germany,* 52 FR 35750 (September 23, 1987); *Antidumping Duty Order: Brass Sheet and Strip from Italy,* 52 FR 6997 (March 6, 1987), amended in *Amendment to Final Determination of Sales of Less Than Fair Value and Amendment of Antidumping Duty Order in Accordance with Decision Upon Remand: Brass Sheet and Strip from Italy,* 56 FR 23272 (May 21, 1991) (*Italy Amended Order*); and *Antidumping Duty Order of Sales at Less than Fair Value: Brass Sheet and Strip from Japan,* 53 FR 30454 (August 12, 1988) (collectively, *Orders*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 87 FR 53727 (September 1, 2022) (*Notice of Initiation*).

[3] *See* Domestic Interested Parties' Letters, ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Brass Sheet and Strip from France—Notice of Intent to Participate,'' dated September 16, 2022; ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Brass Sheet and Strip from France—Amendment to Notice of Intent to Participate,'' dated September 29, 2022; ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Brass Sheet and Strip from Germany—Notice of Intent to Participate,'' dated September 16, 2022; ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Brass Sheet and Strip from Germany—Amendment to Notice of Intent to Participate,'' dated September 29, 2022; ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Brass Sheet and Strip From Italy—Notice of Intent to Participate,'' dated September 16, 2022; ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Brass Sheet and Strip from Italy—Amendment to Notice of Intent to Participate,'' dated September 29, 2022; ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Brass Sheet and Strip from Japan—Notice of Intent to Participate,'' dated September 16, 2022; and ''Five-Year (''Sunset'') Review of Antidumping Duty Order on Brass Sheet and Strip from Japan—Amendment to Notice of Intent to Participate,'' dated September 29, 2022.

[4] *See* Domestic Interested Parties' Letters, ''Fifth Sunset Review of the Antidumping Duty Order on Brass Sheet and Strip from France: Substantive Response to Notice of Initiation,'' dated October 3, 2022; ''Fifth Sunset Review of the Antidumping Duty Order on Brass Sheet and Strip from Germany: Substantive Response to Notice of Initiation,'' dated October 3, 2022; ''Fifth Sunset Review of the Antidumping Duty Order on Brass Sheet and Strip from Italy: Substantive Response to Notice of Initiation,'' dated October 3, 2022; and ''Fifth Sunset Review of the Antidumping Duty Order on Brass Sheet and Strip Shrimp from Japan: Substantive Response to Notice of Initiation,'' dated October 3, 2022.

[5] *See* Commerce's Letter, ''Sunset Reviews Initiated on September 1, 2022,'' dated October 25, 2022.

[6] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Expedited Fifth Sunset Reviews of the Antidumping Duty Orders on Brass Sheet and Strip from France, Germany, Italy, and Japan,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

purposes, the written description of the scope of the *Orders* remains dispositive.

[FR Doc. 2022–28475 Filed 12–30–22; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–802]

Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Preliminary Determination of No Shipments of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that no companies under review qualify for a separate rate and that these companies are, therefore, considered part of the Vietnam-Wide entity. Additionally, Commerce is rescinding this review with respect to Thong Thuan Cam Ranh Seafood Joint Stock Company, T&T Cam Ranh, Soc Trang Seafood Joint Stock Company, STAPIMEX, Seavina Joint Stock Company, and Bien Dong Seafood Co., Ltd. Further, Commerce preliminarily determines that BIM Foods Joint Stock Company, Minh Phu Hau Giang Seafood, Minh Phu Seafood Corporation, and Minh Qui Seafood Co., Ltd. had no shipments of subject merchandise during the period of review (POR). The POR is February 1, 2021, through January 31, 2022. Interested parties are invited to comment on these preliminary results.

DATES: Applicable January 3, 2023.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6905.

SUPPLEMENTARY INFORMATION:

Background

On February 8, 2022, Commerce published a notice of opportunity to request an administrative review of the antidumping duty (AD) order on certain frozen warmwater shrimp (shrimp) from the Socialist Republic of Vietnam (Vietnam).[1] Commerce received timely requests for an administrative review from Ad Hoc Shrimp Trade Action Committee (the petitioner), the American Shrimp Processors Association (ASPA) (domestic processors), and numerous Vietnamese companies. On April 12, 2022, Commerce published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on shrimp from Vietnam for the period February 1, 2021, through January 31, 2022, covering 106 companies, including multiple companies with name variations/abbreviations, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.221(c)(1)(i).[2]

On April 13, 2022, the petitioner and ASPA both filed timely withdrawals of their respective review requests of Soc Trang Seafood Joint Stock Company and STAPIMEX.[3] On April 13, 2022, Soc Trang Seafood Joint Stock Company also withdrew its review request.[4] On April 22, 2022, Thong Thuan Cam Ranh Seafood Joint Stock Company withdrew its review request.[5] Also on April 22, 2022, ASPA withdrew its review request of Thong Thuan Cam Ranh Seafood Joint Stock Company and T&T Cam Ranh.[6] On April 26, 2022, the petitioner and ASPA also filed timely withdrawals of their respective review requests of Seavina Joint Stock Company and Bien Dong Seafood Co., Ltd.[7] Therefore, Commerce is rescinding its review of: (1) Thong Thuan Cam Ranh Seafood Joint Stock Company; (2) T&T Cam Ranh; (3) Soc Trang Seafood Joint Stock Company; (4) STAPIMEX; (5) Seavina Joint Stock Company; and (6) Bien Dong Seafood Co., Ltd., as discussed below.

On May 9 and 12, 2022, three companies identified in the U.S. Customs and Border Protection (CBP) data as having entries of subject merchandise during the POR filed timely separate rate applications.[8] On June 2, 2022, we selected Quang Minh Seafood Co., Ltd. for individual examination pursuant to section 777A(c)(2) of the Act.[9] On September 19, 2022, Safe and Fresh Aquatic Products Joint Stock Company, one of the non-selected companies seeking a separate rate, withdrew from the administrative review.[10] On September 30, 2022, Commerce extended the deadline for the preliminary results by 100 days to February 8, 2023.[11]

On October 18, 2022, Quang Minh Seafood Co., Ltd., the mandatory respondent, withdrew from the administrative review.[12] On November 4, 2022, consistent with section 777(A)(c)(2) of the Act, we selected the remaining company under review that was eligible for individual examination, Ngoc Trinh Bac Lieu Seafood Co., Ltd., as a mandatory respondent.[13] On November 15, 2022, Ngoc Trinh Bac Lieu Seafood Co., Ltd. also withdrew from the administrative review.[14] Commerce did not select any further mandatory respondents because all companies that were eligible for individual examination had withdrawn from the administrative review, as discussed above.

Scope of the Order [15]

The merchandise subject to the *Order* is certain frozen warmwater shrimp.

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 87 FR 7112 (February 8, 2022).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 87 FR 21619 (April 12, 2022) (*Initiation Notice*).

[3] *See* Petitioner's Letter, ''Domestic Producers' Partial Withdrawal of Review Requests,'' dated April 13, 2022; and ASPA's Letter, ''American Shrimp Processors Association's Supplemental Partial Withdrawal of Review Requests,'' dated April 13, 2022.

[4] *See* Soc Trang Seafood Joint Stock Company's Letter, ''Withdrawal of Request for Review,'' dated April 13, 2022.

[5] *See* Akin Gump's Letter, ''Withdrawal of Review Request—Thong Thuan Cam Ranh Seafood Joint Stock Company (T&T Cam Ranh),'' dated April 22, 2022.

[6] *See* ASPA's Letters, ''American Shrimp Processors Association's Supplemental Partial Withdrawal of Review Requests,'' both dated April 22, 2022. ASPA initially filed a letter withdrawing its review request of only Thong Thuan Cam Ranh Seafood Joint Stock Company, and subsequently, filed a second letter withdrawing its review request of T&T Cam Ranh, a known trade name of Thong Thuan Cam Ranh Seafood Joint Stock Company, for which ASPA also initially requested review.

[7] *See* Petitioner's Letter, ''Domestic Producers' Partial Withdrawal of Review Requests,'' dated April 26, 2022; and ASPA's Letter, ''American Shrimp Processors Association's Supplemental Partial Withdrawal of Review Requests,'' dated April 26, 2022.

[8] *See* Akin Gump's Letters, ''Separate Rate Applications,'' dated May 9, 2022 (under separate cover for Quang Minh Seafood Limited Liability Company and Ngoc Trinh Bac Lieu Seafood Co., Ltd); and ''Separate Rate Applications,'' May 12, 2022 (covering Safe and Fresh Aquatic Products Joint Stock Company).

[9] *See* Memorandum, ''Respondent Selection,'' dated June 2, 2022.

[10] *See* Safe and Fresh Aquatic Products Joint Stock Company's Letter, ''Withdrawal of Safe and Fresh from Administrative Review,'' dated September 19, 2022.

[11] *See* Memorandum, ''Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated September 30, 2022.

[12] *See* Quang Ming Seafood Co., Ltd.'s Letter, ''Withdrawal from Administrative Review,'' dated October 18, 2022.

[13] *See* Memorandum, ''Second Respondent Selection,'' dated November 4, 2022.

[14] *See* Ngoc Trinh Bac Lieu Seafood Co., Ltd.'s Letter, ''Withdrawal from Administrative Review,'' dated November 15, 2022.

[15] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam,* 70 FR 5152 (February 1, 2005) (*Order*).

The product is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) item numbers: 0306.17.0004, 0306.17.0005, 0306.17.0007, 0306.17.0008, 0306.17.0010, 0306.17.0011, 0306.17.0013, 0306.17.0014, 0306.17.0016, 0306.17.0017, 0306.17.0019, 0306.17.0020, 0306.17.0022, 0306.17.0023, 0306.17.0025, 0306.17.0026, 0306.17.0028, 0306.17.0029, 0306.17.0041, 0306.17.0042, 1605.21.10.30, and 1605.29.10.10. Although the HTSUS numbers are provided for convenience and for customs purposes, the written product description, provided in Appendix I, remains dispositive.

Partial Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the party that requested the review withdraws its request within 90 days of the publication of the notice of initiation of the requested review. Because all requests for administrative review of: (1) Bien Dong Seafood Co., Ltd.; (2) Seavina Joint Stock Company; (3) Soc Trang Seafood Joint Stock Company; (4) STAPIMEX; (5) Thong Thuan Cam Ranh Seafood Joint Stock Company; and (6) T&T Cam Ranh were withdrawn by interested parties within 90 days of the date of publication of the *Initiation Notice,* and no other interested party requested a review of them, Commerce is rescinding this review with respect to these companies and their name variations/abbreviations, in accordance with 19 CFR 351.213(d)(1). Commerce will instruct CBP to assess antidumping duties on all appropriate entries at a rate equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period February 1, 2021, through January 31, 2022, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 35 days after the publication of this notice in the **Federal Register**.

The administrative review remains active with respect to 100 companies.

Preliminary Determination of No Shipments

Commerce received timely no-shipment certifications from four companies: (1) BIM Foods Joint Stock Company; (2) Minh Phu Hau Giang Seafood (3) Minh Phu Seafood Corporation and (4) Minh Qui Seafood Co., Ltd.[16] To confirm these companies' no-shipment claims,[17] Commerce issued a no-shipment inquiry to CBP and received no contradictory information.[18] Therefore, we preliminarily determine that these four companies did not have any shipments of subject merchandise during the POR. Consistent with Commerce's practice, we will not rescind the review with respect to these companies, but rather, will complete the review and issue instructions based on the final results.[19]

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Act. Because the two mandatory respondents and a non-selected separate rate company in this administrative review did not respond to Commerce's requests for information, but rather, withdrew their participation from the review, we preliminarily determine that they are ineligible for a separate rate and are, therefore, part of the Vietnam-Wide entity, subject to the Vietnam-Wide entity rate of 25.76 percent.

Vietnam-Wide Entity

Commerce finds that 96 companies (*see* Appendix II) under review, including Quang Minh Seafood Co., Ltd., Safe and Fresh Aquatic Products Joint Stock Company, and Ngoc Trinh Bac Lieu Seafood Co., Ltd., have not established eligibility for a separate rate and are considered to be part of the Vietnam-wide entity for these preliminary results.[20] Commerce's policy regarding conditional review of the Vietnam-wide entity applies to this administrative review.[21] Under this policy, the Vietnam-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity. Because no party requested a review of the Vietnam-wide entity, the entity is not under review and the entity's rate of 25.76 percent is not subject to change.

Preliminary Results of Review

Commerce finds that because the two mandatory respondents did not respond to our requests for information, but rather, withdrew from the review, they have not established eligibility for a separate rate. Based on the above information, Commerce has not calculated any dumping margins for any companies under review, nor has Commerce granted separate rates to any companies under review. As discussed above, Commerce has preliminarily determined that the remaining 96 companies under review, including the two mandatory respondents and a non-selected company seeking a separate rate, are part of the Vietnam-wide entity, and are subject to the Vietnam-wide entity rate of 25.76 percent (*see* appendix II).

Disclosure and Public Comment

Normally, Commerce will disclose the calculations used in our analysis to parties in this review within five days of the date of publication of the notice of preliminary results in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, here Commerce has only preliminarily applied the Vietnam-Wide rate, which was established in the underlying investigation,[22] to the 96 companies

[16] As stated in the *Initiation Notice,* shrimp produced and exported by Minh Phu Hau Giang Seafood, Minh Phu Seafood Corporation, and Minh Qui Seafood Co., Ltd., among others, were excluded from the *Order* effective July 18, 2016. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Notice of Implementation of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order,* 81 FR 47756, 47757–47758 (July 22, 2016). Accordingly, this review was initiated for these three exporters only with respect to subject merchandise produced by another entity. *See Initiation Notice,* 87 FR at 21637 (footnotes 8 through 10).

[17] *See* BIM Foods Joint Stock Company's Letter, ''No Shipments Certification,'' dated April 12, 2022; *see also* Minh Phu Group's Letter, ''Notice of No Shipments,'' dated May 11, 2022 (covering all companies identified within the Minh Phu Group, which includes the following companies listed in the *Initiation Notice:* Minh Phu Hau Giang Seafood; Minh Phu Seafood Corporation; and Minh Qui Seafood Co., Ltd).

[18] *See* Memorandum, ''No Shipment Inquiry,'' dated September 6, 2022 (where CBP confirmed that it found no entries by BIM Foods Joint Stock Company; and Minh Phu Hau Giang Seafood, Minh Phu Seafood Corporation, and Minh Qui Seafood Co., Ltd).

[19] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011) (*NME AD Assessment*); *see also* ''Assessment Rates'' section, *infra.*

[20] *See Jilin Forest Indus. Jinqiao Flooring Grp. Co.* v. *United States,* 519 F. Supp. 3d 1224, 1241 (CIT 2021) (affirming how a company is ''unable to carry its burden of affirmatively showing lack of *de jure* and *de facto* control by the Chinese government, because the remaining public information on the record {does} not include verifiable evidence that would be necessary to establish the {company's} eligibility for a separate rate.'')

[21] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[22] *See Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam,* 69 FR 71005, 71008 (December 8, 2004), and accompanying Issues and Decision Memorandum at Comments 6 and 10C (''we have applied a rate of 25.76 percent, a rate calculated in the initiation stage of the investigation from information provided in the petition . . . .'').

identified in appendix II. Thus, there are no calculations to disclose.

Interested parties may submit case briefs no later than 30 days after the date of publication of this notice.[23] Rebuttal briefs, the content of which is limited to the issues raised in the case briefs, must be filed within seven days from the deadline date for the submission of case briefs.[24] Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[25] Case and rebuttal briefs should be filed electronically via ACCESS. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[26]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically-filed document must be received successfully in its entirety by ACCESS by 5 p.m. eastern time within 30 days after the date of publication of this notice.[27] Hearing requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; (3) whether any participant is a foreign national, and (4) a list of issues to be discussed. Issues raised in the hearing will be limited to issues raised in the briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined.[28]

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b)(1), Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise covered by this review. 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).

If we continue to find in the final results no shipments for the companies identified in the ''Preliminary Determination of No Shipments'' section above, Commerce will instruct CBP to liquidate any suspended entries of subject merchandise that entered under those companies' case numbers at the Vietnam-wide rate.[29]

For the final results, if we continue to treat the 96 companies identified in Appendix II as part of the Vietnam-wide entity, we will instruct CBP to apply an *ad valorem* assessment rate of 25.76 percent to all entries of subject merchandise during the POR which were exported by those companies. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from Vietnam entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) for previously investigated or reviewed Vietnam and non-Vietnam exporters that have separate rates, the cash deposit rate will continue to be the exporter-specific rate established in the most recently completed segment of this proceeding; (2) for all Vietnam exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the existing rate for the Vietnam-wide entity of 25.76 percent; and (3) for all non-Vietnam exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Vietnam exporter that supplied that non-Vietnam exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Final Results of Review

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised by the parties in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(1).

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this 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 to Interested Parties

These preliminary results are issued and published in accordance with sections 751(a)(1)(B) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: December 28, 2022.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix I—Scope of the Order

The scope of the *Order* includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[30] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of the *Order,* regardless of definitions in the HTS, are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count-size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, white-leg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

[23] *See* 19 CFR 351.309(c)(1)(ii).

[24] *See* 19 CFR 351.309(d)(1) and (2); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020) (''To provide adequate time for release of case briefs via ACCESS, E&C intends to schedule the due date for all rebuttal briefs to be 7 days after case briefs are filed (while these modifications remain in effect).''

[25] *See* 19 CFR 351.309(c)(2) and (d)(2).

[26] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[27] *See* 19 CFR 351.310(c).

[28] *Id.*

[29] *See NME AD Assessment.*

[30] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of the *Order.* In addition, food preparations, which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of the *Order.*

Excluded from the scope are: (1) breaded shrimp and prawns (HTS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); and (7) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) that is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (IQF) freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this *Order* are currently classified under the following HTS subheadings: 0306.17.0004, 0306.17.0005, 0306.17.0007, 0306.17.0008, 0306.17.0010, 0306.17.0011, 0306.17.0013, 0306.17.0014, 0306.17.0016, 0306.17.0017, 0306.17.0019, 0306.17.0020, 0306.17.0022, 0306.17.0023, 0306.17.0025, 0306.17.0026, 0306.17.0028, 0306.17.0029, 0306.17.0041, 0306.17.0042, 1605.21.10.30, and 1605.29.10.10. These HTS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this *Order* is dispositive.[31]

Appendix II—Companies Under Review Determined To Be Part of the Vietnam-Wide Entity

1. Amanda Seafood Co., Ltd.
2. An Nguyen Investment Production and Group
3. Anh Khoa Seafood
4. Anh Minh Quan Corp.
5. APT Co.
6. Au Vung One Seafood
7. Binh Dong Fisheries Joint Stock Company
8. Binh Thuan Import-Export Joint Stock Company
9. Blue Bay Seafood Co., Ltd.
10. Cadovimex
11. Cadovimex II Seafood Import Export and Processing Joint Stock Company
12. Cadovimex Seafood Import-Export and Processing Joint Stock Company
13. Cantho Import Export Seafood Joint Stock Company
14. Caseamex
15. CJ Cau Tre Foods Joint Stock Company
16. Coastal Fisheries Development Corporation
17. COFIDEC
18. Danang Seafood Import Export
19. Danang Seaproducts Import-Export Corporation
20. Dong Hai Seafood Limited Company
21. Dong Phuong Seafood Co., Ltd.
22. Duc Cuong Seafood Trading Co., Ltd.
23. Duong Hung Seafood
24. FFC
25. Fine Foods Company
26. Gallant Dachan Seafood Co., Ltd.
27. Gallant Ocean (Vietnam) Co. Ltd.
28. Go Dang Joint Stock Company
29. GODACO Seafood
30. Green Farms Seafood Joint Stock Company
31. Hanh An Trading Service Co., Ltd.
32. Hong Ngoc Seafood Co., Ltd.
33. Hung Bang Company Limited
34. Hung Dong Investment Service Trading Co., Ltd.
35. HungHau Agricultural Joint Stock Company
36. JK Fish Co., Ltd.
37. Khanh Hoa Seafoods Exporting Company
38. KHASPEXCO
39. Long Toan Frozen Aquatic Products Joint Stock Company
40. MC Seafood
41. Minh Bach Seafood Company Limited
42. Minh Cuong Seafood Import Export Processing Joint Stock Company
43. Nam Viet Seafood Import Export Joint Stock Company
44. Namcan Seaproducts Import Export Joint Stock Company
45. New Generation Seafood Joint Stock Company
46. New Wind Seafood Co., Ltd.
47. Ngoc Trinh Bac Lieu Seafood Co., Ltd.
48. Nguyen Chi Aquatic Product Trading Company Limited
49. Nhat Duc Co., Ltd.
50. Nigico Co., Ltd.
51. Phuong Nam Foodstuff Corp.
52. Quang Minh Seafood Co., Ltd.
53. QAIMEXCO
54. Quoc Ai Seafood Processing Import Export Co., Ltd.
55. Quoc Toan PTE
56. Quoc Toan Seafood Processing Factory
57. Quy Nhon Frozen Seafoods Joint Stock Company
58. Safe and Fresh Aquatic Products Joint Stock Company
59. Safe and Fresh Co.
60. Saigon Aquatic Product Trading Joint Stock Company
61. Saigon Food Joint Stock Company
62. SEADANANG
63. Seafood Joint Stock Company No. 4
64. Seafood Travel Construction Import-Export Joint Stock Company
65. Seanamico
66. Seaspimex Vietnam
67. South Ha Tinh Seaproducts Import-Export Joint Stock Company
68. South Vina Shrimp–SVS
69. Southern Shrimp Joint Stock Company
70. Special Aquatic Products Joint Stock Company
71. T & P Seafood Company Limited
72. Tai Nguyen Seafood Co., Ltd.
73. Tan Phong Phu Seafood Co., Ltd.
74. Tan Thanh Loi Frozen Food Co., Ltd.
75. THADIMEXCO
76. Thai Hoa Foods Joint Stock Company
77. Thai Minh Long Seafood Company Limited
78. Thaimex
79. Thanh Doan Fisheries Import-Export Joint Stock Company
80. Thanh Doan Sea Products Import & Export Processing Joint-Stock Company
81. Thanh Doan Seafood Import Export Trading Joint-Stock Company
82. The Light Seafood Company Limited
83. Thien Phu Export Seafood
84. Thinh Hung Co., Ltd.
85. Thinh Phu Aquatic Products Trading Co., Ltd.
86. TPP Co. Ltd.
87. Trading and Import-Export Co., Ltd.
88. Trang Corporation (Vietnam)
89. Trung Son Seafood Processing Joint Stock Company
90. Van Duc Food Company Limited
91. Viet Phu Foods and Fish Corp.
92. Viet Shrimp Corporation
93. VIFAFOOD
94. Vinh Hoan Corp.
95. Vinh Phat Food Joint Stock Company
96. XNK Thinh Phat Processing Company

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[31] On April 26, 2011, Commerce amended the antidumping duty order to include dusted shrimp, pursuant to the U.S. Court of International Trade (CIT) decision in *Ad Hoc Shrimp Trade Action Committee* v. *United States,* 703 F. Supp. 2d 1330 (CIT 2010) and the U.S. International Trade Commission (ITC) determination, which found the domestic like product to include dusted shrimp. *See Certain Frozen Warmwater Shrimp from Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision,* 76 FR 23277 (April 26, 2011); *see also Ad Hoc Shrimp Trade Action Committee* v. *United States,* 703 F. Supp. 2d 1330 (CIT 2010); and *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and Vietnam,* Inv. Nos. 731–TA–1063, 1064, 1066–1068 (Review), USITC Publication 4221 (March 2011).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–802]

Uranium From the Russian Federation; Final Results of the Expedited Fifth Sunset Review of the Suspension Agreement

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: As a result of this sunset review, the U.S. Department of Commerce (Commerce) finds that termination of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation (Agreement) and the suspended antidumping duty

investigation would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Review'' section of this notice.

DATES: Applicable January 3, 2023.

FOR FURTHER INFORMATION CONTACT: Sally C. Gannon or Jill Buckles, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0162 or (202) 482–6230, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 1, 2022, Commerce initiated the fifth sunset review of the suspended antidumping duty investigation on uranium from the Russian Federation (Russia), pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[1] Commerce received notices of intent to participate in this sunset review from Louisiana Energy Services, LLC (LES); Ur-Energy USA Inc (Ur-Energy); Energy Fuels Resources (USA) Inc. (Energy Fuels); Power Resources, Inc. and Crow Butte Resources, Inc. (PRI and Crow Butte); ConverDyn; Global Laser Enrichment, LLC (GLE); Uranium Producers of America (UPA); and Centrus Energy Corp. and United States Enrichment Corporation (collectively, Centrus) between September 12, 2022, and September 16, 2022, within the applicable deadline specified in section 351.218(d)(1)(i) of Commerce's regulations. Each claimed interested party status under section 771(9) of the Act as producers of the domestic like product, importers of such merchandise, or as a trade association whose members manufacture a domestic like product.

Commerce received adequate substantive responses from LES, PRI and Crow Butte, GLE, UPA, Centrus, and Constellation Energy Generation, LLC within the 30-day deadline specified in Commerce's regulations under section 351.218(d)(3)(i). Ur-Energy and Energy Fuels submitted their substantive responses very shortly after the 5:00 p.m. time limit on the due date, and Commerce subsequently extended the time limit and accepted these responses for good cause pursuant to 19 CFR 351.302(b). Commerce did not receive a substantive response from any respondent interested party. As a result, Commerce conducted an expedited (120-day) sunset review, in accordance with 19 CFR 351.218(e)(1)(ii)(C)(2).[2]

Scope of the Agreement

The product covered by the Agreement is natural uranium in the form of uranium ores and concentrates; natural uranium metal and natural uranium compounds; alloys, dispersions (including cermets), ceramic products, and mixtures containing natural uranium or natural uranium compounds; uranium enriched in U^{235} and its compounds; alloys, dispersions (including cermets), ceramic products, and mixtures containing uranium enriched in U^{235} or compounds of uranium enriched in U^{235}; and any other forms of uranium within the same class or kind.

Uranium ore from Russia that is milled into U_3O_8 and/or converted into UF_6 in another country prior to direct and/or indirect importation into the United States is considered uranium from Russia and is subject to the terms of this Agreement.

For purposes of this Agreement, uranium enriched in U^{235} or compounds of uranium enriched in U^{235} in Russia are covered by this Agreement, regardless of their subsequent modification or blending. Uranium enriched in U^{235} in another country prior to direct and/or indirect importation into the United States is not considered uranium from Russia and is not subject to the terms of this Agreement. [3]

HEU is within the scope of the underlying investigation, and HEU is covered by this Agreement. For the purpose of this Agreement, HEU means uranium enriched to 20 percent or greater in the isotope uranium-235.

Imports of uranium ores and concentrates, natural uranium compounds, and all forms of enriched uranium are currently classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 2612.10.00, 2844.10.20, 2844.20.00, respectively. Imports of natural uranium metal and forms of natural uranium other than compounds are currently classifiable under HTSUS subheadings: 2844.10.10 and 2844.10.50. HTSUS subheadings are provided for convenience and Customs purposes. The written description of the scope of this proceeding is dispositive.

Analysis of Comments Received

All issues raised in this sunset review, including the likelihood of continuation or recurrence of dumping and the magnitude of the margin of dumping likely to prevail if the Agreement is terminated, are addressed in the accompanying Issues and Decision Memorandum.[4] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* A list of topics discussed in the Issues and Decision Memorandum is included as an appendix to this notice. A complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Results of Review

Pursuant to section 752(c) of the Act, Commerce determines that termination of the Agreement and suspended investigation on uranium from Russian would likely lead to continuation or recurrence of dumping at a margin of up to 115.82 percent.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to an administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

We are issuing and publishing these results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act and 19 CFR 351.218.

[1] *See Initiation of Five-Year (Sunset) Reviews,* 87 FR 53727 (September 1, 2022).

[2] *See* Commerce's Letter, ''Sunset Reviews Initiated on September 1, 2022,'' dated October 25, 2022.

[3] The second amendment of two amendments to the Suspension Agreement effective on October 3, 1996, in part included within the scope of the Suspension Agreement for Russian uranium which had been enriched in a third country prior to importation into the United States. According to the amendment, this modification remained in effect until October 3, 1998. *See Amendments to the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation,* 61 FR 56665, 56667 (November 4, 1996).

[4] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Fifth Sunset Review of the Agreement Suspending the Antidumping Investigation on Uranium from the Russian Federation,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Dated: December 27, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Agreement
IV. History of the Agreement
V. Legal Framework
VI. Discussion of the Issues
  1. Likelihood of Continuation or Recurrence of Dumping
  2. Magnitude of Margin Likely to Prevail
VII. Final Results of Expedited Review
VIII. Recommendation

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DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUPPLEMENTARY INFORMATION:

Background

Every five years, pursuant to the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) and the International Trade Commission automatically initiate and conduct reviews to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for February 2023

Pursuant to section 751(c) of the Act, the following Sunset Reviews are scheduled for initiation in February 2023 and will appear in that month's *Notice of Initiation of Five-Year Sunset Reviews* (Sunset Review).

	Department contact
Antidumping Duty Proceedings	
Certain Cut-To-Length Carbon-Quality Steel Plate from India, A–533–817 (4th Review)	Mary Kolberg, (202) 482–1785.
Certain Cut-To-Length Carbon-Quality Steel Plate from, A–560–805 (4th Review)	Mary Kolberg, (202) 482–1785.
Certain Cut-To-Length Carbon-Quality Steel Plate from South Korea, A–580–836 (4th Review)	Mary Kolberg, (202) 482–1785.
Fine Denier Polyester Staple Fiber from China, A–570–060 (1st Review)	Thomas Martin, (202) 482–3936.
Fine Denier Polyester Staple Fiber from India, A–533–875 (1st Review)	Thomas Martin, (202) 482–3936.
Fine Denier Polyester Staple Fiber from South Korea, A–580–893 (1st Review)	Thomas Martin, (202) 482–3936.
Fine Denier Polyester Staple Fiber from Taiwan, A–583–860 (1st Review)	Thomas Martin, (202) 482–3936.
Certain Lined Paper Products from China, A–570–901 (3rd Review)	Mary Kolberg, (202) 482–1785.
Certain Lined Paper Products from India, A–533–843 (3rd Review)	Mary Kolberg, (202) 482–1785.
Pure Magnesium from China, A–570–864 (4th Review)	Mary Kolberg, (202) 482–1785.
Countervailing Duty Proceedings	
Certain Cut-To-Length Carbon-Quality Steel Plate from India, C–533–818 (4th Review)	Mary Kolberg, (202) 482–1785.
Certain Cut-To-Length Carbon-Quality Steel Plate from Indonesia, C–560–806 (4th Review)	Mary Kolberg, (202) 482–1785.
Certain Cut-To-Length Carbon-Quality Steel Plate from South Korea, C–580–837 (4th Review)	Mary Kolberg, (202) 482–1785.
Fine Denier Polyester Staple Fiber from China, C–570–061 (1st Review)	Jacky Arrowsmith, (202) 482–5255.
Fine Denier Polyester Staple Fiber from India, C–533–876 (1st Review)	Thomas Martin, (202) 482–3936.
Certain Lined Paper Products from India, C–533–844 (3rd Review)	Mary Kolberg, (202) 482–1785.

Suspended Investigations

No Sunset Review of suspended investigations is scheduled for initiation in February 2023.

Commerce's procedures for the conduct of Sunset Review are set forth in 19 CFR 351.218. The *Notice of Initiation of Five-Year* (*Sunset) Review* provides further information regarding what is required of all parties to participate in Sunset Review.

Pursuant to 19 CFR 351.103(c), Commerce will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact Commerce in writing within 10 days of the publication of the Notice of Initiation.

Please note that if Commerce receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue.

Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation. Note that Commerce has modified certain of its requirements for serving documents containing business proprietary information, until further notice.[1]

This notice is not required by statute but is published as a service to the international trading community.

Dated: December 19, 2022.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2022–28520 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (Sunset) Reviews

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) is automatically initiating the five-year reviews (Sunset Reviews) of the antidumping and countervailing duty (AD/CVD) order(s) and suspended investigation(s) listed below. The International Trade Commission (the ITC) is publishing concurrently with this notice its notice of *Institution of Five-Year Reviews* which covers the same order(s) and suspended investigation(s).

DATES: Applicable January 3, 2023.

FOR FURTHER INFORMATION CONTACT: Commerce official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. For information from the ITC, contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

Commerce's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (Sunset) Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to Commerce's conduct of Sunset Reviews is set forth in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with section 751(c) of the Act and 19 CFR 351.218(c), we are initiating the Sunset Reviews of the following antidumping and countervailing duty order(s) and suspended investigation(s):

DOC case No.	ITC case No.	Country	Product	Commerce contact
A–583–008 ...	731–TA–132	Taiwan	Certain Circular Welded Carbon Steel Pipes & Tubes (5th Review).	Jacky Arrowsmith, (202) 482–5255.
A–533–502 ...	731–TA–271	India	Certain Welded Carbon Steel Pipes & Tubes (5th Review).	Mary Kolberg, (202) 482–1785.
A–549–502 ...	731–TA–252	Thailand	Certain Welded Carbon Steel Pipes & Tubes (5th Review).	Mary Kolberg, (202) 482–1785.
A–489–501 ...	731–TA–273	Turkey	Certain Welded Carbon Steel Pipes & Tubes (5th Review).	Mary Kolberg, (202) 482–1785.
A–351–809 ...	731–TA–532	Brazil	Circular Welded Non-Alloy Steel Pipe (5th Review) ...	Jacky Arrowsmith, (202) 482–5255.
A–201–805 ...	731–TA–534	Mexico	Circular Welded Non-Alloy Steel Pipe (5th Review) ...	Jacky Arrowsmith, (202) 482–5255.
A–580–809 ...	731–TA–533	South Korea ...	Circular Welded Non-Alloy Steel Pipe (5th Review) ...	Jacky Arrowsmith, (202) 482–5255.
A–583–814 ...	731–TA–536	Taiwan	Circular Welded Non-Alloy Steel Pipe (5th Review) ...	Jacky Arrowsmith, (202) 482–5255.
A–570–058 ...	731–TA–1362	China	Cold-Drawn Mechanical Tubing (1st Review)	Mary Kolberg, (202) 482–1785.
A–428–845 ...	731–TA–1363	Germany	Cold-Drawn Mechanical Tubing (1st Review)	Mary Kolberg, (202) 482–1785.
A–533–873 ...	731–TA–1364	India	Cold-Drawn Mechanical Tubing (1st Review)	Mary Kolberg, (202) 482–1785.
A–475–838 ...	731–TA–1365	Italy	Cold-Drawn Mechanical Tubing (1st Review)	Mary Kolberg, (202) 482–1785.
A–580–892 ...	731–TA–1366	South Korea ...	Cold-Drawn Mechanical Tubing (1st Review)	Mary Kolberg, (202) 482–1785.
A–441–801 ...	731–TA–1367	Switzerland	Cold-Drawn Mechanical Tubing (1st Review)	Mary Kolberg, (202) 482–1785.
A–428–820 ...	731–TA–709	Germany	Seamless Line and Pressure Pipe (5th Review)	Jacky Arrowsmith, (202) 482–5255.
C–489–502 ...	701–TA–253	Turkey	Circular Welded Carbon Steel Pipes & Tubes (5th Review).	Jacky Arrowsmith, (202) 482–5255.
C–570–059 ...	701–TA–576	China	Cold-Drawn Mechanical Tubing (1st Review)	Jacky Arrowsmith, (202) 482–5255.
C–533–874 ...	701–TA–577	India	Cold-Drawn Mechanical Tubing (1st Review)	Jacky Arrowsmith, (202) 482–5255.

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the pertinent statute and Commerce's regulations, Commerce's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on Commerce's website at the following address: *https://enforcement.trade.gov/sunset/.* All submissions in these Sunset Reviews must be filed in accordance with Commerce's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), can be found at 19 CFR 351.303.

In accordance with section 782(b) of the Act, any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information. Parties must use the certification formats provided in 19 CFR 351.303(g). Commerce intends to reject factual submissions if the submitting party does not comply with applicable revised certification requirements.

Letters of Appearance and Administrative Protective Orders

Pursuant to 19 CFR 351.103(d), Commerce will maintain and make available a public service list for these proceedings. Parties wishing to participate in any of these five-year reviews must file letters of appearance as discussed at 19 CFR 351.103(d). To facilitate the timely preparation of the public service list, it is requested that those seeking recognition as interested parties to a proceeding submit an entry of appearance within 10 days of the publication of the Notice of Initiation. Because deadlines in Sunset Reviews can be very short, we urge interested parties who want access to proprietary information under administrative protective order (APO) to file an APO application immediately following publication in the **Federal Register** of this notice of initiation. Commerce's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[1]

Information Required From Interested Parties

Domestic interested parties, as defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of

[1] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with Commerce's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, Commerce will automatically revoke the order without further review.[2]

If we receive an order-specific notice of intent to participate from a domestic interested party, Commerce's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that Commerce's information requirements are distinct from the ITC's information requirements. Consult Commerce's regulations for information regarding Commerce's conduct of Sunset Reviews. Consult Commerce's regulations at 19 CFR part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at Commerce.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

Dated: December 19, 2022.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2022–28522 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC632]

South Atlantic Fishery Management Council; Public Hearings

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

ACTION: Notice of public hearings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold six in-person public hearings and one public hearing via webinar pertaining to Regulatory Amendment 35 to the Fishery Management Plan (FMP) for the Snapper Grouper Fishery of the South Atlantic Region. This framework amendment considers revisions to South Atlantic red snapper catch levels following the most recent stock assessment (SEDAR 73) and fishing gear changes intended to reduce dead discards throughout the snapper grouper fishery.

DATES: The in-person public hearings will be held January 17, 18, 19, 24, 25, and 26, 2023. The webinar public hearing will be held January 31, 2023. All hearings will begin at 6 p.m., EST.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** for specific locations.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION:

Meeting addresses:

January 17, 2023—Richmond Hill City Center, 520 Cedar Street, Richmond Hill, GA 31324; Phone: (912) 445–0043;

January 18, 2023—Town & Country Inn and Suites, 2008 Savannah Hwy, Charleston, SC 29407; Phone: (843) 571–1000;

January 19, 2023—The Crystal Coast Civic Center, 3505 Arendell Street, Morehead City, NC 28557; Phone: (252) 247–3883;

January 24, 2023—Hyatt Place Jacksonville St. Johns Town Center, 4742 Town Center Parkway, Jacksonville, FL 32246; Phone: (904) 641–7200;

January 25, 2023—City of Cocoa Civic Center, 430 Delannoy Ave, Cocoa Beach, FL 32922; Phone: (321) 639–3500;

January 26, 2023—Holiday Inn Key Largo, 99701 Overseas Highway, Key Largo, FL 33037 Phone: (305) 451–2121; and

January 31, 2023—This hearing will be held via webinar. Registration is required. Information, including a link to the webinar registration will be posted on the Council's website at: *https://safmc.net/public-hearings-and-scoping/* as it becomes available.

Public hearing documents, an online public comment form, and other materials will be posted to the Council's website at *https://safmc.net/public-hearings-and-scoping/* as they become available. Written comments should be addressed to John Carmichael, Executive Director, SAFMC, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405. Written comments must be received by February 3, 2023, by 5 p.m. During the hearings Council staff will provide an overview of actions being considered in the amendment. Staff will answer clarifying questions on the presented information and the proposed actions. Following the presentation and questions, the public will have the opportunity to provide comments on the amendment.

Regulatory Amendment 35 to the Snapper Grouper FMP

Regulatory Amendment 35 considers revisions to South Atlantic red snapper catch levels following the most recent stock assessment (SEDAR 73) and gear changes intended to reduce dead discards throughout the snapper grouper fishery. SEDAR 73 indicated the stock is overfished and overfishing is occurring, primarily due to high numbers of recreational dead discards of red snapper. The Council is required to revise the acceptable biological catch to be based on the Scientific and Statistical Committee's (SSC) most recent recommendations, which are based on SEDAR 73.

The Council is also required to end overfishing of red snapper. Given that the vast majority of red snapper fishing-related mortality is attributed to recreational dead discards and given the multi-species nature of the South Atlantic snapper grouper fishery, the Council is considering a prohibition of the use of more than one separate hook per line while recreationally fishing for snapper grouper species with natural baits. This gear change would be expected to reduce recreational catch and discarding of snapper grouper species overall, thus reducing dead discards and addressing overfishing of red snapper. The actions considered in this amendment in addition to increased outreach and education efforts for best fishing practices, and other longer-term management actions currently under development, are collectively expected to end overfishing of red snapper.

Special Accommodations

These hearings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the hearing.

NOTE: The times and sequence specified in this agenda are subject to change.

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

[2] *See* 19 CFR 351.218(d)(1)(iii).

Dated: December 27, 2022.

Rey Israel Marquez,

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

[FR Doc. 2022–28478 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC637]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Groundfish Recreational Advisory Panel via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Wednesday, January 18, 2023, at 9 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/3856338450606308958.*

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Recreational Advisory Panel will meet to discuss and develop recommendations to the Groundfish Committee on fishing year 2023 recreational measures for Georges Bank cod, Gulf of Maine cod and Gulf of Maine haddock. They will also receive an overview of the Council's groundfish priorities for 2023. Other business may be discussed as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: December 27, 2022.

Rey Israel Marquez,

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

[FR Doc. 2022–28480 Filed 12–30–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2022–SCC–0156]

Agency Information Collection Activities; Comment Request; National Evaluation of Career and Technical Education Under Perkins V

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before March 6, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2022–SCC–0156. 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, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Michael Fong, (202) 245–8407.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: National Evaluation of Career and Technical Education under Perkins V.

OMB Control Number: 1850–NEW.

Type of Review: New ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 305.

Total Estimated Number of Annual Burden Hours: 252.

Abstract: The Strengthening Career and Technical Education for the 21st Century Act (Perkins V) mandates a national evaluation of career and technical education (CTE) to examine key aspects of CTE across the nation, including CTE policy and program

implementation, participation and outcomes, and effectiveness. This new data collection will consist of two surveys that will be conducted in 2023 to collect information about CTE policy and program implementation: (1) a survey of all state directors of CTE and (2) a nationally representative sample of district coordinators of CTE.

Dated: December 28, 2022.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2022–28527 Filed 12–30–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2022–SCC–0132]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; School Pulse Panel 2023–24 Preliminary Field Activities

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before February 2, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. Reginfo.gov provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: School Pulse Panel Preliminary Field Activities.

OMB Control Number: 1850–NEW.

Type of Review: New ICR.

Respondents/Affected Public: State, Local or Tribal Governments.

Total Estimated Number of Annual Responses: 9,939.

Total Estimated Number of Annual Burden Hours: 2,661.

Abstract: The School Pulse Panel (SPP) is a data collection originally designed to collect voluntary responses from a nationally representative sample of public schools to better understand how schools, students, and educators are responding to the ongoing stressors of the coronavirus pandemic. It is conducted by the National Center for Education Statistics (NCES), part of the Institute of Education Sciences (IES), within the United States Department of Education, in cooperation with the U.S. Census Bureau. Due to the immediate need to collect information from schools during the pandemic to satisfy the requirement of Executive Order 14000, an emergency clearance was issued to develop and field the first several monthly collections of the SPP in 2021, and a full review of the SPP data collection was completed in 2022 (OMB# 1850–0969). SPP's innovative design and timely dissemination of findings have been used and cited frequently among Department of Education senior leadership, the White House Domestic Policy Counsel, the USDA's Food and Nutrition Service, the Centers for Disease Control and Prevention, Congressional deliberations, and the media. The ongoing, growing interest by stakeholders has resulted in the request for dedicated funding to create an established NCES quick-turnaround data collection vehicle, with the goal of standing up a post-pandemic panel to begin with the 2023–24 school year. One notable difference for the next SPP study will be the addition of a district-level survey. The purpose of the district component is two-fold: (1) to collect data on topics that schools cannot report about such as facilities, supply chain issues and finances; and (2) to reduce burden on schools by allowing district staff to report on district policies and school level data tracked at the district. The district component will enhance the breadth of data that can be collected in SPP. For the 23–24 school year, the survey may ask school and district staff about a range of topics, including but not limited to instructional mode offered; enrollment counts of subgroups of students for various subject interests; strategies to address learning recovery; safe and healthy school mitigation strategies; mental health services; use of technology; information on staffing, nutrition services, absenteeism, usage of federal funds, facilities, and overall principal and district staff experiences. Some new content will be rotated in and out monthly. As in previous waves, for SPP 2023–24 roughly 5,000 (4,000 in an initial sample and 1,000 in a reserve sample) public elementary, middle, high, and combined-grade schools will be randomly selected to participate in a panel. It is expected these schools will come from roughly 3,000 districts with a reserve sample of 300 districts to replace district refusals. The goal is national representation from 1,000 responding schools and districts to report national estimates. School and district staff will be asked to provide requested data as frequently as monthly during the 23–24 school year. This approach provides the ability to collect detailed information on various topics while also assessing changes over time for items that are repeated. Given the high demand for data collection, the content of the survey will change monthly. This request is to conduct the SPP 2023–24 preliminary activities, including contacting and obtaining research approvals from public school districts with an established research approval process (''special contact districts''), notifying sampled schools and districts of their selection for the survey, and inviting them to complete short Screener Surveys to establish a point of contact at their school and at the district.

Dated: December 28, 2022.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2022–28516 Filed 12–30–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada; Meeting

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid open meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 18, 2023; 4 p.m.–7:50 p.m. PT.

The opportunity for public comment is at 4:10 p.m. PT.

This time is subject to change; please contact the Nevada Site Specific Advisory Board (NSSAB) Administrator (below) for confirmation of time prior to the meeting.

ADDRESSES: This meeting will be open to the public in-person at the Valley Conference Center (address below) or virtually via Microsoft Teams. To attend virtually, please contact Barbara Ulmer, NSSAB Administrator, by email *nssab@emcbc.doe.gov* or phone (702) 523–0894, no later than 4 p.m. PT on Monday, January 16, 2023.

Valley Electric Association, Valley Conference Center, 800 E Highway 372, Pahrump, NV 89048

Attendees should check the website listed below for any meeting format changes due to COVID–19 protocols.

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, NSSAB Administrator, by phone: (702) 523–0894 or email: *nssab@emcbc.doe.gov* or visit the Board's internet homepage at *www.nnss.gov/NSSAB/.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

1. Recommendation Development on Groundwater Open House (Work Plan Item #1)
2. DOE Presentations
3. State of Nevada Division of Environmental Protection Presentation

Public Participation: The in-person/online virtual hybrid meeting is open to the public either in-person at the Valley Conference Center or via Microsoft Teams. To sign-up for public comment, please contact the NSSAB Administrator (above) no later than 4:00 p.m. PT on Monday, January 16, 2023. In addition to participation in the live public comment session identified above, written statements may be filed with the Board either before or within seven days after the meeting by sending them to the NSSAB Administrator at the aforementioned email address. Written public comment received prior to the meeting will be read into the record. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments can do so in 2-minute segments for the 15 minutes allotted for public comments.

Minutes: Minutes will be available by writing or calling Barbara Ulmer, NSSAB Administrator, U.S. Department of Energy, EM Nevada Program, 100 North City Parkway, Suite 1750, Las Vegas, NV 89106; Phone: (702) 523–0894. Minutes will also be available at the following website: *http://www.nnss.gov/nssab/pages/MM_FY23.html.*

Signed in Washington, DC, on December 27, 2022.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2022–28503 Filed 12–30–22; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Proposed Agency Information Collection Extension

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE).

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy pursuant to the Paperwork Reduction Act of 1995, intends to modify and extend for three years an information collection request with the Office of Management and Budget.

DATES: Comments regarding this proposed information collection must be received on or before March 6, 2023. If you anticipate any difficulty in submitting comments within that period, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible.

ADDRESSES: Written comments should include Docket # EERE–2019–VT–0XXX in the subject line of the message and be sent to:

Mr. Mark Smith, Office of Energy Efficiency and Renewable Energy (EE–3V), U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585–0121, or by fax at (202) 586–1600, or by email at *Mark.Smith@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Mark Smith, at telephone: (202) email: *Mark.Smith@ee.doe.gov.*

SUPPLEMENTARY INFORMATION: The Department of Energy is proposing to modify and extend an information collection pursuant to the Paperwork Reduction Act of 1995. The approved collection is presently being used for Clean Cities programmatic efforts involving three Clean Cities efforts: (1) community readiness for plug-in electric vehicles (PEV); (2) DOE's National Clean Fleets Partnership; and (3) Clean Cities coalition ''Ride and Drive Surveys''. DOE is proposing to continue assessing levels of community readiness for PEVs and also to continue assessing progress and acceptance of advanced technology vehicles via ''Ride and Drive Surveys''. DOE is proposing to include a new information collection instrument that is an active and effective Clean Cities Coalition self-assessment to ensure its coalitions can remain in good standing for designation purposes. DOE will no longer be collecting information regarding its National Clean Fleets Partnership. The net result is that DOE is not proposing to expand the scope of the existing ICR.

Comments are invited on: (a) whether the modified and extended collection of information is necessary for the proper performance of the functions of DOE, including whether the information shall have practical utility; (b) the accuracy of DOE's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

This information collection request contains: (1) *OMB No.:* 1910–5171; (2) *Information Collection Request Title:* Clean Cities Vehicle Programs; (3) *Type of Review:* renewal and modification; (4) *Purpose:* DOE's Clean Cities initiative has developed three voluntary mechanisms by which communities, certain fleets, and the purchasing public can get a better understanding of their readiness for plug-in electric vehicles (PEVs), and to help DOE's Clean Cities coalitions prepare for the successful adoption of these vehicles and assess their progress in doing so. The voluntary PEV Scorecard is intended to assist its coalitions and stakeholders in assessing the level of readiness of their communities for PEVs. The principal objective of the scorecard is to provide respondents with an objective assessment and estimate of their respective community's readiness for PEV deployment as well as understand the respective community's commitment to deploying these vehicles successfully. DOE intends the scorecard to be completed by a city/county/regional sustainability or energy coordinator. As the intended respondent may not be aware of every aspect of local or regional PEV readiness, coordination among local stakeholders to gather appropriate information may be necessary.

DOE expects a total respondent population of approximately 1,250 respondents. Selecting the multiple-choice answers in completing a scorecard questionnaire is expected to take under 30 minutes, although additional time of no more than 20 hours may be needed to assemble information necessary to be able to answer the questions, leading to a total burden of approximately 25,625 hours. Assembling information to update questionnaire answers in the future on a voluntary basis would be expected to take less time, on the order of 10 hours, as much of any necessary time and effort needed to research information would have been completed previously.

For the Clean Cities Coalition active and effective self-assessment, DOE seeks to gain information that allows DOE Clean Cities leadership to determine whether its coalitions can remain in good standing, and thereby retain designation as a Clean Cities coalition. There are 80 Clean Cities coalitions across the United States, each of which applies to DOE for designation. Achieving full designation requires a comprehensive, strategic, four-year Program Plan that spells out a much broader range of commitments from the coalition and associated stakeholder outlining education plans, technical assistance, and other strategies to overcome market barriers and adopt best practices for organizational excellence that ensure the long-term sustainability of the coalition itself. DOE expects approximately 80 coalitions to complete the self-assessment annually, and DOE expects a total respondent population of 80 corresponding respondents. Completing the self-assessment for each Clean Cities coalition, which occurs annually, is expected to take 45 minutes. The total burden is expected to be 80 coalition respondents × 45 minutes = 60 hours.

For the DOE Clean Cities initiative that involves the ride-and-drive surveys, DOE has developed a three-part voluntary survey to assist its coalitions and stakeholders in assessing the level of interest, understanding, and acceptance of PEVs and alternative fuel vehicles (AFV) by the purchasing public. DOE intends the surveys to be completed by individuals who are participating in one of many ride-and-drive events. There are three phases to the Survey: (1) pre Ride-and-Drive; (2) post Ride-and-Drive; and (3) a few months/sometime later to discern if the respondent followed through with acquisition of a PEV or another AFV. Respondents provide answers in the first two phases through a user-friendly paper survey and on-line survey, and in the third phase they answer questions via an electronic interface, although a paper survey may be used for those lacking access to an electronic device or computer.

The Surveys' effort relies on responses to questions the respondent chooses to answer. The multiple-choice questions address the following topic areas: (1) Demographics; (2) Current vehicle background; (3) How they learned about ride and drive event; (4) Perceptions of PEVs before and after driving; (5) Post-drive vehicle experience; (6) Purchase expectations; (7) Follow-up survey regarding subsequent behaviors; (8) Purchase information; (9) Barriers; and (10) Future intentions. The survey is expected to take 30 minutes, leading to a total burden of approximately 28,250 hours (an increase 2,500 hours above the total burden in hours for the two currently approved collections).

(5) *Annual Estimated Number of Respondents:* 16,300; (6) *Annual Estimated Number of Total Responses:* 16,300; (7) *Annual Estimated Number of Burden Hours:* 28,250 hours (25,625 for PEV Scorecard, 60 hours for Clean Fleets coalition self-assessment, and 2,500 for the Ride and Drive Surveys); and (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* There is no cost associated with reporting and recordkeeping.

Statutory Authority: 42 U.S.C. 13233; 42 U.S.C. 13252(a)–(b); 42 U.S.C. 13255.

Signing Authority

This document of the Department of Energy was signed on December 23, 2022, by Sarah Ollila, Acting Director of the Vehicle Technologies Office, Office Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 28, 2022

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2022–28498 Filed 12–30–22; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Hanford; Meeting

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid open meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Hanford. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, January 25, 2023; 1 p.m.–4 p.m. and 5 p.m.–8 p.m. PT; Thursday, January 26, 2023; 9 a.m.–4 p.m. PT.

ADDRESSES: This hybrid meeting will be in-person at the Holiday Inn Richland on the River (address below) and virtually. To receive the virtual access information and call-in number, please contact the Federal Coordinator, Gary Younger, at the telephone number or email listed below at least five days prior to the meeting.

The meeting will be held, strictly following COVID–19 precautionary

measures, at: Holiday Inn Richland on the River, 802 George Washington Way, Richland, WA 99352.

Attendees should check with the Federal Coordinator (below) for any meeting format changes due to COVID–19 protocols.

FOR FURTHER INFORMATION CONTACT: Gary Younger, Federal Coordinator, U.S. Department of Energy, Hanford Office of Communications, Richland Operations Office, P.O. Box 550, Richland, WA 99354; Phone: (509) 372–0923; or email: *gary.younger@rl.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

- Tri-Party Agreement Agencies' Updates
- Board Subcommittee Reports
- Discussion of Board Business
- Election of Board Officers

Public Participation: The meeting is open to the public. The EM SSAB, Hanford, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Gary Younger at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or within five business days after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Gary Younger. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available at the following website: *http://www.hanford.gov/page.cfm/hab/FullBoardMeetingInformation.*

Signed in Washington, DC, on December 27, 2022.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2022–28502 Filed 12–30–22; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

President's Council of Advisors on Science and Technology

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a virtual open meeting of the President's Council of Advisors on Science and Technology (PCAST). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, January 19, 2023; 11:30 a.m.–12:35 p.m. EST.

ADDRESSES: Information to participate virtually can be found on the PCAST website closer to the meeting at: *www.whitehouse.gov/PCAST/meetings.* Due to the COVID–19 pandemic, this meeting will be held virtually.

FOR FURTHER INFORMATION CONTACT: Dr. Reba Bandyopadhyay, Designated Federal Officer, PCAST, email: *PCAST@ostp.eop.gov.* Telephone: (202) 881–6399.

SUPPLEMENTARY INFORMATION: PCAST is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from the White House, cabinet departments, and other Federal agencies. See the Executive Order at *whitehouse.gov.* PCAST is consulted on and provides analyses and recommendations concerning a wide range of issues where understanding of science, technology, and innovation may bear on the policy choices before the President. Information about PCAST can be found at: *www.whitehouse.gov/PCAST.*

Tentative Agenda

Open Portion of the Meeting: PCAST will discuss and consider for approval a report from the Wildfires Sub-Committee. Additional information and the meeting agenda, including any changes that arise, will be posted on the PCAST website at: *www.whitehouse.gov/PCAST/meetings.*

Public Participation: The meeting is open to the public. The meeting will be held virtually for members of the public.

It is the policy of the PCAST to accept written public comments no longer than 10 pages and to accommodate oral public comments whenever possible. The PCAST expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

The public comment period for this meeting will take place on January 19, 2023, at a time specified in the meeting agenda. This public comment period is designed only for substantive commentary on PCAST's work, not for business marketing purposes.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak at *PCAST@ostp.eop.gov*, no later than 12 p.m. eastern time on January 12, 2023. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of up to 10 minutes. If more speakers register than there is space available on the agenda, PCAST will select speakers on a first-come, first-served basis from those who registered. Those not able to present oral comments may file written comments with the council.

Written Comments: Although written comments are accepted continuously, written comments should be submitted to *PCAST@ostp.eop.gov* no later than 12:00 p.m. Eastern Time on January 12, 2023, so that the comments can be made available to the PCAST members for their consideration prior to this meeting.

PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST website at: *www.whitehouse.gov/PCAST/meetings.*

Minutes: Minutes will be available within 45 days at: *www.whitehouse.gov/PCAST/meetings.*

Signed in Washington, DC, on December 28, 2022.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2022–28525 Filed 12–30–22; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–49–000.

Applicants: Diablo Winds, LLC.

Description: Diablo Winds, LLC submits Notice of Self-Recertification of Exempt Wholesale Generator Status.

Filed Date: 12/23/22.

Accession Number: 20221223–5113.

Comment Date: 5 p.m. ET 1/13/23.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL23–19–000.

Applicants: PJM Interconnection, L.L.C.

Description: ISO/RTO § 206 Filing: LDA Reliability Requirement Complaint, Extended 28-day Comment Period to be effective 12/24/2022.

Filed Date: 12/23/22.

Accession Number: 20221223–5171.

Comment Date: 5 p.m. ET 1/20/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1728–015.

Applicants: The Dayton Power and Light Company.

Description: Triennial Market Power Analysis for Northeast Region of The Dayton Power and Light Company.

Filed Date: 12/23/22.

Accession Number: 20221223–5114.

Comment Date: 5 p.m. ET 2/21/23.

Docket Numbers: ER16–2520–004; ER17–318–004; ER19–8–004; ER19–119–004; ER19–2476–004; ER20–1799–003; ER20–1800–003; ER20–1801–004.

Applicants: Techren Solar V LLC, Techren Solar IV LLC, Techren Solar III LLC, Techren Solar II LLC, Techren Solar I LLC, Sweetwater Solar, LLC, Three Peaks Power, LLC, Grand View PV Solar Two LLC.

Description: Triennial Market Power Analysis for Northwest Region of Techren Solar I LLC, et al.

Filed Date: 12/22/22.

Accession Number: 20221222–5329.

Comment Date: 5 p.m. ET 2/20/23.

Docket Numbers: ER18–1182–004.

Applicants: System Energy Resources, Inc.

Description: Compliance filing: SERI MPSC Settlement Compliance (ER18–1182, et al.) to be effective 7/1/2022.

Filed Date: 12/23/22.

Accession Number: 20221223–5125.

Comment Date: 5 p.m. ET 1/13/23.

Docket Numbers: ER23–48–001.

Applicants: West Line Solar, LLC.

Description: Tariff Amendment: West Line Solar, LLC Response to Request for Information and MBR Tariff to be effective 10/15/2022.

Filed Date: 12/27/22.

Accession Number: 20221227–5117.

Comment Date: 5 p.m. ET 1/17/23.

Docket Numbers: ER23–435–003.

Applicants: System Energy Resources, Inc.

Description: Compliance filing: SERI Part Settlement Compliance (ER23–435 and EL2–72) to be effective 10/1/2022.

Filed Date: 12/23/22.

Accession Number: 20221223–5128.

Comment Date: 5 p.m. ET 1/13/23.

Docket Numbers: ER23–702–001.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: Tariff Amendment: Errata to Replace Transmittal Letter in Docket No. ER23–703–000 to be effective 2/21/2023.

Filed Date: 12/23/22.

Accession Number: 20221223–5000.

Comment Date: 5 p.m. ET 1/13/23.

Docket Numbers: ER23–729–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: LDA Reliability Requirement; Extended 28-day Comment Period to be effective 12/24/2022.

Filed Date: 12/23/22.

Accession Number: 20221223–5161.

Comment Date: 5 p.m. ET 1/20/23.

Docket Numbers: ER23–730–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Correction to eTariff Metadata for SA No. 6258 Filed in Docket No. ER22–510–000 to be effective 11/1/2021.

Filed Date: 12/27/22.

Accession Number: 20221227–5089.

Comment Date: 5 p.m. ET 1/17/23.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF23–168–000.

Applicants: GL Dairy Biogas, LLC.

Description: Refund Report of GL Dairy Biogas, LLC.

Filed Date: 12/7/22.

Accession Number: 20221207–5182.

Comment Date: 5 p.m. ET 1/17/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene 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: December 27, 2022.

Kimberly D. Bose,

Secretary.

[FR Doc. 2022–28511 Filed 12–30–22; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2022–0163; FRL–9408–11–OCSPP]

Pesticide Product Registration; Receipt of Applications for New Uses, November 2022

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before February 2, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2022–0163, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (BPPD) (7511M), main telephone number: (202) 566–1400, email address: *BPPDFRNotices@epa.gov;* or Dan Rosenblatt, Registration Division (RD) (7505T), main telephone number: (202) 566–2875, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. 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:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).

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. Registration Applications

EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

Notice of Receipt—New Uses

1. *File Symbols:* 35935–REI, 71368–RUE, 71368–RUR. *EPA Registration Numbers:* 228–742, 15440–24, 15440–35, 71368–130. *Docket ID number:* EPA–HQ–OPP–2022–0594. *Applicant:* Nufarm Limited, C/O Nufarm Americas Inc., 4020 Aerial Center Parkway, Suite 101, Morrisville, NC 27560. *Active ingredient:* Dichlorprop-p. *Product type:* Herbicide. *Proposed uses:* Barley, canarygrass (annual), corn (field, pop, sweet), fallow (alfalfa termination and cotton termination), fallowland and crop stubble, oat, oat (common), millet (barnyard, finger, foxtail, little, pearl, proso), rye, sorghum, soybean, teff, teosinte, triticale, wheat (common, durum), wheatgrass (intermediate). *Contact:* RD.

2. *EPA Registration Numbers:* 264–776 and 264–826. *Docket ID number:* EPA–HQ–OPP–2021–0448. *Applicant:* Bayer CropScience LP, 800 N. Lindbergh Boulevard St. Louis, MO 63169. *Active ingredient:* Trifloxystrobin. *Product type:* Fungicide. *Proposed uses:* Bulb onion subgroup 3–07A, green onion subgroup 3–07B, edible podded bean legume vegetable subgroup 6–22A, and crop group subgroup conversions and expansions. *Contact:* RD.

3. *File Symbols:* 35935–REI, 71368–RUE, 71368–RUR. *EPA Registration Numbers:* 228–742, 15440–24, 15440–35, 71368–130. *Docket ID number:* EPA–HQ–OPP–2022–0594. *Applicant:* Nufarm Limited, C/O Nufarm Americas Inc., 4020 Aerial Center Parkway, Suite 101, Morrisville, NC 27560. *Active ingredient:* Dichlorprop-p. *Product type:* Herbicide. *Proposed uses:* Barley, canarygrass (annual), corn (field, pop, sweet), fallow (alfalfa termination and cotton termination), fallowland and crop stubble, oat, oat (common), millet (barnyard, finger, foxtail, little, pearl, proso), rye, sorghum, soybean, teff, teosinte, triticale, wheat (common, durum), wheatgrass (intermediate). *Contact:* RD.

4. *EPA Registration Numbers:* 70506–514, 70506–602, 70506–603, 91813–79. *Docket ID number:* EPA–HQ–OPP–2022–0455. *Applicant:* UPL Delaware Inc. and UPL NA Inc. 630 Freedom Business Center, Suite 402 King of Prussia, PA 19406. *Active ingredient:* Carboxin. *Product type:* Fungicide. *Proposed Use(s):* Additional new food uses of Carboxin on Subgroup 6–22F: pulses, dried shelled pea: *Contact:* RD.

5. *EPA Registration Numbers* 71512–7, 71512–9, 71512–10, and 71512–14. *Docket ID number:* EPA–HQ–OPP–2022–0382. *Applicant:* ISK Biosciences Corporation, 7470 Auburn Road, Suite A, Concord, OH 44077. *Active ingredient:* Flonicamid. *Product type:* Insecticide. *Proposed uses:* Bushberry subgroup 13–07B; caneberry subgroup 13–07A; corn (sweet); legume vegetable group 6–22; pomegranate; and prickly pear cactus. *Contact:* RD.

6. *File Symbol:* 71693–G. *Docket ID number:* EPA–HQ–OPP–2022–0943. *Applicant:* Arizona Cotton Research and Protection Council, 3721 East Wier Avenue, Phoenix, Arizona 85040–2933. *Active ingredient: Aspergillus flavus* strain AF36. *Product type:* Fungicide. *Proposed use:* For application to all food and feed commodities of cotton, corn, pistachio, almond, and fig to displace aflatoxin-producing strains of *Aspergillus flavus. Contact:* BPPD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 21, 2022.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Program Support.

[FR Doc. 2022–28528 Filed 12–30–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2020–0682; FRL–10163–02–ORD]

Notice of Public Comment Period for the Biofuels and the Environment: Third Triennial Report to Congress External Review Draft

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is announcing the public comment period for the draft document titled, ''Biofuels and the Environment: Third Triennial Report to Congress (External Review Draft).'' The document was prepared by EPA's Office of Research and Development (ORD) and Office of Air and Radiation (OAR), in consultation with the U.S. Departments of Agriculture and Energy. EPA is releasing this draft document to seek review by a contractor-led peer review panel. The peer review, organized by EPA's contractor, ERG, will be conducted under the framework of EPA's Scientific Integrity Policy (*https://www.epa.gov/sites/default/files/2014-02/documents/scientific_integrity_policy_2012.pdf*) and follow procedures established in EPA's Peer Review Handbook 4th Edition, 2015 (EPA/100/B–15/001). The draft document and information about the peer review meeting can be found through *www.epa.gov/risk/biofuels-and-environment.*

DATES: The 60-day public comment period begins January 3, 2023 and ends March 6, 2023. Comments must be received on or before March 6, 2023.

ADDRESSES: Please follow the instructions as provided in the section

of this notice entitled **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: For information on the period of submission, contact the ORD Docket at the EPA Headquarters Docket Center; phone: 202–566–1752; fax: 202–566–9744; or email: *ord.docket@epa.gov.* For technical information, contact Christopher Clark; email: *Clark.Christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Information About the Document

In 2007, Congress enacted the Energy Independence and Security Act (EISA) with the stated goals of ''mov[ing] the United States toward greater energy independence and security [and] to increase the production of clean renewable fuels.'' In accordance with these goals, EISA revised the Renewable Fuel Standard (RFS) Program, which was created under the 2005 Energy Policy Act and is administered by EPA, to increase the volume of renewable fuel required to be blended into transportation fuel to 36 billion gallons per year by 2022. Section 204 of EISA directs EPA, in consultation with the U.S. Departments of Agriculture and Energy, to assess and report triennially to Congress on the environmental and resource conservation impacts of the RFS Program.

The first report to Congress (RtC1) was completed in 2011 and provided an assessment of the environmental and resource conservation impacts associated with increased biofuel production and use (EPA/600/R–10/183F). The overarching conclusions of this first report were: (1) the environmental impacts of increased biofuel production and use were likely negative but limited in impact; (2) there was a potential for both positive and negative impacts in the future; and (3) EISA goals for biofuels production could be achieved with minimal environmental impacts if best practices were used and if technologies advanced to facilitate the use of second-generation biofuel feedstocks (corn stover, perennial grasses, woody biomass, algae, and waste).

The second report to Congress (RtC2) was completed in 2018 and reaffirmed the overarching conclusions of the RtC1 (EPA/600/R–18/195). The RtC2 noted that the biofuel production and use conditions that led to the conclusions of the RtC1 had not materially changed, and that the production of biofuels from cellulosic feedstocks anticipated by both the EISA and the RtC1 had not materialized. Noting observed increases in acreage for corn and soybean production in the period prior to and following implementation of the RFS Program, the RtC2 concluded that the environmental and resource conservation impacts associated with land use change were likely due, at least in part, to increased biofuel production and use associated with the RFS Program. However, the RtC2 also concluded that further research was needed to assess the linkages between environmental impacts and either the biofuels market generally or the RFS Program specifically.

This RtC3 builds on the previous two reports and provides an update on the impacts to date of the RFS Program on the environment. This report assesses air, water, and soil quality; ecosystem health and biodiversity; and other effects. This third report also includes new analyses not previously included in the first and second reports.

II. Information About This Peer Review

On May 9, 2022, EPA announced through an FRN (87 FR 27634) that it was seeking public comment on a pool of twenty (20) candidates identified through a previous FRN seeking nomination of experts (87 FR 5479, February 1, 2022). After considering public comment, and the balance and collective expertise of the reviewers, ERG identified two (2) additional candidates to strengthen expertise gaps in ecology, water quality, and economics, and allow a more balanced panel. On August 1, 2022, EPA announced through an FRN (87 FR 46958) that it was seeking public comment on the two (2) additional peer review candidates.

After review and consideration of public comments on the candidates submitted in response to the previous FRNs (87 FR 27634, May 9, 2022, and 87 FR 46958, August 1, 2022), EPA's contractor, ERG, selected nine (9) peer reviewers from the pool in a manner consistent with EPA's Peer Review Handbook 4th Edition, 2015 (EPA/100/B–15/001) and independently conducted a conflict of interest (COI) screening of candidates to ensure that the selected experts have no COI in conducting this review. Candidates' combined expertise span the following disciplines: economics, engineering, agronomics, land use change, remote sensing, air quality, biogeochemistry, water quality, hydrology, conservation biology, limnology, and ecology. The external peer review panel, peer review meeting dates, and registration information will be available on *www.epa.gov/risk/biofuels-and-environment.*

III. How To Submit Technical Comments to the Docket at *www.regulations.gov*

We encourage the public to submit comments to Docket ID No. [EPA–HQ–ORD–2020–0682] via web at *https://www.regulations.gov/* or via email at *ord.docket@epa.gov,* as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received at the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC, from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal Holidays. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

Instructions: Direct your comments to Docket ID No. [EPA–HQ–ORD–2020–0682]. Please ensure that your comments are submitted within the specified comment period. It is EPA's policy to include all materials it receives in the public docket without change and to make the materials available online at *www.regulations.gov,* including any personal information provided, unless materials include information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the materials that are placed in the public docket and made available on the internet. If you submit electronic materials, EPA recommends that you include your name and other contact information in the body of your materials and with any disk or CD–ROM you submit. If EPA cannot read your materials due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider the materials you submit. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit EPA's Docket Center homepage at *www.epa.gov/epahome/dockets.htm.*

Docket: Documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some

information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other materials, such as copyrighted material, are publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the ORD Docket in EPA's Headquarters Docket Center.

Wayne Cascio,

Director, Center for Public Health and Environmental Assessment, Office of Research and Development.

[FR Doc. 2022–27939 Filed 12–30–22; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

Updated Intent To Conduct a Detailed Economic Impact Analysis

AGENCY: Export-Import Bank.

ACTION: Notice.

SUMMARY: This notice is to inform the public that the Export-Import Bank of the United States has received has received a request to increase the financed amount for a previously notified application (FR Doc. 2022–19164). The application is now for a $99.7 million direct loan to support the export of approximately $63.88 million in U.S. equipment and services to upgrade and expand an oil refinery in Indonesia. There has been no change in the expected output of the facility, and the supported U.S. exports will still enable the facility to increase production capacity of gasoline by 101,000 barrels per day and propylene by 225,000 tons per year. Available information indicates that the refined products will be consumed domestically, with negligible sales to other markets.

DATES: Comments are due 14 days from publication in the **Federal Register**.

ADDRESSES: Interested parties may submit comments on this transaction electronically at *www.regulations.gov,* or by email to *economic.impact@exim.gov*.

Scott Condren,

Sr. Policy Analyst.

[FR Doc. 2022–28495 Filed 12–30–22; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0548; FR ID 121020]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), 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 Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments shall be submitted on or before March 6, 2023. 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 contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email: *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: 3060–0548.

Title: Sections 76.1709 and 76.1620, Availability of Signals; Section 76.1614, Identification of Must-Carry Signals.

Type of Review: Extension without change of a currently approved collection.

Respondents: Businesses or other for-profit.

Number of Respondents and Responses: 4,103 respondents; 49,236 responses.

Estimated Time per Response: 0.5–1.0 hour.

Frequency of Response: Recordkeeping requirement, Third party disclosure requirement, On occasion reporting requirement.

Obligation to Respond: Voluntary.

Total Annual Burden: 24,618 hours.

Total Annual Cost: No cost.

Needs and Uses: 47 CFR 76.1709(a) states that the operator of every cable television system shall maintain for public inspection a file containing a list of all broadcast television stations carried by its system in fulfillment of the must-carry requirements. Such list shall include the call sign; community of license, broadcast channel number, cable channel number, and in the case of a noncommercial educational broadcast station, whether that station was carried by the cable system on March 29, 1990.

47 CFR 76.1614 and 47 CFR 76.1709(c) each state that a cable operator shall respond in writing within 30 days to any written request by any person for the identification of the signals carried on its system in fulfillment of the must-carry requirements. In addition, 47 CFR 76.1614 states that the required written response may be delivered by email, if the consumer used email to make the request or complaint directly to the cable operator, or if the consumer specifies email as the preferred delivery method in the request or complaint.

47 CFR 76.1620, pursuant to 47 U.S.C. 614(b)(7), states that if a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers. Such notification must be provided by June 2, 1993, and annually thereafter and to each new subscriber upon initial installation. The notice, which may be included in routine billing statements, shall identify the signals that are unavailable without

an additional connection, the manner for obtaining such additional connection and instructions for installation. 47 CFR 76.1600(a) provides that written information provided by cable operators to subscribers or customers pursuant to § 76.1620 may be delivered electronically by email to any subscriber who has not opted out of electronic delivery if the entity: (1) Sends the notice to the subscriber's or customer's verified email address; (2) Provides either the entirety of the written information or a weblink to the written information in the notice; and (3) Includes, in the body of the notice, a telephone number that is clearly and prominently presented to subscribers so that it is readily identifiable as an opt-out mechanism that will allow subscribers to continue to receive paper copies of the written material.

Note: These recordkeeping and notification requirements ensure that subscribers are aware of the broadcast stations carried in compliance with the Commission's cable must-carry rules, see 47 CFR 76.56.

Federal Communications Commission.

Kimberly Stewart,

Federal Register Liaison Officer, Office of the Secretary.

[FR Doc. 2022–28491 Filed 12–30–22; 8:45 am]

BILLING CODE 6712–01–P

GOVERNMENT ACCOUNTABILITY OFFICE

Request for Medicaid and CHIP Payment and Access Commission (MACPAC) Nominations

AGENCY: Government Accountability Office.

ACTION: Request for letters of nomination and resumes.

SUMMARY: The Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) established MACPAC to review Medicaid and CHIP access and payment policies and to advise Congress on issues affecting Medicaid and CHIP. CHIPRA gave the Comptroller General of the United States responsibility for appointing MACPAC's members. The U.S. Government Accountability Office (GAO) is now accepting nominations for MACPAC appointments that will be effective May 2023. Nominations should be sent to the email address listed below. Acknowledgement of receipt will be provided within a week of submission.

DATES: Letters of nomination and resumes should be submitted no later than January 26, 2023, to ensure adequate opportunity for review and consideration of nominees prior to appointment.

ADDRESSES: Submit letters of nomination and resumes to *MACPACappointments@gao.gov.*

FOR FURTHER INFORMATION CONTACT: Susan Anthony at (312) 220–7666 or *anthonys@gao.gov* if you do not receive an acknowledgment or need additional information. For general information, contact GAO's Office of Public Affairs, (202) 512–4800.

Authority: 42 U.S.C. 1396.

Gene L. Dodaro,

Comptroller General of the United States.

[FR Doc. 2022–27887 Filed 12–30–22; 8:45 am]

BILLING CODE 1610–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2021–N–0973]

Revocation of Three Authorizations of Emergency Use of In Vitro Diagnostic Devices for Detection and/or Diagnosis of COVID–19; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the revocation of the Emergency Use Authorizations (EUAs) (the Authorizations) issued to the University of Texas MD Anderson Cancer Center, Molecular Diagnostics Laboratory (MD Anderson) for the MD Anderson High-throughput SARS–CoV–2 RT–PCR Assay, and Visby Medical, Inc. for the Visby Medical COVID–19 and Visby Medical COVID–19 Point of Care Test. FDA revoked these Authorizations under the Federal Food, Drug, and Cosmetic Act (FD&C Act). The revocations, which include an explanation of the reasons for each revocation, are reprinted in this document.

DATES: The Authorization for the MD Anderson High-throughput SARS–CoV–2 RT–PCR Assay is revoked as of November 30, 2022. The Authorizations for the Visby Medical COVID–19 and Visby Medical COVID–19 Point of Care Test are revoked as of December 2, 2022.

ADDRESSES: Submit written requests for a single copy of the revocations to the Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4338, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the revocations may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the revocations.

FOR FURTHER INFORMATION CONTACT: Jennifer Ross, Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4332, Silver Spring, MD 20993–0002, 301–796–8510 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

Section 564 of the FD&C Act (21 U.S.C. 360bbb–3) as amended by the Project BioShield Act of 2004 (Pub. L. 108–276) and the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (Pub. L. 113–5) allows FDA to strengthen the public health protections against biological, chemical, nuclear, and radiological agents. Among other things, section 564 of the FD&C Act allows FDA to authorize the use of an unapproved medical product or an unapproved use of an approved medical product in certain situations. On June 24, 2020, FDA issued an EUA to MD Anderson for the MD Anderson High-throughput SARS–CoV–2 RT–PCR Assay, subject to the terms of the Authorization. Notice of the issuance of this Authorization was published in the **Federal Register** on November 20, 2020 (85 FR 74346), as required by section 564(h)(1) of the FD&C Act. On September 16, 2020, FDA issued an EUA to Visby Medical, Inc. for the Visby Medical COVID–19, subject to the terms of the Authorization. Notice of the issuance of this Authorization was published in the **Federal Register** on April 23, 2021 (86 FR 21749), as required by section 564(h)(1) of the FD&C Act. On February 8, 2021, FDA issued an EUA to Visby Medical, Inc. for the Visby Medical COVID–19 Point of Care Test, subject to the terms of the Authorization. Notice of the issuance of this Authorization was published in the **Federal Register** on April 23, 2021 (86 FR 21749), as required by section 564(h)(1) of the FD&C Act. Subsequent revisions to the Authorizations were made available on FDA's website. The authorization of a device for emergency use under section 564 of the FD&C Act may, pursuant to section 564(g)(2) of the FD&C Act, be revoked when the criteria under section 564(c) of the FD&C Act for issuance of such authorization are no longer met (section 564(g)(2)(B) of the FD&C Act), or other circumstances make such revocation appropriate to protect

the public health or safety (section 564(g)(2)(C) of the FD&C Act).

II. EUA Revocation Requests

On November 18, 2022, FDA received a request from MD Anderson for the withdrawal of, and on November 30, 2022, FDA revoked, the Authorization for the MD Anderson High-throughput SARS–CoV–2 RT–PCR Assay. Because MD Anderson requested FDA withdraw the EUA for the MD Anderson High-throughput SARS–CoV–2 RT–PCR Assay, FDA has determined that it is appropriate to protect the public health or safety to revoke this Authorization. On November 29, 2022, FDA received a request from Visby Medical, Inc. for the closure of, and on December 2, 2022, FDA revoked, the Authorizations for the Visby Medical COVID–19 and Visby Medical COVID–19 Point of Care Test. Because Visby Medical, Inc. requested FDA close the EUAs for the Visby Medical COVID–19 and Visby Medical COVID–19 Point of Care Test, FDA has determined that it is appropriate to protect the public health or safety to revoke these Authorizations.

III. Electronic Access

An electronic version of this document and the full text of the revocations are available on the internet at *https://www.regulations.gov/*.

IV. The Revocations

Having concluded that the criteria for revocation of the Authorizations under section 564(g)(2)(C) of the FD&C Act are met, FDA has revoked the EUAs for MD Anderson's MD Anderson High-throughput SARS–CoV–2 RT–PCR Assay and for Visby Medical, Inc.'s Visby Medical COVID–19 and Visby Medical COVID–19 Point of Care Test. The revocations in their entirety follow and provide an explanation of the reasons for each revocation, as required by section 564(h)(1) of the FD&C Act.

BILLING CODE 4164–01–P

U.S. FOOD & DRUG ADMINISTRATION

November 30, 2022

Keyur P. Patel, Ph.D.
Medical Director, Molecular Diagnostics Laboratory
The University of Texas MD Anderson Cancer Center
6565 MD Anderson Blvd.
Houston, TX 77030

Re: Revocation of EUA200158

Dear Dr. Patel:

This letter is in response to the request from the University of Texas MD Anderson Cancer Center, Molecular Diagnostics Laboratory, received via email on November 18, 2022, that the U.S. Food and Drug Administration (FDA) withdraw the EUA for the MD Anderson High-throughput SARS-CoV-2 RT-PCR Assay issued on June 24, 2020, and amended on September 23, 2021 and November 29, 2021. The University of Texas MD Anderson Cancer Center, Molecular Diagnostics Laboratory discontinued testing with the MD Anderson High-throughput SARS-CoV-2 RT-PCR Assay as of October 31, 2022.

The authorization of a device for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. 360bbb-3) may, pursuant to section 564(g)(2) of the Act, be revoked when circumstances make such revocation appropriate to protect the public health or safety (section 564(g)(2)(C) of the Act). Because the University of Texas MD Anderson Cancer Center, Molecular Diagnostics Laboratory has requested FDA withdraw the EUA for the MD Anderson High-throughput SARS-CoV-2 RT-PCR Assay, FDA has determined that it is appropriate to protect the public health or safety to revoke this authorization. Accordingly, FDA hereby revokes EUA200158 for the MD Anderson High-throughput SARS-CoV-2 RT-PCR Assay, pursuant to section 564(g)(2)(C) of the Act. As of the date of this letter, the MD Anderson High-throughput SARS-CoV-2 RT-PCR Assay is no longer authorized for emergency use by FDA.

Notice of this revocation will be published in the *Federal Register*, pursuant to section 564(h)(1) of the Act.

Sincerely,

/s/

Namandjé N. Bumpus, Ph.D.
Chief Scientist
Food and Drug Administration

U.S. FOOD & DRUG ADMINISTRATION

December 2, 2022

Beth Lingenfelter
VP of Clinical and Regulatory Affairs
Visby Medical, Inc.
3010 North First Street
San Jose, CA 95134

Re: Revocation of EUA202677

Dear Ms. Lingenfelter:

This letter is in response to the request from Visby Medical, Inc., received via email on November 29, 2022, that the U.S. Food and Drug Administration (FDA) close the EUA for the Visby Medical COVID-19 issued on September 16, 2020, amended on December 28, 2020, and reissued on August 31, 2021. Visby Medical, Inc. discontinued manufacturing the Visby Medical COVID-19 test on January 25, 2021, and FDA understands there are no viable (non-expired) Visby Medical COVID-19 tests remaining in distribution in the United States.

The authorization of a device for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. 360bbb-3) may, pursuant to section 564(g)(2) of the Act, be revoked when circumstances make such revocation appropriate to protect the public health or safety (section 564(g)(2)(C) of the Act). Because Visby Medical, Inc. has requested FDA close the EUA for the Visby Medical COVID-19, FDA has determined that it is appropriate to protect the public health or safety to revoke this authorization. Accordingly, FDA hereby revokes EUA202677 for the Visby Medical COVID-19, pursuant to section 564(g)(2)(C) of the Act. As of the date of this letter, the Visby Medical COVID-19 is no longer authorized for emergency use by FDA.

Notice of this revocation will be published in the *Federal Register*, pursuant to section 564(h)(1) of the Act.

Sincerely,

/s/

Namandjé N. Bumpus, Ph.D.
Chief Scientist
Food and Drug Administration

U.S. FOOD & DRUG ADMINISTRATION

December 2, 2022

Beth Lingenfelter
VP of Clinical and Regulatory Affairs
Visby Medical, Inc.
3010 North First Street
San Jose, CA 95134

Re: Revocation of EUA203089

Dear Ms. Lingenfelter:

This letter is in response to the request from Visby Medical, Inc., received via email on November 29, 2022, that the U.S. Food and Drug Administration (FDA) close the EUA for the Visby Medical COVID-19 Point of Care Test issued on February 8, 2021, amended on September 23, 2021, and reissued on July 22, 2022. Visby Medical, Inc. discontinued manufacturing the Visby Medical COVID-19 Point of Care Test on April 25, 2022, and FDA understands there are no viable (non-expired) Visby Medical COVID-19 Point of Care Tests remaining in distribution in the United States.

The authorization of a device for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. 360bbb-3) may, pursuant to section 564(g)(2) of the Act, be revoked when circumstances make such revocation appropriate to protect the public health or safety (section 564(g)(2)(C) of the Act). Because Visby Medical, Inc. has requested FDA close the EUA for the Visby Medical COVID-19 Point of Care Test, FDA has determined that it is appropriate to protect the public health or safety to revoke this authorization. Accordingly, FDA hereby revokes EUA203089 for the Visby Medical COVID-19 Point of Care Test, pursuant to section 564(g)(2)(C) of the Act. As of the date of this letter, the Visby Medical COVID-19 Point of Care Test is no longer authorized for emergency use by FDA.

Notice of this revocation will be published in the *Federal Register*, pursuant to section 564(h)(1) of the Act.

Sincerely,

/s/

Namandjé N. Bumpus, Ph.D.
Chief Scientist
Food and Drug Administration

Dated: December 27, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–28496 Filed 12–30–22; 8:45 am]

BILLING CODE 4164–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcement of First Meeting of the 2025 Dietary Guidelines Advisory Committee and Request for Comments

AGENCY: U.S. Department of Health and Human Services (HHS), Office of the Assistant Secretary for Health (OASH); U.S. Department of Agriculture (USDA), Food, Nutrition, and Consumer Services (FNCS).

ACTION: Notice.

SUMMARY: The U.S. Departments of Health and Human Services and Agriculture announce the first meeting of the newly appointed 2025 Dietary Guidelines Advisory Committee (Committee). This meeting will be open to the public virtually. Additionally, this notice opens a public comment period that will remain open until late 2024, throughout the Committee's deliberations.

DATES: The first meeting will be held February 9–10, 2023. The public comment period opens with the publication of this notice.

ADDRESSES:

(a) The meeting will be accessible online via livestream and recorded for later viewing. Registrants will receive the livestream information prior to the meeting.

(b) You may send comments, identified by Docket OASH–2022–0021, by either of the following methods:

- *Online (preferred method):* Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Mail:* Janet M. de Jesus, MS, RD, HHS/OASH Office of Disease Prevention and Health Promotion

(ODPHP), 1101 Wootton Parkway, Suite 420, Rockville, MD 20852.

Instructions: All submissions received must include the agency name and Docket OASH–2022–0021. For detailed instructions on sending comments, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Designated Federal Officer, 2025 Dietary Guidelines Advisory Committee, Janet M. de Jesus, MS, RD; HHS/OASH/ODPHP, 1101 Wootton Parkway, Suite 420, Rockville, MD 20852; Phone: 240–453–8266; Email *DietaryGuidelines@hhs.gov.* Additional information is available on the internet at *www.DietaryGuidelines.gov.*

SUPPLEMENTARY INFORMATION:

Authority and Purpose: Under section 301 of Public Law 101–445 (7 U.S.C. 5341, the National Nutrition Monitoring and Related Research Act of 1990, Title III), the Secretaries of HHS and USDA are directed to publish the *Dietary Guidelines for Americans* (*Dietary Guidelines*) jointly at least every five years. The law instructs that this publication shall contain nutritional and dietary information and guidelines for the general public; shall be based on the preponderance of scientific and medical knowledge current at the time of publication; and shall be promoted by each Federal agency in carrying out any Federal food, nutrition, or health program. The current edition of the *Dietary Guidelines* (2020–2025) provides guidance on the entire lifespan, from birth to older adulthood, including pregnancy and lactation. The *Dietary Guidelines for Americans, 2025–2030* will continue to provide food-based dietary guidance across the entire lifespan to help meet nutrient needs, promote health, and reduce the risk of chronic disease. HHS and USDA appointed the 2025 Dietary Guidelines Advisory Committee (Committee) to conduct an independent scientific review that will help inform the Departments' development of the next edition of the *Dietary Guidelines.* The Committee's review and advice will focus on the scientific questions prioritized by HHS and USDA, with the potential to inform nutrition guidance for Americans across the lifespan. Information on the 2025 Committee membership and the scientific questions will be available at *www.DietaryGuidelines.gov.*

The 2025 Committee's formation is governed under the provisions of the Federal Advisory Committee Act (FACA), Public Law 92–463, as amended (5 U.S.C. app), which sets forth standards for the formation and use of advisory committees.

Committee's Task: The work of the Committee will be solely advisory in nature and time limited. The Committee will examine evidence on the scientific questions, using approaches including systematic reviews, food pattern modeling, and data analysis. The Committee will then develop a scientific report to be submitted to the HHS and USDA Secretaries. The scientific report should describe the Committee's review and conclusions and provide science-based advice and rationale to the Departments based on the preponderance of evidence reviewed. HHS and USDA will consider the Committee's scientific report as they develop the *Dietary Guidelines for Americans, 2025–2030.* The Committee will hold approximately six meetings, open to the public virtually, to review the evidence and discuss recommendations. Future meeting dates, times, and other relevant information will be announced via **Federal Register** notice and at *www.DietaryGuidelines.gov.* As stipulated in the charter, the Committee will disband after delivery of its final report to the Secretaries of HHS and USDA, or two years from the date the charter was filed, whichever comes first.

Purpose of the Meeting: In accordance with FACA, and to promote transparency of the process, deliberations of the Committee will occur in a public forum. The purpose of this first meeting is to orient the Committee to the *Dietary Guidelines* process and mark the beginning of its work.

Meeting Agenda: The first meeting agenda will include (a) review of operations for the Committee members, (b) overview of the proposed scientific questions identified by the Departments to be examined by the Committee, (c) presentations on the evidence-based approaches for reviewing the scientific evidence, and (d) plans for future Committee work.

Meeting Registration: The meeting is open to the public. The meeting will be accessible online via livestream and recorded for later viewing. Registration is required for the livestream. To register, go to *www.DietaryGuidelines.gov* and click on the link for ''Meeting Registration.'' Online registration begins on January 18, 2023 and ends on February 10, 2023. To request a sign language interpreter or other special accommodations, please email *dietaryguidelines@hhs.gov* by February 5, 2023. All registrants will be asked to provide their name, affiliation, email address, and days attending. After registration, individuals will receive livestream access information via email.

Public Comments and Meeting Documents: Written comments from the public will be accepted throughout the Committee's deliberative process for the next approximately two years. Opportunities to present oral comments to the Committee will be provided at a future meeting.

- *Online (preferred method):* Follow the instructions for submitting comments at *www.regulations.gov.* Comments submitted electronically, including attachments, will be posted to Docket OASH–2022–0021.
- *Mail:* Mail/courier to Janet M. de Jesus, MS, RD, HHS/OASH/ODPHP, 1101 Wootton Parkway, Suite 420, Rockville, MD 20852. For written/paper submissions, ODPHP will post your comment, as well as any attachments, to *www.regulations.gov.*

Meeting materials for each meeting will be accessible at *www.DietaryGuidelines.gov.* Materials may be requested by email at *dietaryguidelines@hhs.gov.*

Paul Reed,

Deputy Assistant Secretary for Health, Office of Disease Prevention and Health Promotion.

[FR Doc. 2022–28510 Filed 12–30–22; 8:45 am]

BILLING CODE 4150–32–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, National Institute of Mental Health.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(6), title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Mental Health, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Mental Health.

Date: February 2, 2023.

Time: 11:00 a.m. to 5:45 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: Porter Neuroscience Research Center, Building 35A, 35 Convent Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jennifer E Mehren, Ph.D., Scientific Advisor, Division of Intramural Research Programs, National Institute of Mental Health, NIH, 35A Convent Drive, Room GE 412, Bethesda, MD 20892–3747, 301–496–3501, *mehrenj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: December 27, 2022.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28485 Filed 12–30–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, NIA.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL INSTITUTE ON AGING, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIA.

Date: October 24–26, 2023.

Closed: October 24, 2023, 8:00 a.m. to 8:45 a.m.

Agenda: Executive Session.

Place: National Institutes of Health, National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Open: October 24, 2023, 9:00 a.m. to 1:00 p.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institutes of Health, National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Closed: October 25, 2023, 9:00 a.m. to 9:45 a.m.

Agenda: Executive Session.

Place: National Institutes of Health, National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Closed: October 26, 2023, 9:00 a.m. to 11:30 a.m.

Agenda: Executive Session.

Place: National Institutes of Health, National Institute on Aging Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Contact Person: Luigi Ferrucci, Ph.D., M.D., Scientific Director, National Institute on Aging, 251 Bayview Boulevard, Suite 100, Room 4C225, Baltimore, MD 21224, 410–558–8110, *LF27Z@NIH.GOV*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 27, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28484 Filed 12–30–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Center for Scientific Review Special Emphasis Panel; Special Topics in HIV Coinfections and HIV Associated Cancers.

Date: January 17, 2023.

Time: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Joshua David Powell, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–594–5370; *josh.powell@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. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 27, 2022.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28515 Filed 12–30–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors, NIA.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL INSTITUTE ON AGING, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIA.

Date: May 23–25, 2023.

Closed: May 23, 2023, 9:00 a.m. to 9:45 a.m.

Agenda: Executive Session.

Place: National Institutes of Health, National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Open: May 23, 2023, 9:45 a.m. to 11:30 a.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institutes of Health, National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Closed: May 23, 2023, 11:30 a.m. to 1:00 p.m.

Agenda: Executive Session.

Place: National Institutes of Health, National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Closed: May 24, 2023, 10:00 a.m. to 12:00 p.m.

Agenda: Executive Session.

Place: National Institutes of Health, National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Closed: May 25, 2023, 8:00 a.m. to 11:30 a.m.

Agenda: Executive Session.

Place: National Institutes of Health, National Institute on Aging, Biomedical Research Center, 251 Bayview Boulevard, Baltimore, MD 21224 (Virtual Meeting).

Contact Person: Luigi Ferrucci, Ph.D., M.D., Scientific Director, National Institute on Aging, 251 Bayview Boulevard, Suite 100, Room 4C225, Baltimore, MD 21224 410–558–8110 *LF27Z@NIH.GOV*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 27, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28487 Filed 12–30–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 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 on Aging Special Emphasis Panel; AI and ML strategies.

Date: January 27, 2023.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nijaguna Prasad, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg, Suite 2W200, Bethesda, MD 20892, (301) 496–9667, *prasadnb@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 27, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–28486 Filed 12–30–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of HHS-Certified Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine and Oral Fluid Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITFs) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs using Urine or Oral Fluid (Mandatory Guidelines).

FOR FURTHER INFORMATION CONTACT: Anastasia Donovan, Division of Workplace Programs, SAMHSA/CSAP, 5600 Fishers Lane, Room 16N06B, Rockville, Maryland 20857; 240–276–2600 (voice); *Anastasia.Donovan@samhsa.hhs.gov* (email).

SUPPLEMENTARY INFORMATION: In accordance with section 9.19 of the Mandatory Guidelines, a notice listing all currently HHS-certified laboratories and IITFs is published in the **Federal Register** during the first week of each month. If any laboratory or IITF certification is suspended or revoked, the laboratory or IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory or IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the internet at *https://www.samhsa.gov/workplace/resources/drug-testing/certified-lab-list.*

The Department of Health and Human Services (HHS) notifies federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITFs) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines) using Urine and of the laboratories currently certified to meet the standards of the Mandatory Guidelines using Oral Fluid.

The Mandatory Guidelines using Urine were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November 25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); April 30, 2010 (75 FR 22809); and on January 23, 2017 (82 FR 7920).

The Mandatory Guidelines using Oral Fluid were first published in the **Federal Register** on October 25, 2019 (84 FR 57554) with an effective date of January 1, 2020.

The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71 and allowed urine drug testing only. The Mandatory Guidelines using Urine have since been revised, and new Mandatory Guidelines allowing for oral fluid drug testing have been published. The Mandatory Guidelines require strict standards that laboratories and IITFs must meet in order to conduct drug and specimen validity tests on specimens for federal agencies. HHS does not allow IITFs to conduct oral fluid testing.

To become certified, an applicant laboratory or IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory or IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and IITFs in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines using Urine and/or Oral Fluid. An HHS-certified laboratory or IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA), which attests

that the test facility has met minimum standards. HHS does not allow IITFs to conduct oral fluid testing.

HHS-Certified Laboratories Approved To Conduct Oral Fluid Drug Testing

In accordance with the Mandatory Guidelines using Oral Fluid dated October 25, 2019 (84 FR 57554), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on oral fluid specimens:

At this time, there are no laboratories certified to conduct drug and specimen validity tests on oral fluid specimens.

HHS-Certified Instrumented Initial Testing Facilities Approved To Conduct Urine Drug Testing

In accordance with the Mandatory Guidelines using Urine dated January 23, 2017 (82 FR 7920), the following HHS-certified IITFs meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Dynacare, 6628 50th Street NW, Edmonton, AB Canada T6B 2N7, 780–784–1190 (Formerly: Gamma-Dynacare Medical Laboratories)

HHS-Certified Laboratories Approved To Conduct Urine Drug Testing

In accordance with the Mandatory Guidelines using Urine dated January 23, 2017 (82 FR 7920), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Alere Toxicology Services, 1111 Newton St., Gretna, LA 70053, 504–361–8989/800–433–3823 (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.)

Alere Toxicology Services, 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130 (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.)

Clinical Reference Laboratory, Inc., 8433 Quivira Road, Lenexa, KS 66215–2802, 800–445–6917

Desert Tox, LLC, 5425 E Bell Rd., Suite 125, Scottsdale, AZ 85254, 602–457–5411/623–748–5045

DrugScan, Inc., 200 Precision Road, Suite 200, Horsham, PA 19044, 800–235–4890

Dynacare*, 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519–679–1630 (Formerly: Gamma-Dynacare Medical Laboratories)

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662–236–2609

Laboratory Corporation of America Holdings, 7207 N Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986 (Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Corporation of America Holdings, 1904 TW Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984 (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group)

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339 (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center)

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–873–8845 (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.)

Legacy Laboratory Services Toxicology, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295

MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112, 651–636–7466/800–832–3244

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612–725–2088. Testing for Veterans Affairs (VA) Employees Only

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942 (Formerly: Centinela Hospital Airport Toxicology Laboratory)

Phamatech, Inc., 15175 Innovation Drive, San Diego, CA 92128, 888–635–5840

Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403, 610–631–4600/877–642–2216 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085, Testing for Department of Defense (DoD) Employees Only

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on January 23, 2017 (82 FR 7920). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Anastasia Marie Donovan,

Public Health Advisor, Division of Workplace Programs.

[FR Doc. 2022–28506 Filed 12–30–22; 8:45 am]

BILLING CODE 4160–20–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2022–0047]

Port Access Route Study: Approaches to Maine, New Hampshire, and Massachusetts

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability of draft report; request for comments.

SUMMARY: On March 31, 2022, the Coast Guard published a notice of study and request for comments announcing commencement of an Approaches to Maine, New Hampshire, and Massachusetts Port Access Route Study (MNMPARS). This notice announces the availability of a draft report for public review and comment. The Coast Guard is seeking public comments on the content, proposed routing measures, and development of the report. The recommendations of this study may lead

to future rulemakings or appropriate international agreements.

DATES: All comments and related material must be received on or before February 2, 2022. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight, Eastern Daylight Time, on the last day of the comment period.

ADDRESSES: You may submit comments identified by docket number USCG–2022–0047 using the Federal eRulemaking Portal (*http://www.regulations.gov*). See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on viewing the draft report and submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice, call or email LTJG Thomas Davis, First Coast Guard District (dpw), U.S. Coast Guard: telephone (617) 223–8632, email *SMB-D1Boston-MNMPARS@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

DHS Department of Homeland Security
MNMPARS Approaches to Maine, New Hampshire, and Massachusetts Port Access Route Study
PARS Port Access Route Study
TSS Traffic Separation Scheme
USCG United States Coast Guard

II. Background and Purpose

Under section 70003 of title 46 of the United States Code (46 U.S.C. 70003(c)), the Commandant of the U.S. Coast Guard (USCG) may designate necessary fairways and traffic separation schemes (TSSs) to provide safe access routes for vessels proceeding to and from U.S. ports. The designation of fairways and TSSs recognizes the paramount right of navigation over all other uses in the designated areas.

Before establishing or adjusting fairways or TSSs, the USCG must conduct a Port Access Route Study (PARS), *i.e.,* a study of potential traffic density and the need for safe access routes for vessels. Through the study process, the USCG must coordinate with federal, state, tribal, and foreign state agencies (where appropriate) and consider the views of maritime community representatives, environmental groups, and other stakeholders. The primary purpose of this coordination is, to the extent practicable, to reconcile the need for safe access routes with other reasonable waterway uses such as anchorages, construction, operation of renewable energy facilities, marine sanctuary operations, commercial and recreational activities, and other uses.

On March 31, 2022, the Coast Guard commenced an Approaches to Maine, New Hampshire, and Massachusetts Port Access Route Study (MNMPARS) by publishing a notice of study and request for comments in the **Federal Register** (87 FR 18800). The purpose of the MNMPARS is to evaluate the adequacy of existing vessel routing measures and determine whether additional vessel routing measures are necessary for port approaches to Maine, New Hampshire, and Massachusetts and international and domestic transit areas in the First Coast Guard District area of responsibility.

On June 28, 2022, the First Coast Guard District published a 60-day Notification of Inquiry and Public Meetings; request for comments (87 FR 38418). This supplemental notice announced a schedule for six public meetings and sought additional public comments concerning more specific navigational safety issues. The notification requested responses to several general and port-specific questions that were based on analysis of historical traffic data and public comments received from the original Notice of Study. Of the six public meetings, four were conducted in both in-person and virtual formats, one was in-person only, and one was virtual only.

During both comment periods a total of 30 comments were submitted by representatives of the maritime community, Federal and State governmental agencies, environmental groups, non-governmental organizations, and other stakeholders. Comments were provided during public meetings, via email, and submitted directly to the electronic docket. Oral comments provided during public meetings can be viewed in the individual meeting recordings posted to the ''Documents'' section of the public docket.

The USCG is opening this third MNMPARS comment period to facilitate transparent public feedback on the content and findings included in the draft report of this study.

III. Information Requested

The USCG is seeking all public comments on the content and recommendations contained in the study draft report. All comments received will be reviewed and considered before a final version of the PARS is announced in the **Federal Register**.

IV. Public Participation and Request for Comments

We encourage you to participate in the study process by commenting on the content and development of the draft report.

A. *Viewing the draft version of the report:* To view the draft version of the MNMPARS report in the docket, go to *http://www.regulations.gov,* and insert ''USCG–2022–0047'' in the ''search box''. Click ''Search''. Then, scroll to find the document entitled ''DRAFT REPORT Approaches to Maine, New Hampshire, and Massachusetts Port Access Route Study'' under the document type ''Supporting & Related Material.''

B. *Submitting Comments:* To submit your comment online, go to *http://www.regulations.gov,* and insert ''USCG–2022–0047'' in the ''search box.'' Click ''Search''. Then scroll to find the most recent ''notice'' entitled ''Port Access Route Study: Approaches to Maine, New Hampshire, and Massachusetts'' and click ''Comment.'' The ''Comment'' button can be found on the following pages:

- Docket Details page when a document within the docket is open for comment,
- Document Details page when the document is open for comment, and
- Document Search Tab with all search results open for comment displaying a ''Comment'' button.

Clicking ''Comment'' on any of the above pages will display the comment form. You can enter your comment on the form, attach files (maximum of 20 files up to 10MB each), and choose whether to identify yourself as an individual, an organization, or anonymously. Be sure to complete all required fields depending on which identity you have chosen. Once you have completed all required fields and chosen an identity, the ''Submit Comment'' button is enabled. Upon completion, you will receive a Comment Tracking Number for your comment. For additional step by step instructions, please see the Frequently Asked Questions page on *http://www.regulations.gov* or by clicking *https://www.regulations.gov/faq.*

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

We review all comments and materials received during the comment

period, but we may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

C. *How do I find and browse for posted comments on Regulations.gov?* On the previous version of *Regulations.gov,* users browsed for comments on the Docket Details page. However, since comments are made on individual documents, not dockets, new *Regulations.gov* organizes comments under their corresponding document. To access comments and documents submitted to this draft version of the study report go to *http://www.regulations.gov* and insert ''USCG–2022–0047'' in the ''search box.'' Click ''Search.'' Then scroll down to and click on the most recent ''notice'' entitled ''Port Access Route Study: Approaches to Maine, New Hampshire, and Massachusetts.'' This will open to the ''Document Details'' page. Then click on the ''Browse Comments'' tab. On the comment tab, you can search and filter comments. Note: If no comments have been posted to a document, the ''Comments'' tab will not appear on the Document Details page.

D. If you need additional help navigating the new Regulations.gov. For additional step by step instructions to submit a comment or to view submitted comments or other documents please see the Frequently Asked Questions (FAQs) at *http://www.regulations.gov/faqs* or call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

E. *Privacy Act:* Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act, system of records notice regarding DHS's eRulemaking in the March 11, 2020, issue of the **Federal Register** (85 FR 14226).

V. Future Actions

Any comments received by the comment period end date will be reviewed and considered before the final report of the MNMPARS is announced in the **Federal Register**.

This notice is published under the authority of 5 U.S.C. 552(a).

Dated: December 22, 2022.

J. W. Mauger,

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

[FR Doc. 2022–28482 Filed 12–30–22; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2010–0164]

National Boating Safety Advisory Committee; January 2023 Virtual Meeting

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Notice of Federal Advisory Committee virtual meeting.

SUMMARY: The National Boating Safety Advisory Committee (Committee) and its Subcommittees will meet virtually to discuss matters relating to national boating safety. The virtual meeting will be open to the public.

DATES:

Meeting: The Committee and its Subcommittees will meet on Wednesday, January 18, 2023, from noon until 5 p.m. Eastern Standard Time (EST). This virtual meeting may adjourn early if the Committee has completed its business.

Comments and supporting documentation: To ensure your comments are received by Committee members before the virtual meeting, submit your written comments no later than January 11, 2023.

ADDRESSES: To join the virtual meeting or to request special accommodations, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 1 p.m. EST on January 16, 2023. The number of virtual lines are limited and will be available on a first-come, first-served basis.

Pre-registration information: Pre-registration is required for attending virtual meeting. You must request attendance by contacting the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice. You will receive a response with attendance instructions.

The National Boating Safety Advisory Committee is committed to ensuring all participants have equal access regardless of disability status. If you require reasonable accommodation due to a disability to fully participate, please email Mr. Jeff Decker at *NBSAC@uscg.mil* or call 202–372–1507 as soon as possible.

Instructions: You are free to submit comments at any time, including orally at the meeting as time permits, but if you want Committee members to review your comments before the meeting, please submit your comments no later than January 11, 2023. We are particularly interested in comments on the issues in the ''Agenda'' section below. We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* contact the individual in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. You must include the docket number [USCG–2010–0164]. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. You may wish to review the privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020). If you encounter technical difficulties with comment submission, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Docket Search: Documents mentioned in this notice as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign-up for email alerts, you will be notified when comments are posted.

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Decker, Alternate Designated Federal Officer of the National Boating Safety Advisory Committee, 2703 Martin Luther King Jr. Ave. SE, Stop 7509, Washington, DC 20593–7509, telephone 202–372–1507 or via email at *NBSAC@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given pursuant the *Federal Advisory Committee Act,* (5 U.S.C. Appendix). The Committee was established on December 4, 2018, by section 601 of the *Frank LoBiondo Coast Guard Authorization Act of 2018,* Public Law 115–282, 132 Stat. 4192, and is codified in 46 U.S.C. 15105. The Committee operates under the provisions of the *Federal Advisory Committee Act* (5 U.S.C. Appendix), and 46 U.S.C. 15109. The National Boating Safety Advisory Committee provides advice and recommendations to the Secretary of Homeland Security via the Commandant of the United States Coast Guard on matters relating to national boating safety. This notice is issued under the authority of 46 U.S.C. 15109(a).

Agenda

The agenda for the National Boating Safety Advisory Committee meeting is as follows:

(1) Call to order.

(2) Roll call of Committee members and determination of quorum.

(3) Opening remarks.

(4) Conflict of interest statement.

(5) Receipt and discussion of the following reports from the Office of Auxiliary and Boating Safety:

(a) Division Chief report.

(b) Right Whale Speed Rule.

(c) Presentation and discussion on the 2022–2027 National Recreational Boating Strategic Plan.

(d) Human Factors.

(6) Report of the Boats and Associated Equipment Subcommittee on Task 2022–01.

(7) Report of the Strategic Planning Subcommittee on Task 2022–02.

(8) Report of the Prevention Through People Subcommittee on Task 2022–03.

(9) Discussion of Subcommittee recommendations.

(10) Committee discussion on boating safety related topics.

(11) Public comment period.

(12) Closing remarks.

(13) Adjournment of meeting.

A copy of all meeting documentation will be available at *https://homeport.uscg.mil/Lists/Content/DispForm.aspx?ID=75937&Source=/Lists/Content/DispForm.aspx?ID=75937,* no later than January 11, 2023. Alternatively, you may contact Mr. Jeff Decker as noted in the **FOR FURTHER INFORMATION** section above.

There will be a public comment period from approximately 3:00 p.m. until 3:15 p.m. (EST). Speakers are requested to limit their comments to 3 minutes. Please note that the public comment period may end before the period allotted, following the last call for comments.

Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section above to register as a speaker.

Dated: December 27, 2022.

Amy M. Beach,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2022–28500 Filed 12–30–22; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2022–0033; OMB No. 1660–NW160]

Agency Information Collection Activities: Proposed Collection; Comment Request; Floodplain Administrator (FPA) National Training Assessment

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of new collection and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a new information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning the training needs of National Flood Insurance Program (NFIP) Floodplain Administrators (FPAs) throughout the United States.

DATES: Comments must be submitted on or before March 6, 2023.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at *www.regulations.gov* under Docket ID FEMA–2022–0033. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Michael Gumpert, National Floodplain Management Training Coordinator, FIMA, Floodplain Management Division, *Michael.Gumpert@fema.dhs.gov,* 202–646–2607. You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP) is authorized by the National Flood Insurance Act of 1968 (title XIII of Pub. L. 90–448, as amended, 42 U.S.C. 4001 *et seq.*). The general purpose of the NFIP is to create a voluntary program of flood insurance that can promote the public interest by providing appropriate protection against the perils of flood losses and encouraging sound land use by minimizing exposure of property to flood losses; and integrate the objectives of a flood insurance program. Nationally, as of December 2021, over 22,000 communities in 56 states and jurisdictions participate in the NFIP. Each ''eligible or participating community,'' shall legislatively (1) Appoint or designate the agency or official with the responsibility, authority, and means to implement the commitments of application to the National Flood Insurance Program and (2) Designate the official responsible to submit a report to the Federal Insurance Administrator concerning the community participation in the Program, including, but not limited to the development and implementation of flood plain management regulations. It is common for eligible and participating communities to assign the FPA role to employees who are also simultaneously responsible for other roles such as Police Chief, Town Clerk, Grants Manager, Finance Manager. FPAs are a diverse group with varied socio-economic backgrounds, needs, challenges, abilities, schedules, learning styles, geographies, and resources. A Training Strategy is needed to direct FEMA's limited FPA Training budget into training solutions that address the unique needs of FPAs as well as their varied socio-economic backgrounds, challenges, abilities, schedules, learning styles, geographies, and resources to advance equity, professional development, and retention of FPAs. To be effective, the FPA Training Strategy must be grounded in an accurate understanding FPAs' varied socio-economic backgrounds, needs, challenges, abilities, schedules, learning styles, geographies, and resources. To achieve this understanding, a Training Needs Assessment must be performed. This data has not been collected previously.

FEMA is requesting a three-year clearance to collect information from FPAs regarding their training needs, floodplain management experiences, and demographics to produce improved outcomes for the NFIP. The data will be used to help FEMA, State, Tribal, and Territorial NFIP Offices, and Floodplain Associations to develop equitable

training strategies and solutions that effectively and efficiently address the diverse abilities, schedules, learning styles, geographies and resources of FPAs who implement this Federal Government program on behalf of their local communities. The information collection, to be administered by an independent, third-party research organization, will allow for a data-informed approach to understanding the needs and expectations of an important and specific group of FEMA partners and customers for their development and program administration. By using this approach, FEMA will be able to gain important insights about FPAs and how to improve its offerings and support as well as to allocate resources more effectively. The ultimate objective is to reduce the socio-economic impact of floods through better preparation of FPAs to assist communities adopt and enforce floodplain management regulations that help mitigate flooding effects and thus support property owners, renters, and businesses to recover faster after a flooding event.

The primary law that supports the information collection efforts is the Government Performance and Results Act of 1993, 31 U.S.C. 1116, which has as one of its purposes ''improve Federal programs effectiveness and public accountability by promoting a new focus on results, service quality, and customer satisfaction.''

Collection of Information

Title: Floodplain Administrator (FPA) National Training Needs Assessment.

Type of Information Collection: New information collection.

OMB Number: 1660–NW160.

FEMA Forms: FEMA Form FF–206–FY–22–159, Floodplain Administrator Training Needs Assessment.

Abstract: The online survey will collect information from Floodplain Administrators regarding their training needs, floodplain management experiences, and demographics. The data will be used to help FEMA, State, Tribal, and Territorial NFIP Offices, and Floodplain Associations to develop training strategies and solutions that effectively and efficiently address those needs to produce improved outcomes for the National Flood Insurance Program.

Affected Public: State, local, or Tribal government.

Estimated Number of Respondents: 6,323.

Estimated Number of Responses: 6,323.

Estimated Total Annual Burden Hours: 3,161.5.

Estimated Total Annual Respondent Cost: $124,310.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $420,329.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2022–28513 Filed 12–30–22; 8:45 am]

BILLING CODE 9111–47–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2022–0038; OMB No. 1660–NW144]

Agency Information Collection Activities: Proposed Collection; Comment Request; FEMA Region II Community and Faith-Based Organizations Needs/Capabilities and Continuity Program Survey

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: 60-Day notice of new collection and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a new information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning a series of surveys on continuity planning and organizational needs and capabilities from various stakeholders.

DATES: Comments must be submitted on or before March 6, 2023.

ADDRESSES: To avoid duplicate submissions to the docket, please submit comments at *www.regulations.gov* under Docket ID FEMA–2022–0038. Follow the instructions for submitting comments.

All submissions received must include the agency name and Docket ID, and will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Jeremy Brooks, Management and Program Analyst, at *jeremy.brooks@fema.dhs.gov* or 202–355–4981. You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov*.

SUPPLEMENTARY INFORMATION: The legal basis for the collection off the following information includes titles 6 and 42 of the United States Code. The sections in title 6 include 313, 314, and 317, which provides legal authority and responsibilities to the Federal Emergency Management Agency (FEMA) and to its respective regional offices to work with state, local, territorial and Tribal (SLTT) governments and private non-profits (PNP) with disaster preparedness. The sections in title 42 include 5131(a), 5131(b), 5195, 5195(a), 5196(e), and 5196(f). The identified sub sections of 5131 provides legal authority to FEMA Federal and state disaster preparedness programs via utilization of services of other agencies and technical assistance. Sections 5195 and 5195(a) vests responsibility for emergency preparedness in the Federal Government and provides definitions for relevant terms. Sections 5196(e) and 5196(f) provides detailed functions of administration for emergency preparedness measures and training programs. All these legal authorities affirm the authority of FEMA Region II to collect this information and the critical need to do so.

Additionally, the Presidential Policy Directive (PPD–8)—National Preparedness, identifies core capabilities to track and improve on to reach the National Preparedness Goal. The proposed collection works to improve tracking of core capabilities across FEMA Region II to most efficiently use resources to meet the National Preparedness Goal.

The Federal Emergency Management Agency (FEMA) National Preparedness Division (NPD) is responsible for educating and securing the nation with the capabilities required across the whole community to prevent, protect against, mitigate, respond to, and recover from the threats and hazards that pose the greatest risk. One of the ways FEMA accomplishes this is through conducting exercises, trainings, and webinars where stakeholders like SLTT governments and PNP entities participate.

These delivery methodology of these programs to a variety of stakeholders are always evolving and continuously improving to meet stakeholder's needs. Likewise, as internal agency policy changes, so can delivery methods. Specifically for FEMA, this includes release of the 2022–2026 FEMA Strategic Plan. Strategic Goal #3 includes Promote and Sustain a Ready FEMA and Prepared Nation, and the objectives 3.1—Strengthen the Emergency Management Workforce and 3.2—Posture FEMA to Meet Current and Emergency Threats. This strategic goal and its associated objectives are well aligned to priorities of FEMA Region II's National Preparedness Division, with internal goals of data-driven capacity building and a more equitable approach to program delivery.

By better gauging stakeholder capacity and needs at an organizational level we can better provide programs and services to our stakeholders to ultimately improve preparedness in FEMA Region II.

Authorities for the collection of information include the following:

Presidential Policy Directive (PPD–8), National Preparedness; 6 U.S.C. 313, 314, 317(c); 42 U.S.C. 5195, 5195a, 5196(e) and (f); 42 U.S.C. 5131(a) and (b).

Collection of Information

Title: FEMA Region II Community and Faith-Based Organizations Needs/Capabilities and Continuity Program Survey.

Type of Information Collection: New information collection.

OMB Number: 1660–NW144.

FEMA Forms: FEMA Form FF–008–FY–22–128, Region II Community and Faith-Based Organizations Needs/Capabilities Feedback Survey.

Abstract: FEMA Region II (NJ, NY, PR, VI) is working to better assess the ability of stakeholders' emergency response capabilities to better target program design and delivery in the future. These voluntary survey questions are designed to collect actionable data at the organizational level and allows for a better understanding of potential future collaborations.

Affected Public: Not-for-profit institutions; State, Local, or Tribal Government;

Estimated Number of Respondents: 1,862.

Estimated Number of Responses: 1,862.

Estimated Total Annual Burden Hours: 466.

Estimated Total Annual Respondent Cost: $19,086.

Estimated Respondents' Operation and Maintenance Costs: $0.

Estimated Respondents' Capital and Start-Up Costs: $0.

Estimated Total Annual Cost to the Federal Government: $9,437.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Millicent Brown Wilson,

Records Management Branch Chief, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2022–28514 Filed 12–30–22; 8:45 am]

BILLING CODE 9111–27–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Immigration and Customs Enforcement

[Docket No. ICEB–2022–0013]

RIN 1653–ZA33

Employment Authorization for Yemeni F–1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the Crisis in Yemen

AGENCY: U.S. Immigration and Customs Enforcement, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice announces that the Secretary of Homeland Security (Secretary) is suspending certain regulatory requirements for F–1 nonimmigrant students whose country of citizenship is Yemen, regardless of country of birth (or individuals having no nationality who last habitually resided in Yemen), and who are experiencing severe economic hardship as a direct result of the crisis in Yemen. The Secretary is taking action to provide relief to these Yemeni students who are lawful F–1 nonimmigrant students so the students may request employment authorization, work an increased number of hours while school is in session, and reduce their course load while continuing to maintain their F–1 nonimmigrant student status. The U.S. Department of Homeland Security (DHS) will deem an F–1 nonimmigrant student who receives employment authorization by means of this notice to be engaged in a ''full course of study'' for the duration of the employment authorization, if the nonimmigrant student satisfies the minimum course load requirement described in this notice.

DATES: This notice is effective from March 4, 2023, through September 3, 2024.

FOR FURTHER INFORMATION CONTACT: Sharon Snyder, Unit Chief, Policy and Response Unit, Student and Exchange Visitor Program, MS 5600, U.S. Immigration and Customs Enforcement, 500 12th Street SW, Washington, DC 20536–5600; email: *sevp@ice.dhs.gov,* telephone: (703) 603–3400. This is not a toll-free number. Program information can be found at *https://www.ice.gov/sevis/.*

SUPPLEMENTARY INFORMATION:

What action is DHS taking under this notice?

The Secretary is exercising the authority under 8 CFR 214.2(f)(9) to temporarily suspend the applicability of certain requirements governing on-campus and off-campus employment for F–1 nonimmigrant students whose country of citizenship is Yemen, regardless of country of birth (or individuals having no nationality who last habitually resided in Yemen), who are lawfully present in the United States in F–1 nonimmigrant student status on the date of publication of this notice, and who are experiencing severe economic hardship as a direct result of the crisis in Yemen. The original notice, which applied to F–1 nonimmigrant students who met certain criteria, including having been lawfully present in the United States in F–1 nonimmigrant status on September 4, 2021, became effective from September 4, 2021, through March 3, 2023. *See* 86 FR 36288 (July 9, 2021). Effective with this publication, suspension of the employment limitations is available through September 3, 2024, for those who are in lawful F–1 nonimmigrant status as of January 3, 2023. DHS will deem an F–1 nonimmigrant student granted employment authorization through this notice to be engaged in a ''full course of study'' for the duration of the employment authorization, if the student satisfies the minimum course load set forth in this notice.[1] *See* 8 CFR 214.2(f)(6)(i)(F).

Who is covered by this notice?

This notice applies exclusively to F–1 nonimmigrant students who meet all of the following conditions:

(1) Are a citizen of Yemen, regardless of country of birth (or an individual having no nationality who last habitually resided in Yemen);

(2) Were lawfully present in the United States in F–1 nonimmigrant status under section 101(a)(15)(F)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(F)(i), on the date of publication of this notice;

(3) Are enrolled in an academic institution that is Student and Exchange Visitor Program (SEVP)-certified for enrollment for F–1 nonimmigrant students;

(4) Are currently maintaining F–1 nonimmigrant status; and

(5) Are experiencing severe economic hardship as a direct result of the crisis in Yemen.

This notice applies to F–1 nonimmigrant students in an approved private school in kindergarten through grade 12, public school grades 9 through 12, and undergraduate and graduate education. An F–1 nonimmigrant student covered by this notice who transfers to another SEVP-certified academic institution remains eligible for the relief provided by means of this notice.

Why is DHS taking this action?

DHS is taking action to provide relief to Yemeni F–1 nonimmigrant students experiencing severe economic hardship due to the ongoing armed conflict and continued crisis in Yemen. Based on its review of country conditions in Yemen and input received from the U.S. Department of State, DHS is taking action to allow eligible F–1 nonimmigrant students from Yemen to request employment authorization, work an increased number of hours while school is in session, and reduce their course load while continuing to maintain F–1 nonimmigrant student status.

Previously DHS took action to provide temporary relief to F–1 nonimmigrant students whose country of citizenship is Yemen, regardless of country of birth (or individuals having no nationality who last habitually resided in Yemen), and who experienced severe economic hardship because of the crisis in Yemen. *See* 86 FR 36288 (July 9, 2021). It has enabled these F–1 nonimmigrant students to obtain employment authorization, work an increased number of hours while school was in session, and reduce their course load, while continuing to maintain their F–1 nonimmigrant student status.

DHS reviewed conditions in Yemen and determined that suspending certain employment authorization requirements for eligible nonimmigrant students is again warranted due to the ongoing civil war and continued crisis, which has deepened Yemen's difficult economic and humanitarian situation. While a truce backed by the United Nations (UN) came into effect on April 2, 2022,[2] the truce expired on October 2, 2022,[3] and the future of the Yemen conflict continues to be uncertain.

The UN considers the situation in Yemen to be the most widespread and dire humanitarian crisis in the world with an estimated 24.1 million people (approximately 80% of the population) needing humanitarian assistance as a result of armed conflict in the country.[4] The number of those who have died as a result of the conflict is now estimated at over 377,000 individuals.[5] The protracted armed conflict has resulted in high levels of food insecurity, limited access to water and medical care,[6] and the large-scale destruction of Yemen's infrastructure and cultural heritage.[7]

The United Nations High Commissioner for Refugees (UNHCR) has recorded 73,077 Yemeni refugees and asylum-seekers in neighboring countries.[8] Over 4 million people have been internally displaced within Yemen, 286,000 of those in 2021 alone.[9] The situation of internally displaced persons (IDPs) did not improve despite the truce.

The conflict in Yemen has directly affected the physical security of the civilian population throughout the country.[10] Active conflict has put civilians at significant risk of harm—both directly from the protracted armed conflict and from conflict-related

[1] Because the suspension of requirements under this notice applies throughout an academic term during which the suspension is in effect, DHS considers an F–1 nonimmigrant student who engages in a reduced course load or employment (or both) after this notice is effective to be engaging in a ''full course of study,'' *see* 8 CFR 214.2(f)(6), and eligible for employment authorization, through the end of any academic term for which such student is matriculated as of September 3, 2024, provided the student satisfies the minimum course load requirements in this notice. DHS also considers students who engage in online coursework pursuant to U.S. Immigration and Customs Enforcement (ICE) coronavirus disease 2019 (COVID–19) guidance for nonimmigrant students to be in compliance with regulations while such guidance remains in effect. *See* ICE Guidance and Frequently Asked Questions on COVID–19, Nonimmigrant Students & SEVP-Certified Schools: Frequently Asked Questions, *https://www.ice.gov/coronavirus* (last visited Oct. 14, 2022).

[2] Yemen truce renewed for another two months, UN News, Aug. 2, 2022, available at: *https://news.un.org/en/story/2022/08/1123832* (last visited Aug. 22, 2022).

[3] Department of State, Press Release, UN Truce Expiration in Yemen, Oct. 3, 2022, available at: *https://www.state.gov/un-truce-expiration-in-yemen/* (last visited Oct. 7, 2022).

[4] The United Nations in Yemen, available at: *https://yemen.un.org/en/about/about-the-un,* (last visited Aug. 31, 2022).

[5] Yemen war deaths will reach 377,000 by end of the year: UN, Al-Jazeera, Nov. 23, 2021, available at: *https://www.aljazeera.com/news/2021/11/23/un-yemen-recovery-possible-in-one-generation-if-war-stops-now* (last visited Aug. 31, 2022).

[6] Yemen's Tragedy: War, Stalemate, and Suffering, Council on Foreign Relations, Aug. 22, 2022, available at: *https://www.cfr.org/backgrounder/yemen-crisis* (last visited Aug. 31, 2022).

[7] Heritage at Risk in Yemen, UNESCO, available at: *https://en.unesco.org/galleries/heritage-risk-yemen* (last visited Aug. 31, 2022).

[8] Refugee Data Finder, The UN Refugee Agency, UNHCR, available at: *https://www.unhcr.org/refugee-statistics/download/?url=Gb4fe1* (last visited Sept. 1, 2022).

[9] Yemen Fact Sheet, UNHCR, June, 2022, available at: *https://reporting.unhcr.org/document/3030* (last visited Sept. 1, 2022).

[10] World Report—Yemen, Human Rights Watch World Report, available at: *https://www.hrw.org/world-report/2022/country-chapters/yemen?gclid=EAIaIQobChMIo86n6cvx-QIVL3FvBB3bpQduEAAYASAAEgI9C_D_BwE* (last visited Aug. 31, 2022).

externalities.[11] Despite the truce, Explosive Remnants of War, which consist of Unexploded Ordinances, Improvised Explosive Devices and landmines, remain a threat to civilians in Yemen.[12] Terrorist organizations operating inside of Yemen also pose a danger to civilians.[13]

Currently in Yemen, 19.7 million people lack access to basic health services.[14] Only 51 percent of the health facilities in Yemen are fully functioning and of those, most lack operational specialists, equipment, and basic medicines.[15] These gaps impact services for the most vulnerable, especially women and children.'' [16] The World Food Program (WFP) estimates that 17.4 million Yemenis (or more than 50 percent of the population) are food insecure, including 7.3 million needing emergency assistance.[17] The International Committee of the Red Cross (ICRC) estimates that 17.8 million people in Yemen (approximately 56% of the population) do not currently have access to clean water and sanitation.[18] The condition of Yemen's water supply also had a direct impact on major health outbreaks, like the cholera outbreak of 2016,[19] since cholera is an infectious disease that is caused by drinking unclean or unsanitary water or food.[20] Though there has been a significant decrease in the number of Acute Watery Diarrhea/suspected cholera cases in 2022 compared with the same period of 2021,[21] the cholera outbreak in Yemen was considered to be one of the worst outbreaks of the disease in modern times and affected all other major health crises including COVID–19, and widespread malnutrition.[22]

The conflict continues to damage civilian infrastructure including houses, hospitals, agricultural infrastructure, energy infrastructure, roads, bridges and water systems.[23] Yemen is highly dependent on food, fuel, and medicine imports.[24] Despite the truce, the World Bank reported that in Yemen as of April 14, 2022 ''[e]conomic conditions continue to deteriorate, and the acute humanitarian crisis persists.'' [25] Further, the conflict in Ukraine has negatively impacted the ability of Yemenis to import foodstuffs.[26]

As of December 20, 2022, approximately 325 F–1 nonimmigrant students from Yemen are enrolled at SEVP-certified academic institutions in the United States. Given the extent of the crisis in Yemen, affected students whose primary means of financial support comes from Yemen may need to be exempt from the normal student employment requirements to continue their studies in the United States. The ongoing crisis has made it unfeasible for many students to safely return to Yemen for the foreseeable future. Without employment authorization, these students may lack the means to meet basic living expenses.

What is the minimum course load requirement to maintain valid F–1 nonimmigrant status under this notice?

Undergraduate F–1 nonimmigrant students who receive on-campus or off-campus employment authorization under this notice must remain registered for a minimum of six semester or quarter hours of instruction per academic term. Undergraduate F–1 nonimmigrant students enrolled in a term of different duration must register for at least one half of the credit hours normally required under a ''full course of study.'' *See* 8 CFR 214.2(f)(6)(i)(B) and (F). A graduate-level F–1 nonimmigrant student who receives on-campus or off-campus employment authorization under this notice must remain registered for a minimum of three semester or quarter hours of instruction per academic term. *See* 8 CFR 214.2(f)(5)(v). Nothing in this notice affects the applicability of other minimum course load requirements set by the academic institution.

In addition, an F–1 nonimmigrant student (either undergraduate or graduate) granted on-campus or off-campus employment authorization under this notice may count up to the equivalent of one class or three credits per session, term, semester, trimester, or quarter of online or distance education toward satisfying this minimum course load requirement, unless their course of study is in an English language study program.[27] *See* 8 CFR 214.2(f)(6)(i)(G).

[11] World Report—Yemen, Human Rights Watch World Report, available at: *https://www.hrw.org/world-report/2022/country-chapters/yemen?gclid=EAIaIQobChMIo86n6cvx-QIVL3FvBB3bpQduEAAYASAAEgI9C_D_BwE* (last visited Aug. 31, 2022).

[12] Yemen: Explosive remnants of war the biggest killer of children since truce began, Save the Children, June 30, 2022, available at: *https://www.savethechildren.net/news/yemen-explosive-remnants-war-biggest-killed-children-truce-began* (last visited Aug. 31, 2022).

[13] World Report—Yemen, Human Rights Watch World Report, available at: *https://www.hrw.org/world-report/2022/country-chapters/yemen?gclid=EAIaIQobChMIo86n6cvx-QIVL3FvBB3bpQduEAAYASAAEgI9C_D_BwE* (last visited Aug. 31, 2022).

[14] Yemen Health Factsheet, USAID, Apr. 25, 2022, available at: *https://www.usaid.gov/yemen/fact-sheets/health-fact-sheet* (last visited Oct. 21, 2022).

[15] Yemen Health Factsheet, USAID, Apr. 25, 2022, available at: *https://www.usaid.gov/yemen/fact-sheets/health-factsheet#:~:text=In%20Yemen%2C%2019.7%20million%20people,vulnerable%2C%20especially%20women%20and%20children.* (last visited Aug. 31, 2022).

[16] Yemen Health Factsheet, USAID, Apr. 25, 2022, available at: *https://www.usaid.gov/yemen/fact-sheets/health-factsheet#:~:text=In%20Yemen%2C%2019.7%20million%20people,vulnerable%2C%20especially%20women%20and%20children.* (last visited Aug. 31, 2022).

[17] Yemen—World Food Programme, June 2022, available at: *https://docs.wfp.org/api/documents/WFP-0000141295/download/* (last visited Sept. 2, 2022).

Brutal War on Yemen: Dire Hunger Crisis Teetering on the Edge of Catastrophe, IPS, Mar. 18, 2022, available at: *https://www.ipsnews.net/2022/03/brutal-war-yemen-dire-hunger-crisis-teetering-edge-catastrophe/?utm_source=rss&utm_medium=rss&utm_campaign=brutal-war-yemen-dire-hunger-crisis-teetering-edge-catastrophe* (last visited Sept. 2, 2022).

[18] The Water Situation in Yemen, ICRC, June 5, 2002, available at: *https://www.icrc.org/en/document/water-situation-yemen* (last visited Sept. 1, 2022).

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[25] Republic of Yemen, World Bank Economic Update, Apr. 14, 2022, available at: *https://thedocs.worldbank.org/en/doc/de816119d04a4e82a9c380bfd02dbc3a-0280012022/original/mpo-sm22-yemen-yem-kcm.pdf* (last visited Sept. 1, 2022).

[26] Republic of Yemen, World Bank Economic Update, Apr. 14, 2022, available at: *https://thedocs.worldbank.org/en/doc/de816119d04a4e82a9c380bfd02dbc3a-0280012022/original/mpo-sm22-yemen-yem-kcm.pdf* (last visited Sept. 1, 2022).

[27] DHS considers students who are compliant with ICE Coronavirus Disease 2019 (COVID–19) guidance for nonimmigrant students to be in compliance with regulations while such COVID–19 guidance remains in effect. *See* ICE Guidance and Frequently Asked Questions on COVID–19, *https://*

An F–1 nonimmigrant student attending an approved private school in kindergarten through grade 12 or public school in grades 9 through 12 must maintain ''class attendance for not less than the minimum number of hours a week prescribed by the school for normal progress toward graduation,'' as required under 8 CFR 214.2(f)(6)(i)(E). Nothing in this notice affects the applicability of federal and state labor laws limiting the employment of minors.

May an eligible F–1 nonimmigrant student who already has on-campus or off-campus employment authorization benefit from the suspension of regulatory requirements under this notice?

Yes. An F–1 nonimmigrant student who is a Yemeni citizen, regardless of country of birth (or an individual having no nationality who last habitually resided in Yemen), who already has on-campus or off-campus employment authorization and is otherwise eligible may benefit under this notice, which suspends certain regulatory requirements relating to the minimum course load requirement under 8 CFR 214.2(f)(6)(i) and certain employment eligibility requirements under 8 CFR 214.2(f)(9). Such an eligible F–1 nonimmigrant student may benefit without having to apply for a new Form I–766, Employment Authorization Document (EAD). To benefit from this notice, the F–1 nonimmigrant student must request that their designated school official (DSO) enter the following statement in the remarks field of the student's Student and Exchange Visitor Information System (SEVIS) record, which the student's Form I–20, Certificate of Eligibility for Nonimmigrant (F–1) Student Status, will reflect:

Approved for more than 20 hours per week of [DSO must insert ''on-campus'' or ''off-campus,'' depending upon the type of employment authorization the student already has] employment authorization and reduced course load under the Special Student Relief authorization from [DSO must insert the beginning date of the notice or the beginning date of the student's employment, whichever date is later] through [DSO must insert either the student's program end date, the current EAD expiration date (if the student is currently authorized for off-campus employment), or the end date of this notice, whichever date comes first].[28]

Must the F–1 nonimmigrant student apply for reinstatement after expiration of this special employment authorization if the student reduces their ''full course of study''?

No. DHS will deem an F–1 nonimmigrant student who receives and comports with the employment authorization permitted under this notice to be engaged in a ''full course of study'' [29] for the duration of the student's employment authorization, provided that a qualifying undergraduate level F–1 nonimmigrant student remains registered for a minimum of six semester or quarter hours of instruction per academic term, and a qualifying graduate level F–1 nonimmigrant student remains registered for a minimum of three semester or quarter hours of instruction per academic term. *See* 8 CFR 214.2(f)(5)(v) and (f)(6)(i)(F). Undergraduate F–1 nonimmigrant students enrolled in a term of different duration must register for at least one half of the credit hours normally required under a ''full course of study.'' *See* 8 CFR 214.2(f)(6)(i)(B) and (F). DHS will not require such students to apply for reinstatement under 8 CFR 214.2(f)(16) if they are otherwise maintaining F–1 nonimmigrant status.

Will an F–2 dependent (spouse or minor child) of an F–1 nonimmigrant student covered by this notice be eligible for employment authorization?

No. An F–2 spouse or minor child of an F–1 nonimmigrant student is not authorized to work in the United States and, therefore, may not accept employment under the F–2 nonimmigrant status, consistent with 8 CFR 214.2(f)(15)(i).

Will the suspension of the applicability of the standard student employment requirements apply to an individual who receives an initial F–1 visa and makes an initial entry into the United States after the effective date of this notice in the Federal Register?

No. The suspension of the applicability of the standard regulatory requirements only applies to certain F–1 nonimmigrant students who meet the following conditions:

(1) Are a citizen of Yemen regardless of country of birth (or an individual having no nationality who last habitually resided in Yemen);

(2) Were lawfully present in the United States in F–1 nonimmigrant status, under section 101(a)(15)(F)(i) of the INA, 8 U.S.C. 1101(a)(15)(F)(i) on the date of publication of this notice;

(3) Are enrolled in an academic institution that is SEVP-certified for enrollment of F–1 nonimmigrant students;

(4) Are maintaining F–1 nonimmigrant status; and

(5) Are experiencing severe economic hardship as a direct result of the crisis in Yemen.

An F–1 nonimmigrant student who does not meet all these requirements is ineligible for the suspension of the applicability of the standard regulatory requirements (even if experiencing severe economic hardship as a direct result of the crisis in Yemen).

Does this notice apply to a continuing F–1 nonimmigrant student who departs the United States after the effective date of this notice in the Federal Register and who needs to obtain a new F–1 visa before returning to the United States to continue an educational program?

Yes. This notice applies to such an F–1 nonimmigrant student, but only if the DSO has properly notated the student's SEVIS record, which will then appear on the student's Form I–20. The normal rules for visa issuance remain applicable to a nonimmigrant who needs to apply for a new F–1 visa to continue an educational program in the United States.

Does this notice apply to elementary school, middle school, and high school students in F–1 status?

Yes. However, this notice does not by itself reduce the required course load for F–1 nonimmigrant students from Yemen enrolled in kindergarten through grade 12 at a private school, or grades 9 through 12 at a public high school. Such students must maintain the minimum number of hours of class attendance per week prescribed by the academic institution for normal progress toward graduation, as required under 8 CFR 214.2(f)(6)(i)(E). The suspension of certain regulatory requirements related to employment through this notice is applicable to all eligible F–1 nonimmigrant students regardless of educational level. Eligible F–1 nonimmigrant students from Yemen enrolled in an elementary school, middle school, or high school may benefit from the suspension of the requirement in 8 CFR 214.2(f)(9)(i) that limits on-campus employment to 20

www.ice.gov/coronavirus (last visited Oct. 14, 2022).

[28] Because the suspension of requirements under this notice applies throughout an academic term during which the suspension is in effect, DHS considers an F–1 nonimmigrant student who engages in a reduced course load or employment (or both) after this notice is effective to be engaging in a ''full course of study,'' *see* 8 CFR 214.2(f)(6), and eligible for employment authorization, through the end of any academic term for which such student is matriculated as of September 3, 2024, provided the student satisfies the minimum course load requirements in this notice.

[29] *See* 8 CFR 214.2(f)(6).

hours per week while school is in session.

On-Campus Employment Authorization

Will an F–1 nonimmigrant student who receives on-campus employment authorization under this notice be authorized to work more than 20 hours per week while school is in session?

Yes. For an F–1 nonimmigrant student covered in this notice, the Secretary is suspending the applicability of the requirement in 8 CFR 214.2(f)(9)(i) that limits an F–1 nonimmigrant student's on-campus employment to 20 hours per week while school is in session. An eligible F–1 nonimmigrant student has authorization to work more than 20 hours per week while school is in session if the DSO has entered the following statement in the remarks field of the student's SEVIS record, which will be reflected on the student's Form I–20:

> Approved for more than 20 hours per week of on-campus employment and reduced course load, under the Special Student Relief authorization from [DSO must insert the beginning date of this notice or the beginning date of the student's employment, whichever date is later] through [DSO must insert the student's program end date or the end date of this notice, whichever date comes first].[30]

To obtain on-campus employment authorization, the F–1 nonimmigrant student must demonstrate to the DSO that the employment is necessary to avoid severe economic hardship directly resulting from the crisis in Yemen. An F–1 nonimmigrant student authorized by the DSO to engage in on-campus employment by means of this notice does not need to file any applications with U.S. Citizenship and Immigration Services (USCIS). The standard rules permitting full-time employment on-campus when school is not in session or during school vacations apply, as described in 8 CFR 214.2(f)(9)(i).

Will an F–1 nonimmigrant student who receives on-campus employment authorization under this notice have authorization to reduce the normal course load and still maintain his or her F–1 nonimmigrant student status?

Yes. DHS will deem an F–1 nonimmigrant student who receives on-campus employment authorization under this notice to be engaged in a ''full course of study'' [31] for the purpose of maintaining their F–1 nonimmigrant student status for the duration of the on-campus employment, if the student satisfies the minimum course load requirement described in this notice, consistent with 8 CFR 214.2(f)(6)(i)(F). However, the authorization to reduce the normal course load is solely for DHS purposes of determining valid F–1 nonimmigrant student status. Nothing in this notice mandates that school officials allow an F–1 nonimmigrant student to take a reduced course load if the reduction would not meet the academic institution's minimum course load requirement for continued enrollment.[32]

Off-Campus Employment Authorization

What regulatory requirements does this notice temporarily suspend relating to off-campus employment?

For an F–1 nonimmigrant student covered by this notice, as provided under 8 CFR 214.2(f)(9)(ii)(A), the Secretary is suspending the following regulatory requirements relating to off-campus employment:

(a) The requirement that a student must have been in F–1 nonimmigrant student status for one full academic year to be eligible for off-campus employment;

(b) The requirement that an F–1 nonimmigrant student must demonstrate that acceptance of employment will not interfere with the student's carrying a full course of study;

(c) The requirement that limits an F–1 nonimmigrant student's employment authorization to no more than 20 hours per week of off-campus employment while the school is in session; and

(d) The requirement that the student demonstrate that employment under 8 CFR 214.2(f)(9)(i) is unavailable or otherwise insufficient to meet the needs that have arisen as a result of the unforeseen circumstances.

Will an F–1 nonimmigrant student who receives off-campus employment authorization under this notice have authorization to reduce the normal course load and still maintain F–1 nonimmigrant status?

Yes. DHS will deem an F–1 nonimmigrant student who receives off-campus employment authorization by means of this notice to be engaged in a ''full course of study'' [33] for the purpose of maintaining F–1 nonimmigrant student status for the duration of the student's employment authorization if the student satisfies the minimum course load requirement described in this notice, consistent with 8 CFR 214.2(f)(6)(i)(F). However, the authorization for a reduced course load is solely for DHS purposes of determining valid F–1 nonimmigrant student status. Nothing in this notice mandates that school officials allow an F–1 nonimmigrant student to take a reduced course load if such reduced course load would not meet the school's minimum course load requirement.[34]

How may an eligible F–1 nonimmigrant student obtain employment authorization for off-campus employment with a reduced course load under this notice?

An F–1 nonimmigrant student must file a Form I–765, Application for Employment Authorization, with USCIS to apply for off-campus employment authorization based on severe economic hardship directly resulting from the crisis in Yemen.[35] Filing instructions are located at *https://www.uscis.gov/i-765.*

Fee considerations. Submission of a Form I–765 currently requires payment of a $410 fee. An applicant who is unable to pay the fee may submit a completed Form I–912, Request for Fee Waiver, along with the Form I–765, Application for Employment Authorization. *See www.uscis.gov/feewaiver.* The submission must include an explanation about why USCIS should grant the fee waiver and the reason(s) for the inability to pay, and any evidence to support the reason(s). *See* 8 CFR 103.7(c).

Supporting documentation. An F–1 nonimmigrant student seeking off-campus employment authorization due to severe economic hardship must demonstrate the following to their DSO:

(1) This employment is necessary to avoid severe economic hardship; and

(2) The hardship is a direct result of the crisis in Yemen.

If the DSO agrees that the F–1 nonimmigrant student is entitled to receive such employment authorization, the DSO must recommend application approval to USCIS by entering the

[30] Because the suspension of requirements under this notice applies throughout an academic term during which the suspension is in effect, DHS considers an F–1 nonimmigrant student who engages in a reduced course load or employment (or both) after this notice is effective to be engaging in a ''full course of study,'' *See* 8 CFR 214.2(f)(6), and eligible for employment authorization, through the end of any academic term for which such student is matriculated as of September 3, 2024, provided the student satisfies the minimum course load requirements in this notice.

[31] *See* 8 CFR 214.2(f)(6).

[32] Minimum course load requirement for enrollment in a school must be established in a publicly available document (*e.g.,* catalog, website, or operating procedure), and it must be a standard applicable to all students (U.S. citizens and foreign students) enrolled at the school.

[33] *See* 8 CFR 214.2(f)(6).

[34] Minimum course load requirement for enrollment in a school must be established in a publicly available document (*e.g.,* catalog, website, or operating procedure), and it must be a standard applicable to all students (U.S. citizens and foreign students) enrolled at the school.

[35] *See* 8 CFR 274a.12(c)(3)(iii).

following statement in the remarks field of the student's SEVIS record, which will then appear on that student's Form I–20:

Recommended for off-campus employment authorization in excess of 20 hours per week and reduced course load under the Special Student Relief authorization from the date of the USCIS authorization noted on Form I–766 through [DSO must insert the program end date or the end date of this notice, whichever date comes first].[36]

The F–1 nonimmigrant student must then file the properly endorsed Form I–20 and Form I–765 according to the instructions for the Form I–765. The F–1 nonimmigrant student may begin working off campus only upon receipt of the EAD from USCIS.

DSO recommendation. In making a recommendation that an F–1 nonimmigrant student be approved for Special Student Relief, the DSO certifies that:

(a) The F–1 nonimmigrant student is in good academic standing and is carrying a ''full course of study'' [37] at the time of the request for employment authorization;

(b) The F–1 nonimmigrant student is a citizen of Yemen, regardless of country of birth (or an individual having no nationality who last habitually resided in Yemen), and is experiencing severe economic hardship as a direct result of the crisis in Yemen, as documented on the Form I–20;

(c) The F–1 nonimmigrant student has confirmed that the student will comply with the reduced course load requirements of this notice and register for the duration of the authorized employment for a minimum of six semester or quarter hours of instruction per academic term if at the undergraduate level, or for a minimum of three semester or quarter hours of instruction per academic term if the student is at the graduate level; [38] and

(d) The off-campus employment is necessary to alleviate severe economic hardship to the individual as a direct result of the crisis in Yemen.

Processing. To facilitate prompt adjudication of the student's application for off-campus employment authorization under 8 CFR 214.2(f)(9)(ii)(C), the F–1 nonimmigrant student should do both of the following:

(a) Ensure that the application package includes all of the following documents:

(1) A completed Form I–765;

(2) The required fee or properly documented fee waiver request as defined in 8 CFR 103.7(c); and

(3) A signed and dated copy of the student's Form I–20 with the appropriate DSO recommendation, as previously described in this notice; and

(b) Send the application in an envelope which is clearly marked on the front of the envelope, bottom right-hand side, with the phrase ''SPECIAL STUDENT RELIEF.'' [39] Failure to include this notation may result in significant processing delays.

If USCIS approves the student's Form I–765, USCIS will send the student an EAD as evidence of employment authorization. The EAD will contain an expiration date that does not exceed the end of the granted temporary relief.

Temporary Protected Status (TPS) Considerations

Can an F–1 nonimmigrant student re-register or apply for TPS and for benefits under this notice at the same time?

Yes. An F–1 nonimmigrant student who must re-register, or one that has not yet applied for TPS or for other relief that reduces the student's course load per term and permits an increased number of work hours per week, such as Special Student Relief,[40] under this notice has two options.

Under the first option, the nonimmigrant student may re-register or apply for TPS according to the instructions in the USCIS notice designating Yemen for TPS elsewhere in this issue of the **Federal Register**. All TPS applicants must file a Form I–821, Application for Temporary Protected Status, with the appropriate fee (or request a fee waiver). Although not required to do so, if F–1 nonimmigrant students want to obtain a new EAD based on their TPS application that is valid through September 3, 2024, and to be eligible for automatic EAD extensions that may be available to certain EADs with an A–12 or C–19 category code, they may need to file Form I–765 and pay the Form I–765 fee (or request a fee waiver). A Yemen TPS-related EAD can also be automatically extended for up to 540 days [41] if an F–1 nonimmigrant student who is a TPS beneficiary properly files a renewal Form I–765 application and pays the Form I–765 fee (or requests a fee waiver) during the filing period described in the **Federal Register** notice extending the designation of Yemen for TPS. After receiving the TPS-related EAD, an F–1 nonimmigrant student may request that their DSO make the required entry in SEVIS, issue an updated Form I–20, as described in this notice, and notate that the nonimmigrant student has been authorized to carry a reduced course load and is working pursuant to a TPS-related EAD. So long as the nonimmigrant student maintains the minimum course load described in this notice, does not otherwise violate their nonimmigrant status, including as provided under 8 CFR 214.1(g), and maintains TPS, then the student maintains F–1 status and TPS concurrently.

Under the second option, the nonimmigrant student may apply for an EAD under Special Student Relief by filing Form I–765 at the location specified in the filing instructions. At the same time, the F–1 nonimmigrant student may file a separate TPS application but must submit the Form I–821 according to the instructions provided in the **Federal Register** notice designating Yemen for TPS. If the F–1 nonimmigrant student has already applied for employment authorization under Special Student Relief, they are not required to submit the Form I–765 as part of the TPS application. However, some nonimmigrant students may wish to obtain a TPS-related EAD in light of certain extensions that may be available to EADs with an A–12 or C–19 category code that are not available to Special Student Relief EADs. The nonimmigrant student should check the appropriate box when filling out Form I–821 to indicate whether a TPS-related EAD is being requested. Again, so long as the nonimmigrant student maintains the minimum course load described in this notice and does not otherwise violate the student's nonimmigrant status, included as provided under 8 CFR 214.1(g), the nonimmigrant will be able to maintain compliance requirements for F–1 nonimmigrant student status while having TPS.

[36] Because the suspension of requirements under this notice applies throughout an academic term during which the suspension is in effect, DHS considers an F–1 nonimmigrant student who engages in a reduced course load or employment (or both) after this notice is effective to be engaging in a ''full course of study,'' *see* 8 CFR 214.2(f)(6), and eligible for employment authorization, through the end of any academic term for which such student is matriculated as of September 3, 2024, provided the student satisfies the minimum course load requirements in this notice.

[37] *See* 8 CFR 214.2(f)(6).

[38] 8 CFR 214.2(f)(5)(v).

[39] Guidance for direct filing addresses can be found here: *https://www.uscis.gov/i-765-addresses.*

[40] *See* DHS Study in the States, Special Student Relief, *https://studyinthestates.dhs.gov/students/special-student-relief* (last visited Oct. 14, 2022).

[41] 8 CFR 274a.13(d)(5).

When a student applies simultaneously for TPS and benefits under this notice, what is the minimum course load requirement while an application for employment authorization is pending?

The F–1 nonimmigrant student must maintain normal course load requirements for a ''full course of study'' [42] unless or until the nonimmigrant student receives employment authorization under this notice. TPS-related employment authorization, by itself, does not authorize a nonimmigrant student to drop below twelve credit hours, or otherwise applicable minimum requirements (*e.g.,* clock hours for non-traditional academic programs). Once approved for Special Student Relief employment authorization, the F–1 nonimmigrant student may drop below twelve credit hours, or otherwise applicable minimum requirements (with a minimum of six semester or quarter hours of instruction per academic term if at the undergraduate level, or for a minimum of three semester or quarter hours of instruction per academic term if at the graduate level). *See* 8 CFR 214.2(f)(5)(v), (f)(6), and (f)(9)(i) and (ii).

How does a student who has received a TPS-related EAD then apply for authorization to take a reduced course load under this notice?

There is no further application process with USCIS if a student has been approved for a TPS-related EAD. The F–1 nonimmigrant student must demonstrate and provide documentation to the DSO of the direct economic hardship resulting from the crisis in Yemen. The DSO will then verify and update the student's record in SEVIS to enable the F–1 nonimmigrant student with TPS to reduce the course load without any further action or application. No other EAD needs to be issued for the F–1 nonimmigrant student to have employment authorization.

Can a noncitizen who has been granted TPS apply for reinstatement of F–1 nonimmigrant student status after the noncitizen's F–1 nonimmigrant student status has lapsed?

Yes. Regulations permit certain students who fall out of F–1 nonimmigrant student status to apply for reinstatement. *See* 8 CFR 214.2(f)(16). This provision might apply to students who worked on a TPS-related EAD or dropped their course load before publication of this notice, and therefore fell out of student status. These students must satisfy the criteria set forth in the F–1 nonimmigrant student status reinstatement regulations.

How long will this notice remain in effect?

This notice grants temporary relief through September 3, 2024,[43] to eligible F–1 nonimmigrant students. DHS will continue to monitor the situation in Yemen. Should the special provisions authorized by this notice need modification or extension, DHS will announce such changes in the **Federal Register**.

Paperwork Reduction Act (PRA)

An F–1 nonimmigrant student seeking off-campus employment authorization due to severe economic hardship resulting from the crisis in Yemen must demonstrate to the DSO that this employment is necessary to avoid severe economic hardship. A DSO who agrees that a nonimmigrant student should receive such employment authorization must recommend an application approval to USCIS by entering information in the remarks field of the student's SEVIS record. The authority to collect this information is in the SEVIS collection of information currently approved by the Office of Management and Budget (OMB) under OMB Control Number 1653–0038.

This notice also allows an eligible F–1 nonimmigrant student to request employment authorization, work an increased number of hours while the academic institution is in session, and reduce their course load while continuing to maintain F–1 nonimmigrant student status.

To apply for employment authorization, certain F–1 nonimmigrant students must complete and submit a currently approved Form I–765 according to the instructions on the form. OMB has previously approved the collection of information contained on the current Form I–765, consistent with the PRA (OMB Control No. 1615–0040). Although there will be a slight increase in the number of Form I–765 filings because of this notice, the number of filings currently contained in the OMB annual inventory for Form I–765 is sufficient to cover the additional filings. Accordingly, there is no further action required under the PRA.

Alejandro Mayorkas,

Secretary, U.S. Department of Homeland Security.

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[42] *See* 8 CFR 214.2(f)(6).

[43] Because the suspension of requirements under this notice applies throughout an academic term during which the suspension is in effect, DHS considers an F–1 nonimmigrant student who engages in a reduced course load or employment (or both) after this notice is effective to be engaging in a ''full course of study,'' *see* 8 CFR 214.2(f)(6), and eligible for employment authorization, through the end of any academic term for which such student is matriculated as of September 3, 2024, provided the student satisfies the minimum course load requirement in this notice. DHS also considers students who engage in online coursework pursuant to ICE coronavirus disease 2019 (COVID–19) guidance for nonimmigrant students to be in compliance with regulations while such guidance remains in effect. *See* ICE Guidance and Frequently Asked Questions on COVID–19, Nonimmigrant Students & SEVP-Certified Schools: Frequently Asked Questions, *https://www.ice.gov/coronavirus* (last visited Oct. 14, 2022).

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2729–22; DHS Docket No. USCIS–2015–0005]

RIN 1615–ZB76

Extension and Redesignation of Yemen for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Notice of Temporary Protected Status (TPS) extension and redesignation.

SUMMARY: Through this notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of Yemen for Temporary Protected Status (TPS) for 18 months, beginning on March 4, 2023, through September 3, 2024. This extension allows existing TPS beneficiaries to retain TPS through September 3, 2024, so long as they otherwise continue to meet the eligibility requirements for TPS. Existing TPS beneficiaries who wish to extend their status through September 3, 2024, must re-register during the 60-day re-registration period described in this notice. The Secretary is also redesignating Yemen for TPS. The redesignation of Yemen allows additional Yemeni nationals (and individuals having no nationality who last habitually resided in Yemen) who have been continuously residing in the United States since December 29, 2022 to apply for TPS for the first time during the initial registration period described under the redesignation information in this notice. In addition to demonstrating continuous residence in the United States since December 29, 2022 and meeting other eligibility criteria, initial applicants for TPS under this

designation must demonstrate that they have been continuously physically present in the United States since March 4, 2023, the effective date of this redesignation of Yemen for TPS.

DATES:

Extension of Designation of Yemen for TPS: The 18-month designation of Yemen for TPS begins on March 4, 2023, and will remain in effect for 18 months, through September 3, 2024. The extension impacts existing beneficiaries of TPS.

Re-registration: The 60-day re-registration period for existing beneficiaries runs from January 3, 2023 through March 6, 2023. (Note: It is important for re-registrants to timely re-register during the registration period and not to wait until their Employment Authorization Documents (EADs) expire, as delaying reregistration could result in gaps in their employment authorization documentation.)

Redesignation of Yemen for TPS: The 18-month redesignation of Yemen for TPS begins on March 4, 2023, and will remain in effect for 18 months, through September 3, 2024. The redesignation impacts potential first-time applicants and others who do not currently have TPS.

First-time Registration: The initial registration period for new applicants under the Yemen TPS redesignation begins on January 3, 2023 and will remain in effect through September 3, 2024.

FOR FURTHER INFORMATION CONTACT: You may contact Rená Cutlip-Mason, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Drive, Camp Springs, MD 20746, or by phone at 800–375–5283.

For further information on TPS, including guidance on the registration process and additional information on eligibility, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* You can find specific information about Yemen's TPS designation by selecting ''Yemen'' from the menu on the left side of the TPS web page.

If you have additional questions about TPS, please visit *uscis.gov/tools.* Our online virtual assistant, Emma, can answer many of your questions and point you to additional information on our website. If you are unable to find your answers there, you may also call our USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

Applicants seeking information about the status of their individual cases may check Case Status Online, available on the USCIS website at *uscis.gov*, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.*

Further information will also be available at local USCIS offices upon publication of this notice.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

BIA—Board of Immigration Appeals
CFR—Code of Federal Regulations
DHS—U.S. Department of Homeland Security
DOS—U.S. Department of State
EAD—Employment Authorization Document
FNC—Final Nonconfirmation
Form I–131—Application for Travel Document
Form I–765—Application for Employment Authorization
Form I–797—Notice of Action
Form I–821—Application for Temporary Protected Status
Form I–9—Employment Eligibility Verification
Form I–912—Request for Fee Waiver
Form I–94—Arrival/Departure Record
FR—Federal Register
Government—U.S. Government
IER—U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section
IJ—Immigration Judge
INA—Immigration and Nationality Act
SAVE—USCIS Systematic Alien Verification for Entitlements Program
Secretary—Secretary of Homeland Security
TPS—Temporary Protected Status
TTY—Text Telephone
USCIS—U.S. Citizenship and Immigration Services
U.S.C.—United States Code

Purpose of This Action (TPS)

Through this notice, DHS sets forth procedures necessary for nationals of Yemen (or individuals having no nationality who last habitually resided in Yemen) to (1) re-register for TPS and to apply for renewal of their EADs with USCIS or (2) submit an initial registration application under the redesignation and apply for an EAD.

Re-registration is limited to individuals who have previously registered for TPS under the prior designation of Yemen and whose applications have been granted. Failure to re-register properly within the 60-day re-registration period may result in the withdrawal of your TPS following appropriate procedures. *See* 8 CFR 244.14.

For individuals who have already been granted TPS under Yemen's designation, the 60-day re-registration period runs from January 3, 2023 through March 6, 2023. USCIS will issue new EADs with a September 3, 2024 expiration date to eligible Yemeni TPS beneficiaries who timely re-register and apply for EADs. Given the time frames involved with processing TPS re-registration applications, DHS recognizes that not all re-registrants may receive new EADs before their current EADs expire. Accordingly, through this **Federal Register** notice, DHS automatically extends the validity of certain EADs previously issued under the TPS designation of Yemen through March 3, 2024. Therefore, as proof of continued employment authorization through March 3, 2024, TPS beneficiaries can show their EADs that have the notation A–12 or C–19 under Category and a ''Card Expires'' date of March 3, 2023, or September 3, 2021. This notice explains how TPS beneficiaries and their employers may determine which EADs are automatically extended and how this affects the Form I–9, Employment Eligibility Verification, E-Verify, and USCIS Systematic Alien Verification for Entitlements (SAVE) processes.

Individuals who have a Yemen TPS application (Form I–821) and/or Application for Employment Authorization (Form I–765) that was still pending as of January 3, 2023 do not need to file either application again. If USCIS approves an individual's pending Form I–821, USCIS will grant the individual TPS through September 3, 2024. Similarly, if USCIS approves a pending TPS-related Form I–765, USCIS will issue the individual a new EAD that will be valid through the same date.

Under the redesignation, individuals who currently do not have TPS may submit an initial application during the initial registration period that runs from January 3, 2023 through the full length of the redesignation period, ending September 3, 2024.[1] In addition to demonstrating continuous residence in the United States since December 29, 2022 and meeting other eligibility

[1] In general, individuals must be given an initial registration period of no less than 180 days to register for TPS, but the Secretary has discretion to provide for a longer registration period. *See* 8 U.S.C. 1254a(c)(1)(A)(iv). In keeping with the humanitarian purpose of TPS and advancing the goal of ensuring ''the Federal Government eliminates . . . barriers that prevent immigrants from accessing government services available to them'' under *Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans,* 86 FR 8277 (Feb. 5, 2021), the Secretary has exercised his discretion to provide for TPS initial registration periods that coincide with the full period of a TPS country's initial designation or redesignation. *See, e.g.,* 86 FR 41863 (Aug. 3, 2021) (providing 18-mos. registration period under new TPS designation of Haiti); 86 FR 41986 (Aug. 4, 2021) (''Extension of Initial Registration Periods for New Temporary Protected Status Applicants Under the Designations for Venezuela, Syria and Burma). For the same reasons, the Secretary is similarly exercising his discretion to provide applicants under this TPS designation of Yemen with an 18-month initial registration period.

criteria, initial applicants for TPS under this redesignation must demonstrate that they have been continuously physically present in the United States since March 4, 2023,[2] the effective date of this redesignation of Yemen, before USCIS may grant them TPS. DHS estimates that approximately 1,200 individuals may become newly eligible for TPS under the redesignation of Yemen.

What is Temporary Protected Status (TPS)?

- TPS is a temporary immigration status granted to eligible nationals of a foreign state designated for TPS under the INA, or to eligible individuals without nationality who last habitually resided in the designated foreign state, regardless of their country of birth.
- During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed, and are authorized to obtain EADs so long as they continue to meet the requirements of TPS.
- TPS beneficiaries may also apply for and be granted travel authorization as a matter of DHS discretion.
- To qualify for TPS, beneficiaries must meet the eligibility standards at INA sec. 244(c)(1)–(2), 8 U.S.C. 1254a(c)(1)–(2).
- When the Secretary terminates a foreign state's TPS designation, beneficiaries return to one of the following:
  - The same immigration status or category that they maintained before TPS, if any (unless that status or category has since expired or terminated); or
  - Any other lawfully obtained immigration status or category they received while registered for TPS, as long as it is still valid beyond the date TPS terminates.

When was Yemen designated for TPS?

Yemen was initially designated for TPS on September 3, 2015, based on ongoing armed conflict that prevented nationals of Yemen from returning to Yemen in safety. *See* Designation of Republic of Yemen for Temporary Protected Status, 80 FR 53319 (Sept. 3, 2015). In January 2017, Yemen's designation was extended for 18 months through September 3, 2018, and Yemen was redesignated for TPS on the dual bases of ongoing armed conflict and extraordinary and temporary conditions. *See* Extension and Redesignation of Republic of Yemen for Temporary Protected Status, 82 FR 859 (Jan. 4, 2017). The Secretary extended Yemen's TPS designation in 2018 and 2020 because the statutory bases of ongoing armed conflict and extraordinary and temporary conditions persisted. *See* Extension of the Designation of Yemen for Temporary Protected Status, 83 FR 40307 (Aug. 14, 2018); *see also* Extension of the Designation of Yemen for Temporary Protected Status, 85 FR 12313 (Mar. 2, 2020). Most recently, the Secretary extended and redesignated Yemen for TPS based on ongoing armed conflict and extraordinary and temporary conditions in 2021. *See* Extension and Redesignation of Yemen for Temporary Protected Status, 86 FR 36295 (July 9, 2021).

What authority does the Secretary have to extend the designation Yemen for TPS?

Section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist.[3] The decision to designate any foreign state (or part thereof) is a discretionary decision, and there is no judicial review of any determination with respect to the designation, termination, or extension of a designation. *See* INA sec. 244(b)(5)(A); 8 U.S.C. 1254a(b)(5)(A).[4] The Secretary, in his or her discretion, may then grant TPS to eligible nationals of that foreign state (or individuals having no nationality who last habitually resided in the designated foreign state). *See* INA sec. 244(a)(1)(A), 8 U.S.C. 1254a(a)(1)(A).

At least 60 days before the expiration of a foreign state's TPS designation or extension, the Secretary, after consultation with appropriate U.S. Government agencies, must review the conditions in the foreign state designated for TPS to determine whether they continue to meet the conditions for the TPS designation. *See* INA sec. 244(b)(3)(A), 8 U.S.C. 1254a(b)(3)(A). If the Secretary determines that the foreign state continues to meet the conditions for TPS designation, the designation will be extended for an additional period of 6 months or, in the Secretary's discretion, 12 or 18 months. *See* INA sec. 244(b)(3)(A), (C), 8 U.S.C. 1254a(b)(3)(A), (C). If the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation. *See* INA sec. 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B).

What is the Secretary's authority to redesignate Yemen for TPS?

In addition to extending an existing TPS designation, the Secretary, after consultation with appropriate Government agencies, may redesignate a country (or part thereof) for TPS. *See* INA sec. 244(b)(1), 8 U.S.C. 1254a(b)(1); *see also* INA sec. 244(c)(1)(A)(i), 8 U.S.C. 1254a(c)(1)(A)(i) (requiring that ''the alien has been continuously physically present since the effective date of *the most recent designation of the state*'') (emphasis added).[5]

When the Secretary designates or redesignates a country for TPS, the Secretary also has the discretion to establish the date from which TPS applicants must demonstrate that they have been ''continuously resid[ing]'' in the United States. *See* INA sec. 244(c)(1)(A)(ii), 8 U.S.C. 1254a(c)(1)(A)(ii). The Secretary has determined that the ''continuous residence'' date for applicants for TPS under the redesignation of Yemen shall be December 29, 2022. Initial applicants for TPS under this redesignation must also show they have been ''continuously physically present'' in the United States since March 4, 2023, which is the

[2] The ''continuous physical presence date'' (CPP) is the effective date of the most recent TPS designation of the country, which is either the publication date of the designation announcement in the **Federal Register** or such later date as the Secretary may establish. The ''continuous residence date'' (CR) is any date established by the Secretary when a country is designated (or sometimes redesignated) for TPS. *See* INA sec. 244(b)(2)(A) (effective date of designation); 244(c)(1)(A)(i–ii) (discussing CR and CPP date requirements).

[3] INA sec. 244(b)(1) ascribes this power to the Attorney General. Congress transferred this authority from the Attorney General to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135. The Secretary may designate a country (or part of a country) for TPS on the basis of ongoing armed conflict such that returning would pose a serious threat to the personal safety of the country's nationals and habitual residents, environmental disaster (including an epidemic), or extraordinary and temporary conditions in the country that prevent the safe return of the country's nationals. For environmental disaster-based designations, certain other statutory requirements must be met, including that the foreign government must request TPS. A designation based on extraordinary and temporary conditions cannot be made if the Secretary finds that allowing the country's nationals to remain temporarily in the United States is contrary to the U.S. national interest. *Id.,* at § 244(b)(1).

[4] This issue of judicial review is the subject of litigation. *See, e.g., Ramos* v. *Wolf,* 975 F.3d 872 (9th Cir. 2020), *petition for en banc rehearing* filed Nov. 30, 2020 (No. 18–16981); *Saget* v. *Trump,* 375 F. Supp. 3d 280 (E.D.N.Y. 2019).

[5] The extension and redesignation of TPS for Yemen is one of several instances in which the Secretary and, prior to the establishment of DHS, the Attorney General, have simultaneously extended a country's TPS designation and redesignated the country for TPS. See, *e.g.,* 76 FR 29000 (May 19, 2011) (extension and redesignation for Haiti); 69 FR 60168 (Oct. 7, 2004) (extension and redesignation for Sudan); 62 FR 16608 (Apr. 7, 1997) (extension and redesignation for Liberia).

effective date of the Secretary's redesignation, of Yemen. *See* INA sec. 244(c)(1)(A)(i), 8 U.S.C. 1254a(c)(1)(A)(i). For each initial TPS application filed under the redesignation, the final determination of whether the applicant has met the ''continuous physical presence'' requirement cannot be made until March 4, 2023, the effective date of this redesignation for Yemen. However, during the registration period and upon filing of the initial TPS application, USCIS will issue employment authorization documentation if the TPS applicant established prima facie eligibility for TPS. *See* 8 CFR 244.5(b).

Why is the Secretary extending the TPS designation for Yemen and simultaneously redesignating Yemen for TPS through September 3, 2024?

DHS has reviewed country conditions in Yemen. Based on the review, including input received from DOS and other U.S. Government agencies, the Secretary has determined that an 18-month extension is warranted because the ongoing armed conflict and extraordinary and temporary conditions supporting Yemen's TPS designation remain. The Secretary has further determined that redesignating Yemen for TPS under INA sec. 244(b)(1)(A), 8 U.S.C. 1254a(b)(1)(A) and INA sec. 244(b)(1)(C), 8 U.S.C. 1254a(b)(1)(C) is warranted. The Secretary is accordingly updating the ''continuous residence'' and ''continuous physical presence'' dates that applicants must meet to be eligible for TPS.

The ongoing armed conflict has deepened Yemen's difficult economic and humanitarian situation. It has directly affected the physical security of the civilian population, including from attacks involving artillery, missiles, mortars, rockets, and landmines.[6] Over 4 million people have been internally displaced within Yemen, 286,000 of them in 2021 alone;[7] children account for half of the IDP population, approximately 2 million.[8] Terrorist organizations operating inside of Yemen also pose a danger to civilians.[9]

The protracted conflict had carried on for years until a truce backed by the United Nations (UN) came into effect on April 2, 2022.[10] During the truce period, armed confrontation decreased; however, the risk to civilians, particularly from unexploded ordinance, remained significant.[11] Between April and September 2022, the Armed Conflict Location & Event Data Project (ACLED) recorded an average of more than 200 reported deaths per month from organized political violence across the country.[12] Although much lower than what was recorded before the truce, this number is still alarmingly high.[13] The truce was extended twice, once effective June 2, 2022, and once effective August 2, 2022,[14] before ultimately expiring on October 2, 2022.[15]

Notably, the truce did not reduce the need for humanitarian aid across Yemen. The UN reports that 24.1 million people (approximately 80 percent of the population) are in need of humanitarian assistance as a result of armed conflict.[16] The conflict continues to cause high levels of food insecurity, limited access to water and medical care,[17] and the large-scale destruction of Yemen's infrastructure and cultural heritage.[18]

The six months of the truce did have a positive impact on the safety and security of most civilians, with the number of civilian deaths declining by 60 percent and displacement decreasing by nearly 50 percent.[19] However, political violence continued even during the truce.[20] The April 2022 truce terms included ''a halt to all offensive . . . military operations, inside and outside of Yemen'' [21] but there were 2,977 reported violations of the truce and 504 reported fatalities from truce violation events.[22] These reported violations included 2,208 shelling/artillery/missile attacks, 374 air/drone strikes, 369 armed clashes, and 26 disrupted weapons use.[23]

Even prior to the expiration of the truce on October 2, 2022, Explosive Remnants of War (ERWs), which consist of Unexploded Ordinances (UXOs), Improvised Explosive Devices (IEDs) and landmines, remained a significant threat to civilians in Yemen.[24] Despite the truce, July 2022 was the deadliest month due to ERWs in over two years.[25] Since April 2, 2022, ERWs have been the ''biggest killers of children in Yemen'' [26] as a ''result of families moving to previously inaccessible areas following the decrease in hostilities.'' [27] According to Save the Children,

[6] World Report 2022—Yemen Events of 2021, Human Rights Watch World Report, available at: *https://www.hrw.org/world-report/2022/country-chapters/yemen?gclid=EAIaIQobChMIo86n6cvx-QIVL3FvBB3bpQduEAAYASAAEgI9C_D_BwE* (last visited Oct. 21, 2022).

[7] Yemen Fact Sheet, United Nations High Commissioner for Refugees (UNHCR), June 2022, available at: *https://reporting.unhcr.org/document/3030* (last visited Oct. 21, 2022).

[8] UNICEF Yemen Humanitarian Situation Report: January—December 2021, Reliefweb, Mar. 16, 2022, available at: *https://reliefweb.int/report/yemen/unicef-yemen-humanitarian-situation-report-january-december-2021-enar* (last visited Oct. 21, 2022).

[9] Yemen's Tragedy: War, Stalemate, and Suffering, Council on Foreign Relations, Oct. 21, 2022, available at: *https://www.cfr.org/backgrounder/yemen-crisis* (last visited Dec. 6, 2022).

[10] Yemen truce renewed for another two months, UN News, Aug. 2, 2022, available at: *https://news.un.org/en/story/2022/08/1123832* (last visited Aug. 22, 2022).

[11] Save the Children, Yemen: Explosive remnants of war the biggest killer of children since truce began, June 30, 2022, available at: *https://www.savethechildren.net/news/yemen-explosive-remnants-war-biggest-killed-children-truce-began* (last visited Oct. 25, 2022).

[12] Violence in Yemen During the UN-Mediated Truce: April-October 2022, Armed Conflict Location & Event Data Project (ACLED), Oct. 14, 2022, available at: *https://acleddata.com/2022/10/14/violence-in-yemen-during-the-un-mediated-truce-april-october-2022/* (last visited Oct. 25, 2022).

[13] *Id.*

[14] Yemen truce renewed for another two months, UN News, Aug. 2, 2022, Available at: *https://news.un.org/en/story/2022/08/1123832* (last visited Oct. 7, 2022).

[15] Department of State, Press Release, UN Truce Expiration in Yemen, Oct. 3, 2022, available at: *https://www.state.gov/un-truce-expiration-in-yemen/* (last visited Oct. 7, 2022).

[16] The United Nations in Yemen, available at: *https://yemen.un.org/en/about/about-the-un* (last visited Aug. 31, 2022).

[17] Yemen's Tragedy: War, Stalemate, and Suffering, Council on Foreign Relations, Aug. 22, 2022, available at: *https://www.cfr.org/backgrounder/yemen-crisis* (last visited Aug. 31, 2022).

[18] Heritage at Risk in Yemen, UNESCO, available at: *https://en.unesco.org/galleries/heritage-risk-yemen* (last visited Aug. 31, 2022).

[19] End of Yemen's truce leaves civilians afraid dark days are back, Al-Jazeera, Oct. 7, 2022, available at: *https://www.aljazeera.com/news/2022/10/7/end-yemen-truce-leaves-civilians-afraid-dark-days-back* (last visited Oct. 7, 2022).

[20] Violence in Yemen During the UN-Mediated Truce: April–October 2022, ACLED, Oct. 14, 2022, available at: *https://acleddata.com/2022/10/14/violence-in-yemen-during-the-un-mediated-truce-april-october-2022/* (last visited Oct. 25, 2022).

[21] Yemen Truce Monitor, ACLED, available at: *https://acleddata.com/middle-east/yemen/yemen-truce-monitor/* (last visited Oct. 19, 2022).

[22] *Id.*

[23] *Id.*

[24] Yemen: Explosive remnants of war the biggest killer of children since truce began, Save the Children, June 30, 2022, available at: *https://www.savethechildren.net/news/yemen-explosive-remnants-war-biggest-killed-children-truce-began* (last visited Aug. 31, 2022).

[25] Thematic Report: A review of how flooding can exacerbate civilian vulnerabilities to the ERW threat in Yemen, Civilian Impact Monitoring Center, Aug. 2022, available at: *https://civilianimpactmonitoring.org/onewebmedia/20220826_CIMP%20Thematic%2008_Flooding%20and%20ERW.pdf* (last visited Aug. 31, 2022).

[26] Yemen: Explosive remnants of war the biggest killer of children since truce began, Save the Children, June 30, 2022, available at: *https://www.savethechildren.net/news/yemen-explosive-remnants-war-biggest-killed-children-truce-began* (last visited Aug. 31, 2022).

[27] *Id.*

landmines and unexploded munition were responsible for over 75 percent of all war-related casualties among children.[28] DOS estimates that as of April 2021, ''Houthi forces (have) laid over one million landmines and IEDs across the country.'' [29] According to a 2018 United Nations experts report, those mines ''represent a hazard for commercial shipping and sea lines of communication that could remain for as long as six to 10 years.'' [30] Landmines and other explosive hazards have continued to be the main cause of civilian casualties.[31]

The UN considers the humanitarian crisis in Yemen to be the largest in the world.[32] As of April 2022, ''19.7 million people lack access to basic health services. Only 51 percent of the health facilities in Yemen are fully functioning and of those, most lack operational specialists, equipment, and basic medicines.'' [33] As of September 2021, ''over 80% of the population face[d] significant challenges in reaching food, drinking water and access to health care services. Shortages of human resources, equipment, and supplies are severely hindering healthcare provision.'' [34] The lack of specialists has been an increasing problem; as of March 2022, fewer than 2,000 medical specialists were left in all of Yemen.[35] Healthcare for mothers and their babies in Yemen is categorized by the UN as ''highly vulnerable;'' according to the World Bank, approximately one woman and six newborns in Yemen die every two hours due to complications during pregnancy or childbirth.[36]

Historically, Yemen has relied on imported foodstuffs.[37] Yemen imports 90 percent of its basic food needs.[38] The World Food Programme (WFP) estimated that 19 million Yemenis (or more than 60 percent of the population) would be food insecure over the second half of 2022,[39] and 1.6 million people in Yemen ''[were] expected to fall into emergency levels of hunger, taking the total to 7.3 million people by the end of the year.'' [40] Currently, 2.2 million children (approximately half of Yemeni children under age five) are under threat of acute malnutrition.[41] The United Nations High Commissioner for Refugees (UNHCR) has stated that Yemen is on the brink of famine, and IDPs are ''four times more likely to go hungry than the rest of the population.'' [42]

The World Bank reported that as of April 14, 2022, ''[e]conomic conditions continue to deteriorate, and the acute humanitarian crisis persists.'' [43] Official statistics about the status of Yemen's economy are scarce, and there is limited reliable economic information.[44] Available data indicates an economy that continues to weaken.[45] The ongoing armed conflict has damaged civilian infrastructure, including houses, hospitals, agricultural infrastructure, energy infrastructure, roads, bridges and water systems.[46] Yemen is highly dependent on imports,[47] and the conflict in Ukraine has negatively impacted the ability of Yemenis to import key commodities.[48]

In summary, the ongoing armed conflict and stream of challenges that flow from it have not been resolved. Civilians continue to be killed and displacement is substantial and widespread. Deteriorating humanitarian conditions and protracted internal conflict continue to adversely affect Yemen's civilian population.

Based upon this review and after consultation with appropriate U.S. Government agencies, the Secretary has determined that:

- The conditions supporting Yemen's designation for TPS continue to be met. *See* INA sec. 244(b)(3)(A) and (C), 8 U.S.C. 1254a(b)(3)(A) and (C).
- There continues to be an ongoing armed conflict in Yemen and, due to such conflict, requiring the return to Yemen of Yemeni nationals (or individuals having no nationality who last habitually resided in Yemen) would pose a serious threat to their personal safety. *See* INA sec. 244(b)(1)(A), 8 U.S.C. 1254a(b)(1)(A).
- There continue to be extraordinary and temporary conditions in Yemen that prevent Yemeni nationals (or individuals having no nationality who last habitually resided in Yemen) from returning to Yemen in safety, and it is not contrary to the national interest of the United States to permit Yemeni TPS beneficiaries to remain in the United States temporarily. *See* INA sec. 244(b)(1)(C), 8 U.S.C. 1254a(b)(1)(C).
- The designation of Yemen for TPS should be extended for an 18-month period, from March 4, 2023, through September 3, 2024. *See* INA sec. 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C).
- Due to the conditions described above, Yemen should be simultaneously

[28] *Id.*

[29] Daniel Gurley, Small Steps Have a Big Impact for Yemeni Civilians, DOS Dipnote: Military and Security, Apr. 6, 2021, available at: *https://www.state.gov/dipnote-u-s-department-of-state-official-blog/small-steps-have-a-big-impact-for-yemeni-civilians/* (last visited Sept. 6, 2022).

[30] Land mines will be hidden killer in Yemen decades after war, AP, Dec. 24, 2018, available at: *https://www.apnews.com/bce0a80324d040f09843ceb3e4e45c1e* (last visited Sept. 6, 2022).

[31] UN chief urges Yemen's warring parties to extend truce, AP, Oct. 13, 2022, available at: *https://apnews.com/article/middle-east-united-nations-abu-dhabi-yemen-civil-wars-abde5c3c4247328a8d38f6d65ad85231* (last visited Nov. 17, 2022).

[32] The United Nations in Yemen, available at: *https://yemen.un.org/en/about/about-the-un* (last visited Aug. 31, 2022).

[33] Yemen Health Factsheet, USAID, Apr. 25, 2022, available at: *https://www.usaid.gov/yemen/fact-sheets/health-fact-sheet* (last visited Oct. 21, 2022).

[34] Health Care Sector in Yemen—Policy Note, World Bank, Sept. 14, 2021, available at *https://www.worldbank.org/en/country/yemen/publication/health-sector-in-yemen-policy-note* (last visited Sept. 1, 2022).

[35] Yemen's hospitals in crisis as doctors flee country, Middle East Eye, Mar. 29, 2022, available at: *https://www.middleeasteye.net/news/yemens-hospitals-crisis-doctors-flee-country* (last visited Sept. 1, 2022).

[36] Health Care Sector in Yemen—Policy Note, World Bank, Sept. 14, 2021, available at *https://www.worldbank.org/en/country/yemen/publication/health-sector-in-yemen-policy-note* (last visited Sept. 1, 2022).

[37] Missiles and Food: Yemen's man-made food security crisis, Oxfam, Dec. 2017, available at: *https://reliefweb.int/sites/reliefweb.int/files/resources/bn-missiles-food-security-yemen-201217-en.pdf* (last visited Sept. 6, 2022).

[38] Democratizing Development in Yemen: Beyond Food Aid, Wilson Center, Aug. 8, 2022, available at: *https://www.wilsoncenter.org/article/democratizing-development-yemen-beyond-food-aid* (last visited Nov. 17, 2022).

[39] Yemen—World Food Programme, June 2022, available at: *https://docs.wfp.org/api/documents/WFP-0000141295/download/* (last visited Oct. 21, 2022).

[40] Brutal War on Yemen: Dire Hunger Crisis Teetering on the Edge of Catastrophe, IPS, Mar. 18, 2022, available at: *https://www.ipsnews.net/2022/03/brutal-war-yemen-dire-hunger-crisis-teetering-edge-catastrophe/?utm_source=rss&utm_medium=rss&utm_campaign=brutal-war-yemen-dire-hunger-crisis-teetering-edge-catastrophe* (last visited Oct. 21, 2022).

[41] Yemen—World Food Programme, June 2022, available at: *https://docs.wfp.org/api/documents/WFP-0000141295/download/* (last visited Sept. 2, 2022).

[42] Get to know Fattoum, a displaced Yemeni mother who struggles to take care of her orphaned children, UNHCR, Apr. 22, 2022, available at: *https://zakat.unhcr.org/blog/en/beneficiaries/fattoum* (last visited Oct. 21, 2022).

[43] Republic of Yemen, World Bank Economic Update, Apr. 14, 2022, available at: *https://thedocs.worldbank.org/en/doc/de816119d04a4e82a9c380bfd02dbc3a-0280012022/original/mpo-sm22-yemen-yem-kcm.pdf* (last visited Sept. 1, 2022).

[44] *Id.*

[45] *Id.*

[46] Saudi-led attacks devastated Yemen's civilian infrastructure, dramatically worsening the humanitarian crisis, The Washington Post, Feb. 22, 2021, available at: *https://www.washingtonpost.com/politics/2021/02/22/saudi-led-attacks-devastated-yemens-civilian-infrastructure-dramatically-worsening-humanitarian-crisis/* (last visited Sept. 6, 2022).

[47] Yemen: Civil War and Regional Intervention, Congressional Research Service, Sept. 17, 2019, available at: *https://fas.org/sgp/crs/mideast/R43960.pdf* (last visited Sept. 6, 2022).

[48] Republic of Yemen, World Bank Economic Update, Apr. 14, 2022, available at: *https://thedocs.worldbank.org/en/doc/de816119d04a4e82a9c380bfd02dbc3a-0280012022/original/mpo-sm22-yemen-yem-kcm.pdf* (last visited Sept. 1, 2022).

redesignated for TPS effective March 4, 2023, through September 3, 2024. *See* INA sec. 244(b)(1)(A) and (C) and (b)(2), 8 U.S.C. 1254a(b)(1)(A) and (C) and (b)(2).

- For the redesignation, the Secretary has determined that TPS applicants must demonstrate that they have continuously resided in the United States since December 29, 2022.
- Initial TPS applicants under the redesignation must demonstrate that they have been continuously physically present in the United States since March 4, 2023, the effective date of the redesignation of Yemen for TPS.
- It is estimated that approximately 1,200 individuals may become newly eligible for TPS under the redesignation of Yemen. This population includes Yemeni nationals who are in the United States in nonimmigrant status or without immigration status.

Notice of the Designation of Yemen for TPS

By the authority vested in me as Secretary under INA sec. 244, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate U.S. Government agencies, the statutory conditions supporting Yemen's designation for TPS on the basis of ongoing armed conflict and extraordinary and temporary conditions are met. *See* INA sec. 244(b)(1)(A), 8 U.S.C. 1254a(b)(1)(A) and INA sec. 244(b)(1)(C), 8 U.S.C. 1254a(b)(1)(C). On the basis of this determination, I am simultaneously extending the existing designation of Yemen for TPS for 18 months, from March 4, 2023, through September 3, 2024, and redesignating Yemen for TPS for the same 18-month period. *See* INA sec. 244(b)(1)(A), (b)(1)(C) and (b)(2); 8 U.S.C. 1254a(b)(1)(A), (b)(1)(C), and (b)(2).

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Eligibility and Employment Authorization for TPS

Required Application Forms and Application Fees To Register for TPS

To register for TPS based on the designation of Yemen, you must submit a Form I–821, Application for Temporary Protected Status, and pay the filing fee (or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver). You may be required to pay the biometric services fee. If you can demonstrate an inability to pay the biometric services fee, you may request to have the fee waived. Please see additional information under the ''Biometric Services Fee'' section of this notice.

TPS beneficiaries are authorized to work in the United States and are eligible for an EAD which proves their employment authorization. You are not required to submit Form I–765, Application for Employment Authorization, or have an EAD, but see below for more information if you want an EAD to use as proof that you can work in the United States.

Individuals who have a Yemen TPS application (Form I–821) that was still pending as of January 3, 2023 do not need to file the application again. If USCIS approves an individual's Form I–821, USCIS will grant the individual TPS through September 3, 2024.

For more information on the application forms and fees for TPS, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* Fees for the Form I–821, the Form I–765, and biometric services are also described in 8 CFR 106.

How can TPS beneficiaries obtain an Employment Authorization Document (EAD)?

Every employee must provide their employer with documentation showing that they have the legal right to work in the United States. TPS beneficiaries are eligible to obtain an EAD, which proves their legal right to work. Those who want to obtain an EAD must file a Form I–765 and pay the Form I–765 fee (or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver). TPS applicants may file this form along with their TPS application, or at a later date, provided their TPS application is still pending or has been approved. Beneficiaries with a Yemeni TPS-related Form I–765 that was still pending as of January 3, 2023 do not need to file the application again. If USCIS approves a pending TPS-related Form I–765, USCIS will issue the individual a new EAD that will be valid through September 3, 2024.

Refiling an Initial TPS Registration Application After Receiving a Denial of a Fee Waiver Request

If you receive a denial of a fee waiver request, you must refile your Form I–821 for TPS along with the required fees during the registration period, which ends on September 3, 2024. Meanwhile, Form I–765 EAD applications with fee payment may be filed at the same time as your TPS application or at any later date you decide you want to request an EAD during the designation period, which ends on September 3, 2024.

Refiling a TPS Re-Registration Application After Receiving Notice That the Fee Waiver Request Was Not Granted

You should file as soon as possible so USCIS can process your application and issue any EAD promptly, if you requested one. Properly filing early will also give you time to refile your application before the deadline, if USCIS does not grant your fee waiver request. If you receive a notice that USCIS did not grant your fee waiver request, and you are unable to refile by the re-registration deadline, you may still refile your Form I–821 with the biometric services fee. USCIS will review this situation to determine whether you established good cause for late TPS re-registration. However, if possible, we urge you to refile within 45 days of the date on any USCIS notice that we did not grant you a fee waiver. *See* INA sec. 244(c)(3)(C); 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17(b). For more information on good cause for late re-registration, visit the USCIS TPS web page at *https://www.uscis.gov/tps.* If USCIS does not grant your fee waiver request, you may also refile your Form I–765 with the fee either with your Form I–821 or at a later time, if you choose.

Note: A re-registering TPS beneficiary age 14 and older must pay the biometric services fee (but not the Form I–821 filing fee), or request a fee waiver, when filing a TPS re-registration application. However, if you decide to wait to request an EAD, you do not have to file the Form I–765 or pay the associated Form I–765 fee (or request a fee waiver) at the time of re-registration. You may wait to seek an EAD until after USCIS has approved your TPS re-registration application or at any later date you decide you want to request an EAD. To re-register for TPS, you only need to file the Form I–821 with the biometric services fee, if applicable (or request a fee waiver).

Filing Information

USCIS offers the option to applicants for TPS under Yemen's designation to file Form I–821 and related requests for EADs online or by mail. When filing a TPS application, applicants can also request an EAD by submitting a completed Form I–765 with their Form I–821.

Online filing: Form I–821 and I–765 are available for concurrent filing online.[49] To file these forms online, you

[49] Find information about online filing at ''Forms Available to File Online,'' *https://www.uscis.gov/file-online/forms-available-to-file-online.*

must first create a USCIS online account.[50]

Mail filing: Mail your application for TPS to the proper address in Table 1.

Table 1-Mailing Addresses

Mail your completed Form I–821, Application for Temporary Protected Status and Form I–765, Application for Employment Authorization, Form I–912, Request for Fee Waiver, if applicable, and supporting documentation to the proper address in Table 1.

TABLE 1—MAILING ADDRESSES

If. . .	Mail to. . .
You are using the U.S. Postal Service (USPS).	USCIS, Attn: TPS Yemen, P.O. Box 6943, Chicago, IL 60680–6943.
You are using FedEx, UPS, or DHL.	USCIS, Attn: TPS Yemen (Box 6943), 131 S Dearborn St., 3rd Floor, Chicago, IL 60603–5517.

If you were granted TPS by an immigration judge (IJ) or the Board of Immigration Appeals (BIA) and you wish to request an EAD, please mail your Form I–765 application to the appropriate mailing address in Table 1. When you are requesting an EAD based on an IJ/BIA grant of TPS, please include a copy of the IJ or BIA order granting you TPS with your application. This will help us verify your grant of TPS and process your application.

Supporting Documents

The filing instructions on the Form I–821 list all the documents needed to establish eligibility for TPS. You may also find information on the acceptable documentation and other requirements for applying (*i.e.,* registering) for TPS on the USCIS website at *https://www.uscis.gov/tps* under ''Yemen.''

Travel

TPS beneficiaries may also apply for and be granted travel authorization as a matter of discretion. You must file for travel authorization if you wish to travel outside of the United States. If granted, travel authorization gives you permission to leave the United States and return during a specific period. To request travel authorization, you must file Form I–131, Application for Travel Document, available at *https://www.uscis.gov/i-131.* You may file Form I–131 together with your Form I–821 or separately. When filing the Form I–131, you must:

- Select Item Number 1.d. in Part 2 on the Form I–131; and
- Submit the fee for the Form I–131, or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver.

If you are filing Form I–131 together with Form I–821, send your forms to the address listed in Table 1. If you are filing Form I–131 separately based on a pending or approved Form I–821, send your form to the address listed in Table 2 and include a copy of Form I–797 for the approved or pending Form I–821.

TABLE 2—MAILING ADDRESSES

If you are . . .	Mail to . . .
Filing Form I–131 together with a Form I–821, Application for Temporary Protected Status.	The address provided in Table 1.
Filing Form I–131 based on a pending or approved Form I–821, and you are using the U.S. Postal Service (USPS):. You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821..	USCIS, Attn: I–131 TPS, P.O. Box 660167, Dallas, TX 75266–0867.
Filing Form I–131 based on a pending or approved Form I–821, and you are using FedEx, UPS, or DHL:. You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821..	USCIS, Attn: I–131 TPS, 2501 S State Hwy. 121 Business, Ste. 400, Lewisville, TX 75067.

Biometric Services Fee for TPS

Biometrics (such as fingerprints) are required for all applicants 14 years of age and older. Those applicants must submit a biometric services fee. As previously stated, if you are unable to pay the biometric services fee, you may request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver. For more information on the application forms and fees for TPS, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* If necessary, you may be required to visit an Application Support Center to have your biometrics captured. For additional information on the USCIS biometric screening process, please see the USCIS Customer Profile Management Service Privacy Impact Assessment, available at *https://www.dhs.gov/publication/dhsuscispia-060-customer-profile-management-service-cpms.*

General Employment-Related Information for TPS Applicants and Their Employers

How can I obtain information on the status of my TPS application and EAD request?

To get case status information about your TPS application, as well as the status of your TPS-based EAD request, you can check Case Status Online at uscis.gov, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.* If your Form I–765 has been pending for more than 90 days, and you still need assistance, you may ask a question about your case online at *https://egov.uscis.gov/e-request/Intro.do* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

Am I eligible to receive an automatic extension of my current EAD through March 3, 2024, using this Federal Register notice?

Yes. Regardless of your country of birth, provided that you currently have a Yemen TPS-based EAD that has the notation A–12 or C–19 under Category and a ''Card Expires'' date of March 3, 2023, or September 3, 2021, this **Federal Register** notice automatically extends your EAD through March 3, 2024. Although this **Federal Register** notice automatically extends your EAD through March 3, 2024, you must timely re-register for TPS in accordance with the procedures described in this **Federal Register** notice to maintain your TPS and employment authorization.

When hired, what documentation may I show to my employer as evidence of identity and employment authorization when completing Form I–9?

You can find the Lists of Acceptable Documents on Form I–9, Employment Eligibility Verification, as well as the

[50] *https://myaccount.uscis.gov/users/sign_up.*

Acceptable Documents web page at *https://www.uscis.gov/i-9-central/acceptable-documents.* Employers must complete Form I–9 to verify the identity and employment authorization of all new employees. Within three days of hire, employees must present acceptable documents to their employers as evidence of identity and employment authorization to satisfy Form I–9 requirements.

You may present any document from List A (which provides evidence of both identity and employment authorization) or one document from List B (which provides evidence of your identity) together with one document from List C (which provides evidence of employment authorization), or you may present an acceptable receipt as described in the Form I–9 Instructions. Employers may not reject a document based on a future expiration date. You can find additional information about Form I–9 on the I–9 Central web page at *https://www.uscis.gov/I-9Central.* An EAD is an acceptable document under List A. *See* the section ''How do my employer and I complete Form I–9 using my automatically extended EAD for a new job?'' of this **Federal Register** notice for further information. If your EAD states A–12 or C–19 under Category and has a ''Card Expires'' date of March 3, 2023 or September 3, 2021, it has been extended automatically by virtue of this **Federal Register** notice and you may choose to present your EAD to your employer as proof of identity and employment eligibility for Form I–9 through March 3, 2024, unless your TPS has been withdrawn or your request for TPS has been denied. Your country of birth notated on the EAD does not have to reflect the TPS designated country of Yemen for you to be eligible for this extension.

What documentation may I present to my employer for Form I–9 if I am already employed but my current TPS-related EAD is set to expire?

Even though we have automatically extended your EAD, your employer is required by law to ask you about your continued employment authorization. Your employer may need to re-inspect your automatically extended EAD to check the ''Card Expires'' date and Category code if your employer did not keep a copy of your EAD when you initially presented it. Once your employer has reviewed the Card Expiration date and Category code, your employer should update the EAD expiration date in Section 2 of Form I–9. *See* the section ''What updates should my current employer make to Form I–9 if my EAD has been automatically extended?'' of this **Federal Register** notice for further information. You may show this **Federal Register** notice to your employer to explain what to do for Form I–9 and to show that USCIS has automatically extended your EAD through March 3, 2024, but you are not required to do so. The last day of the automatic EAD extension is March 3, 2024. Before you start work on March 4, 2024, your employer is required by law to reverify your employment authorization on Form I–9. By that time, you must present any document from List A or any document from List C on Form I–9 Lists of Acceptable Documents, or an acceptable List A or List C receipt described in the Form I–9 instructions to reverify employment authorization.

Your employer may not specify which List A or List C document you must present and cannot reject an acceptable receipt.

If I have an EAD based on another immigration status, can I obtain a new TPS-based EAD?

Yes, if you are eligible for TPS, you can obtain a new TPS-based EAD, regardless of whether you have an EAD or work authorization based on another immigration status. If you want to obtain a new TPS-based EAD valid through September 3, 2024, then you must file Form I–765, Application for Employment Authorization, and pay the associated fee (unless USCIS grants your fee waiver request).

Can my employer require that I provide any other documentation such as evidence of my status or proof of my Yemeni citizenship or a Form I–797C showing that I registered for TPS for Form I–9 completion?

No. When completing Form I–9, employers must accept any documentation you choose to present from the Form I–9 Lists of Acceptable Documents that reasonably appears to be genuine and that relates to you, or an acceptable List A, List B, or List C receipt. Employers need not reverify List B identity documents. Employers may not request proof of Yemeni citizenship or proof of registration for TPS when completing Form I–9 for new hires or reverifying the employment authorization of current employees. If you present an EAD that USCIS has automatically extended, employers should accept it as a valid List A document so long as the EAD reasonably appears to be genuine and to relate to you. Refer to the ''Note to Employees'' section of this **Federal Register** notice for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin.

How do my employer and I complete Form I–9 using my automatically extended EAD for a new job?

When using an automatically extended EAD to complete Form I–9 for a new job before March 4, 2024:

1. For Section 1, you should:

a. Check ''An alien authorized to work until'' and enter March 3, 2024, as the ''expiration date''; and

b. Enter your USCIS number or A-Number where indicated. (Your EAD or other document from DHS will have your USCIS number or A-Number printed on it; the USCIS number is the same as your A-Number without the A prefix.)

2. For Section 2, employers should:

a. Determine if the EAD is auto-extended by ensuring it is in category A–12 or C–19 and has a ''Card Expires'' date of March 3, 2023 or September 3, 2021.

b. Write in the document title;

c. Enter the issuing authority;

d. Provide the document number; and

e. Write March 3, 2024 as the expiration date.

Before the start of work on March 4, 2024, employers must reverify the employee's employment authorization on Form I–9.

What updates should my current employer make to Form I–9 if my EAD has been automatically extended?

If you presented a TPS-related EAD that was valid when you first started your job and USCIS has now automatically extended your EAD, your employer may need to re-inspect your current EAD if they do not have a copy of the EAD on file. Your employer should determine if your EAD is automatically extended by ensuring that it contains Category A–12 or C–19 and has a ''Card Expires'' date of March 3, 2023 or September 3, 2021. Your employer may not rely on the country of birth listed on the card to determine whether you are eligible for this extension.

If your employer determines that USCIS has automatically extended your EAD, your employer should update Section 2 of your previously completed Form I–9 as follows:

1. Write EAD EXT and March 3, 2024 as the last day of the automatic extension in the Additional Information field; and

2. Initial and date the correction.

Note: This is not considered a reverification. Employers do not reverify the employee until either the automatic extension has ended, or the employee presents a new document to show continued employment authorization, whichever is sooner. By March 4, 2024, when the employee's automatically extended EAD has expired, employers are required by law to reverify the employee's employment authorization on Form I–9.

If I am an employer enrolled in E-Verify, how do I verify a new employee whose EAD has been automatically extended?

Employers may create a case in E-Verify for a new employee by entering the number from the Document Number field on Form I–9 into the document number field in E-Verify. Employers should enter March 3, 2024 as the expiration date for an EAD that has been extended under this **Federal Register** notice.

If I am an employer enrolled in E-Verify, what do I do when I receive a ''Work Authorization Documents Expiring'' alert for an automatically extended EAD?

E-Verify automated the verification process for TPS-related EADs that are automatically extended. If you have employees who provided a TPS-related EAD when they first started working for you, you will receive a ''Work Authorization Documents Expiring'' case alert when the auto-extension period for this EAD is about to expire. Before this employee starts work on March 4, 2024, you must reverify their employment authorization on Form I–9. Employers may not use E-Verify for reverification.

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This **Federal Register** notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call USCIS at 888–464–4218 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls and emails in English and many other languages. For questions about avoiding discrimination during the employment eligibility verification process (Form I–9 and E-Verify), employers may call the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) Employer Hotline at 800–255–8155 (TTY 800–237–2515). IER offers language interpretation in numerous languages. Employers may also email IER at *IER@usdoj.gov.*

Note to Employees

For general questions about the employment eligibility verification process, employees may call USCIS at 888–897–7781 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls in English, Spanish and many other languages. Employees or job applicants may also call the IER Worker Hotline at 800–255–7688 (TTY 800–237–2515) for information regarding employment discrimination based on citizenship, immigration status, or national origin, including discrimination related to Form I–9 and E-Verify. The IER Worker Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents from the Lists of Acceptable Documents if the documentation reasonably appears to be genuine and to relate to the employee, or an acceptable List A, List B, or List C receipt as described in the Form I–9 Instructions. Employers may not require extra or additional documentation beyond what is required for Form I–9 completion. Further, employers participating in E-Verify who receive an E-Verify case result of Tentative Nonconfirmation (mismatch) must promptly inform employees of the mismatch and give such employees an opportunity to take action to resolve the mismatch. A mismatch means that the information entered into E-Verify from Form I–9 differs from records available to DHS.

Employers may not terminate, suspend, delay training, withhold or lower pay, or take any adverse action against an employee because of a mismatch while the case is still pending with E-Verify. A Final Nonconfirmation (FNC) case result is received when E-Verify cannot confirm an employee's employment eligibility. An employer may terminate employment based on a case result of FNC. Work-authorized employees who receive an FNC may call USCIS for assistance at 888–897–7781 (TTY 877–875–6028). For more information about E-Verify-related discrimination or to report an employer for discrimination in the E-Verify process based on citizenship, immigration status, or national origin, contact IER's Worker Hotline at 800–255–7688 (TTY 800–237–2515). Additional information about proper nondiscriminatory Form I–9 and E-Verify procedures is available on the IER website at *https://www.justice.gov/crt/immigrant-and-employee-rights-section* and the USCIS and E-Verify websites at *https://www.uscis.gov/i-9-central* and *https://www.e-verify.gov.*

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

For Federal purposes, if you present an automatically extended EAD referenced in this **Federal Register** notice, you do not need to show any other document, such as a Form I–797 or Form I–797C, Notice of Action reflecting receipt of a Form I–765 EAD renewal application or this **Federal Register** notice, to prove that you qualify for this extension. While Federal Government agencies must follow the guidelines laid out by the Federal Government, State and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, State, or local government benefit, you may need to provide the government agency with documents that show you are a TPS beneficiary, show you are authorized to work based on TPS or other status, or that may be used by DHS to determine if you have TPS or another immigration status. Examples of such documents are:

- Your current EAD with a TPS category code of A–12 or C–19, even if your country of birth noted on the EAD does not reflect the TPS designated country of Yemen;
- Your Form I–94, Arrival/Departure Record;
- Your Form I–797C, Notice of Action, reflecting approval of your Form I–765; or
- Form I–797 or Form I–797C, Notice of Action, reflecting approval or receipt of a past or current Form I–821.

Check with the government agency requesting documentation regarding which document(s) the agency will accept. Some state and local government agencies use the SAVE program to confirm the current immigration status of applicants for public benefits.

While SAVE can verify that an individual has TPS, each agency's procedures govern whether they will accept an unexpired EAD, Form I–797, Form I–797C, or Form I–94, Arrival/Departure Record. If an agency accepts the type of TPS-related document you present, such as an EAD, the agency

should accept your automatically extended EAD, regardless of the country of birth listed on the EAD. It may assist the agency if you:

a. Give the agency a copy of the relevant **Federal Register** notice showing the extension of TPS-related documentation in addition to your recent TPS-related document with your A-number, USCIS number or Form I–94 number;

b. Explain that SAVE will be able to verify the continuation of your TPS using this information; and

c. Ask the agency to initiate a SAVE query with your information and follow through with additional verification steps, if necessary, to get a final SAVE response verifying your TPS.

You can also ask the agency to look for SAVE notices or contact SAVE if they have any questions about your immigration status or automatic extension of TPS-related documentation. In most cases, SAVE provides an automated electronic response to benefit-granting agencies within seconds, but occasionally verification can be delayed.

You can check the status of your SAVE verification by using CaseCheck at *https://save.uscis.gov/casecheck/.* CaseCheck is a free service that lets you follow the progress of your SAVE verification case using your date of birth and one immigration identifier number (A-number, USCIS number or Form I–94 number) or Verification Case Number. If an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted on or will act on a SAVE verification and you do not believe the SAVE response is correct, the SAVE website, *https://www.uscis.gov/save,* has detailed information on how to make corrections or update your immigration record, make an appointment, or submit a written request to correct records.

[FR Doc. 2022–28283 Filed 12–30–22; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7050–N–69]

30-Day Notice of Proposed Information Collection: Public Housing Reform Act: Changes to Admission and Occupancy Requirements; OMB Control No.: 2577–0230

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* February 2, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_submission@omb.eop.gov* or *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: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 31, 2022 at 87 FR 53482.

This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Public Housing Reform Act: Changes to Admission and Occupancy Requirements.

OMB Approval Number: 2577–0230.

Type of Request: Revision of currently approved collection.

Form Number: N/A.

Description of the Need for the Information and Proposed Use:

This collection of information implements changes to the admission and occupancy requirements for the public housing program made by the Quality Housing and Work Responsibility (QHWRA) Act of 1998 (Title V of the FY 1999 HUD appropriations Act, Public Law 105–276, 112 Stat. 2518, approved October 21, 1998), and the Housing Opportunity Through Modernization Act of 2016 (HOTMA), section 103, which amends the United States Housing Act of 1937. Both QHWRA and HOTMA made comprehensive changes to HUD's public housing program. These changes include defining an 'over-income family' as one having an annual income 120 percent above the median income for the area for two consecutive years and includes new mandatory annual reporting requirements on the number of over-income families residing in public housing and the total number of families on the public housing waiting lists at the end of each reporting year.

The purpose of the admission and occupancy policy requirement is to ensure that public housing agencies have written documentation of their respective admission and occupancy policies for both the public and the Department of Housing and Urban Development (HUD). Public housing authorities must have on hand and available for inspection, policies related to admission and occupancy, to respond to inquiries from tenants, legal-aid services, HUD, and other interested parties informally or through the Freedom of Information Act of policies relating to eligibility for admission and continued occupancy, local preferences, income limitations, and rent determination. HOTMA now requires PHAs to make an update to their Admission and Occupancy policy to apply local over-income limits, and annually report on the number of over-income families living in their public housing units as well as the number of families on the public housing waiting list.

Additional revisions have been made to this collection to reflect adjustments in calculations based on the total number of current, active public housing agencies (PHAs) to date. The number of active public housing agencies has changed from 2,897 to

2,774 [1] since the last approved information collection. In general, the number of PHAs can fluctuate due to many factors, including but not limited to the merging of two or more PHAs or the termination of the public housing programs due to the Rental Assistance Demonstration.

Lastly, to provide an opportunity to respondents to review, this notice includes a burden statement that will able be made available on HUD's website:

The public reporting burden for this collection of information for the Admission and Occupancy Requirements of Public Housing is estimated to average 24 hours, including the time for reviewing instructions, searching existing data sources, gathering, and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions to reduce this burden, to the Reports Management Officer, Paperwork Reduction Project, to the Office of Information Technology, U.S. Department of Housing and Urban Development, Washington, DC 20410–3600. When providing comments, please refer to OMB Approval No. 2577–0230. HUD may not conduct and sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

This collection of information is required to ensure that public housing agencies have written documentation of their respective admission and occupancy policies for both the public and HUD pursuant to regulations found at 24 CFR 903.7 and 960. The information will be used to provide HUD with sufficient information to enable a determination that HUD statutory and regulatory requirements have been met. No assurances of confidentiality are provided for this information collection.

Respondents: State, local or Tribal government.

Estimated Number of Respondents: 2,774.

Estimated Number of Responses: 2,774.

Frequency of Response: 1.

Average Hours per Response: 24.

Total Estimated Burdens: 66,576.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2022–28507 Filed 12–30–22; 8:45 am]

BILLING CODE 4210–67–P

[1] The Public Housing (PH) Data Dashboard as of 5/16/22, *https://www.hud.gov/program_offices/public_indian_housing/programs/ph/PH_Dashboard.*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7050–N–68]

30-Day Notice of Proposed Information Collection: Housing Opportunity Through Modernization Act of 2016 (HOTMA): Public Housing Waiting List Data Collection Tool OMB Control No: 2577–NEW

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* February 2, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_submission@omb.eop.gov* or *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: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on August 31, 2022 at 87 FR 53484.

A. Overview of Information Collection

Title of Information Collection: Housing Opportunity Through Modernization Act of 2016 (HOTMA): Public Housing Waiting List Data Collection Tool.

OMB Approval Number: 2577–XXXX.

Type of Request: New Collection.

Form Number: Form HUD–XXXXX.

Description of the Need for the Information and Proposed Use:

This collection of information implements a statutory requirement made by Section 103 of the Housing Opportunity Through Modernization Act of 2016 (HOTMA). HOTMA was signed into law on July 29, 2016 (Public Law 114–201, 130 Stat. 782). Section 103 of HOTMA amends section 16(a) of the United States Housing Act of 1937 (42 U.S.C. 1437n(a)) (1937 Act).

Section 103 of HOTMA states that after a public housing family has been over-income for two consecutive years, a public housing agency (PHA) must either: (1) charge the over-income family a monthly rent that is the higher of fair market rent under section 8(c) for the dwelling unit or the monthly amount of public housing subsidy provided for the dwelling unit; or (2) terminate the

tenancy of the over-income family no later than 6 months after the end of the two-year period. Additionally, pursuant to section 103 of HOTMA, PHAs must submit an annual report on two specific data points: 1. The number of over-income families residing in public housing and 2. the number of families on the public housing waiting lists.

The number of over-income families currently residing in public housing is already being collected via the form HUD–50058. Therefore, PHAs will be allowed to use income data already provided by form HUD–50058, under OMB approval number 2577–0083, which is submitted electronically in the PIH Information Center (PIC) system to satisfy the first data requirement to report the annual number of over-income families residing in public housing. The requirement for PHAs to report on the number of over-income families will be satisfied with currently-existing 50058 reporting requirements and HUD will compile this with the data provided on the number of families on the public housing waiting list for the public report.

The requirement for PHAs to report on the number of families on the public housing waiting list is new and so has resulted in the need to for this collection of information request. Each PHA will now be required to submit the total number of families on the public housing waiting lists annually utilizing the newly created electronic Public Housing Waiting List Data Collection Tool. The data on the total number of unduplicated families on the public housing waiting list will be provided by the PHA in the aggregate and no personally identifiable information will be collected. Section 103 of HOTMA permits HUD to determine the format of these annual reports and HUD has elected to utilize PIC data when possible as this will result in no additional burden to the PHA. Per the requirements of Section 103 of HOTMA, HUD will compile the data provided in PIC and the new data that will be collected via the electronic Public Housing Waiting List Data Collection Tool to publish this information annually in a publicly available report.

Respondents: State, Local or Tribal Government.

Estimated Number of Respondents: 2,774 (This number excludes HCV-only PHA's).

Estimated Number of Responses: 2,774 (This number excludes HCV-only PHA's).

Frequency of Response: Annually.

Average Hours per Response: 0.5 of an hour (30 min).

Total Estimated Burdens: 1,387 hours.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Public Housing Waiting List Data Collection Tool.	**2,774	1	1	0.5 of an hr. (30 min).	1,387	*$21.82	$30,264
Total	2,774	1	1	0.5 hr	1,387	21.82	30,264

*Based on the U.S. national average of the hourly pay for an Executive Assistant (*payscale.com*, 3/7/2022).
**Based on data from the Public Housing (PH) Dashboard updated as of 8/1/22.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2022–28489 Filed 12–30–22; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7050–N–66]

30-Day Notice of Proposed Information Collection: Inspector Candidate Assessment Questionnaire; OMB Control No.: 2577–0243

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* February 2, 2023.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_submission@omb.eop.gov* or *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: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/*

consumers/guides/telecommunications-relay-service-trs.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on October 17, 2022 at 87 FR 62877.

A. Overview of Information Collection

Title of Proposal: Inspector Candidate Assessment Questionnaire.

OMB Approval Number: 2577–0243.

Type of Request: Reinstatement with change of a previously approved collection.

Form Number: Form HUD 50002A and Form HUD 50002B—HFA.

Description of the Need for the Information and Proposed Use: To meet the requirements of HUD's Uniform Physical Condition Standards (UPCS), the Physical Condition of Multifamily Properties and the Public Housing Assessment System (PHAS) regulations, the Department conducts physical condition inspections of approximately 14,000 multifamily and public housing properties annually. HUD uses contract inspectors that are trained and certified in the UPCS protocol by HUD to conduct UPCS inspections. Individuals who wish to be trained and certified UPCS by HUD are requested to electronically submit the questionnaire via the internet. The questionnaire provides HUD with basic knowledge of an individual's inspection skills and abilities.

As part of aligning REAC UPCS inspections with those conducted by state Housing Finance Agencies, state HFA staff also may fill out a form for information purposes only prior to attending the UPCS training.

Respondents: Applicants to the UPCS inspector certification program and state HFA staff.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
HUD 50002A	200	1	200	0.33	66	$34.86	$ 2300.76
HUD 50002B–FHA	35	1	35	0.25	9	34.86	313.74
Total Burden			235	1	75		2614.50

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Colette Pollard,

Department Reports Management Officer, Office of Policy Development and Research, Chief Data Officer.

[FR Doc. 2022–28488 Filed 12–30–22; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GR23ZD01BNEPJ002; OMB Control Number 1028–NEW]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Angler Participation Study

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) is proposing a new information collection.

DATES: Interested persons are invited to submit comments on or before February 2, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Comments can also be sent by mail to the U.S. Geological Survey, Information Collections Officer, 12201 Sunrise Valley Drive MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number 1028–NEW in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this Information Collection Request (ICR), contact Lucas Bair by email at *lbair@usgd.gov,* or by telephone at 916–556–7362. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information

collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on February 4, 2022 (87 FR 6621). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personally identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Abstract: In 2019 the National Park Service (NPS) completed a plan for non-native fish management from Glen Canyon Dam to Lees Ferry and on through Grand Canyon National Park. With public and partner input, the NPS identified specific tools for managing non-native brown trout, including an incentivized harvest program that offers a reward to anglers for catching and harvesting brown trout. The Glen Canyon Dam Adaptive Management Program along with its science provider, the U.S. Geological Survey's Grand Canyon Monitoring and Research Center, is interested in understanding the participation of anglers in the brown trout incentivized harvest program. An online survey will be used to collect information concerning (1) trip characteristics, (2) incentive structure and (3) opinions on river management. This collection proposes to provide data that will be used to inform the ongoing incentivized harvest program.

Title of Collection: Angler Participation Study.

OMB Control Number: 1028–NEW.

Form Number: None.

Type of Review: New.

Respondents/Affected Public: Individuals/households.

Total Estimated Number of Annual Respondents: 800.

Total Estimated Number of Annual Responses: 800.

Estimated Completion Time per Response: 27 minutes.

Total Estimated Number of Annual Burden Hours: 360.

Respondent's Obligation: Voluntary.

Frequency of Collection: One time.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor, nor is a person required to respond to, a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the PRA (44 U.S.C. 3501 *et seq.*).

Scott Vanderkooi,

Director, USGS Southwest Biological Science Center.

[FR Doc. 2022–28490 Filed 12–30–22; 8:45 am]

BILLING CODE 4338–11–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–253 and 731–TA–132, 252, 271, 273, 532–534, and 536 (Fifth Review)]

Circular Welded Pipe and Tube From Brazil, India, Mexico, South Korea, Taiwan, Thailand, and Turkey; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the countervailing duty order on certain circular welded pipe and tube from Turkey and the antidumping duty orders on certain circular welded pipe and tube from Brazil, India, Mexico, South Korea, Taiwan, Thailand, and Turkey would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted January 3, 2023. To be assured of consideration, the deadline for responses is February 2, 2023. Comments on the adequacy of responses may be filed with the Commission by March 16, 2023.

FOR FURTHER INFORMATION CONTACT: Andres Andrade (202–205–2078), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.— On the dates listed below, the Department of Commerce (''Commerce'') issued a countervailing duty order and antidumping duty orders on the subject imports:

Order date	Product/country	Inv. No.	FR cite
5/7/84	Small diameter carbon steel pipe and tube/Taiwan	731–TA–132	49 FR 19369
3/7/86	Welded carbon steel pipe and tube/Turkey	701–TA–253	51 FR 7984

Order date	Product/country	Inv. No.	FR cite
3/11/86	Welded carbon steel pipe and tube/Thailand	731–TA–252	51 FR 8341
5/12/86	Welded carbon steel pipe and tube/India	731–TA–271	51 FR 17384
5/15/86	Welded carbon steel pipe and tube/Turkey	731–TA–273	51 FR 17784
11/2/92	Circular welded non-alloy steel pipe/Brazil	731–TA–532	57 FR 49453
11/2/92	Circular welded non-alloy steel pipe/Korea	731–TA–533	57 FR 49453
11/2/92	Circular welded non-alloy steel pipe/Mexico	731–TA–534	57 FR 49453
11/2/92	Circular welded non-alloy steel pipe/Taiwan	731–TA–536	57 FR 49454

Commerce issued a continuation of the countervailing duty order on certain circular welded pipe and tube from Turkey and the antidumping duty orders on certain circular welded pipe and tube from Brazil, India, Mexico, South Korea, Taiwan, Thailand, and Turkey following Commerce's and the Commission's first five-year reviews, effective August 22, 2000 (65 FR 50955–50958 and 50960), second five-year reviews, effective August 8, 2006 (71 FR 44996) and August 14, 2006 (71 FR 46447), third five-year reviews, effective July 17, 2012 (77 FR 41967), and fourth five-year reviews, effective February 7, 2018 (83 FR 5402). The Commission is now conducting fifth reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are Brazil, India, Mexico, South Korea, Taiwan, Thailand, and Turkey.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its separate original determinations, the Commission defined the *Domestic Like Product* as follows: (1) small diameter circular pipes and tubes (*i.e.,* with an outside diameter of at least 0.375 inch but not more than 4.5 inches) (Inv. No. 731–TA–132); (2) standard pipe up to and including 16 inches in outside diameter (Inv. Nos. 731–TA–252 and 701–TA–253); (3) standard pipe of not more than 16 inches in outside diameter (Inv. Nos. 731–TA–271 and 273); and (4) circular welded, non-alloy steel pipes and tubes of not more than 16 inches in outside diameter, except (a) finished conduit other than finished rigid conduit and (b) mechanical tubing that is not cold-drawn or cold-rolled (Inv. Nos. 731–TA–532–534 and 536). In its combined full first five-year review determinations, the Commission defined a single *Domestic Like Product* consisting of all circular welded non-alloy steel pipes and tubes not more than 16 inches in outside diameter for all the orders under review. In its full second and third five-year review determinations and in its expedited fourth five-year review determinations, the Commission again defined a single *Domestic Like Product* in the same manner as it did in the first five-year reviews. That is, it defined the *Domestic Like Product* corresponding to the circular welded pipe orders under review to be all circular, welded, non-alloy steel pipes and tubes not more than 16 inches in outside diameter.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations and all subsequent five-year review determinations, the Commission defined the *Domestic Industry* as all U.S. producers of the domestic like product.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in

this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is February 2, 2023. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is March 16, 2023. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 22–5–555, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information to Be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

Those responding to this notice of institution are encouraged, but not required, to visit the USITC's website for this proceeding at *https://www.usitc.gov/investigations/701731/2023/circular_welded_pipe_and_tube_brazil_india_korea/adequacy.htm* and download and complete the ''NOI worksheet'' Excel form, to be included as attachment/exhibit 1 of your overall response.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2016.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone

number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2022, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* after 2016, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: December 27, 2022.

Jessica Mullan,

Acting Supervisory Attorney.

[FR Doc. 2022–28479 Filed 12–30–22; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–709 (Fifth Review)]

Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From Germany; Institution of a Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted a review pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping duty order on certain seamless carbon and alloy steel standard, line, and pressure pipe from Germany would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by

submitting the information specified below to the Commission.

DATES: Instituted January 3, 2023. To be assured of consideration, the deadline for responses is February 2, 2023. Comments on the adequacy of responses may be filed with the Commission by March 16, 2023.

FOR FURTHER INFORMATION CONTACT: Julie Duffy (202–708–2579), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On August 3, 1995, the Department of Commerce (''Commerce'') issued an antidumping duty order on imports of certain seamless pipe from Germany (60 FR 39704). Commerce issued a continuation of the antidumping duty order on certain seamless pipe from Germany following Commerce's and the Commission's first five-year reviews, effective July 16, 2001 (66 FR 37004), second five-year reviews, effective May 18, 2007 (72 FR 28026), third five-year reviews, effective September 14, 2012 (77 FR 56809), and fourth five-year reviews, effective February 28, 2018 (83 FR 8651). The Commission is now conducting a fifth review pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the order would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct a full review or an expedited review. The Commission's determination in any expedited review will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to this review:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year review, as defined by Commerce.

(2) The *Subject Country* in this review is Germany.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determination, the Commission found a single *Domestic Like Product* consisting of circular seamless carbon and alloy steel standard, line, and pressure pipe and tubes not more than 4.5 inches in outside diameter, including redraw hollows. In its full first and second five-year review determinations and its expedited third and fourth five-year review determinations, the Commission found one *Domestic Like Product* consisting of all seamless carbon and alloy steel standard, line, and pressure pipe and tubes not more than 4.5 inches in outside diameter, including redraw hollows.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determination, its full first and second five-year review determinations, and its expedited third and fourth five-year review determinations, the Commission defined the *Domestic Industry* as all U.S. producers of the *Domestic Like Product.*

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register.** Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in

internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is February 2, 2023. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct an expedited or full review. The deadline for filing such comments is March 16, 2023. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 22–5–553, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determination in the review.

Information to be provided in response to this notice of institution: As used below, the term ''firm'' includes any related firms.

Those responding to this notice of institution are encouraged, but not required, to visit the USITC's website for this proceeding at *https://www.usitc.gov/investigations/701731/2023/seamless_carbon_and_alloy_steel_standard_line_and/adequacy.htm* and download and complete the ''NOI worksheet'' Excel form, to be included as attachment/exhibit 1 of your overall response.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty order on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2016.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2022, except as noted (report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic*

Like Product produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* after 2016, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: December 27, 2022.

Jessica Mullan,

Acting Supervisory Attorney.

[FR Doc. 2022–28477 Filed 12–30–22; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–1348]

Certain Cabinet X-Ray and Optical Camera Systems and Components Thereof Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 25, 2022, under section 337 of the Tariff Act of 1930, as amended, on behalf of KUB Technologies, Inc. of Stratford, Connecticut. A supplement to the complaint was filed on December 9, 2022. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cabinet x-ray and optical camera systems and components thereof by reason of the infringement of certain claims of U.S. Patent No. 10,670,545 (''the '545 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and a cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Jessica Mullan, Office of the Secretary, Docket Services Division, U.S. International Trade Commission, (202) 205–1802.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the

Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2021).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 27, 2022, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1–4, 6–9, 16–18, and 22 of the '545 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''an x-ray and optical camera system contained in a mobile cabinet and components thereof'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

KUB Technologies, Inc., 111 Research Drive, Stratford, CT 06615

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

CompAI Healthcare (Shenzhen) Co., Ltd., 8B, Huangting Building, No. 355, Fuhua Road, Futian Street, Futian District, Shenzhen, Guangdong 518026, China

CompAI Healthcare (Suzhou) Co., Ltd., Room 3A05, Building 2, No. 8, Changting, Road, Suzhou, Jiangsu, 215051, China

Kangpai Medical Technology (Changchun) Co., Ltd., c/o CompAI Healthcare (Suzhou) Co., Ltd., Room 3A05, Building 2, No. 8, Changting Road, Suzhou, Jiangsu, 215051, China

Kangpai (Beijing) Medical Equipment Co., Ltd., c/o CompAI Healthcare (Suzhou) Co., Ltd., Room 3A05, Building 2, No. 8, Changting Road, Suzhou, Jiangsu, 215051, China

Dilon Technologies, Inc., 12050 Jefferson Ave., Ste. 340, Newport News, VA 23606

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigation is not a party to this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 27, 2022.

Jessica Mullan,

Acting Supervisory Attorney.

[FR Doc. 2022–28492 Filed 12–30–22; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–576–577 and 731–TA–1362–1367 (Review)]

Cold-Drawn Mechanical Tubing From China, Germany, India, Italy, South Korea, and Switzerland; Institution of Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the countervailing duty orders on certain cold-drawn mechanical tubing of carbon and alloy steel (''cold-drawn mechanical tubing'') from China and India and the antidumping duty orders on cold-drawn mechanical tubing from China, Germany, India, Italy, South Korea, and Switzerland would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

DATES: Instituted January 3, 2023. To be assured of consideration, the deadline for responses is February 2, 2023. Comments on the adequacy of responses may be filed with the Commission by March 16, 2023.

FOR FURTHER INFORMATION CONTACT: Keysha Martinez (202–205–2136), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On February 1, 2018, the Department of Commerce (''Commerce'') issued countervailing duty orders on imports of cold-drawn mechanical tubing from China and India (83 FR 4637). On June 11, 2018, Commerce issued antidumping duty orders on imports of cold-drawn mechanical tubing from China, Germany, India, Italy, South Korea, and Switzerland (83 FR 26962). The Commission is conducting reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts

available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are China, Germany, India, Italy, South Korea, and Switzerland.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, the Commission defined a single *Domestic Like Product* consisting of all cold-drawn mechanical tubing coextensive with Commerce's scope. The Commission did not include as-welded tubes within the definition of the domestic like product.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined a single *Domestic Industry* to include all U.S. producers of cold-drawn mechanical tubing, not including U.S. producers of as-welded tubes.

(5) The *Order Dates* are the dates that the orders under review became effective. In these reviews, the *Order Date* for the countervailing duty orders concerning China and India is February 1, 2018, and the *Order Date* for the antidumping duty orders concerning China, Germany, India, Italy, South Korea, and Switzerland is June 11, 2018.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the proceeding and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Written submissions.—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is February 2, 2023. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is March 16, 2023. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 22–5–554, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations,

U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Inability to provide requested information.—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

Information to Be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

Those responding to this notice of institution are encouraged, but not required, to visit the USITC's website for this proceeding at *https://www.usitc.gov/investigations/701731/2023/cold_drawn_mechanical_tubing_china_germany_india/adequacy.htm* and download and complete the ''NOI worksheet'' Excel form, to be included as attachment/exhibit 1 of your overall response.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandis*e, a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in § 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date.*

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2022, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not

including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This proceeding is being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.
Issued: December 27, 2022.

Jessica Mullan,

Acting Supervisory Attorney.

[FR Doc. 2022–28470 Filed 12–30–22; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–0099]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension Without Change of a Currently Approved Collection; USMS Medical Forms

AGENCY: U.S. Marshals Service, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The U.S. Marshals Service (USMS), Department of Justice (DOJ), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until March 6, 2023.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any additional information, please contact Nicole Timmons either by mail at CG–3, 10th Floor, Washington, DC 20530–0001, by email at *Nicole.Timmons@usdoj.gov,* or by telephone at 202–236–2646.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection:* Extension and revision of a currently approved collection.

2. *The Title of the Form/Collection:* USMS Medical Forms.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form Numbers: USM–522A Physician Evaluation Report for USMS Operational Employees.

USM–522P Physician Evaluation Report for USMS Operational Employees—Pregnancy Only.

USM–600 Physical Requirements of USMS District Security Officers.

CSO–012 Request to Reevaluate Court Security Officer's Medical Qualification.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Affected public: Private sector (Physicians).

USM–522A Physician Evaluation Report for USMS Operational Employees.

Brief abstract: This form is completed by an USMS operational employee's treating physician to report any illness/injury (other than pregnancy) that requires restriction from full performance of duties for longer than 80 consecutive hours.

USM–522P Physician Evaluation Report for USMS Operational Employees (Pregnancy Only).

Brief abstract: Form USM–522P must be completed by the OB/GYN physician of pregnant USMS operational employees to specify any restrictions from full performance of duties.

USM–600 Physical Requirements of USMS District Security Officers.

Brief abstract: It is the policy of the USMS to ensure a law enforcement work force that is medically able to safely perform the required job functions. All applicants for law enforcement positions must have pre-employment physical examinations; existing District Security Officers (DSOs) must recertify that they are

physically fit to perform the duties of their position each year. DSOs are individual contractors, not employees of USMS; Form USM–522 does not apply to DSOs.

CSO–012 Request to Reevaluate Court Security Officer's Medical Qualification.

Brief abstract: This form is completed by the Court Security Officer (CSO)'s attending physician to determine whether a CSO is physically able to return to work after an injury, serious illness, or surgery. The physician returns the evaluation to the contracting company, and if the determination is that the CSO may return to work, the CSO–012 is then signed off on by the contracting company and forwarded to the USMS for final review by USMS' designated medical reviewing official. Court Security Officers are contractors, not employees of USMS; Form USM–522A does not apply to CSOs.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

USM–522A Physician Evaluation Report for USMS Operational Employees.

It is estimated that 208 respondents will complete a 20 minute form twice per year.

USM–522P Physician Evaluation Report for USMS Operational Employees (Pregnancy Only) It is estimated that 7 respondents will complete a 15 minute form twice per year.

USM–600 Physical Requirements of USMS District Security Officers. It is estimated that 2,000 respondents will complete a 20 minute form.

CSO–012 Request to Reevaluate Court Security Officer's Medical Qualification.

It is estimated that 300 respondents will complete a 30 minute form.

6. *An estimate of the total public burden (in hours) associated with the collection:*

USM–522A Physician Evaluation Report for USMS Operational Employees.

There are an estimated 139 annual total burden hours associated with this collection.

USM–522P Physician Evaluation Report for USMS Operational Employees (Pregnancy Only) There are an estimated 4 annual total burden hours associated with this collection.

USM–600 Physical Requirements of USMS District Security Officers. There are an estimated 667 annual total burden hours associated with this collection.

CSO–012 Request to Reevaluate Court Security Officer's Medical Qualification.

There are an estimated 150 annual total burden hours associated with this collection.

Total Annual Time Burden (Hr): 960.

If additional information is required contact: Robert Houser, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE, 3E.206, Washington, DC 20530.

Dated: December 28, 2022.

Robert Houser,

Department Clearance Officer for PRA, Office of Chief Information Officer, U.S. Department of Justice.

[FR Doc. 2022–28523 Filed 12–30–22; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Prohibited Transaction Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before February 2, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Mara Blumenthal by telephone at 202–693–8538, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Section 408(a) of the Employee Retirement Income Security Act (ERISA) authorizes the Secretary of Labor ''to grant a conditional or unconditional exemption of any fiduciary or class of fiduciaries or transactions, from all or part of the restrictions imposed by section 406 and 407(a).'' Class exemption PTE 77–4, which was originally granted on April 8, 1977, exempts from the prohibited transaction restrictions the purchase and sale by an employee benefit plan of shares from a registered, open-end investment company (mutual fund) when a fiduciary of the plan (*e.g.,* an investment manager) is also the investment advisor for the investment company. The exemption requires disclosure of any redemption fees in the current prospectus and approval of the advisory fees by a second fiduciary so that the plan fiduciary can make informed judgments with respect to the prudence of the transactions. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 22, 2022 (87 FR 43897).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL-EBSA.

Title of Collection: Prohibited Transaction Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans.

OMB Control Number: 1210–0049.

Affected Public: Private Sector—Businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 825.

Total Estimated Number of Responses: 297,552.

Total Estimated Annual Time Burden: 25,208 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Dated: December 23, 2022.

Mara Blumenthal,

Senior PRA Analyst.

[FR Doc. 2022–28501 Filed 12–30–22; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2022–0002]

National Advisory Committee on Occupational Safety and Health (NACOSH); Request for Nominations

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for nominations.

SUMMARY: OSHA invites interested persons to submit nominations for membership on the National Advisory Committee on Occupational Safety and Health (NACOSH).

DATES: Nominations for NACOSH membership must be submitted (postmarked, sent, transmitted, or received) by February 2, 2023.

ADDRESSES:

Electronically: You may submit nominations, including attachments, electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the online instructions for making submissions.

OSHA will post submissions in response to this **Federal Register** notice, including personal information, in the public docket, which will be available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates.

Docket: To read or download submissions or other material in the docket, go to *http://www.regulations.gov.* All documents in the public docket are listed in the index; however, some documents (*e.g.,* copyrighted material) are not publicly available to read or download through *www.regulations.gov.* All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General information and technical inquiries: Ms. Lisa Long, Acting Deputy Director, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone: (202) 693–2049; email: *long.lisa@dol.gov.*

SUPPLEMENTARY INFORMATION: The Secretary of Labor (Labor Secretary) invites interested individuals to submit nominations for membership on NACOSH.

I. Background

The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651, 656) established NACOSH to advise, consult with, and make recommendations to the Secretary and the Secretary of Health and Human Services (HHS Secretary) on matters relating to the administration of the OSH Act. NACOSH is a continuing advisory committee of indefinite duration.

NACOSH operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2), implementing regulations (41 CFR part 102–3), the OSH Act, and OSHA's regulations on NACOSH (29 CFR part 1912a).

The Committee meets at least two times a year (29 U.S.C. 656(a)(2)). Committee members serve without compensation, but OSHA provides travel and per diem expenses. NACOSH members serve staggered terms, unless the member becomes unable to serve, resigns, ceases to be qualified to serve, or is removed by the Labor Secretary. The terms of two Health and Human Services-designated NACOSH members expire on June 16, 2023, and four Department of Labor-designated NACOSH members expire on July 31, 2023.

II. NACOSH Membership

NACOSH is comprised of 12 members appointed by the Secretary of Labor, four of which are designated by the HHS Secretary. Accordingly, the Labor Secretary seeks committed members to serve a two-year term. If a vacancy occurs before a term expires, the Labor Secretary may appoint a new member who represents the same interest as the predecessor to serve the remainder of the unexpired term. The U.S. Department of Labor is committed to equal opportunity in the workplace and seeks a broad-based and diverse NACOSH membership.

Nominations of new members, or resubmissions of current or former members, will be accepted in five categories of membership. Interested persons may nominate themselves or submit the name of another person whom they believe to be interested in and qualified to serve on NACOSH. Nominations may also be submitted by organizations from one of the categories listed.

OSHA invites nominations for the following NACOSH positions:

- Two (2) public representatives (one for OSHA, one for HHS);
- One (1) management representative (OSHA);
- One (1) labor representative (OSHA);
- One (1) occupational safety professional representative (OSHA); and
- One (1) occupational health professional representative (HHS).

III. Submission Requirements

Any individual or organization may nominate one or more qualified persons for membership on NACOSH. Nominations must include the following information:

1. The nominee's name, contact information, and current employment or position;
2. The nominee's resume or curriculum vitae, including prior membership on NACOSH and other relevant organizations and associations;
3. The categories that the nominee is qualified to represent;
4. A summary of the background, experience, and qualifications that address the nominee's suitability for membership;
5. A list of articles or other documents the nominee has authored that indicates the nominee's experience in worker safety and health; and
6. A statement that the nominee is aware of the nomination, is willing to regularly attend and participate in NACOSH meetings, and has no conflicts of interest that would preclude membership on NACOSH.

OSHA will conduct a basic background check of candidates before their appointment to NACOSH. The background check will involve accessing publicly available, internet-based sources.

IV. Member Appointment

The Labor Secretary will appoint six NACOSH members, two of which will be designated by the HHS Secretary, based on their experience, knowledge, and competence in the field of occupational safety and health (29 CFR 1912a.2). Information received through this nomination process, in addition to other relevant sources of information, will assist the Labor Secretary in appointing members to NACOSH. In selecting NACOSH members, the Labor Secretary will consider individuals nominated in response to this **Federal Register** notice, as well as other qualified individuals. OSHA will publish a list of newly appointed NACOSH members in the **Federal Register**.

Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by 29 U.S.C. 656, 5 U.S.C. App. 2, 29 CFR parts 1912 and 1912a; 41 CFR part 102–3; and Secretary of Labor's Order No. 8–2020 (85 FR 58393, Sept. 18, 2020).

Signed at Washington, DC, on December 12, 2022.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2022–28499 Filed 12–30–22; 8:45 am]

BILLING CODE 4510–26–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2020–135; CP2022–63; MC2023–97 and CP2023–98; MC2023–98 and CP2023–99; MC2023–99 and CP2023–100; MC2023–100 and CP2023–101; MC2023–101 and CP2023–102; MC2023–102 and CP2023–103; MC2023–103 and CP2023–104; MC2023–104 and CP2023–105]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 5, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2020–135; *Filing Title:* USPS Notice of Amendment to Parcel Return Service Contract 18, Filed Under Seal; *Filing Acceptance Date:* December 23, 2022; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* January 5, 2023.

2. *Docket No(s).:* CP2022–63; *Filing Title:* USPS Notice of Amendment to Priority Mail Contract 741, Filed Under Seal; *Filing Acceptance Date:* December 23, 2022; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* January 5, 2023.

3. *Docket No(s).:* MC2023–97 and CP2023–98; *Filing Title:* USPS Request to Add Priority Mail Contract 774 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 23, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* January 5, 2023.

4. *Docket No(s).:* MC2023–98 and CP2023–99; *Filing Title:* USPS Request to Add Priority Mail & Parcel Select Contract 7 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 23, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* January 5, 2023.

5. *Docket No(s).:* MC2023–99 and CP2023–100; *Filing Title:* USPS Request to Add Parcel Select Contract 57 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 23, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* January 5, 2023.

6. *Docket No(s).:* MC2023–100 and CP2023–101; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail, First-Class Package Service & Parcel Select Contract 106 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 23, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* January 5, 2023.

7. *Docket No(s).:* MC2023–101 and CP2023–102; *Filing Title:* USPS Request to Add Priority Mail Express, Priority

Mail, First-Class Package Service & Parcel Select Contract 107 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* January 5, 2023.

8. *Docket No(s).:* MC2023–102 and CP2023–103; *Filing Title:* USPS Request to Add Priority Mail & Parcel Select Contract 8 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* January 5, 2023.

9. *Docket No(s).:* MC2023–103 and CP2023–104; *Filing Title:* USPS Request to Add Priority Mail, Parcel Select & Parcel Return Service Contract 1 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Gregory S. Stanton; *Comments Due:* January 5, 2023.

10. *Docket No(s).:* MC2023–104 and CP2023–105; *Filing Title:* USPS Request to Add First-Class Package Service & Parcel Select Contract 1 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 27, 2022; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* January 5, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2022–28526 Filed 12–30–22; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Thursday, January 5, 2023.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Authority: 5 U.S.C. 552b.

Dated: December 29, 2022.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2022–28560 Filed 12–29–22; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–96586; File No. SR–DTC–2022–014]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Guide

December 27, 2022.

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 December 22, 2022, The Depository Trust Company (''DTC'') 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 clearing agency. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(2) thereunder.[4] 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.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change[5] consists of amendments to the Guide to the DTC Fee Schedule[6] (''Fee Guide'') to revise certain fees charged to Participants for settlement services,[7] as described below.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend the Fee to revise certain fees charged to Participants for settlement services, as described below.

Overview

DTC is a central securities depository, and as such, provides a central location in which Eligible Securities[8] may be

[5] Each capitalized term not otherwise defined herein has its respective meaning as set forth the Rules, By-Laws and Organization Certificate of DTC (the ''Rules''), *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.*

[6] *Available at http://www.dtcc.com/~/media/Files/Downloads/legal/fee-guides/dtcfeeguide.pdf.*

[7] Pursuant to Rule 2, Section 1, each Participant shall pay to DTC the compensation due it for services rendered to the Participant based on DTC's fee schedules. *See* Rule 2, *supra* note 5.

[8] Pursuant to Rule 5, Section 1, an Eligible Security shall only be a Security accepted by DTC, in its sole discretion, as an Eligible Security. *See*

Continued

immobilized, or through which Securities may be dematerialized, and interests, in the form of Security Entitlements,[9] in those Securities reflected in Accounts maintained for Participants.[10] DTC provides its Participants with settlement services relating to Deliveries [11] of such Securities on DTC's books.[12]

DTC operates a ''low cost'' pricing model and has in place procedures to control costs and to regularly review pricing levels against costs of operation. It reviews pricing levels against its costs of operation during the annual budget process. The budget is approved annually by the Board. DTC's fees are cost-based plus a markup, as approved by the Board or management (pursuant to authority delegated by the Board), as applicable. This markup of ''low margin'' is applied to recover development costs and operating expenses, and to accumulate capital sufficient to meet regulatory and economic requirements.[13]

After evaluation of DTC's short-term and long-term financial position in consideration of expected Participant activity, revenues, cost of funding, market volatility, and the financial markets more broadly, DTC has determined that it should increase the overall amount it collects from Participants through fees for its settlement services relating to Deliveries in order to cover its costs for settlement services and maintain the appropriate low margin above costs.

Specifically, operating expense increases for DTC's settlement services are driven by compensation and contract inflation, IT risk mitigation, resiliency initiatives and infrastructure investments partially offset by efficiencies. In this regard, the proposed rule change would increase certain fees relating to book-entry delivery in the settlement services section [14] of the Fee Guide to bring the operating margin for DTC's settlement services within the Preferred Range, as described below.

Fee Revisions and Consolidations for Certain Settlement Services

Fee Increase for Day Deliver Orders

A Participant may submit an instruction (''Deliver Order'') to DTC to make a Delivery [15] of Eligible Securities via book-entry to another Participant's account.[16] DTC reduces the Deliverer's [17] position and increases the Receiver's [18] position without the need to move physical certificates. Deliveries can be made Delivery Versus Payment [19] or as a Free Delivery,[20] depending on the applicable Participant's delivery instructions provided in the Deliver Order.

A Participant is charged a fee, named in the Fee Guide as ''Day Deliver Order (including reclaims; excluding stock loans),'' (''Day Deliver Order Fee'') of 40 cents for a Deliver Order, except the charge is 17 cents for Deliver Orders submitted by the Participant for processing in the night cycle.[21] The latter fee, named the ''Night Deliver Order'' fee [22] (''Night Deliver Order Fee''), is lower than the former because it is designed to encourage earlier submission of transactions by Participants, which results in more efficient settlement processing by increasing the volume of transactions processed in the night-cycle, which, in turn, enhances intraday settlement processing.[23]

The Receiver of the Delivery is charged 11 cents, regardless of time, per receive. This fee is named in the Fee Guide as ''Receive, regardless of time (excluding reclaims and stock loans and returns).'' [24]

Pursuant to the proposed rule change, DTC would increase the Day Deliver Order Fee from 40 cents to 54 cents per item. The proposed fee reflects an amount that would facilitate DTC's ability, as discussed above, to increase the overall fees DTC collects from Participants relating to its settlement services in order to cover its costs and maintain the appropriate low margin above costs.

As a result of the above-described proposed change, the Fee Guide entry for the Day Deliver Order Fee would be revised, as follows (Bold, italicized text indicates additions, Bold, strikethrough text indicates deletions):

Rule 5, *supra* note 5. *See also,* DTC Operational Arrangements Necessary for Securities to Become and Remain Eligible for DTC Services (''OA''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/issue-eligibility/eligibility/operational-arrangements.pdf,* at 6–19 (setting forth DTC eligibility requirements).

[9] Pursuant to Rule 1, the term ''Security Entitlement'' has the meaning given to the term ''security entitlement'' in Section 8–102 of the New York Uniform Commercial Code. The interest of a Participant or Pledgee in a Security credited to its Account is a Security Entitlement. *See* Rule 1, *supra* note 5.

[10] *See also* DTC Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/DTC_Disclosure_Framework.pdf,* at 5.

[11] Pursuant to Rule 1, the term Delivery, as used with respect to a Security held in the form of a Security Entitlement on the books of DTC, means debiting the Security from an Account of the Deliverer and crediting the Security to an Account of the Receiver. A Delivery may be a Delivery Versus Payment or a Free Delivery, or both collectively, as the context may require. *See* Rule 1, *supra* note 5.

[12] *See* Rule 9(A), Rule 9(B), Rule 9(C) and Rule 9(D), *supra* note 5, and Settlement Service Guide (''Settlement Guide''), *available at http://www.dtcc.com/~/media/Files/Downloads/legal/service-guides/Settlement.pdf,* at 21–31. DTC allows a Participant to settle securities transactions by making book-entry Deliveries to another Participant's account. DTC reduces the seller's position and increases the buyer's position without the need to move physical certificates. *See* Settlement Guide at 4–5.

[13] For this purpose, DTC has established a percentage-based range (''Preferred Range'') for its operating margin. Currently, DTC's operating margin is below the Preferred Range and the fee increase is projected to bring DTC's operating margin within the Preferred Range.

[14] *See* Fee Guide, *supra* note 6, at 18.

[15] *Supra* note 12.

[16] *See* Rule 9(B), *supra* note 5.

[17] Pursuant to Rule 1, the term ''Deliverer,'' as used with respect to a Delivery of a Security, means the Person which Delivers the Security. *See* Rule 1, *supra* note 5.

[18] Pursuant to Rule 1, the term ''Receiver,'' as used with respect to a Delivery of a Security, means the Person which receives the Security. *See id.*

[19] Pursuant to Rule 1, the term ''Delivery Versus Payment'' means a Delivery against a settlement debit to the Account of the Receiver, as provided in Rule 9(A) and Rule 9(B) and as specified in the Procedures. *See* Rule 1, *supra* note 5.

[20] Pursuant to Rule 1, the term ''Free Delivery'' means a Delivery free of any payment by the Receiver through the facilities of the Corporation, as provided in Rule 9(B) and as specified in the Procedures. *See id.*

[21] *See* Fee Guide, *supra* note 6, at 18. On the night before settlement day (''S–1'') DTC commences ''night cycle'' processing. During the night cycle, DTC operates a process (''Night Batch Process'') that utilizes a settlement processing algorithm capable of evaluating each Participant's transaction obligations, available positions, transaction priorities and risk management controls. Specifically, at approximately 8:30 p.m. on S–1, DTC subjects all transactions eligible for processing to the Night Batch Process. The Night Batch Process runs ''off-line'' (*i.e.,* is not visible to Participants), allowing DTC to run multiple processing scenarios until the optimal processing scenario is identified. Once the optimal scenario is identified, the results are incorporated back into DTC's core processing environment on a transaction-by-transaction basis prior to the start of daytime processing. Transactions that have satisfied DTC's risk controls will be staged for settlement. However, as was the case prior to this change, if a transaction cannot satisfy DTC's control functions initially, then it will recycle throughout the day, continuously attempting to satisfy the controls until approximately 3:10 p.m. for valued transactions and until 6:35 p.m. for free transactions. *See* Settlement Guide, *supra* note 12, at 7 and 72.

[22] *See id.*

[23] *See* Securities Exchange Act Release No. 84768 (December 10, 2018), 83 FR 64401 (December 14, 2018) (SR–DTC–2018–011).

[24] *See* Fee Guide, *supra* note 6, at 18.

Fee name	Amount ($)	Conditions
Day deliver order (including reclaims; excluding stock loans) ...	~~0.40~~ *0.54*	Per item; charged to deliverer; applies to each DO submitted.

As a result of its review of pricing levels against costs of operation of its settlement services, DTC believes that the proposed fee changes would enable DTC to offset its cost and expense while generating a low margin within the Preferred Range.

Fee Increase for Deliveries and Receives of Securities To and From CNS

Another important use of DTC book-entry transfer services is the interface of DTC with its affiliate National Securities Clearing Corporation (''NSCC'') for the processing of trades that are cleared and settled in the NSCC Continuous Net Settlement (''CNS'') system and are processed as Free Deliveries at DTC.[25] DTC also processes Free Deliveries as instructed by NSCC to DTC relating to NSCC's Automated Customer Account Transfer Service (''ACATS'').[26]

A Participant is charged 7 cents for the Delivery of a Security to the NSCC CNS account at DTC (''CNS Account'') or for an ACATS Delivery on the Participant's behalf.[27] Likewise, the receiving Participant of a Security from the CNS Account is charged 7 cents for the Delivery of the Securities from the CNS Account or for an ACATS Delivery to its account.[28] This fee is named in the Fee Guide as ''Delivery to/from CNS (including ACATS).'' [29]

Specifically, pursuant to the proposed rule change, DTC would increase the Delivery to/from CNS (including ACATS) fee from 7 cents to 17 cents.

As a result of the above-described proposed changes, the text of the Fee Guide relating to these fees would be revised as follows (Bold, italicized text indicates additions, Bold, strikethrough text indicates deletions):

Fee name	Amount ($)	Conditions
Delivery to/from CNS (including ACATS)	~~0.07~~ *0.17*	Per delivery or receive.

As a result of its review of pricing levels against costs of operation, DTC believes that these proposed fee amounts would enable DTC to offset its cost and expense while generating a low margin.

Participant Impact

The proposed rule change is expected to increase DTC's annual revenue by approximately $30 million. Individual Participant impacts are project to vary depending on a Participant's settlement activity impacted by the proposed fee changes. As a result of the fee change, (i) 80% of Participants are projected to incur a 25% or less increase in overall fees charged, (ii) 13% are projected to incur an increase above 25% and below 50%, and (iii) 7% of Participants are projected to incur an increase in fees of greater than 50%.

Participant Outreach

DTC has conducted ongoing outreach to each Participant in order to provide them with notice of the proposed changes and the anticipated impact for the Participant. As of the date of this filing, no written comments relating to the proposed changes have been received in response to this outreach. The Commission will be notified of any written comments received.

Implementation Timeframe

DTC would implement this proposal on January 1, 2023. As proposed, a legend would be added to the Fee Guide stating there are changes that have become effective upon filing with the Commission but have not yet been implemented. The proposed legend also would include a date on which such changes would be implemented and the file number of this proposal, and state that, once this proposal is implemented, the legend would automatically be removed from the Fee Guide.

2. Statutory Basis

DTC believes this proposal is consistent with the requirements of the Act, and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, DTC believes the proposed changes to modify settlement service fees, as described above, are consistent with Section 17A(b)(3)(D) of the Act,[30] for the reasons described below. DTC believes that the proposed changes to update the Fee Guide with the new fees are consistent with Rule 17Ad–22(e)(23)(ii),[31] as promulgated under the Act, for the reasons described below.

Section 17A(b)(3)(D) of the Act requires, *inter alia,* that the Rules provide for the equitable allocation of reasonable dues, fees, and other charges among participants.[32] For the reasons set forth below, DTC believes that each of the proposed rule changes described above would provide for the equitable allocation of reasonable dues, fees, and other charges among Participants.

DTC believes the proposed rule change to (i) increase the Day Deliver Order Fee, and (ii) increase the Delivery to/from CNS fee as described above, would provide for the equitable allocation of reasonable fees. While the impact of the proposed fees would vary based on Members' usage of the underlying DTC services, the proposed rule change would not alter how these Fees are calculated or how such fees are allocated to Participants. In this regard, since the proposed change would not alter how these fees are charged to Participants, DTC believes that the fees would continue to be equitably allocated because they would continue to be charged based on volume of transaction activity for a given Participant. More specifically, as mentioned above, the Day Deliver Order Fee and the Night Deliver Order Fee are charged based on a Participant's volume of Deliveries during the applicable timeframes, as described above. As such, and as is currently the case, Participants that provide a greater number of Delivery instructions, or receive a greater number of Deliveries, would generally be subject to a higher overall charge for Deliveries and/or Receives, as applicable, based on volume of related transactions. Conversely, Participants that make fewer Deliveries and or receive few Deliveries would generally be subject to a smaller overall charge for Deliveries and receives based on volume.

Similarly, DTC believes that the Day Deliver Order Fee and the Delivery to/from CNS fee would continue to be

[25] *See* Settlement Guide, *supra* note 12, at 18–20.
[26] *See id* at 20.
[27] *See* Fee Guide, *supra* note 6, at 18.
[28] *Id.*
[29] *Id.*
[30] 15 U.S.C. 78q–1(b)(3)(D).
[31] 17 CFR.17Ad–22(e)(23)(ii).
[32] 15 U.S.C. 78q–1(b)(3)(D).

reasonable fees under the proposed change described above. The proposed fees were selected for adjustment based on an analysis of projected market volumes and revenues for DTC during its annual budgeting process. Based on this analysis, first, DTC determined that it would increase the Delivery to/from CNS fee by an amount similar to the amount it was reduced in 2021.[33] DTC then determined that the Day Deliver Order Fee, which was also reduced in 2021, would be increased by an amount sufficient to close a remaining projected shortfall of DTC's operating margin versus the Preferred Range.[34] The proposed fee changes are intended to better align to the projected operating costs and expenses of DTC relating to settlement service and would result in an overall increase of fees imposed on DTC's Participants and are expected to bring DTC's operating margin for its settlement services within the Preferred Range. For this reason, DTC believes that the proposed rule change to (i) increase the Day Deliver Order Fee, and (ii) increase the Delivery to/from CNS fee, as described above, would be reasonable fees charged by DTC for these services and is consistent with Section 17A(b)(3)(D) of the Act.[35]

Rule 17Ad–22(e)(23)(ii) under the Act [36] requires DTC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they incur by participating in the covered clearing agency. The proposed fees would be clearly and transparently published in the Fee Guide, which is available on a public website,[37] thereby enabling Participants to identify the fees and costs associated with participating in DTC. As such, DTC believes the proposed rule change is consistent with Rule 17Ad–22(e)(23)(ii) under the Act.[38]

(B) Clearing Agency's Statement on Burden on Competition

DTC believes that the proposed rule change to increase the Day Deliver Order Fees and the Delivery to/from CNS fee may present a competitive burden among Participants because this change could increase the fees of those Participants that perform activity covered by these fees. DTC does not believe the proposed change in and of itself would mean that the burden on competition among Participants is significant. This is because even though the amount of the fee increase may seem significant, DTC believes the increase in fees would similarly affect all Participants that utilize DTC's services and be reflective of each Participant's individual activity at DTC, and therefore the burden on competition would not be significant. Regardless of whether the burden on competition is deemed significant, DTC believes any burden that is created by the proposed change would be necessary and appropriate in furtherance of the purposes of the Act, as permitted by Section 17A(b)(3)(I) of the Act.[39]

Any such burden would be necessary because these proposed fee increases would provide DTC with the ability to achieve and maintain its net income margin. Any such burden would be appropriate because DTC believes that the fees would continue to be equitably allocated because they would continue to be charged based on volume of transaction activity for a given Participant.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC has not received or solicited any written comments relating to this proposal. If any written comments are received, they would be publicly filed as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at *https://www.sec.gov/regulatory-actions/how-to-submitcomments*. General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

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) [40] of the Act and paragraph (f) [41] of Rule 19b–4 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.

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–DTC–2022–014 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2022–014. 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,

[33] In 2021, DTC reduced this fee from 16 cents to the current 7 cents. *See* Securities Exchange Act Release Number 90546 (December 7, 2020), 85 FR 78897 (December 1, 2020) (SR–DTC–2020–014).

[34] In 2021, DTC reduced the Day Deliver Order Fee from 45 cents to the current 40 cents. *Id.*

[35] *Supra* note 32.

[36] 17 CFR 240.17Ad–22(e)(23)(ii).

[37] *See supra* note 6.

[38] 17 CFR 240.17Ad–22(e)(23)(ii).

[39] 15 U.S.C. 78q–1(b)(3)(I).

[40] 15 U.S.C. 78s(b)(3)(A).

[41] 17 CFR 240.19b–4(f).

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 DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2022–014 and should be submitted on or before January 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Vanessa A. Countryman,

Secretary.

[FR Doc. 2022–28483 Filed 12–30–22; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice: 11956]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: ''Scripture and Science: Our Universe, Ourselves, and Our Place'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to agreements with their foreign owners or custodians for temporary display in the exhibition ''Scripture and Science: Our Universe, Ourselves, and Our Place'' at the Museum of the Bible, Washington, District of Columbia, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Elliot Chiu, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Stacy E. White,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2022–28509 Filed 12–30–22; 8:45 am]

BILLING CODE 4710–05–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Publication of 2023 Aggregate Quantities Under the U.S.-Australia Free Trade Agreement

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice.

SUMMARY: In accordance with the United States-Australia Free Trade Agreement and the Harmonized Tariff Schedule of the United States (HTSUS), USTR is providing notice of aggregate quantities of certain tariff subheadings for calendar year (CY) 2023. Additionally, this notice makes technical modifications to aggregate quantities for CY2021 and CY2022.

DATES: The changes made by this notice are applicable as of January 3, 2023.

FOR FURTHER INFORMATION CONTACT: Sarah E. Fasano, Office of Agricultural Affairs, at (202) 395–9491 or *Sarah.E.Fasano@ustr.eop.gov*.

SUPPLEMENTARY INFORMATION: Pursuant to section 201 of the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108–286; 118 Stat. 919) (19 U.S.C. 3805 note), Presidential Proclamation No. 7857 of December 20, 2004, and subchapter XXII of chapter 98 of the HTSUS, Annex 1 provides the aggregate quantities in CY2023 of originating goods of Australia entering the United States under certain subheadings.

Presidential Proclamation 6969 of January 27, 1997 (62 FR 4415), authorizes the U.S. Trade Representative to exercise the authority provided to the President under section 604 of the Trade Act (19 U.S.C. 2483) to embody rectifications, technical or conforming changes, or similar modifications in the HTSUS. U.S. note 12 to subchapter XIII of chapter 99 of the HTSUS implements U.S. obligations under Annex 2B–US–General Note 14 of the United States-Australia Free Trade Agreement. Pursuant to the authority delegated to the U.S. Trade Representative under Proclamation 6969, Annex 2 makes technical modifications to U.S. note 12 to subchapter XIII of chapter 99 of the HTSUS to indicate the correct aggregate amounts for 2021 and 2022.

Annex 1

Effective with respect to originating goods of Australia, entered under the terms of general note 28 to the HTSUS and as provided in subchapter XXII of chapter 98 of the HTSUS, on or after January 1, 2023, and through the close of December 31, 2023:

1. For purposes of subdivision (a) of U.S. note 8 to subchapter XXII of chapter 98 of the HTSUS and in accordance with paragraph 4(b) of Section C of Annex 3–A to Chapter 3 of the United States-Australia Free Trade Agreement (Price-Based Safeguard for Beef), the aggregate quantity of originating goods of Australia is 70,420 metric tons for CY2023.

2. For purposes of U.S. note 9 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.05 shall not exceed 21,408,000 liters for CY2023.

3. For purposes of U.S. note 10 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.10 shall not exceed 2,554 metric tons for CY2023.

4. For purposes of U.S. note 11 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.15 shall not exceed 170 metric tons for CY2023.

5. For purposes of U.S. note 12 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.20 shall not exceed 8,103 metric tons for CY2023.

6. For purposes of U.S. note 13 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.25 shall not exceed 4,282 metric tons for CY2023.

7. For purposes of U.S. note 14 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.30 shall not exceed 8,563 metric tons for CY2023.

8. For purposes of U.S. note 15 to subchapter XXII of chapter 98 of the

[42] 17 CFR 200.30–3(a)(12).

HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.35 shall not exceed 8,423 metric tons for CY2023.

9. For purposes of U.S. note 16 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.40 shall not exceed 4,814 metric tons for CY2023.

10. For purposes of U.S. note 17 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.45 shall not exceed 1,277 metric tons for CY2023.

11. For purposes of U.S. note 18 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.50 shall not exceed 851 metric tons for CY2023.

12. For purposes of U.S. note 19 to subchapter XXII of chapter 98 of the HTSUS, the aggregate quantity of originating goods of Australia entered under subheading 9822.04.65 shall not exceed 1,203 metric tons for CY2023.

Annex 2

1. The aggregate quantity in U.S. note 12 to subchapter XIII of chapter 99 of the HTSUS for CY2021 is modified by deleting ''1,264'' and by inserting ''1,204'' in lieu thereof.

2. The aggregate quantity in U.S. note 12 to subchapter XIII of chapter 99 of the HTSUS for CY2022 is modified by deleting ''1,302'' and by inserting ''1,240'' in lieu thereof.

Julie Callahan,

Assistant U.S. Trade Representative for Agricultural Affairs and Commodity Policy, Office of the United States Trade Representative.

[FR Doc. 2022–28512 Filed 12–30–22; 8:45 am]

BILLING CODE 3390–F3–P

FEDERAL REGISTER

Vol. 88 Tuesday,

No. 1 January 3, 2023

Part II

Securities and Exchange Commission

17 CFR Parts 240 and 242

Order Competition Rule; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 242

[Release No. 34–96495; File No. S7–31–22]

RIN 3235–AM57

Order Competition Rule

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is proposing to amend the regulation governing the national market system (''NMS'') under the Securities Exchange Act of 1934 (''Exchange Act'') to add a new rule designed to promote competition as a means to protect the interests of individual investors and to further the objectives of an NMS. The proposed rule would prohibit a restricted competition trading center from internally executing certain orders of individual investors at a price unless the orders are first exposed to competition at that price in a qualified auction operated by an open competition trading center. The proposed rule would also include limited exceptions to this general prohibition. In addition, the Commission is proposing to amend the regulation governing the NMS to add new defined terms included in the proposed rule.

DATES: Comments should be received on or before March 31, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–31–22 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–31–22. 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 website (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Dan Gray, Senior Special Counsel, Jennifer Dodd, Special Counsel, or Stacia Sowerby, Special Counsel, at (202) 551–5500, Office of Market Supervision, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing for public comment amendments to Regulation NMS [17 CFR 242.600 through 242.614] (''Regulation NMS'') that would add new 17 CFR 242.615 (''Proposed Rule 615''), add new defined terms to 17 CFR 242.600 (''Rule 600'') that are used in Proposed Rule 615, and make conforming amendments to defined terms in 17 CFR 242.602, 17 CFR 242.611, and 17 CFR 242.614; and conforming amendments to defined terms in 17 CFR 240.3a51–1, 17 CFR 240.13h–1, 17 CFR 242.105, 17 CFR 242.201, 17 CFR 242.204, and 17 CFR 242.1000.

Table of Contents

I. Introduction

The Commission is proposing a new rule, Proposed Rule 615 of Regulation NMS, entitled the ''Order Competition Rule,'' to promote a more competitive, transparent, and efficient market structure for NMS stocks, with resulting benefits to investors. Proposed Rule 615 would require that certain orders of individual investors be exposed to competition in fair and open auctions, before such orders could be executed internally by trading centers that restrict order-by-order competition.[1] The Commission believes that the proposal would better advance each of the five Congressional objectives for an NMS set forth in section 11A of the Exchange Act.[2] In particular, Proposed Rule 615 is designed to benefit individual investors by promoting competition and transparency as means to enhance the opportunity for their orders to receive more favorable prices than they receive in the current market structure, as well as to benefit investors generally by giving them an opportunity to interact directly with a large volume of individual investor orders that are mostly inaccessible to them in the current market structure. This section provides an overview of that market structure and how that market structure may impact investors.

As discussed in sections II and VII below, individual investors primarily use market orders and marketable limit orders (collectively known as ''marketable orders'') to trade in NMS stocks. Market participants who use these orders seek to trade immediately at the best available prices in the market. Broker-dealers route more than 90% of marketable orders of individual investors in NMS stocks to a small group of six off-exchange dealers, often referred to as ''wholesalers.'' [3] The wholesaling business is highly concentrated, with two firms capturing approximately 66% of the executed share volume of wholesalers as of the first quarter of 2022.[4] The practice of separately identifying and routing the marketable orders of individual investors to wholesalers is a form of ''segmentation.'' The term ''segmentation'' can refer to any practice by which a certain category of orders is identified and treated differently for execution than other categories of orders.

As discussed in the economic analysis in section VII.B.2 below, individual investor orders are segmented because they are ''low-cost'' flow—they impose lower adverse selection costs on liquidity providers than the unsegmented order flow routed to national securities exchanges. ''Adverse selection'' involves situations where buyers and sellers have different information, and specifically for a liquidity provider, refers to the extent to which prices move against it after a trade. For example, if the price of a stock drops right after a liquidity provider buys it, the liquidity provider has suffered from adverse selection. Generally, the more severe the adverse selection, the larger the ''effective spread'' that would be expected for a trade because liquidity providers require a wider effective spread to compensate them for the higher cost of adverse selection.[5] In this respect, the size of effective spreads can be interpreted as a measure of the average adverse selection that liquidity providers expect to suffer when trading with incoming orders. Data analysis conducted for this proposal reveals that the average adverse selection costs of orders routed to wholesalers are far lower than the average adverse selection costs of orders routed to national securities exchanges.[6]

The primary benefit of segmentation for individual investors is that it can provide an opportunity for their low-cost orders to be executed at better prices than those generally available on national securities exchanges, a practice known as ''price improvement.'' [7] As discussed in section VII below, wholesalers often provide some price improvement relative to the best publicly quoted prices for round lot sizes on national securities exchanges.[8]

Price improvement, however, is not the same as competitive order execution. Today, the primary business model of wholesalers is to trade bilaterally as principal with individual investor orders (a form of ''internalization''). Typically, the way broker-dealers choose a wholesaler for any particular order is not based on the

[1] ''Order-by-order'' competition in this context means an opportunity to compete to trade with individual investor orders by offering the most favorable price for each order based on the particular characteristics of the order, including the nature of the NMS stock, the size of the order, and market conditions at the time the order is submitted. Section II below provides an overview of the current market structure for NMS stocks, including descriptions of key terms used in this release that readers may find useful to assess and comment on the Commission's proposal. Among many others, these terms include ''individual investors,'' ''trading centers,'' and ''wholesalers.''

[2] 15 U.S.C. 78k–1 (''section 11A''). These objectives are: (1) economically efficient execution of securities transactions; (2) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets; (3) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities; (4) the practicability of brokers executing investors' orders in the best market; and (5) an opportunity, consistent with objectives 1 and 4, for investors' orders to be executed without the participation of a dealer. 15 U.S.C. 78k–1(a)(1)(C).

[3] Table 3, *infra,* section VII.B.2.a.

[4] *See infra* note 372.

[5] As explained in more detail in section II.D below, the ''effective spread'' of a trade is measured as double the difference between the trade's execution price and the midpoint of the national best bid and offer at the time of order receipt. Adverse selection reflects the ''price impact'' of a trade, which is measured as the difference between the midpoint of the national best bid and offer at the time of the trade and the midpoint of the national best bid and offer at a specified time (*e.g.,* one minute or five minutes) after the time of the trade.

[6] Table 7, *infra,* section VII.B.4 (adverse selection costs, as measured by price impact, of marketable orders of individual investors in all NMS stocks are 71% lower at wholesalers (1.26 basis points) than on exchanges (4.40 basis points)).

[7] Section VII.B.4 below discusses an analysis of wholesaler trading data indicating the relationship between segmentation, adverse selection costs, and order execution quality.

[8] Table 5, *infra,* section VII.B.4 (83.17% of marketable orders routed to wholesalers receive price improvement when compared to the best publicly quoted prices for round lot sizes on national securities exchanges, and 8.78% of marketable orders routed to national securities exchanges receive such price improvement). These better prices are due in large part to the ability of wholesalers to offer sub-penny prices that are not permitted on national securities exchanges and other trading centers. The current rules that govern sub-penny trading are discussed in section III.B.2.c below.

price the wholesaler is willing to provide for that order, as wholesalers do not display or otherwise indicate in real-time the prices at which they are willing to trade with individual investor orders. Instead, a wholesaler is often chosen by a formula that depends on past execution quality of the wholesaler, its relationship with the broker-dealer, and other factors. In addition, the bilateral nature of the wholesaler business model not only restricts contemporaneous competition among wholesalers, it also restricts opportunities for other market participants to trade with the low-cost flow. Once a wholesaler receives an individual investor's marketable order, the wholesaler's execution of the order does not face competition at all—the wholesaler typically executes the order internally without providing any opportunity for other market participants, including institutional investors, to compete to provide more favorable prices for the order.[9] This lack of order-by-order competition among market participants is particularly significant in the market for NMS stocks, which is an order-driven market in which a wide range of market participants, including institutional investors, seek to provide liquidity on national securities exchanges by posting orders for the approximately 12,000 NMS stocks. In contrast, the listed options market is a quote-driven market in which professional market makers dominate liquidity provision by displaying quotes in the more than 1,000,000 different options series. In sum, in the current market structure for NMS stocks, individual investor orders are not merely segmented; they also are isolated from order-by-order competition by a wide range of market participants, which, as discussed below, can affect the prices that individual investors receive for their orders.

Data analysis suggests that opening up individual investor orders to order-by-order competition would lead to significantly better prices for those investors. In a fully competitive market, competition among liquidity providers would be expected to drive the amount of price improvement that an order receives to a level commensurate with its adverse selection cost (setting aside other relevant costs). All else equal, the lower an order's expected adverse selection cost, the greater would be the order's expected price improvement. However, as discussed in section VII.C.1.b below, the current isolation of individual investor orders from order-by-order competition results in suboptimal price improvement for such orders. The Commission labels this forgone price improvement ''competitive shortfall.'' Based on an analysis of trading data from the wholesalers and national securities exchanges in the first quarter of 2022, the competitive shortfall is estimated to be approximately 1.08 basis points per dollar traded by wholesalers or 1.08 cents for every $100 traded, with an estimated total annual competitive shortfall of $1.5 billion.[10]

In addition to this competitive shortfall, the isolation of individual investor orders at wholesalers prevents other investors from having an opportunity to trade with this low-cost flow. Institutional investors that currently submit their own marketable orders on national securities exchanges and other trading centers potentially could trade at better prices if given an opportunity to interact with the marketable orders of individual investors in fair and open auctions.[11] For example, data analysis indicates that undisplayed liquidity often is available at trading centers other than wholesalers when a wholesaler executes marketable orders of individual investors at prices less favorable for the individual investor than the prices of the undisplayed liquidity.[12] Moreover, if institutional investors that currently pay a full ''spread'' (that is, the difference between the highest price bid and the lowest price offer) to access liquidity were able instead to interact in auctions with the marketable orders of individual investors that currently are mostly inaccessible to them, these institutional investors could benefit from lower spread costs.[13]

The Commission is proposing Rule 615 to encourage greater competition for individual investor order execution. Proposed Rule 615 generally would require that individual investor orders be exposed to order-by-order competition in fair and open auctions designed to obtain the best prices before such orders could be internalized by wholesalers or any other type of trading center that restricts order-by-order competition. As a result, individual investor orders could continue to receive the benefits of segmentation (*i.e.,* better prices that reflect the low adverse selection costs of those orders), but without the negative effects of those orders being isolated from order-by-order competition (*i.e.,* such better prices not fully reflecting the low adverse selection costs of those orders; and a substantial percentage of those orders seldom being accessible to institutional investors and other market participants). In sum, the auctions required by Proposed Rule 615 are intended to enhance competitive forces as a means to protect the interests of investors in the NMS.

In developing the specific elements of Proposed Rule 615, the Commission has been guided by this goal of benefiting investors by enhancing competition. The overriding objective of these elements of Proposed Rule 615 is to maximize the opportunity for a wide range of market participants to participate in auctions on terms that will promote the best possible prices for the orders of individual investors. In this respect, the Commission has drawn from its experience with the operation of existing auctions for orders in listed options and tailored Proposed Rule 615 to promote fair and open auctions that reflect the particular nature of the market for NMS stocks. As discussed in section IV below, these elements would include the wide dissemination of auction messages in consolidated market data, requirements that any fees and rebates be capped at a low level ($0.0005 per share for auction prices of $1 or more) and be flat across all market participants, and requirements for execution priority of auction responses that give no advantage to the broker-dealer that routed the marketable order of an individual investor to the auction.

In addition, the Commission has limited the scope of Proposed Rule 615 to contexts in which an auction could be most beneficial for individual investors. For example, individual investors that trade many times per day tend to use marketable orders that pose higher adverse selection risk for liquidity providers; hence, their orders would be outside the scope of the rule.[14] In addition, proposed exceptions are provided for orders with a market value of $200,000 or more and for orders with execution prices (including prices constrained by non-marketable limit prices) that are very favorable for individual investors (*i.e.,* the midpoint of the best displayed round lot

[9] As shown in Table 7, *infra,* section VII.B.4, wholesalers execute internally (in ''principal transactions'') 90.44% of the dollar volume of executed marketable orders routed to them. As discussed in section VII.B.2.b below, wholesalers primarily obtain external executions of the remaining volume of the marketable orders in ''riskless principal'' transactions.

[10] Table 18 and Table 19, *infra,* section VII.C.1.b (figures in text are for the CAT rebate base competitive shortfall estimates).

[11] *See, e.g.,* section VII.B.3, *infra,* discussing institutional investor interactions with retail orders.

[12] Table 20, *infra,* section VII.C.1.b.

[13] *See, e.g.,* Section VII.C.1.c, *infra,* discussing potential improved execution quality for institutional investor orders.

[14] *See infra* section IV.B.1; section VII.D.2.c.

quotations or better).[15] These exceptions would not be mandatory, however, which means that broker-dealers could choose whether or not to route orders with these characteristics to an auction.

As discussed in section VII.D, the Commission assessed several alternatives to Proposed Rule 615, both to the design of the required auctions and to the auction approach itself. The Commission preliminarily considers Proposed Rule 615 to be the best approach for investors. As described throughout this release, and in more detail in section IV, Proposed Rule 615 is designed to maintain the price improvement benefits of the segmentation of individual investor orders and to enhance those benefits through the introduction of order-by-order competition with a wide range of market participants, including institutional investors, through an auction mechanism that is fast, low-cost, transparent, and fair.

The next two sections of this release are intended to provide background information on the current structure and regulation of the market for NMS stocks that will help promote understanding of the details of the Commission's proposal. Section II provides a general overview of the current market structure for NMS stocks, and section III provides background on the statutory and regulatory framework for NMS stocks. Section IV then describes the proposal in detail, and section V consolidates all Commission requests for comment on the proposal.

II. Overview of Market Structure for NMS Stocks

This section provides an overview of the market structure for NMS stocks,[16] particularly focusing on the types of market participants, order types, and trading costs that will be referred to throughout this release.[17] An understanding of the current market structure, particularly the trading costs of different types of market participants, including liquidity takers and liquidity providers, is critically important when assessing the rationale and objectives of Proposed Rule 615.

A. Investors

Section 11A(a)(2) of the Exchange Act[18] provides that the Commission should have due regard for the protection of ''investors'' when facilitating the establishment of an NMS. As used in this release, the term ''individual investor'' will refer to natural persons that trade relatively infrequently for their own or closely related accounts.[19] Individual investors generally trade in relatively small sizes that can be executed against immediately available liquidity.

The term ''institutional investor'' as used in this release refers to investors that trade in much larger sizes and much more frequently than individual investors. Many institutional investors, such as pension funds and mutual funds, operate on behalf of a large number of individuals. Because institutional investors need to trade in large sizes that can exceed immediately available liquidity, their large ''parent'' orders typically will be broken into smaller ''child'' orders. Institutional investors typically are focused primarily on obtaining the best price for their large parent orders as a whole.[20] The child orders will be fed into the market gradually so as to minimize the extent to which market prices move away before the full size of a parent order is executed, which is known as ''slippage.'' One means for institutional investors to minimize slippage is to limit ''information leakage'' concerning the unexecuted portions of their large parent orders by closely controlling the impact of the execution of their child orders on market prices.

B. Trading Centers

Trades in NMS stocks are executed at a number of different types of trading centers.[21] As discussed below, trading centers that currently trade NMS stocks can be divided into five categories: (1) national securities exchanges operating SRO trading facilities; [22] (2) alternative trading systems (''ATSs'') that trade NMS stocks (''NMS Stock ATSs''); (3) exchange market makers; (4) wholesalers; and (5) any other broker-dealer that executes orders internally by trading as principal or crossing orders as agent.[23]

National securities exchanges, among other things, operate SRO trading facilities that bring together purchasers and sellers of NMS stocks and execute their trades, fall within the definition of an exchange in section 3(a)(1) of the Exchange Act,[24] and are required to register under section 6 of the Exchange Act.[25] As discussed further in section III.A below, national securities exchanges are subject to a comprehensive regulatory regime that, among other things, requires that their rules not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act and not be designed to permit unfair discrimination between customers,

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[15] As discussed in section IV.B.1 below, a subset of non-marketable limit orders with prices not as favorable for individual investors (*i.e.,* beyond the midpoint of the best displayed round lot quotations) would not qualify for the proposed exceptions.

[16] NMS stocks generally include equity securities other than options that are listed on a national securities exchange. Rule 600(b)(55) of Regulation NMS defines ''NMS stock'' as any NMS security other than an option, and Rule 600(b)(54) defines ''NMS security'' to mean any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective NMS plan for reporting transactions in listed options. The definition of NMS stock does not include securities that are not listed on a national securities exchange, sometimes referred to as ''over-the-counter'' or ''OTC'' securities.

[17] A much more extensive discussion of the ''market microstructure'' of securities markets is provided by treatises on the subject. *See, e.g.,* Larry Harris, Trading and Exchanges: Market Microstructure for Practitioners (Oxford University Press 2003) (''Harris Treatise''); Joel Hasbrouck, Empirical Market Microstructure: The Institutions, Economics, and Econometrics of Securities Trading (Oxford University Press 2007) (''Hasbrouck Treatise'').

[18] 15 U.S.C. 78k–1(a)(2).

[19] For a discussion of the specific orders covered by Proposed Rule 615, *see* Proposed Rule 600(b)(91) (defining the term ''segmented order'') and section IV.B.1 below (discussing the proposed definition of ''segmented order''). As discussed in section IV.B, the Commission is proposing to add definitions to Rule 600(b) of Regulation NMS and adjust the numbering of current definitions accordingly. Throughout this release, unless otherwise noted, references to existing Rule 600(b) definitions are to the definitions as they are currently numbered. References to proposed new definitions are designated with ''Proposed Rule 600(b)'' and reflect the proposed adjusted numbering.

[20] *See, e.g.,* Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594, 3604–3605 (Jan. 21, 2010) (''Equity Market Structure Concept Release'') (measuring the transaction costs of institutional investors ''can be extremely complex'' because their ''large orders often are broken up into smaller child orders and executed in a series of transactions'' and ''[m]etrics that apply to small order executions may miss how well or poorly the large order traded overall.'').

[21] Rule 600(b)(95) of Regulation NMS defines ''trading center'' as a national securities exchange or national securities association that operates a self-regulatory organization (''SRO'') trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.

[22] Rule 600(b)(89) of Regulation NMS defines ''SRO trading facility'' as, among other things, a facility operated by a national securities exchange that executes orders in a security.

[23] ''Broker'' is generally defined in section 3(a)(4)(A) of the Exchange Act as any person engaged in the business of effecting transactions in securities for the account of others. 15 U.S.C. 78c(a)(4)(A). ''Dealer,'' in turn, is generally defined in section 3(a)(5)(A) of the Exchange Act as any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise. 15 U.S.C. 78c(a)(5)(A). The term ''broker-dealer'' is used in this release to encompass all brokers, all dealers, and firms that are both brokers and dealers.

[24] Section 3(a)(1) of the Exchange Act defines ''exchange'' as, among other things, any organization that provides facilities for bringing together purchasers and sellers of securities. 15 U.S.C. 78c(1).

[25] 15 U.S.C. 78f.

issuers, and broker-dealers. All national securities exchanges publicly display quotations for NMS stocks in consolidated market data and are known as ''lit'' trading centers. As discussed in section III.B.1 below, the best-priced quotations of round lots of national securities exchanges (highest priced bids to buy and lowest priced offers to sell) are included in the consolidated market data feeds currently disseminated by centralized securities information processors (''SIPs''). In the first quarter of 2022, 16 national securities exchanges executed 59.7% of share volume in NMS stocks.[26]

NMS Stock ATSs operate facilities that fall within the definition of an exchange in section 3(a)(1) of the Exchange Act, but, as discussed in section III.B.3.b below, they are exempted from that definition if they register as broker-dealers and otherwise comply with Regulation ATS under the Exchange Act.[27] No NMS Stock ATS currently displays quotations in NMS stocks in consolidated market data. The trading centers that do not display quotations are known as ''dark'' trading centers or ''dark pools.'' An NMS Stock ATS is required to provide fair access to its services if it had 5% or more of the average daily volume with respect to an NMS stock during four of the preceding six calendar months,[28] and as of November 30, 2022, one NMS Stock ATS discloses on its Form ATS–N that it is subject to these fair access requirements for securities that are available for trading on its platform.[29] In the first quarter of 2022, 32 ATSs executed 10.2% of volume in NMS stocks.[30]

An exchange market maker is defined in Rule 600(b)(32) of Regulation NMS as any member of a national securities exchange that is registered as a specialist or market maker pursuant to the rules of such exchange. Exchange rules typically require exchange market makers to provide liquidity by displaying quotations at which they are willing to buy and sell NMS stocks for their own account.[31] In this respect, exchange market makers fall within the definition of a ''dealer'' in section 3(a)(5) of the Exchange Act as buying and selling NMS stocks for their own accounts as part of a regular business. The on-exchange volume of exchange market makers in NMS stocks is included in the volume for national securities exchanges referenced above because it is reported by such exchanges.

Wholesalers fall within the definition of an OTC market maker in Rule 600(b)(64) of Regulation NMS—any dealer that holds itself out as being willing to buy from and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange in amounts of less than block size. The term ''wholesaler'' is not defined in Regulation NMS, but commonly refers to an OTC market maker that seeks to attract orders from broker-dealers that service the accounts of individual investors,[32] referred to in this release as ''retail brokers.'' [33] The public order-routing reports required by 17 CFR 242.606 (''Rule 606'') [34] show that the six largest wholesalers collectively paid retail brokers $235 million in payment for order flow (''PFOF'') in the first quarter of 2022 for orders in NMS stocks.[35] Many retail brokers do not accept PFOF for marketable orders in NMS stocks routed to wholesalers, though the retail brokers that do accept PFOF represent 73.88% of the dollar volume of marketable orders of retail brokers routed to wholesalers.[36]

Wholesalers do not display or otherwise reveal the prices at which they are willing to execute individual investor orders internally. Moreover, as discussed in section III.B.3 below, while they are subject to Commission and SRO requirements as broker-dealers, wholesalers are not subject to a statutory or regulatory requirement to provide fair access. They are not required to provide an opportunity for other market participants, including institutional investors and other exchange market makers, to compete on an order-by-order basis to provide the best prices for the individual investor orders that the wholesalers internalize. Some institutional investors, for example, consider this order flow to be ''inaccessible.'' [37] In the first quarter of 2022, six large wholesalers internally executed 23.9% of share volume in NMS stocks.[38]

The fifth and final category of trading center that executes trades in NMS stocks is a catchall category encompassing broker-dealers that execute orders internally by trading as principal or crossing orders as agent. In the first quarter of 2022, over 230 broker-dealers (other than NMS Stock ATSs and OTC market makers) reported trades in NMS stocks, which accounted for the remaining 6.3% of share volume in NMS stocks.[39]

C. Order Types and Trading Costs

When seeking to buy and sell NMS stocks, investors submit orders through the broker-dealers that service their accounts. The order type most frequently used to trade by individual investors is a ''market'' order, which simply instructs a broker-dealer to seek an execution of the order at the best available price in the market. In contrast to market orders, a ''limit order'' specifies a ''limit price''—a price

[26] Table 1, *infra,* section VII.B.1.

[27] 17 CFR 240.3a1–1(a)(2); *see also* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, 70858 (Dec. 22, 1998) (''Regulation ATS Adopting Release'') (stating that the Commission would not consider making an assessment whether a particular system should register as an exchange unless such system exceeded the volume thresholds specified in 17 CFR 240.3a1–1(b): during three of preceding four calendar quarters, the system had (1) 50% or more of the average daily dollar trading volume in any security and 5% or more of the average daily dollar trading volume in any class of security; or (2) 40% or more of the average daily dollar trading volume in any class of securities).

[28] *See* Rule 301(b)(5); *infra* section III.B.3.b (discussing fair access requirements for NMS Stock ATSs).

[29] *See* Dealerweb Inc., Form ATS–N/OFA, Part III, Items 11 (Trading Services, Facilities and Rules) and Item 25 (Fair Access) (filed Oct. 24, 2022), *https://www.sec.gov/Archives/edgar/data/817462/000081746222000015/0000817462-22-000015-index.htm* (disclosing that the NMS Stock ATS is subject to the fair access requirements in symbols SPY and QQQ). This NMS Stock ATS generally limits its eligible subscribers to market makers, banks, broker-dealers, and asset managers with at least $10 under management. *See id.* at Part III, Item 1 (Types of Subscribers) and Item 2 (Eligibility for ATS Services). Access to Form ATS-Ns filed by NMS Stock ATSs are available on the Commission's website at *https://www.sec.gov/divisions/marketreg/form-ats-n-filings.htm.*

[30] Table 1, *infra,* section VII.B.1.

[31] *See, e.g.,* New York Stock Exchange LLC (''NYSE'') Rule 104 (Dealing and Responsibilities of DMMs) (requiring the exchange's Designated Market Makers (''DMMs'') to maintain a continuous two-sided quote for securities in which the DMM unit is registered with the exchange) *available at https://nyseguide.srorules.com/rules.*

[32] Another type of business operated by some OTC market makers is known as a ''single dealer platform,'' which primarily seeks to attract the orders of institutional investors for internal execution. *Infra* section VII.B.3.

[33] As discussed in section VII.B.1.a below, the Commission has identified six firms as wholesalers based on the public order routing disclosures of retail brokers. Retail broker services are discussed in section VII.B.6 below.

[34] Rule 606 is discussed in section III.B.4 below.

[35] *See infra* section VII.B.6.a.

[36] *See* Table 14, *infra* section VII.B.5.c.

[37] *See, e.g.,* Cowen, Inc., ''Cowen Market Structure: Retail Trading—What's going on, what may change, and what can you do about it?'' (Mar. 23, 2021), *available at https://www.cowen.com/insights/retail-trading-whats-going-on-what-may-change-and-what-can-institutional-traders-do-about-it/* (''Market makers print most of these shares internally at their firm, so they trade off-exchange. One way we have for isolating retail volume is to look at the share of volume that trades off-exchange, but not in a dark pool. We refer to this as 'inaccessible liquidity.' This is because most institutional orders—whether they are executed via algos directly or by high touch desks—primarily go to exchanges and dark pools.'').

[38] Table 1, *infra,* section VII.B.1.

[39] Table 1, *infra,* section VII.B.1.

beyond which the investor is not willing to trade. Limit prices reflect an intention to ''buy low and sell high.'' For example, a buy order with a limit price of $20 means the investor would like to buy as soon as possible, but only at a price that is $20 or less. Conversely, a sell order with a limit price of $20 means the investor would like to sell as soon as possible, but only at a price that is $20 or more.

In practice, the likelihood and speed of execution of limit orders can vary greatly depending primarily on the relation between their limit prices and the best-priced quotations that are displayed by national securities exchanges in the consolidated market data feeds. As discussed in section III.B.1 below, these quotations are in ''round lot'' sizes, which currently are 100 shares or more for nearly all NMS stocks. The highest price bid for an NMS stock is known as the national best bid (''NBB''), and the lowest price offer for an NMS stock is known as the national best offer (''NBO''). Collectively, the NBB and NBO are known as the national best bid and offer (''NBBO''). When a limit order to buy has a limit price that is equal to or greater than the NBO, it is known as a ''marketable'' limit order because it can be executed immediately at the best displayed quote to sell. Similarly, a limit order to sell is marketable when it has a limit price that is equal to or less than the NBB.[40]

For example, assume the NBB is $20.00 and the NBO is $20.10. A buy limit order with a price of $20.10 or higher is marketable, and a sell limit order with $20.00 or lower is marketable. Marketable limit orders are similar to market orders with respect to their willingness to trade immediately at the best displayed prices or better and will be referred to collectively in this release as ''marketable orders.''

Investors that use marketable orders to trade immediately at the best available prices are known as ''liquidity takers'' and generally incur a trading cost for the service, known as a ''spread.'' In the example above, when the NBBO is $20.00 and $20.10, the quoted spread is 10 cents. An investor that wished to avoid paying a spread could use a ''non-marketable'' limit order in an attempt to become a ''liquidity provider.'' A non-marketable limit order to buy has a limit price that is less than the NBO, and a non-marketable limit order to sell has a limit price that is greater than the NBB.[41] For example, again using the example when the NBBO is $20.00 and $20.10, an investor could submit a buy limit order with a limit price of $20.00. This buy order is not marketable because it is priced less than the NBO of $20.10 and therefore cannot be executed immediately against the best displayed offer. A non-marketable limit order generally will ''rest'' on the continuous order book of a trading center awaiting the arrival of a contra-side marketable order against which it can execute. In the example, if the resting non-marketable limit order to buy were able to obtain an execution at its limit price of $20.00 (*e.g.,* by interacting with a contra-side marketable order to sell), the investor would have succeeded in trading at a price that was 10 cents lower than if the investor had used a marketable order and traded at the NBO of $20.10. The risk, however, of using a non-marketable limit order is that it may not execute at all if market prices move away from the order (*i.e.,* prices increase for buy orders and decrease for sell orders). If this happens, the investor will incur an opportunity cost by missing a trade.

Using the example of an NBBO of $20.00 and $20.10, assume the investor submitted a non-marketable order to buy with a limit price of $20.00, but did not obtain an execution and the NBBO then rose to $20.15 and $20.25. Seeing that the market was moving away, the investor decided to cancel the unexecuted non-marketable order and replace it with a marketable order to buy, which then was executed at the new NBO price of $20.25. In this case, the investor incurred an opportunity cost of 15 cents—the difference between (1) the original NBO price of $20.10 that the investor likely could have obtained if the investor first had used a marketable order to buy at $20.10 rather than using the non-marketable order in an unsuccessful attempt to buy at $20.00, and (2) the price of $20.25 at which the investor actually obtained an execution.

In sum, an investor's decision of whether to use marketable orders or non-marketable orders to trade can depend on an often complex judgment of whether prices are likely to move in the short-term future. Individual investors, who typically do not follow market prices closely throughout a trading day, often will not feel in the best position to make this judgment and generally choose to be liquidity takers by using marketable orders to obtain the certainty of an immediate execution at a displayed price or better.[42] Accordingly, a key source of trading costs for individual investors are the spreads they pay when using marketable orders. The narrower the spreads, the lower the prices at which they will buy and the higher the prices at which they will sell, which translate into lower trading costs and higher investment returns. Conversely, wider spreads mean higher trading costs and lower investment returns.

The spread costs of individual investors highlight the role played by liquidity providers in determining spreads. Liquidity providers determine spreads by setting the prices at which they are willing to trade with marketable orders as such orders are submitted by liquidity takers. Liquidity providers can include professional market intermediaries, such as exchange market makers and OTC market makers (including wholesalers), as well as investors that use non-marketable limit orders. For example, national securities exchanges, which display the quotations that determine the NBBO, all operate continuous order books. Unexecuted non-marketable orders that have been routed to an exchange rest on its continuous order book awaiting an opportunity for interaction with incoming contra-side orders. Using the NBBO example of $20.00 and $20.10, assume a national securities exchange has displayed limit orders resting on its continuous order book with limit prices that equal the NBBO, but then an institutional investor submits a buy order with a limit price of $20.02 for display on the continuous order book. At this point, there will be a new NBB of $20.02 and the NBBO spread will have been reduced from 10 cents to 8 cents. If an individual investor's market order to sell was routed to the exchange, the order would execute at the new NBB of $20.02, saving the individual investor two cents per share compared to the old NBB of $20.00.

For liquidity providers, the adverse selection costs of trading with a given

[40] Rule 600(b)(47) of Regulation NMS defines a ''marketable limit order'' as any buy order with a limit price equal to or greater than the NBO at the time of order receipt, or any sell order with a limit price equal to or less than the NBB at the time of order receipt.

[41] Rule 600(b)(57) of Regulation NMS defines ''non-marketable limit order'' as any limit order other than a marketable limit order.

[42] Rule 606 order-routing reports reveal that customers of retail brokers used marketable orders for approximately 39–40% of their trades and used ''other'' orders for approximately 26–27% of their trades. Table 3, *infra,* section VII.B.2.a. As presented in Table 2 in section VII.B.2.a below, however, the PFOF rates received from wholesalers for these ''other'' orders almost exactly matched the rates received from wholesalers for marketable limit orders. Accordingly, it is likely that most of these other orders were marketable (*i.e.,* immediately executable at the best available prices), although the orders may have had particular characteristics that led them to be classified as other orders.

marketable order flow are a key factor for determining the prices at which they are willing to trade with such flow, particularly for professional market intermediaries. These market intermediaries generally seek to generate short-term trading profits by buying and selling on a continuous basis and capturing a spread between their buys and sells. Adverse selection costs reflect the extent to which prices move against the liquidity provider in the seconds and minutes after a trade, which increases the difficulty faced by the liquidity provider in successfully capturing a spread between buys and sells.

For example, assume an NBBO of $20.00 and $20.10, and a market maker provides liquidity by trading with a contra-side marketable sell order at the $20.00 NBB. The market maker may hope to profit by quickly providing liquidity to a contra-side marketable buy order at the $20.10 NBO and thereby earning a 10 cent spread. Seconds later, however, and before the market maker is able to liquidate the buy position, the NBBO declines to $19.85 and $19.95. In this case, the market maker has bought immediately prior to a 15 cent decline in the NBBO. This subsequent move in the NBBO is known as ''price impact.'' Instead of earning a 10 cent spread as it hoped by providing liquidity when the NBBO was $20.00 and $20.10, the market maker would realize a loss of 5 cents on its position if it then provided liquidity to a contra-side marketable buy order by selling at the new NBO of $19.95. Therefore, the market maker had an adverse selection cost of 15 cents. Accordingly, market makers assess the potential adverse selection costs of the liquidity-taking order flow with which they are likely to interact when setting the spreads at which they are willing to provide liquidity to such flow. Segmentation of marketable orders with low adverse selection costs is a means for liquidity providers to control such costs. As discussed in section VII,[43] the marketable orders of individual investors routed to wholesalers have adverse selection costs (as measured by price impact) that are approximately 71% lower than the adverse selection costs of orders routed to national securities exchanges. The low adverse selection costs of the segmented marketable orders of individual investors generally enable wholesalers to offer better prices for such orders than would be available for unsegmented orders routed to national securities exchanges.

The trading examples thus far have assumed that trades occur at the NBBO prices, which are determined by round lot quotations displayed on national securities exchanges. In fact, however, trades can be executed on national securities exchanges at prices that are better than NBBO prices (''NBBO price improvement''). Marketable orders routed to access the NBBO at a national securities exchange can obtain NBBO price improvement in two primary contexts. First, a national securities exchange may have displayed orders on its continuous order book with sizes less than round lots, known as ''odd lot quotations,'' that are priced better than the NBBO. If a contra-side marketable order is routed to a national securities exchange with such an odd lot quotation, the contra-side marketable order will interact with the odd-lot quotation and receive a better price than the NBBO. Second, there may be undisplayed non-marketable limit orders resting on the continuous order book of a national securities exchange with prices that are better than such exchange's displayed quotations. One common example is an NBBO midpoint order. An NBBO midpoint order has an execution price that is pegged to, and accordingly fluctuates with, the midpoint of the NBBO. If the NBBO is $20.00 and $20.10, and an NBBO midpoint order to sell is resting on the continuous order book of a national securities exchange, a marketable order to buy that is routed to such exchange will execute at the NBBO midpoint price of $20.05 rather than the NBO of $20.10. By trading at the NBBO midpoint, the incoming marketable buy order has obtained an immediate execution without paying any spread, and the resting NBBO midpoint order to sell has not earned any spread. Institutional investors may use undisplayed NBBO midpoint orders because they provide an opportunity to trade with contra-sided marketable flow, but without the information leakage (and potential slippage) that could occur if their orders were displayed.

D. Quantitative Measures of Order Execution Quality and Trading Costs

A variety of quantitative measures can be used to assess the quality of order executions that broker-dealers obtain for their individual investor customers, as well as more generally the trading costs of liquidity takers and liquidity providers. 17 CFR 242.605 (''Rule 605'') of Regulation NMS,[44] for example, requires many trading centers, including national securities exchanges and wholesalers, to make data files publicly available on a monthly basis that include detailed measures of execution quality for marketable and non-marketable orders in NMS stocks. This section will describe some of the quantitative measures included in Rule 605 data, as well as provide concrete examples illustrating specifically how the measures are calculated. These quantitative measures are referenced extensively throughout this release to explain the rationale for and the potential economic effects of Proposed Rule 615.

1. Description of Quantitative Measures

The following is a list, with brief descriptions, of quantitative measures of order execution quality and trading costs in NMS stocks that are included in, or can be derived from, Rule 605 data files. Specific examples of how the measures are calculated will be provided in section II.D.2 below.

As stated above, NBBO price improvement is the amount by which the execution price of a marketable order is better than the relevant NBBO quotation at the time a marketable order is received by a trading center.[45] For marketable buy orders, it is the amount by which the buy order received a price lower than the NBO at the time of order receipt. For marketable sell orders, it is the amount by which the sell order received a price higher than the NBB at the time of order receipt.

''NBBO quoted half-spread'' is one-half of the difference between the NBO and NBB, as measured at the time when a marketable order is received by a trading center. The full quoted spread is halved to reflect the spread cost for establishing or liquidating a position (long or short). For example, if an investor uses a marketable order to buy at the NBO (incurring a half-spread to establish a long position), but then is able to use a non-marketable order to sell at the NBO (earning a half-spread to liquidate the long position), the investor would have paid a net spread of 0 cents on the ''round-trip'' transaction.

''Effective half-spread'' is the half-spread actually paid by a marketable order. It is calculated by comparing execution prices with the NBBO midpoint, rather than the relevant NBB or NBO, at the time of order receipt.[46]

[43] *See* Table 7, *infra,* section VII.B.4.

[44] Rule 605 is discussed in section III.B.4 below.

[45] Rule 600(b)(36) of Regulation NMS defines ''executed with price improvement'' as, for buy orders, execution at a price lower than the NBO at the time of order receipt and, for sell orders, execution at a price higher than the NBB at the time of order receipt.

[46] Rule 600(b)(8) of Regulation NMS defines ''average effective spread'' as the share-weighted average of effective spreads for order executions

Accordingly, a trading center's average effective half-spread for marketable orders may be narrower or wider than the NBBO quoted half-spread, depending on the extent to which execution prices at a trading center are inside, at, or outside NBBO prices.

''Price impact'' is the extent to which the NBBO midpoint moves against the liquidity provider for a marketable order in a short time period after the order execution. For Rule 605 reporting, the time period is five minutes after the time of order execution. For the analyses of CAT data provided in section VII.B.4 below, the time period is one minute after the time of order execution.[47] Price impact measures the extent of adverse selection costs faced by a liquidity provider and is closely related to realized half-spread (described next). When price impact and realized half-spread are calculated using the same post-trade time period, the difference between the effective half-spread and the realized half-spread on a trade will equal the price impact of the trade.[48]

''Realized half-spread'' is calculated similarly to the effective half-spread, but, instead of using the NBBO midpoint at the time of order receipt, the realized spread calculation uses the NBBO midpoint a short time period after the execution of a marketable order.[49] For Rule 605 reporting, the time period is five minutes after the time of order execution. For the analyses of CAT data provided in section VII.B.4 below, the time period is one minute after the time of order execution.[50] When deciding to include realized spread statistics in Rule 605 reports, the Commission stated that the smaller the average realized spread, ''the more market prices have moved adversely to the market center's liquidity providers after the order was executed,'' which shrinks the spread ''realized'' by the liquidity providers.[51] The Commission further stated that the average realized spread statistic for market and marketable limit orders potentially could help ''to spur more vigorous competition to provide the best prices to these orders to the benefit of many retail investors.'' [52] In sum, by capturing the extent of adverse selection costs faced by liquidity providers, realized spreads are designed to provide a more accurate measure of the potential profitability of trading for liquidity providers than do effective spreads.[53]

2. Examples of Calculating Measures of Order Execution Quality and Trading Costs

When the execution quality and trading cost measures described above are calculated and averaged for a large volume of orders at different trading centers, the results can reveal important information about the nature of the order execution quality and trading costs across different trading centers. Section VII below, which provides an economic analysis of Proposed Rule 615, makes extensive use of data analyses using these measures.

The following two examples are patterned on those analyses, particularly the empirical finding that the marketable orders of individual investors routed to wholesalers have adverse selection costs (as measured by price impact) that, on average, are approximately 71% lower than the marketable orders routed to national securities exchanges. The examples are intended to illustrate how quantitative measures of order execution quality and trading costs are calculated in these two contexts that are most relevant for understanding the empirical basis for Proposed Rule 615. The examples show how a difference in the adverse selection costs of order flow routed to two different trading centers can result in more price improvement and narrower effective spreads at the trading center with lower adverse selection costs (the wholesaler) than at the trading center with higher adverse selection costs (the exchange), yet still result in wider realized spreads (*i.e.,* spreads realized by the liquidity provider after estimating for adverse selection costs) at the wholesaler than at the exchange.

The first example below (''Exchange Example'') presents the execution of an unsegmented marketable order to buy at a national securities exchange at a price that matches the NBBO, and the second example below (''Wholesaler Example'') presents the execution of a segmented marketable order to buy of an individual investor at a wholesaler at a price better than the NBBO. The examples use the calculation methodology prescribed by Rule 605 of Regulation NMS, except that statistics are presented for the half-spread associated with a single buy or sell order rather than the full spread statistics prescribed for Rule 605, which are doubled to reflect estimates of round-trip (offsetting buy and sell) trading costs.[54] Half-spreads are used to more clearly present the calculations for the single order in each of the examples.

The data used for the two examples are labeled as follows: execution price of marketable order (''ExP''), NBB at time of order receipt (''NBB_{t0}''), NBO at time of order receipt (''NBO_{t0}''), NBBO midpoint at time of order receipt (''MP_{t0}''), and NBBO midpoint 5 minutes after time of order execution (''MP_{t5}'').

The execution quality and trading cost measures for the two examples of marketable orders to buy are calculated as follows:

NBBO quoted half-spread: $\frac{1}{2} \times (NBO_{t0} - NBB_{t0})$

NBBO price improvement: $NBO_{t0} - ExP$

Effective half-spread: $ExP - MP_{t0}$

Price impact: $MP_{t5} - MP_{t0}$

Realized half-spread: $ExP - MP_{t5}$

The data and calculations for the two examples are as follows:

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calculated, for buy orders, as double the amount of difference between the execution price and the midpoint of the NBB and NBO at the time of order receipt and, for sell orders, as double the amount of difference between the midpoint of the NBB and NBO at the time of order receipt and the execution price.

[47] The analysis in section VII.B.4 below uses one minute to reflect the increase in trading speed in the years since Rule 605 was adopted.

[48] *See, e.g.,* Hasbrouck Treatise at 147 (''The execution cost based on the pretrade bid-ask midpoint (BAM) is also known as the effective cost. Since 2001, the U.S. SEC has required U.S. equity markets to compute effective costs and make summary statistics available on the Web . . . . The rule . . . also requires computation of the realized cost . . . . The difference between effective and realized costs is sometimes used as an estimate of the price impact of the trade. The realized cost can also be interpreted as the revenue of the dealer who sold to the customer . . . and then covered his position at the subsequent BAM.'').

[49] Rule 600(b)(9) of Regulation NMS generally defines ''average realized spread'' as the share-weighted average of realized spreads for order executions calculated, for buy orders, as double the amount of difference between the execution price and the midpoint of the NBB and NBO five minutes after the time of order execution and, for sell orders, as double the amount of difference between the midpoint of the NBB and NBO five minutes after the time of order execution and the execution price.

[50] The analysis in section VII.B.4 below uses a one-minute period to reflect the increase in trading speed in the years since Rule 605 was adopted.

[51] Securities Exchange Act Release No. 43590 (Nov. 17, 2000), 65 FR 75414, 75424 (Dec. 1, 2000).

[52] *Id.*

[53] *See, e.g.,* Harris Treatise at 286 (''Informed traders buy when they think that prices will rise and sell otherwise. If they are correct, they profit, and whoever is on the other side of their trade loses. When dealers trade with informed traders, prices tend to fall after the dealer buys and rise after the dealer sells. These price changes make it difficult for dealers to complete profitable round-trip trades. When dealers trade with informed traders, their realized spreads are often small or negative. Dealers therefore must be very careful when trading with traders they suspect are well informed.'').

[54] The definitions of ''average effective spread'' and ''average realized spread'' provided in Rule 600(b)(8) and (9) of Regulation NMS, which are incorporated in Rule 605, prescribe doubling of the amounts by which an order execution price differs from the NBBO midpoint at the time of order receipt (for effective spreads) and five minutes after the time of order execution (for realized spreads).

	Exchange example	Wholesaler example
EXP	$110.05	$110.04.
NBB_{T0}	$110.00	$110.00.
NBO_{T0}	$110.05	$110.05.
MP_{T0}	$110.025	$110.025.
MP_{T5}	$110.055	$110.035.
NBBO PRICE IMPROVEMENT	0 cents	1 cent.
NBBO QUOTED HALF-SPREAD	2.5 cents	2.5 cents.
EFFECTIVE HALF-SPREAD	2.5 cents	1.5 cents.
PRICE IMPACT	3 cents	1 cent.
REALIZED HALF-SPREAD	<0.5 cents>	0.5 cents.

In the Exchange Example and Wholesaler Example, the NBBO is the same at the time of order receipt for both marketable buy orders, but the national securities exchange in the Exchange Example executes the order at the NBO with no NBBO price improvement, while the wholesaler in the Wholesaler Example executes the marketable buy order with NBBO price improvement of one cent. Consequently, the NBBO quoted half-spread is the same for both trades (2.5 cents), but the effective half-spread is wider for the liquidity provider on the national securities exchange (2.5 cents) than for the wholesaler (1.5 cents) because of the 1 cent NBBO price improvement provided by the wholesaler. The price impact of the order routed to the national securities exchange is 3 cents, while the price impact of the order routed to the wholesaler is only 1 cent. Accordingly, the adverse selection cost for the liquidity provider on the national securities exchange was 3 cents, while the adverse selection cost for the wholesaler was 1 cent.

The difference in adverse selection costs leaves the liquidity provider on the national securities exchange in the Exchange Example with a narrower realized half-spread of negative 0.5 cents, while the wholesaler in the Wholesaler Example preserves a positive realized half-spread of 0.5 cents. Stated another way, the wholesaler provided some NBBO price improvement (1 cent), but its adverse selection cost savings compared to the liquidity provider on the national securities exchange was 2 cents, and as a result the wholesaler was able to capture a realized half-spread that was one cent wider than the liquidity provider on the national securities exchange. If, however, the wholesaler had provided NBBO price improvement that matched its cost savings, the individual investor would have received NBBO price improvement of 2 cents rather than 1 cent. In this case, the realized half-spread for both the wholesaler and the liquidity provider on the national securities exchange would have been the same—negative 0.5 cents.

In this respect, the Exchange Example and Wholesaler Example highlight the key order-by-order competition objective of Proposed Rule 615. As discussed in section VII.C.2.b below, competition among a wide range of liquidity providers on national securities exchanges is intense and results in realized spreads for unsegmented orders that are narrower than the realized spreads captured by wholesalers for the segmented orders of individual investors. Another way of stating the same point is that wholesalers do not provide average NBBO price improvement that matches their savings in average adverse selection costs from securing the opportunity to trade first with the segmented orders of individual investors. Proposed Rule 615 would enable order-by-order competition to provide the best prices to the segmented marketable orders of individual investors. By providing an opportunity for a wide variety of liquidity providers to compete to provide the best prices for the segmented marketable orders of individual investors, Proposed Rule 615 is designed to expand the level of NBBO price improvement currently provided by wholesalers to match the low adverse selection costs of such orders.

III. Statutory and Regulatory Background

The development of today's market structure for NMS stocks has been guided by the Congressional determination set forth in section 11A of the Exchange Act that the United States should have an NMS in which multiple competing markets are linked together through communications and data processing facilities. This section III first will discuss the Exchange Act framework for an NMS. It then will summarize the rules that the Commission has adopted over the years to facilitate the development of an NMS, with particular focus on rules that address the handling and execution of investor orders in NMS stocks. Many aspects of Proposed Rule 615, as described in section IV below, are designed to build on the existing statutory framework and Commission rules discussed in this section III.

A. Statutory Framework for an NMS

Section 11A of the Exchange Act, enacted as part of the Securities Acts Amendments of 1975,[55] sets forth the statutory framework for an NMS. Section 11A(a)(2) directs the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under the Exchange Act to facilitate the establishment of an NMS for securities in accordance with the Congressional findings and objectives set forth in section 11A(a)(1) of the Exchange Act.[56] Section 11A(a)(1)(C) sets forth the finding of Congress that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure five objectives:

(1) economically efficient execution of securities transactions;

(2) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;

(3) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities;

(4) the practicability of brokers executing investors' orders in the best market; and

(5) an opportunity, consistent with the foregoing objectives of efficient execution of securities transactions and practicability of brokers executing investors' orders in the best market, for investors' orders to be executed without the participation of a dealer.[57]

A variety of Exchange Act provisions grant the Commission specific

[55] Public Law 94–29, 89 Stat. 97 (1975).

[56] Section 11A(a)(3)(B) also provides the Commission the authority to require the SROs, by rule or order, ''to act jointly . . . in planning, developing, operating, or regulating [an NMS] (or a subsystem thereof).''

[57] Section 11A(a)(1) of the Exchange Act.

rulemaking authority in different contexts to fulfill its responsibility to facilitate the establishment of an NMS that assures the five objectives. Three of these Exchange Act authorizations are particularly relevant in the context of rules to address the handling and execution of investor orders in NMS stocks.

First, section 11A(c)(1)(E) addresses the routing of orders by broker-dealers. It authorizes the Commission to prescribe rules, as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the Exchange Act to assure that all exchange members and brokers-dealers transmit and direct orders for the purchase or sale of NMS stocks in a manner consistent with the establishment and operation of an NMS.[58]

Second, section 11A(c)(1)(F) grants rulemaking authority to assure equal regulation of all markets for NMS stocks, as well as of all exchange members and broker-dealers effecting transactions in NMS stocks.[59] The meaning of the term ''equal regulation'' is specified in section 3(b)(36), which provides that a class of persons or markets is subject to equal regulation if no member of the class has a competitive advantage over any other member thereof resulting from a disparity in their regulation under the Exchange Act which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Third, section 15(c)(5) addresses the practices of dealers, such as wholesalers. It authorizes the Commission to prescribe rules setting forth specified and appropriate standards with respect to dealing for dealers (other than specialists registered on a national securities exchange) acting in the capacity of a market maker or otherwise that are necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to remove impediments to and perfect the mechanism of an NMS.[60]

In addition to these grants of rulemaking authority to facilitate the development of an NMS, section 6 of the Exchange Act[61] specifically addresses the types of access to trading services that one type of market—a national securities exchange—is required to provide to broker-dealers and market participants. Access to the trading services of a market is essential for that market to be linked together with other markets in an NMS.

First, section 6(b)(2) requires that, subject to the provisions of section 6(c) relating to statutory disqualification and other concerns, the rules of the exchange must provide that any registered broker-dealer may become a member of such exchange.[62] Broker-dealers generally need to become exchange members, as an initial matter, to obtain access to many of the trading services of an exchange.

Second, section 6(b)(4) requires that the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.[63] This provision recognizes that the opportunity for different market participants to access trading services at a market can be greatly affected by the charges for those services.

Third, section 6(b)(5) requires that the rules of the exchange are designed to, among other things, ''remove impediments to and perfect the mechanism of a free and open market and [an NMS], and, in general, to protect investors and the public interest.'' [64] Section 6(b)(5) further requires that the rules of the exchange are not designed ''to permit unfair discrimination between customers, issuers, brokers, or dealers.'' [65] These provisions broadly help ensure fair and efficient access to the trading services of national securities exchanges, both by requiring them to act affirmatively to promote high quality markets and by prohibiting them from acting negatively by unfairly discriminating between customers, issuers, or broker-dealers.

Finally, section 6(b)(8) requires that ''the rules of the exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes'' of the Exchange Act.[66] This provision further restricts a national securities exchange's ability to limit access to its trading services in an anti-competitive manner.

To help ensure that national securities exchanges operate according to rules consistent with their statutory obligations, section 19(b)(1) of the Exchange Act[67] requires SROs,[68] including national securities exchanges, to file with the Commission any proposed rule change.[69] The Commission publishes for public comment all SRO proposed rule changes.[70] For new or materially modified trading services, a proposed rule change generally cannot become effective, and the national securities exchange cannot implement such rule change, until the Commission has approved it as consistent with the requirements of the Exchange Act.[71]

Section 15A of the Exchange Act[72] includes many requirements for the rules of a national securities association that are analogous to those prescribed for national securities exchanges. FINRA is currently the only registered national securities association. Broker-dealers that handle customer orders in NMS stocks or trade NMS stocks in the off-exchange market generally must become FINRA members.[73] Section 15A does not, however, impose fair access requirements on the broker-dealer members of FINRA. Accordingly, broker-dealers that trade internally are not subject to the statutory access requirements that apply to national securities exchanges under section 6 of the Exchange Act.

B. Current Regulatory Components of the NMS for NMS Stocks

Over the years since 1975, the Commission has used its Exchange Act

[58] 15 U.S.C. 78k–1(c)(1)(E).

[59] 15 U.S.C. 78k–1(c)(1)(F).

[60] 15 U.S.C. 78*o*(c)(5).

[61] 15 U.S.C. 78f.

[62] 15 U.S.C. 78f(b)(2).

[63] 15 U.S.C. 78f(b)(4).

[64] 15 U.S.C. 78f(b)(5).

[65] *Id.*

[66] 15 U.S.C. 78f(b)(8).

[67] 15 U.S.C. 78s(b)(1).

[68] *See* 15 U.S.C. 78c(b)(26) (defining ''self-regulatory organization'' to include, among other things, any national securities exchange or registered securities association).

[69] Section 19(b)(1) of the Exchange Act defines a ''proposed rule change'' to be any proposed change in, addition to, or deletion from the rules of an SRO. 15 U.S.C. 78s(b)(1). Section 3(a)(27) of the Exchange Act generally defines ''rules'' to include the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing and the stated policies, practices, and interpretations of an exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange, association, or clearing agency. 15 U.S.C. 78c(a)(27). Rule 19b–4(b) under the Exchange Act defines ''stated policy, practice, or interpretation'' to mean, in part, any material aspect of the operation of the facilities of the SRO or any statement made generally available that establishes or changes any standard, limit, or guideline with respect to the rights, obligations, or privileges of persons or the meaning, administration, or enforcement of an existing rule. 17 CFR 240.19b–4(b).

[70] *See* 15 U.S.C. 78s(b)(1).

[71] If the Commission does not approve or disapprove a proposed rule change within the required timeframe prescribed by section 19 of the Exchange Act, it is ''deemed to have been approved.'' 15 U.S.C. 78s(b)(2)(D).

[72] 15 U.S.C. 78*o*–3.

[73] *See* 15 U.S.C. 78*o*(b)(8). The Commission has proposed to amend 17 CFR 240.15b9–1, which provides an exemption from association membership for certain exchange members. Securities Exchange Act Release No. 95388 (July 29, 2022), 87 FR 49930 (Aug. 12, 2022) (proposing to replace a *de minimis* allowance with narrower exemptions from association membership).

authority to adopt a series of rules to fulfill its regulatory responsibility to facilitate the establishment of an NMS. In doing so, it particularly has emphasized the importance of promoting competition as a means to protect investors and to achieve the five statutory objectives for an NMS. In its request for comment on issues relating to market fragmentation in 2000,[74] for example, the Commission stated that the section 11A findings and objectives can be summed up in two fundamental principles. First, the interests of investors (both large and small) are preeminent, ''especially the efficient execution of their securities transactions at prices established by vigorous competition.'' [75] Second, investor interests are best served by a market structure that, to the greatest extent possible, maintains the benefits of ''*both* an opportunity for interaction of all buying and selling interest'' in individual securities and ''fair competition among all types of market centers'' seeking to provide a forum for the execution of securities transactions.[76] The Commission further stated that competition among multiple competing markets can isolate investor orders and that this ''may reduce competition *on price,* which is one of the most important benefits of greater interaction of buying and selling interest in an individual security.'' [77]

In 2005, the Commission adopted Regulation NMS to consolidate the NMS rules it had previously adopted under section 11A and to include new rules designed to modernize and strengthen equity market structure.[78] It again emphasized the importance of competition among orders to obtain the best prices for investors, stating that this basic principle was recognized in the legislative history of section 11A: ''Investors must be assured that they are participants in a system which maximizes the opportunities for the most willing seller to meet the most willing buyer.'' [79] The Commission summed up its approach to achieving an NMS as resisting suggestions that it adopt an approach focusing on a single form of competition that, while perhaps easier to administer, ''would forfeit the distinct, but equally vital, benefits associated with both competition among markets and competition among orders.'' [80]

Four categories of the Regulation NMS rules are particularly important in the context of Proposed Rule 615: (1) consolidated market data; (2) order handling and execution; (3) access to trading centers; and (4) disclosure of order routing practices and order execution statistics.

1. Rules Addressing Consolidated Market Data

Several rules under Regulation NMS set forth requirements for consolidated market data, which, as defined in Rule 600(b)(19) and (21) of Regulation NMS, includes information concerning quotations and transactions in NMS stocks. 17 CFR 242.601 (''Rule 601'') provides for the dissemination of transaction information; 17 CFR 242.602 (''Rule 602'') provides for the dissemination of quotation information; 17 CFR 242.603 (''Rule 603'') requires, among other things, the national securities exchanges and national securities associations to act jointly for disseminating consolidated market data; and 17 CFR 242.608 (''Rule 608'') addresses the joint-NMS plans that currently are responsible for operating the facilities for collecting and disseminating consolidated market data in NMS stocks.

In 2020, the Commission adopted a new rule and amended existing rules to establish a new infrastructure for consolidated market data and to update and significantly expand the content of consolidated market data (''MDI Rules'').[81] The MDI Rules have not yet been implemented and, as discussed below, given their unimplemented status, the description of Proposed Rule 615 in section IV below reflects the regulatory structure currently in place for consolidated market data. Section VII below addresses the economic effects of Proposed Rule 615, taking into account both the regulatory structure currently in place and the unimplemented MDI Rules. This section III.B.1 first will briefly summarize the currently implemented regulatory structure for consolidated market data. It then will discuss the status of the implementation of MDI Rules and how it would not affect the operation of and need for Proposed Rule 615.

a. Current Regulatory Structure for Consolidated Market Data

As stated in section II.B above, consolidated market data currently is collected and disseminated by the centralized SIPs. For quotation information, only the 16 exchanges that currently trade NMS stocks provide quotation information to the SIPs for dissemination in consolidated market data.[82] FINRA has the only SRO display-only facility (the ADF) for quotations. No broker-dealer, however, currently uses the ADF to display quotations in NMS stocks in consolidated market data. For transaction information, all of the national securities exchanges that trade NMS stocks and FINRA provide real-time transaction information to the SIPs for dissemination in consolidated market data. Such information includes the symbol, price, and size of the transaction. A notable difference, however, between the transaction information provided by the national securities exchanges and the transaction information provided by FINRA is that the identity of the particular exchange that executed a trade is included in consolidated market data, while the

[74] Securities Exchange Act Release No. 42450 (Feb. 23, 2000), 65 FR 10577 (Feb. 28, 2000) (''Market Fragmentation Concept Release'').

[75] *Id.* at 10580.

[76] *Id.* (emphasis in original).

[77] *Id.* (emphasis in original).

[78] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (''Regulation NMS Adopting Release'').

[79] *Id.* at 37499 (quoting H.R. Rep. 94–123, 94th Cong., 1st Sess. 50 (1975)). The Commission further quoted this legislative history for section 11A of the Exchange Act to emphasize the importance of ensuring that investor orders are able to be executed in a market with the best price: '''market fragmentation becomes of increasing concern in the absence of mechanisms designed to assure that public investors are able to obtain the best price for securities regardless of the type or physical location of the market upon which his transaction may be executed.''' *Id.* at 37499 n.13.

[80] *Id.*

[81] Securities Exchange Act Release No. 90610 (Dec. 9, 2020), 86 FR 18596 (Apr. 9, 2021) (''MDI Adopting Release''); *see also The Nasdaq Stock Market LLC, et al* v. *SEC,* No. 21–1100 (D.C. Cir. May 24, 2022) (upholding these Commission amendments to market data rules adopted in the MDI Adopting Release). The MDI Adopting Release provides a comprehensive discussion of the current arrangements for consolidated market data, as well as the adopted but unimplemented rules to change these current arrangements.

[82] Currently, these national securities exchanges are: Cboe BYX Exchange, Inc. (''Cboe BYX''); Cboe BZX Exchange, Inc. (''Cboe BZX''); Cboe EDGA Exchange, Inc. (''Cboe EDGA''); Cboe EDGX Exchange, Inc. (''Cboe EDGX''); Investors Exchange LLC (''IEX''); Long-Term Stock Exchange, Inc. (''LTSE''); MEMX LLC (''MEMX''); MIAX Pearl, LLC (''MIAX PEARL''); Nasdaq BX, Inc. (''Nasdaq BX''); Nasdaq PHLX LLC (''Nasdaq Phlx''); The Nasdaq Stock Market LLC (''Nasdaq''); NYSE; NYSE American LLC (''NYSE American''); NYSE Arca, Inc. (''NYSE Arca''); NYSE Chicago, Inc. (''NYSE CHX''); and NYSE National, Inc. (''NYSE National''). The Commission approved rules proposed by BOX Exchange LLC (''BOX'') for the listing and trading of certain equity securities that would be NMS stocks on a facility of BOX known as BSTX LLC (''BSTX''), but BSTX is not yet operational. *See* Securities Exchange Act Release Nos. 94092 (Jan. 27, 2022), 87 FR 5881 (Feb. 2, 2022) (SR–BOX–2021–06) (approving the trading of equity securities on the exchange through a facility of the exchange known as BSTX); 94278 (Feb. 17, 2022), 87 FR 10401 (Feb. 24, 2022) (SR–BOX–2021–14) (approving the establishment of BSTX as a facility of BOX). BSTX cannot commence operations as a facility of BOX until, among other things, the BSTX Third Amended and Restated Limited Liability Company Agreement approved by the Commission as rules of BOX is adopted. *Id.* at 10407.

identity of the particular FINRA member responsible for reporting a trade, such as a wholesaler or other type of broker-dealer, is not included in consolidated market data.[83]

b. Unimplemented MDI Rules

When implemented, the MDI Rules will modify the current regulatory structure for consolidated market data in two respects. First, they will enhance the content of consolidated market data by defining three new data elements as ''core data'' [84]—(1) information about better priced quotations in higher priced stocks (to be implemented through a new definition of ''round lot'' [85] and the inclusion of certain ''odd-lot information''),[86] (2) information about quotations that are outside of the best-priced quotations (to be implemented through a new ''depth of book data'' definition),[87] and (3) information about orders that are participating in auctions (to be implemented through a new definition of ''auction information'').[88] As discussed below in section III.B.1.b.ii, the MDI Rules will enhance the content of consolidated market data, but the enhanced content of consolidated market data still will not include all of the quotation information currently available to market participants that purchase proprietary data feeds that are disseminated individually by national securities exchanges. Second, the MDI Rules will enhance the provision of consolidated market data by adopting a new decentralized model that replaces the SIPs with ''competing consolidators'' [89] and ''self-aggregators.'' [90] Under the decentralized model, the relevant SROs (national securities exchanges that trade NMS stocks and FINRA) will be required to provide their data directly to multiple competing consolidators and self-aggregators rather than to a centralized SIP.[91]

i. Implementation of the MDI Rules

In the MDI Adopting Release in 2020, the Commission outlined a phased transition plan for the implementation of the MDI Rules.[92] The first step was the filing of amendments to the effective NMS market data plan(s) as required under Rule 614(e) of Regulation NMS.[93] The Commission's approval of such amendments will be the starting point for the rest of the implementation schedule. While the Commission can approve NMS plan amendments within 90 days of the date of their publication in the **Federal Register** if the Commission finds them to be consistent with the standards set forth in Rule 608 of Regulation NMS,[94] the Commission may, under rule 608(b)(2)(i), institute proceedings to determine whether to approve or disapprove proposed amendments, which proceedings must conclude within 180 days of notice publication of the proposed amendments but can be extended by an additional 120 days.[95] Therefore, the maximum time permitted under rule 608 for Commission action is 300 days.

After the Commission finds that the plan amendments required under Rule 614(e) are consistent with the Rule 608 standards and approves such amendments, the next step will be a 180-day development period, during which competing consolidators can register with the Commission. The development period is followed by a 90-day testing period.[96] Once the testing period concludes, a 180-day parallel operation period will begin during which the SIPs and the decentralized consolidation model will operate in parallel.[97]

Within 90 days of the end of the parallel operation period, the operating committee(s) of the effective NMS plan(s), in consultation with relevant market participants, will make a recommendation to the Commission as to whether the SIPs should be decommissioned. The SIPs will only cease operations to the extent that the Commission approves an amendment pursuant to Rule 608 to the effective NMS plan(s) to effectuate such a cessation.[98]

The plan participants of two effective NMS plans filed the MDI Plan Amendments on November 5, 2021.[99] On September 21, 2022, the Commission disapproved the proposed amendments.[100] As a result, new proposed amendments pursuant to Rule 608 will need to be developed and filed for implementation of the MDI Rules.

The Commission does not believe that the subsequent implementation of the MDI Rules would substantially affect the operation of Proposed Rule 615. In the existing regulatory structure, the national securities exchanges and FINRA would be required to provide the SIPs with the necessary data (including the auction messages specified in Proposed Rule 615(c)(1)) and the quotation and transaction information specified in the proposed definition of ''open competition trading center'' in Proposed Rule 600(b)(64) of Regulation NMS). When the MDI Rules are subsequently implemented, a

[83] Separate from the dissemination of real-time transaction information in consolidated market data, FINRA publishes statistics on trading volume at member firms, including ATSs and wholesalers, that are aggregated on a weekly basis. Publication of the aggregate volume statistics is delayed by two weeks for some NMS stocks and by four weeks for others. The statistics are *available at https://www.finra.org/filing-reporting/otc-transparency*.

[84] The term ''core data'' is defined in section 600(b)(21) of Regulation NMS.

[85] The term ''round lot'' is defined in section 600(b)(82) of Regulation NMS.

[86] The term ''odd lot information'' is defined in section 600(b)(59) of Regulation NMS.

[87] The term ''depth of book data'' is defined in section 600(b)(26) of Regulation NMS.

[88] The term ''auction information'' is defined in section 600(b)(5) of Regulation NMS.

[89] The term ''competing consolidator'' is defined in section 600(b)(16) of Regulation NMS.

[90] The term ''self-aggregator'' is defined in section 600(b)(83) of Regulation NMS.

[91] Rule 603(b) of Regulation NMS requires, among other things, every national securities exchange on which an NMS stock is traded and national securities association to make available to all competing consolidators and self-aggregators its information with respect to quotations for and transactions in NMS stocks.

[92] MDI Adopting Release, *supra* note 81, 86 FR at 18698–18701.

[93] 17 CFR 242.614(e). The participants of the effective NMS market data plan(s) filed proposed amendments on Nov. 5, 2021, which were published for comment in the **Federal Register**. Securities Exchange Act Release Nos. 93615 (Nov. 19, 2021), 86 FR 67800 (Nov. 29, 2021); 93625 (Nov. 19, 2021), 86 FR 67517 (Nov. 26, 2021); 93620 (Nov. 19, 2021), 86 FR 67541 (Nov. 26, 2021); 93618 (Nov. 19, 2021), 86 FR 67562 (Nov. 26, 2021) (''MDI Plan Amendments'').

[94] 17 CFR 242.608(b)(2).

[95] 17 CFR 242.608(b)(2). The Commission instituted proceedings to determine whether to approve or disapprove the MDI Plan Amendments. Securities Exchange Act Release Nos. 94310 (Feb. 24, 2022), 87 FR 11748 (Mar. 2, 2022); 94309 (Feb. 24, 2022), 87 FR 11763 (Mar. 2, 2022); 94308 (Feb. 24, 2022), 87 FR 11755 (Mar. 2, 2022); 94307 (Feb. 24, 2022), 87 FR 11787 (Mar. 2, 2022).

[96] MDI Adopting Release, *supra* note 81, 86 FR at 18699–700.

[97] During the parallel operation period, the SIPs will continue to disseminate the data that they currently disseminate and competing consolidators will be permitted to offer consolidated market data products, including odd-lot information. Because the round lot definition will be implemented during a later phase consistent with the MDI Adopting Release, the SIPs and competing consolidators will collect, consolidate and disseminate NMS data that will be based on the current national securities exchange definitions of round lot. *Id.* at 18699–18701.

[98] *Id.* at 18701. Following the cessation of the operations of the SIPs, the changes necessary to implement the new round lot sizes will be tested for 90 days and then implemented. *Id.* The Commission also is proposing to accelerate implementation of the round lot sizes. *See* Securities Exchange Act Release No. 96494 (Dec. 14, 2022) (File No. S7–30–22) (Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders) (''Minimum Pricing Increments Proposal''). The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposing release.

[99] *See supra* note 93.

[100] Securities Exchange Act Release Nos. 95848 (Sept. 21, 2022), 87 FR 58544 (Sept. 27, 2022); 95849 (Sept. 21, 2022), 87 FR 58592 (Sept. 27, 2022); 95850 (Sept. 21, 2022), 87 FR 58560 (Sept. 27, 2022); 95851 (Sept. 21, 2022), 87 FR 58613 (Sept. 27, 2022).

decentralized model would replace the SIPs, and the national securities exchanges and FINRA would provide this information directly to the competing consolidators and self-aggregators pursuant to Rule 603(b) of Regulation NMS.[101]

As noted above, auction information is to be included in the expanded content of consolidated market data that can be disseminated by competing consolidators under the MDI Rules. Market participants in the decentralized model will have a choice of whether to purchase consolidated market data products that include auction information, as well as any of the other components of consolidated market data.[102] The fees that ultimately are approved for the different components of consolidated market data will affect the extent to which market participants choose to purchase auction information,[103] but, as discussed above, the fees are not known at this time. Any fees for auction information will be required to be fair, reasonable, and not unreasonably discriminatory,[104] and, as such, the Commission does not anticipate that such fees would be so high as to deter a substantial number of market participants interested in participating in auctions under Proposed Rule 615 from purchasing consolidated data products that include auction information.

ii. Implementation of the MDI Rules Will Not Substantially Reduce the Need To Propose Rule 615 To Address the Goals Stated Herein

As stated in section I above, Proposed Rule 615 is designed to promote order-by-order competition and thereby achieve two primary goals for the benefit of investors—(1) obtain better prices for the execution of the marketable orders of individual investors that currently are segmented at wholesalers, and (2) expand opportunities for such individual investor orders to meet directly with other investor orders without the participation of a dealer (such as a wholesaler). The MDI Rules would not substantially reduce the need to propose Rule 615 to address the goals stated herein.

The MDI Rules will enhance the content of consolidated market data and thereby benefit those market participants that currently use SIP data and decide to purchase the enhanced elements of consolidated market data. As the MDI Adopting Release stated, however, implementation of the MDI Rules will not expand the content of data already available to sophisticated market participants that purchase the proprietary data feeds that are individually disseminated by the national securities exchanges.[105] The Commission stated its understanding that ''approximately 50 to 100 firms purchase all of the proprietary [depth-of-book] feeds from the exchanges and do not rely on the SIP data for their trading.'' [106] Moreover, these 50 to100 firms that currently use proprietary data feeds play a significant role in the current market structure.[107] For example, the MDI Adopting Release stated that ''nearly all orders entered in the [NMS], including retail orders, touch a component (typically the order router of the executing broker) that uses proprietary data in order to reduce execution costs and improve execution quality.'' [108] Furthermore, the Commission understands that the wholesalers, as six of the highest volume trading firms in the U.S. equity markets, currently pay for and use the proprietary data feeds. One wholesaler submitted a comment on the MDI Rules stating that it would be unable to remain competitive, even after the MDI Rules were implemented, without continuing to purchase proprietary data feeds.[109]

Statements in the MDI Adopting Release addressing the benefits of the MDI Rules are consistent with a conclusion that the MDI Rules can benefit SIP data users that currently do not purchase the proprietary data feeds, but will not substantially reduce the need to propose Rule 615 to address the goals stated herein. For example, the MDI Adopting Release stated that the ''odd-lot aggregation methodology'' of the MDI Rules ''would benefit market participants by promoting tighter spreads in all stocks, especially high priced ones.'' [110] All of the odd lot quotations that will be aggregated, however, were already included in an order-by-order basis in the proprietary data feeds that the Commission understands the wholesalers use. As the MDI Adopting Release stated, the inclusion of odd-lot quote information in core data will improve transparency and ''reduce information asymmetry between market participants who already receive this information through proprietary [depth-of-book] feeds and market participants who choose to subscribe to this aspect of core data and previously did not receive this information.[111]

In addition, the MDI Adopting Release states that ''because richer, more timely consolidated market data may enhance the ability of broker-dealers to obtain the most favorable terms reasonably available under the circumstances, including the best reasonably available price and other factors, for their customer orders, broker-dealers should consider the availability of consolidated market data for purposes of evaluating best execution.'' [112] The availability of additional quotation information in consolidated market data, however, is unlikely to affect the wholesalers' and retail brokers' evaluation of best execution because the Commission understands that wholesalers already would be expected, under FINRA

[101] The MDI Adopting Release states that the benefits of a decentralized model for consolidated market data are gains in efficiency and innovation for delivering consolidated market data, reduced content and latency differentials between consolidated market data and proprietary market data, and increased market resiliency. MDI Adopting Release, *supra* note 81, 86 FR at 18778. As discussed in section III.B.1.b.ii below, the Commission does not believe that these benefits of the MDI Rules substantially reduce the need to propose Rule 615 to address the goals stated herein.

[102] *See, e.g., id.* at 18751 (competing consolidators will not be required to offer consolidated market products that ''include all of the content of expanded core data'' and market participants ''may choose not to take in all of the new core data elements in every instance.'').

[103] *See, e.g., id.* at 18764 (because fees will depend on future action by the effective NMS system plans, the Commission ''cannot be certain of the level of those fees or whether such fees would provide discounts'' for those end users who wish to receive subsets of consolidated market data).

[104] *See, e.g., id.* at 18773 (the fees for the data content underlying consolidated market data must be ''fair, reasonable and not unreasonably discriminatory'').

[105] *See, e.g., id.* at 18752 (''[a]lthough expanded core data will not contain all of the data contained in proprietary [depth of book] feeds, the Commission believes that it will contain data that will be useful for market participants''); *id.* at 18754 (the potentially lower cost of consolidated market data ''will come at the expense of losing the full set of data currently available via proprietary feeds,'' because the consolidated market data definition ''does not include all data elements currently available via proprietary data feeds.'').

[106] *Id.* at 18728.

[107] *See, e.g., id.* at 18734 n. 1724 (Commission analysis showed that 91.6% of the message volume on exchanges in a sample week came from just 50 firms that use proprietary data feeds).

[108] *Id.* at 18734.

[109] *Id.* at 18793 n. 2386 (commenters agreed that ''switching to new consolidated market data would come with this expense of losing some data compared to the proprietary data feeds,'' with one stating that it would be ''unable to remain competitive even after the final amendments are in place without continuing to purchase proprietary data feeds.''); *see also id.* at 18795 (stating possibility that potential participants in automated market making and other latency sensitive trading businesses could not ''compete effectively without using the data that would remain exclusive to proprietary feeds'').

[110] MDI Adopting Release, *supra* note 81, 86 FR at 18615.

[111] *Id.* at 18753.

[112] *Id.* at 18605 (footnotes omitted).

guidance,[113] to use a more complete set of quotation information (*i.e.,* proprietary data feeds) than will be available in the expanded MDI data when evaluating best execution today, and retail brokers use wholesalers as executing brokers to obtain the best terms reasonably available.

The MDI Adopting Release also stated that ''as a result of the new round lot definition and the inclusion of odd-lot quotations in core data, retail investors will be able to see, and more readily access, better-priced quotations.'' [114] Such information will, depending on the fees yet to be determined for such information (as stated above), enable those retail investors that purchase such information (or for those retail investors whose broker-dealers purchase it for them) to see and more readily access better-priced quotations than the current NBBO disseminated by the SIPs. To do so, retail investors will need to direct their own orders to the particular trading center that is displaying a better-priced quotation. As stated in the MDI Adopting Release, however, most retail investors rely on their broker-dealers for execution of their orders, and the additional quotation information will likely be used by more sophisticated retail investors that are able to process quotation information and self-direct their orders.[115]

The MDI Adopting Release also stated that ''through the addition of depth of book data and auction information in core data, the scope of NMS information will, to a greater extent, allow some market participants to trade in a more informed, competitive, and efficient manner.'' [116] The phrase ''some market participants'' as discussed above, refers to those market participants that currently rely on SIP data for trading and not the proprietary data feeds. For the marketable orders of individual investors that currently are routed to wholesalers, the expansion of depth of book data in consolidated market data will not affect the information used for their execution because the Commission understands that wholesalers currently use proprietary data feeds for evaluating the best execution of their orders, which include more information than the expanded consolidated market data of the MDI Rules.

An aspect of the MDI Rules that will affect the public evaluation of wholesaler order execution quality is smaller round lot sizes for quotations in NMS stocks with prices greater than $250 per share. These quotations determine the NBBO, and smaller round lot sizes can lead to narrower NBBO spreads. As discussed in section II above, the NBBO is a benchmark used to assess the market for an NMS stock, as well as to retrospectively assess the level of execution quality for an order. Accordingly, although implementation of the MDI Rules will not increase the information available to wholesalers in proprietary data feeds, changes in the round lot definition could narrow the NBBO as a public benchmark for the execution quality of the marketable orders of individual investors.

The Commission does not believe, however, the smaller round lot sizes for NMS stocks with prices that exceed $250 per share will substantially affect the need for Proposed Rule 615 in terms of improved order execution quality for the marketable orders of individual investors. In particular, Proposed Rule 615 would encompass all NMS stocks, while the new round lot definition will encompass a much smaller range of NMS stocks and trading volume. In the MDI Adopting Release, for example, Table 3 and Table 4 set out the range of stocks and volume estimated to be affected by the new round lot definition. This information is summarized below:

Round lot tier	Number of NMS stocks	% Average daily share volume	% Average daily dollar volume	% Instances of smaller NBBO
$0–$250	9,023	97.12	71.93	n/a
$250.01–$1,000	117	2.79	23.24	26.6
$1,000.01–$10,000	16	0.09	4.82	47.7
$10,000+	1	0.00	0.02	n/a

First, as stated in the MDI Adopting Release, ''most stocks, approximately 98.5%, will remain unaffected'' by the new round lot definition.[117] The 98.5% of unaffected NMS stocks with prices of $250 or less represented 97.12% of total NMS stock share volume and 71.93% of total NMS stock dollar volume. Thus, the great majority of NMS stocks and their volume would not be affected by the narrowing of the NBBO benchmark that will result from the new round lot definition in the MDI Rules.[118]

Second, for the estimated 1.5% of high-priced NMS stocks (over $250) that will be affected by the reduction in round lot sizes, the Commission estimated that most of the dollar volume (23.24% of total NMS stock dollar volume) will occur within the $250.01-$1,000 tier, but in this tier, the NBBO spread will be reduced for only 26.6% of the trading day.[119] For the remaining 73.4% of the trading day in these NMS stocks, the NBBO spread in these NMS stocks will be unaffected.[120] Accordingly, even for the 1.5% of NMS stocks that will be affected by the revised round lot definition, NBBO spreads were estimated to remain unaffected for the most of the trading day.

This conclusion is consistent with statements in the MDI Adopting Release. For example, the MDI Adopting Release states that ''the size of the change in the NBBO spread, conditional

[113] The MDI Adopting Release referred to this FINRA guidance concerning the relevance of proprietary data feeds to a broker-dealer's best execution efforts under FINRA rules. *Id.* at 18605 n. 94 (quoting FINRA Notice to Members 15–46, Guidance on Best Execution Obligations in Equity, Options and Fixed Income Markets at 3 n. 12 (Nov. 2015), *available at https://www.finra.org/rules-guidance/notices/15-46* (''FINRA Notice 15–46''). The relevant portion of FINRA Notice 15–46 provides the following guidance on compliance with FINRA Rule 5310: ''[A] firm that regularly accesses proprietary data feeds, in addition to the consolidated SIP feed, for its proprietary trading, would be expected to also be using these data feeds to determine the best market under prevailing market conditions when handling customer orders to meet its best execution obligations.''

[114] *Id.* at 18601.

[115] *See, e.g., id.* at 18753 (''the Commission believes, as suggested by commenters, that retail brokers may allow some sophisticated retail investors to directly utilize the expanded content of core data and realize the benefits discussed below'').

[116] *Id.* at 18601.

[117] MDI Adopting Release, *supra* note 81, 86 FR at 18743 (Table 4).

[118] *Id.* at 18753 (''Even though the new round lot definition would expand information on odd-lots that may be priced better than the current NBBO in some stocks, most stocks would not be affected by the new round lot definition.'') (footnotes omitted).

[119] *Id.* at 18743 (Table 3).

[120] *Id.* (Table 4). For NMS stocks with prices of $1000.01 to $10,000, which represented 4.82% of trading volume, the Commission estimated that, taking into account the new round lot definition, the NBBO spread would be reduced to some extent for 47.7% of the trading day. *Id.* (Tables 3–4).

on the NBBO being smaller, will also be substantial.'' [121] The phrase ''conditional on the NBBO being smaller'' [122] means that the reduction in size of the half spread is limited to the 1.5% of stocks and their volume that, as discussed above, will be affected by the new odd lot definition. As a result, there will be a significant reduction in half spread of the NBBO for those stocks, but this reduction is conditional on the minority of the trading day for 1.5% of NMS stocks when NBBO spreads actually will be affected by the new round lot definition.

Third and finally, the NBBO as a benchmark for order execution quality does not, as discussed in section II.C above, reflect the availability of prices better than round lot displayed quotations. Such better prices include displayed odd lot quotations and undisplayed orders at national securities exchanges, as well as the availability of NBBO price improvement at wholesalers that is enabled by the low adverse selection costs of the marketable orders of individual investors. In the MDI Adopting Release, the Commission considered whether a narrowing of the NBBO spread would affect the order execution quality of retail investors.[123] While it stated that a narrowing of the NBBO spread would, by definition, reduce the level of NBBO price improvement if execution prices for retail investors remained the same,[124] the Commission stated that ''retail investors might or might not'' experience an improvement in execution quality, ''as measured by execution prices,'' from wholesalers.[125] The Commission stated that a retail broker commented that retail investors would not receive better execution prices under the new round lot sizes because wholesalers already offer price improvement to retail investors that exceeds the potential improvements in the NBBO from the new round lot size.[126] Another commenter stated that all investors, including retail investors, would experience reduced execution costs from a tighter NBBO no matter where the execution took place.[127] The Commission concluded that it was ''uncertain'' whether the execution quality that retail investors receive from wholesalers would change if the NBBO spread narrows because the effect ''would depend on how the change in the NBBO compared to the current price improvement offered by wholesalers,'' as well as on ''changes in the degree of price improvement wholesalers will offer in stocks with tighter NBBOs, which is uncertain.'' [128]

As stated above, the Commission understands that wholesalers already would be expected, under FINRA guidance, to use proprietary data feeds, which contain a fuller set of quotations than will be included in the new round lot definition, when, among other things, evaluating best execution. Consequently, the new round lot definition will not change the quotation data used by wholesalers to determine prices for executing the orders of individual investors, but rather will change the NBBO as benchmark for analysis of order execution quality at wholesalers.[129] Moreover, narrowing the NBBO as a benchmark for execution quality of wholesalers will affect all wholesalers equally. For example, if the average NBO for an NMS stock declined by two cents, the NBO as a benchmark would reduce the calculation of NBBO price improvement by two cents for all wholesalers and therefore leave them in the same relative position when compared to each other. The Commission does not believe that implementation of the new round lot definition in the MDI Rules will substantially affect the need for Proposed Rule 615 in terms of an improvement in the order execution quality of the marketable orders of individual investors.

2. Rules Addressing Order Handling and Execution

Broker-dealers owe their customers a duty of best execution when handling and executing customer orders.[130] This duty of best execution derives from common law agency principles and fiduciary obligations, and is incorporated in SRO rules and enforced through the antifraud provisions of the Federal securities laws.[131] The Commission has stated that ''the duty of best execution generally requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances, *i.e.,* at the best reasonably available price.'' [132] Broker-dealers should periodically assess the quality of competing markets to assure that order flow is directed to the markets providing the most beneficial terms for their customer orders.[133] In doing so, broker-dealers must take into account price improvement opportunities, and whether different markets may be more suitable for different types of orders or particular securities.[134]

After the enactment of section 11A in 1975, which included as an objective the practicability of brokers' executing investor orders in the best market,[135] the Commission adopted rules that prescribe requirements for the handling and execution of orders in NMS stocks in certain contexts. These rules were often designed, at least in part, to promote best execution of investors' orders. Three rules in Regulation NMS, discussed below, specifically address the handling and execution of orders in NMS stocks—17 CFR 242.604 (''Rule 604,'' also known as the ''Limit Order Display Rule''), 17 CFR 242.611 (''Rule 611,'' also known as the ''Order Protection Rule''), and 17 CFR 242.612 (''Rule 612,'' also known as the ''Sub-Penny Rule'').

[121] *Id.* at 18744.

[122] Similarly, the following statement in the MDI Adopting Release is conditional on those instances where the NBBO spread is smaller: ''The Commission believes that, in particular, for securities with a significant amount of dollar trading volume, there will be significant changes to (tightening of) the quoted spread displayed under the new round lot definition.'' *Id.* at 18743.

[123] *Id.* at 18747 (section addressing ''effects of internalization on retail order flow'').

[124] *Id.* (''it may become more difficult for the retail execution business of wholesalers to provide price improvement and other execution quality metrics at levels similar to those provided under the 100 share round lot definition today'').

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 18745 (''the new round lot definition will also improve transaction cost analysis and best execution analysis in higher priced stocks, which are benchmarked against the NBBO'').

[130] The Commission also is proposing a new rule addressing the best execution obligations of broker-dealers. *See* Securities Exchange Act Release No. 96496 (Dec. 14, 2022) (File No. S7–32–22) (Regulation Best Execution) (''Regulation Best Execution Proposal''). The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposal.

[131] *See* MDI Adopting Release, *supra* note 81, 86 FR at 18605. In addition, FINRA has codified a duty of best execution in its rules, requiring a broker-dealer to ''use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions.'' FINRA Rule 5310, ''Best Execution and Interpositioning.''

[132] *See* MDI Adopting Release, *supra* note 81, 86 FR at 18605 (quoting Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37538); *see also Geman* v. *SEC,* 334 F.3d 1183, 1186 (10th Cir. 2003) (quoting *Newton* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 135 F.3d 266, 270 (3d Cir. 1998)) (''[T]he duty of best execution requires that a broker-dealer seek to obtain for its customer orders the most favorable terms reasonably available under the circumstances.''); and *Kurz* v. *Fidelity Management & Research Co.,* 556 F.3d 639, 640 (7th Cir. 2009) (describing the ''duty of best execution'' as ''getting the optimal combination of price, speed, and liquidity for a securities trade'').

[133] *See* Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37538.

[134] *See id.*

[135] Section 11A(a)(1)(C)(iv) of the Exchange Act; *see also supra* note 57 and accompanying text.

a. Limit Order Display Rule

The Limit Order Display Rule was originally adopted in 1996 as Rule 11Ac1–4 and redesignated as Rule 604 with the adoption of Regulation NMS in 2005.[136] It establishes minimum display requirements for customer limit orders that are not executed immediately, which, as discussed in section II.C above, can be referred to as ''non-marketable'' limit orders. In contrast to marketable limit orders, non-marketable limit orders cannot be executed immediately at the NBBO. Rule 604 requires specialists and OTC market makers to display the price and full size of customer limit orders when these orders represent buying and selling interest that is at a better price than a specialist's or OTC market maker's public quotation.[137] Specialists and OTC market makers also must increase the size of their quotation for a particular security to reflect a limit order of greater than *de minimis* size when the limit order is priced equal to the specialist's or OTC market maker's disseminated quotation and that quotation is equal to the NBBO.[138]

In adopting Rule 604, the Commission observed that the enhanced transparency of such orders would increase the likelihood that customer limit orders would be executed because contra-side market participants would have a more accurate picture of trading interest in a given security, and that the increased visibility would enable market participants to interact directly with limit orders, rather than rely on the participation of a dealer for execution.[139] The Commission also stated that the display requirement (together with other amendments being made at the time) would help ensure the disclosure of customer and market maker buying and selling interest that had, prior to adoption of Rule 604, been hidden from many market participants.[140]

b. Order Protection Rule

In 2005, the Commission adopted the Order Protection Rule as Rule 611 of Regulation NMS. Rule 611(a) applies to ''trading centers,'' which is defined broadly in Rule 600(b)(95) as a national securities exchange or national securities association that operates an SRO trading facility, an ATS, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.

Rule 611(a)(1) requires trading centers to implement written policies and procedures reasonably designed to prevent trade-throughs—the execution of an order at a price that is inferior to the price of a ''protected quotation.'' [141] To be protected, a quotation must be immediately and automatically accessible up to its full displayed size, must be the best-priced quotation (highest bid to buy and lowest offer to sell) in round lot sizes of an exchange or FINRA, and must be disseminated in consolidated market data.[142] Accordingly, Rule 611 provides for intermarket price protection only of an exchange's or FINRA's best bid and offer (''BBO''). It does not establish time priority among the same-priced quotations at different trading centers, nor does it protect ''depth-of-book'' quotations (quotations with prices outside an exchange's or FINRA's BBO) or odd lot quotations (quotations with sizes of less than one round lot).

In adopting Rule 611, the Commission stated that strong intermarket price protection offers greater assurance, on an order-by-order basis, to investors who submit market orders that their orders in fact will be executed at the best readily available prices, which can be difficult for investors, particularly individual investors, to monitor.[143] One of the Commission's concerns when adopting Rule 611 was the internalization of individual investor orders by broker-dealers. The Commission observed that the great majority of internalized trades are the small trades of individual investors, and that, in 2003, nearly 1 out of every 30 of these trades, of which there are millions, appears to have been executed at a price inferior to an automated and accessible quotation.[144] The Commission stated that Nasdaq's data submitted in response to the Rule 611 proposal appeared to indicate a need for regulatory action to reinforce the fundamental principle of best price for all NMS stocks.[145]

c. Sub-Penny Rule

Also in 2005, the Commission adopted the Sub-Penny Rule as Rule 612 of Regulation NMS to establish a minimum pricing increment for NMS stocks. Specifically, paragraph (a) of Rule 612 provides that no national securities exchange, national securities association, ATS, vendor, or broker or dealer shall display, rank, or accept from any person a bid or offer, an order, or an indication of interest in any NMS stock priced in an increment smaller than $0.01 if that bid or offer, order, or indication of interest is priced equal to or greater than $1.00 per share.[146] Rule 612 does not, however, prohibit a sub-penny trade by a wholesaler or other internalizing broker-dealer, as long as the trade did not result from an impermissible sub-penny quotation,

[136] Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37570. Modifications included conforming terms to those adopted with Regulation NMS, such as changing references from ''covered security'' to ''NMS stock.'' *Id.* at 37572.

[137] Rule 604(b)(1) provides exceptions for, among other things, orders executed immediately upon receipt and odd lot orders.

[138] *See* Securities Exchange Act Release No. 37619A (Sep. 6, 1996), 61 FR 48290, 48290 (Sep. 12, 1996) (Order Execution Obligations) (adopting final rules to require the display of customer limit orders and amending a rule governing publication of quotations) (''1996 Order Handling Release''); Rule 604(a).

[139] *See* 1996 Order Handling Release, *supra* note 138, 61 FR at 48293.

[140] *Id.* at 48292. The Commission also adopted amendments to require a market maker to publish quotations for any listed security when it is responsible for more than 1% of the aggregate trading volume for that security and to make publicly available any superior prices that a market maker privately quotes through certain electronic communications networks (''ECNs''). *Id.* at 48292. Also, at the same time it adopted the Limit Order Display Rule in 1996, the Commission deferred action on a proposed rule to address the handling of customer market orders of less than block size, referred to as the ''Price Improvement Rule.'' *Id.* at 48322. This proposed rule would have required specialists and OTC market makers to provide their customer market orders an opportunity for price improvement. The proposal included a non-exclusive safe harbor to satisfy the price improvement obligation that included exposing the customer order for 30 seconds at an improved price in a published quotation. The proposal sought to improve opportunities in auction and dealer markets for market orders to interact directly with other market orders and public limit orders, consistent with the goals of an NMS. *Id.*

[141] Rule 600(b)(70) defines ''protected bid'' or ''protected offer'' as a quotation in an NMS stock that: (i) is displayed by an automated trading center; (ii) is disseminated pursuant to an effective NMS plan; and (iii) is an automated quotation that is the best bid or best offer of a national securities exchange, or the best bid or best offer of a national securities association.

[142] Rule 600(b)(71) defines ''protected quotation'' as a protected bid or a protected offer. As stated in section II.B.1 above, no FINRA member currently uses the ADF, its facility for displaying quotations, to disseminate quotations in consolidated market data. Today, only exchanges display protected quotations under Rule 611.

[143] Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37505.

[144] *Id.* at 37508.

[145] *Id.* In response to the Commission's proposal to adopt Regulation NMS, The Nasdaq Stock Market, Inc. (n.k.a. Nasdaq) submitted data to show that the trade-through rates for Nasdaq stocks in some trading centers had dropped from the Fall of 2003 to the Fall of 2004, and that the reduction during that time was a result of fewer independently operating ECNs. The Commission stated ''[i]t is unlikely that ECN consolidation could have caused such a major reduction in trade-through rates at securities dealers when they execute their customer orders internally.'' *Id.* (footnote omitted).

[146] 17 CFR 242.612(a). Paragraph (b) of Rule 612 sets forth a minimum increment of $0.0001 for prices less than $1.00 per share.

order, or indication of interest.[147] For example, Rule 612 does not prevent wholesalers, after they receive an order from a broker, from choosing to execute that order in a transaction at a sub-penny price. This includes a trade executed at a price that is a sub-penny increment better than the best displayed quotation in consolidated market data.[148] This sub-penny trading exception is not available to market participants on exchanges and ATSs,[149] in contrast, because those trading centers operate by accepting, matching, and executing orders from market participants. Exchanges and ATSs, with limited exceptions, may only execute orders at a sub-penny price if the price is the NBBO midpoint.[150] Also, exchanges with retail liquidity programs (''RLPs'') have been granted an exemption from Rule 612 to provide executions in tenths of a penny.[151] The Commission has granted exemptions for these programs to promote competition between exchanges and OTC market makers (which, as discussed above, includes wholesalers).[152] As discussed in section VII below, however, the great majority of marketable orders of individual investors continue to be routed first to wholesalers.

3. Rules Addressing Access to Trading Centers

As stated above, access to trading centers and their services is a critically important component of the NMS as a means to link trading centers together in a unified system. For example, the Regulation NMS rules addressing the display of quotations, the display of customer limit orders, and protection of customer orders cannot achieve their objectives if market participants do not have fair and efficient means to access those trading centers that display quotations and execute orders.[153]

For purposes of assessing access requirements in today's NMS, trading centers for NMS stocks can be divided into three distinct regulatory categories: national securities exchanges, NMS Stock ATSs, and internalizing broker-dealers (including wholesalers). As discussed below, the statutory access requirements and the Commission's access rules currently apply to exchanges and ATSs, as well as to FINRA members that display quotations in consolidated market data through FINRA's ADF (of which there currently are none). In contrast, broker-dealers that do not display quotations in consolidated market data and that trade outside of an ATS, such as wholesalers, are not subject to any fair access requirements under the Exchange Act or Commission rules. While subject to Commission and SRO rules for broker-dealers, internalizing broker-dealers are not prohibited from restricting access to their trading mechanisms and the investor orders that they internalize. An internalizing broker-dealer is not required, for example, to provide other market participants, including institutional investors and liquidity providers on exchanges, with any opportunity to compete to provide the best prices to the individual investor orders that the broker-dealer executes internally.

a. Access Rules for National Securities Exchanges

As stated in section III.A above, the Exchange Act directly requires national securities exchanges to provide fair access in four contexts.[154] Section 6(b)(2) specifies that exchange rules must allow ''any'' broker-dealer registered with the Commission, unless subject to a specified disqualification, to become a member of the exchange. Section 6(b)(4) requires that exchange rules provide for the ''equitable'' allocation of ''reasonable'' dues, fees, and other charges among members, issuers, and other persons using exchange facilities. Section 6(b)(5) broadly requires that exchange rules be designed, among other things, to remove impediments to and perfect the mechanism of a free and open market and an NMS, and that exchange rules are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. And section 6(b)(8) requires that exchange rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

In addition to these broad statutory requirements for all national securities exchanges, the Commission has adopted 17 CFR 242.610 (''Rule 610'') of Regulation NMS, which addresses access to displayed quotations.

[147] The Commission also is proposing to amend Rule 612 regarding sub-penny trading. *See* Minimum Pricing Increments Proposal, *supra* note 98. The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposing release.

[148] Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37556 (the Commission stated that sub-penny executions due to price improvement are generally beneficial to retail investors).

[149] The regulatory framework for ATSs is discussed in section III.B.3 below.

[150] Neither Rule 612 nor any other Commission rule or interpretation states that exchanges and ATSs may execute midpoint orders at a sub-penny amount (*e.g.,* if the NBBO is 10.00–10.01 to execute at the mid-point price of 10.005). However, the Commission has stated that Rule 612 will not prohibit a sub-penny execution resulting from a midpoint or volume-weighted algorithm or from price improvement, so long as the execution did not result from an impermissible sub-penny order or quotation. Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37556. Undisplayed ''floating'' midpoint orders (*i.e.,* orders that re-price when the exchange BBO changes), for example, are permissible under Rule 612, and the Commission has approved numerous rule proposals by national securities exchanges for their use. *See, e.g.,* Securities Exchange Act Release Nos. 89563 (Aug. 14, 2020), 85 FR 51510 (Aug. 20, 2020) (SR–PEARL–2020–03) (order approving proposed rule change by MIAX PEARL to establish rules governing the trading of equity securities, including a midpoint peg order type); and 78101 (June 17, 2016), 81 FR 41142 (June 23, 2016) (File No. 10–222) (order approving IEX's registration as a national securities exchange, including the exchange's inclusion of a midpoint pegged order type in its rulebook).

[151] Several exchanges operate RLPs. These are programs for retail orders seeking liquidity that allow market participants to supply liquidity to such retail orders by submitting undisplayed orders priced at least $0.001 better than the exchange's protected best bid or offer. Each program results from a Commission approval of a proposed rule change made on Form 19b-4 combined with a conditional exemption, pursuant to section 36 of the Exchange Act, from Rule 612 to enable the exchange to accept and rank (but not display) the sub-penny orders. *See, e.g.,* Securities Exchange Act Release Nos. 85160 (Feb. 15, 2019), 84 FR 5754 (Feb. 22, 2019) (SR–NYSE–2018–28) (approving the NYSE RLP on a permanent basis and granting the exchange a limited exemption from the Sub-Penny Rule to operate the program); 86194 (June 25, 2019), 84 FR 31385 (July 1, 2019) (SR–BX–2019–011) (approving Nasdaq BX's retail price improvement program on a permanent basis and granting the exchange a limited exemption from the Sub-Penny Rule to operate the program).

[152] *Id. See also* Securities Exchange Act Release No. 73702 (Nov. 28, 2014), 79 FR 72049 (Dec. 4, 2014) (SR–BX–2014–048) (approving Nasdaq BX's (f/k/a NASDAQ OMX BX Inc.) establishment of its retail price improvement program on a pilot basis). In granting the original exemption from Rule 612, the Commission stated that the vast majority of ''marketable retail orders'' are internalized by OTC market makers, and that retail investors can benefit from such arrangements to the extent that OTC market makers offer them price improvement over the NBBO. This price improvement is typically offered in sub-penny amounts. The Commission explained that OTC market makers typically select a sub-penny price for a trade without quoting at that exact amount or accepting orders from retail customers seeking that exact price; and that exchanges—and exchange member firms that submit orders and quotations to exchanges—cannot compete for ''marketable retail order flow'' on the same basis, because it would be impractical for exchange electronic systems to generate sub-penny executions without exchange liquidity providers or retail brokerage firms having first submitted sub-penny orders or quotations, which the Sub-Penny Rule expressly prohibits. The Commission explained that the limited exemption granted to operate the retail price improvement program should promote competition between exchanges and OTC market makers in a manner reasonably designed to minimize the problems that the Commission identified when adopting the Sub-Penny Rule. *Id.* at 72053.

[153] *See* Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37538. The rules discussed in this section address requirements that apply to trading centers providing access to their services. Exchange Act Rule 15c3–5, in contrast, addresses access, but in the context of risk management controls for broker-dealers with market access.

[154] *See supra* notes 61–66 and accompanying text.

Specifically, Rule 610(a) prohibits any national securities exchange that operates an SRO trading facility [155] from imposing unfairly discriminatory terms that would prevent or inhibit any person from obtaining efficient access through a member of the national securities exchange to the quotations in an NMS stock displayed through its SRO trading facility. This provision is designed to prohibit national securities exchanges from limiting ''piggyback access'' as a means by which non-members obtain access to exchange quotations through the services of an exchange member.[156] Piggyback access, for example, allows non-members to obtain access to a national securities exchange's quotations without the need to obtain (and pay for) direct connectivity to the exchange.

b. Access Rules for NMS Stock ATSs

In 1998, the Commission initiated a new regulatory regime for ATSs with the adoption of Regulation ATS.[157] An ATS is a trading system that falls within the definition of exchange in Section 3(b)(1) of the Exchange Act, but is exempted from such definition by Rule 3a1–1 under the Exchange Act if the trading system complies with Regulation ATS.[158] For an NMS Stock ATS,[159] Regulation ATS requires, among other things, that the NMS Stock ATS must register with the Commission as a broker-dealer and must file a Form ATS–N, a publicly available document that includes detailed disclosures about the NMS Stock ATS's operations.

In addition, Regulation ATS includes two separate types of access requirements that potentially can apply to an NMS Stock ATS. First, Rule 301(b)(3) imposes order display and execution access requirements on an NMS Stock ATS that displays orders to any person and had 5% or more of average daily volume reported in an NMS stock during four of the preceding six calendar months. Similar to Rule 610, the ''execution access'' requirement of Rule 301(b)(3) is limited to access to displayed quotations in consolidated market data. As stated above in section III.B.1, FINRA's ADF is a facility for broker-dealers (including ATSs) to display quotations in consolidated market data. Currently, no NMS Stock ATS that displays quotations uses the ADF to display its quotations in consolidated market data, and no NMS Stock ATS is subject to the execution access requirement of Rule 301(b)(3).

Second, Rule 301(b)(5) imposes ''fair access'' requirements with respect to an NMS stock in which the NMS Stock ATS had 5% or more of the average daily volume reported during four of the preceding six calendar months. This fair access requirement requires an NMS Stock ATS (1) to establish written standards for granting access to trading on its systems, (2) to not unreasonably prohibit or limit any person in respect to access to services offered by such ATS by applying the written access standards in an unfair or discriminatory manner, (3) to maintain records of grants, denials, and limitations of access, and (4) to report the information required by Form ATS–R on grants, denials, and limitations of access. When it adopted Regulation ATS, the Commission emphasized that the fair access requirements of Rule 301(b)(5) apply to a far broader range of services than the ''execution access'' requirements of Rule 301(b)(3), which are limited to access to quotations. Specifically, the Commission stated that although it was adopting rules to require ATSs with significant trading volume to publicly display their best bid and offer and provide equal access to those orders, direct participation in ATSs offers benefits in addition to execution against the best bid and offer. The Commission gave as an example that direct participants could enter limit orders into the system, rather than just execute against existing orders on a fill-or-kill basis,[160] and that direct participants could view all orders, not just the best bid or offer, which provides important information about the depth of interest in a particular security. The Commission further observed that some ATSs also allowed direct participants to enter ''reserve'' orders which hide the full size of an order from view. Because of these advantages to direct participants in an ATS, access to the best bid and offer through an SRO provided an incomplete substitute. Therefore, the Commission adopted rules to require most ATSs that have a significant percentage of overall trading volume in a particular security to comply with fair access standards.[161]

In sum, the fair access requirements of Rule 301(b)(5) encompass all of the trading services of an NMS Stock ATS. When adopting these requirements, the Commission emphasized that an ''alternative trading system must apply [fair access] standards fairly and is prohibited from unreasonably prohibiting or limiting any person with respect to trading in any equity securities.'' [162]

Currently, only a single NMS Stock ATS discloses on its Form ATS–N that it is subject to these fair access requirements for securities that are available for trading on its platform.[163] NMS Stock ATSs that are not subject to fair access requirements are not prohibited from unfairly discriminating with respect to the trading services they offer broker-dealers and other market participants.

c. Access Rules for ADF Participants

As stated in section III.B.2 above, Rule 611 protects the best-priced displayed quotations of FINRA members that use the ADF to display quotations in consolidated market data (though no FINRA member currently uses the ADF to do so). In adopting Rule 611, the Commission recognized that assuring fair and efficient access to FINRA members displaying quotations in the ADF would be essential, given that other market participants were required by rule to not trade through such quotations.[164] The ADF falls within the definition of an ''SRO display-only facility'' in Rule 600(b)(88) because it merely displays the quotations of its participants and neither executes orders itself nor presents orders to ADF participants for execution. Instead, market participants must obtain their own means of access to ADF participants to trade with ADF protected quotations. Accordingly, the Commission adopted Rule 610(b) to promote such access to ADF participants.[165] Rule 610(b)(2) imposes

[155] Rule 600(b)(89) defines an ''SRO trading facility'' as a facility operated by or on behalf of a national securities exchange or a national securities association that executes orders in a security or presents orders to members for execution.

[156] *See* Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37539. Rule 610(c) also limits the fees that can be charged for accessing an exchange's best-priced displayed quotations, and Rule 610(d) addresses locking and crossing quotations.

[157] *See* Regulation ATS Adopting Release, 63 FR 70844, *supra* note 27. ''Regulation ATS'' consists of 17 CFR 242.300 through 242.304 (''Rule 300'' through ''Rule 304'' under the Exchange Act).

[158] 17 CFR 240.3a1–1.

[159] In 2018, the Commission amended Regulation ATS with respect to the requirements that apply to NMS Stock ATSs. Securities Exchange Act Release No. 83663 (July 18, 2018), 83 FR 38768 (Aug. 7, 2018) (''ATS–N Adopting Release'').

[160] A fill-or-kill order is an order with instructions to cancel the order if it cannot be executed in its full size.

[161] Regulation ATS Adopting Release, *supra* note 27, 63 FR at 70872 (footnote omitted).

[162] *See id.* at 70873.

[163] *See supra* note 29 and accompanying text.

[164] *See* Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37540 (discussing Rule 610, which addresses means of access to quotations). The Regulation NMS Adopting Release refers to National Association of Securities Dealers (''NASD'') members. NASD was the predecessor association to what today is FINRA.

[165] *See* Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37502–03; *see also id.* at 37539–43.

the same piggyback access requirement that applies to exchanges under Rule 610(a), thereby assuring that market participants can obtain indirect access to an ATS's or broker-dealer's quotations in the ADF.

In addition, however, Rule 610(b)(1) imposes an access requirement that is particularly tailored to address concerns presented by FINRA members (including NMS Stock ATSs) displaying quotations in the ADF. Specifically, Rule 610(b)(1) requires that any trading center that displays quotations in NMS stocks through an SRO display-only facility must provide a level and cost of access to such quotations that is substantially equivalent to the level and cost of access to quotations displayed by SRO trading facilities (such as national securities exchanges). The Commission emphasized that the phrase ''level and cost of access'' would encompass both (1) the policies, procedures, and standards that govern access to quotations of the trading center, and (2) the connectivity through which market participants can obtain access and the cost of such connectivity.[166] The Commission further stated that trading centers that choose to display quotations in an SRO display-only facility would be required to bear the responsibility of establishing the necessary connections to afford fair and efficient access to their quotations, and the nature and cost of these connections for market participants seeking to access the trading center's quotations would need to be substantially equivalent to the nature and cost of connections to SRO trading facilities.[167]

In addition to these heightened access requirements for FINRA members (including NMS Stock ATSs) that display quotations in the ADF, the Commission stated that FINRA, as the self-regulatory authority responsible for enforcing compliance by ADF participants with the requirements of the Exchange Act, would need to evaluate the connectivity of ADF participants to determine whether they meet the requirements of Rule 610(b)(1).[168] The Commission also stated that the addition of a new ADF participant would constitute a material aspect of the operation of FINRA's facilities, and thus require the filing of a proposed rule change pursuant to section 19(b) of the Exchange Act that would offer an opportunity for public notice and comment.[169]

[166] Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37549.

[167] *Id.*

[168] *Id.*

[169] *Id.*

4. Disclosure of Order Routing Practices and Order Execution Statistics

Rule 606 of Regulation NMS requires broker-dealers to publish quarterly reports on their routing of customer orders in NMS stocks, and Rule 605 of Regulation NMS requires market centers to make data files publicly available on a monthly basis that include a variety of statistics on their execution of orders in NMS stocks.[170] When it originally adopted the two rules in 2000, the Commission stated that, by increasing the visibility of order execution and routing practices, the rules were ''intended to empower market forces with the means to achieve a more competitive and efficient [NMS] for public investors.'' [171]

Rule 606 requires broker-dealers to disclose, among other things, the percentage of non-directed customer orders routed to different trading centers, as well as the financial inducements offered by these trading centers to attract order flow.[172] Information must be provided for four types of orders—market orders, marketable limit orders, non-marketable limit orders, and other orders. The enhanced disclosures include a requirement to disclose net aggregate amounts of PFOF received from trading centers or amounts paid to them (such as transaction fees on exchanges), both as a total dollar amount and an amount per 100 shares.

Rule 605 requires market centers to disclose standardized statistics about the execution quality they achieve for ''covered orders,'' as defined in Rule 600(b)(22) of Regulation NMS.[173] In general, the definition of covered orders excludes order types for which the customer requests special handling that could detract from the goal of achieving comparable statistics for similar order types across different market centers. Unlike the Rule 606 disclosures, the Rule 605 data files are not designed to be human-readable and instead consist of a large volume of detailed statistics for each of the NMS stocks in which a market center receives covered orders. The data files are published in a format that is designed to be downloaded and processed with analysis software, such as a spreadsheet program, which then can be used to generate summary reports for viewing.

[170] The rules that the Commission originally adopted were designated as Rule 11Ac1–6 and Rule 11Ac1–5. The Commission re-designated Rule 11Ac1–6 as Rule 606 and Rule 11Ac1–5 as Rule 605 when it adopted Regulation NMS in 2005. Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37538. The term ''market center,'' as defined in Rule 600(b)(46) of Regulation NMS, is somewhat narrower than trading center. Market centers include, for example, national securities exchanges, ATSs, and OTC market makers (including wholesalers), but do not include the broad catch-all category of trading center that encompasses any broker-dealer that executes orders internally as principal or agent.

[171] Securities Exchange Act Release No. 43590 (Nov. 17, 2000), 65 FR 75414, 75427 (Dec. 1, 2000). The Commission enhanced the order routing disclosure requirements of Rule 606 when it amended the rule in 2018. Securities Exchange Act Release No. 84528 (Nov. 2, 2018), 83 FR 58338 (Nov. 19, 2018).

[172] A ''non-directed order'' is defined in Rule 600(b)(56) of Regulation NMS to mean any order from a customer other than a directed order, and a ''directed order'' is defined in Rule 600(b)(27) of Regulation NMS to mean an order from a customer that the customer specifically instructed the broker-dealer to route to a particular venue for execution.

[173] Rule 605(a)(1). The Commission also is proposing to amend the order execution quality disclosures required by Rule 605. *See* Securities Exchange Act Release No. 96493 (Dec. 14, 2022) (File No. S7–29–22) (Disclosure of Order Execution Information). The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposing release.

IV. Description of Proposed Rule 615

A. Overview of Order Competition Requirement

Paragraph (a) of Proposed Rule 615 sets forth the rule's core competition requirement. It states that a restricted competition trading center shall not execute a segmented order internally [174] until after a broker-dealer has exposed such order to competition at a specified limit price in a qualified auction operated by an open competition trading center. As discussed below in this section IV: (1) segmented order, open competition trading center, restricted competition trading center, and qualified auction are new terms proposed to be defined in Rule 600(b) of Regulation NMS; (2) certain exceptions to the order competition requirement are set forth in paragraph (b) of Proposed Rule 615; (3) the requirements for a qualified auction are specified in paragraph (c) of Proposed Rule 615; and (4) the requirements with respect to segmented orders that would be imposed on open competition trading centers, originating brokers, all broker-dealers, and national securities exchanges are set forth in paragraphs (d) through (g) of Proposed Rule 615.

The term ''segmented order,'' as proposed to be defined in Proposed Rule 600(b)(91) of Regulation NMS, is a

[174] The applicability of paragraph (a) of Proposed Rule 615 to ''internally'' executed transactions is designed to accommodate the practice of some trading centers that both execute orders internally and obtain executions of orders externally by seeking liquidity at other trading centers. *Cf.* Rule 600(b)(95) of Regulation NMS (definition of ''trading center'' includes ''any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent'').

key term determining the scope of Proposed Rule 615 and is designed to encompass those orders of individual investors with relatively low adverse selection costs.[175] In addition, paragraphs (b)(2) and (b)(3) of Proposed Rule 615 would provide exceptions for larger orders ($200,000 or more) and orders that are executed at favorable prices for individual investors (orders executed at the NBBO midpoint or better); paragraph (b)(4) would provide an exception for limit orders that have a limit price that is equal to or more favorable for the segmented order than the NBBO midpoint (*i.e.,* non-marketable segmented orders with a limit price that is equal to or lower than the midpoint for buy orders and equal to or higher than the NBBO midpoint for sell orders); and paragraph (b)(5) would provide an exception for orders sized less than one share and for the fractional component, if any, of a segmented order if no qualified auction is available to execute the fractional share or fractional component.[176]

The purpose of the order competition requirement is to expose segmented orders to competition to provide the best prices on an order-by-order basis and thereby minimize the transaction costs incurred by individual investors when they use marketable orders. Proposed Rule 615 would allow flexibility for broker-dealers, wholesalers, and other restricted competition trading centers in how they comply with the rule. A broker-dealer could choose, subject to its best execution responsibilities as discussed further below, to route a segmented order directly to a qualified auction, to an open competition trading center, or to a national securities exchange. Alternatively, a broker-dealer could route such segmented order to another destination, such as a routing broker-dealer, a wholesaler, or other restricted competition trading center, which, in turn, could route the segmented order to a qualified auction, to an open competition trading center, or to a national securities exchange.

For illustrative purposes, the following is one example of how a segmented order could be handled and executed in compliance with Proposed Rule 615. Assume that a broker-dealer routed a customer's segmented order to a wholesaler. The wholesaler that received the segmented order could select a price at which it was willing to execute a segmented order internally. Before executing internally, however, the wholesaler would be required to submit the segmented order to a qualified auction with a specified limit price. As discussed further below, the specified limit price is not a price at which the wholesaler is guaranteeing to execute (*i.e.,* it is not a ''reserve'' price or a ''backstop'' of the segmented order).[177] Rather, the specified limit price would inform auction responders on how to price their orders and also, if the segmented order did not receive an execution in the qualified auction, would be the price (or better) at which the wholesaler or other restricted competition trading center subsequently could execute the segmented order as soon as reasonably possible.

The wholesaler that submitted the segmented order to a qualified auction would have a choice of whether to participate in the qualified auction by submitting its own auction response. The wholesaler could, for example, use its selected price for execution of the segmented order as the specified limit price in the qualified auction or, alternatively, the wholesaler could pick a less aggressive price as the specified limit price for the qualified auction and participate in the qualified auction by submitting an auction response with its more aggressive selected price. The open competition trading center operating the qualified auction would widely disseminate an auction message, which would include the specified limit price, in consolidated market data that would invite auction responses. During the qualified auction, the full range of market participants with the technological capability of responding to a fast (sub-second) auction, such as exchange market makers and institutional investors through their broker-dealers' smart order routers (''SORs''), would have an opportunity to compete to provide the best price for the segmented order by submitting auction responses. If all or part of the segmented order could be executed in the qualified auction at the specified limit price or better, the open competition trading center operating the qualified auction would execute the segmented order pursuant to the execution priority rules set by the open competition trading center running the qualified auction, consistent with the execution priority requirements of Proposed Rule 615(c)(5). If the segmented order did not receive a full execution in the qualified auction, the unexecuted order, or unexecuted portion thereof, would be canceled back to the wholesaler, who could, as soon as reasonably possible, execute the segmented order, or unexecuted portion thereof, internally at a price that was equal to or better for the segmented order than the specified limit price. As discussed below, the wholesaler would not, however, be required to execute the unexecuted segmented order or unexecuted portion of the segmented order at the specified limit price. Any unexecuted segmented order, or any unexecuted portion thereof, would continue to be subject to the order competition requirements of Proposed Rule 615(a).

Given the absence of a ''reserve price'' or ''backstop'' requirement, a segmented order would not have certainty of an execution in a qualified auction at a price equal to the NBBO or better, but the marketable orders of individual investors orders today also do not have certainty of execution for orders routed to wholesalers. As shown in Table 7 in section VII.B.4 below, 1.67% of marketable order shares in NMS stocks (and 3.61% of marketable order shares in non-S&P 500 stocks) receive executions at prices that are outside the NBBO at the time the wholesaler received the order. This low percentage of orders executed outside the NBBO when routed to wholesalers is consistent with the low probability that the NBBO will move away from individual investor orders in the very short time period of a qualified auction.[178] For the reasons discussed in section VII.C.2.b.i below, the Commission does not believe that

[175] As discussed in IV.B.1 below, the proposed definition of ''segmented order'' would exclude very active traders whose orders are likely to impose a much higher level of adverse selection costs on liquidity providers than the less-active accounts that are more typical of individual investors. This is done by limiting the proposed definition of ''segmented orders'' to orders for accounts in which the average daily number of trades executed in NMS stocks was less than 40 in each of the six preceding calendar months.

[176] As discussed in section IV.B.1 below, the proposed definition of ''segmented order'' does not include a limit price component. Compliance with the order competition requirement for limit orders would vary depending on the relation of any limit price and an execution price to the NBBO. For example, segmented orders that have a limit price, or are executed at a price, equal to or more favorable for the segmented order than the NBBO midpoint or better, would have an exception under paragraph (b)(3) or (b)(4) of Proposed Rule 615(b). Segmented orders with a limit price beyond the NBBO midpoint (higher for segmented orders to buy and lower for segmented orders to sell) could still qualify for the exception in Proposed Rule 615(b)(3) if they were executed at the NBBO midpoint or better (*i.e.,* such an order would have been executed at a more favorable price for the segmented order than its limit price).

[177] If the segmented order is not executed in the qualified auction, however, the wholesaler could choose to execute the segmented order internally at the specified limit price or better.

[178] *See infra* section VII.C.2.b.i (the fade probability of the NBBO prices goes from an average of 1.8% at 25 milliseconds after an internalized individual investor order, to 2.8% at 100 milliseconds, and to 4.6% at 300 milliseconds).

segmented orders would have significantly greater risk of inferior execution prices under Proposed Rule 615 than currently provided by wholesalers, but the variability of execution prices could increase.

In sum, Proposed Rule 615 would allow segmented orders to continue to be executed internally by a wholesaler or other restricted competition trading center, but not until after the execution price had been exposed to order-by-order competition in a fair and open qualified auction. In addition, qualified auctions would give the trading interest of other investors, particularly institutional investors, an opportunity to interact directly (without the participation of a dealer) with, and thus execute against, the marketable orders of individual investors. When investor orders are able to interact directly at a fully competitive price without the intermediation of a wholesaler or other dealer, two investors (both the buyer and the seller) are able to benefit mutually from a single trade, thereby promoting the NMS objective that, consistent with the objectives of economically efficient execution of securities transactions and the practicability of brokers executing investors' orders in the best market, investors' orders have an opportunity to be executed without the participation of a dealer.[179]

Proposed Rule 615 does not limit the types of broker-dealers that would be permitted to submit segmented orders for execution in a qualified auction. For example, a retail broker that currently routes segmented orders directly to a wholesaler could instead route such orders directly to a qualified auction with a specified limit price selected by the retail broker. Such specified limit price would need to be consistent with its best execution responsibilities and the terms of the order as set by the customer. If the segmented order did not receive an execution in the auction at the specified limit price, the retail broker could, as soon as reasonably possible, route the segmented order to a wholesaler with a representation that the segmented order had cleared (*i.e.,* not received an execution in) a qualified auction at that price. The wholesaler then could, in compliance with Proposed Rule 615, as soon as reasonably possible, execute the segmented order internally at the specified limit price or better.

If a segmented order did not receive an execution in a qualified auction (regardless of whether submitted to the auction by a retail broker, a wholesaler, or other broker-dealer), a wholesaler that received such order following the conclusion of a qualified auction would not be required by Proposed Rule 615 to execute the order internally. If a wholesaler chose not to execute the order internally following the conclusion of a qualified auction, the segmented order, as with all segmented orders, would need to be further handled in compliance with Proposed Rule 615. For example, (1) the wholesaler could return the order to the retail broker or other broker-dealer for further handling (such as resubmission to a qualified auction with a revised specified limit price); (2) the wholesaler itself could resubmit the segmented order to a qualified auction with a revised specified limit price; [180] or (3) the wholesaler could route the order directly to an open competition trading center or national securities exchange (as national securities exchanges are not restricted competition trading centers subject to Proposed Rule 615(a)) for an immediate execution on its continuous order book. The decision on how to handle segmented orders that clear qualified auctions without executions also would be governed by the relevant best execution responsibilities of retail brokers and wholesalers.

As indicated in the above example and subject to relevant best execution responsibilities, a broker-dealer responsible for obtaining the execution of a segmented order has the option of routing the order directly to the continuous order book [181] of an open competition trading center or national securities exchange for execution, without exposure in a qualified auction. The definition of restricted competition trading center would exclude all open competition trading centers and all national securities exchanges.[182] They would be excluded because both of these types of trading centers either are not permitted by the Exchange Act currently, or would not be permitted by Proposed Rule 615, to unfairly restrict access to their continuous order books.[183] Consequently, segmented orders routed directly to the continuous order books of open competition trading centers and national securities exchanges would be subject to competition to provide the best prices on an order-by-order basis, and thus would not be isolated.[184]

Importantly, however, all relevant broker-dealer best execution responsibilities would govern the extent to which segmented orders could be routed to an open competition trading center or national securities exchange without first clearing a qualified auction. As discussed in section III.B.2 above, best execution generally requires a broker-dealer to obtain the best terms reasonably available for customer orders. Because liquidity providers can profitably offer better prices to segmented orders of individual investors with low adverse selection costs as compared to the prices they can offer other types of order flow, trading mechanisms that offer such segmentation, as would a qualified auction, are quite likely to obtain better prices for segmented orders than other trading mechanisms, such as the continuous order book of an open competition trading center or national securities exchange, that commingle all types of order flow.[185] A broker-dealer would need to consider the opportunity for better prices in its best execution analysis.

There may be market conditions when a best execution analysis could indicate that a broker-dealer should route segmented orders directly to the continuous order book of an open competition trading center or national securities exchange. One example could be a ''fast market''—when publicly quoted prices are moving rapidly away when a broker-dealer receives a marketable order (that is, rapidly up in price for orders to buy or rapidly down in price for orders to sell). In these market conditions, the broker-dealer could determine that best prices could be obtained by immediately attempting to execute segmented orders against the NBBO on an open competition trading center or national securities exchange,

[179] *See* Section 11A(a)(1)(C)(v) of the Exchange Act.

[180] The revised specified limit price set by the wholesaler would have to be consistent with the terms of the order, such as the limit price set by the customer, if any, as well as with the wholesaler's best execution responsibilities.

[181] *See infra* section IV.B.2 (discussing the proposed definition of ''continuous order book'').

[182] *See* Proposed Rule 600(b)(87) and discussion in section IV.B.3 below.

[183] Section III.B.2 above discusses the Exchange Act provisions that currently prohibit a national securities exchange from unfairly restricting access. Section IV.B.2 below discusses the proposed access requirement for any open competition trading center that is not a national securities exchange (*i.e.,* an NMS Stock ATS). In many cases, an open competition trading center also would be a national securities exchange. As discussed in section IV.B.2 below, however, some national securities exchanges would not meet the definition of an open competition trading center.

[184] As discussed in sections IV.D and IV.G below, open competition trading centers and national securities exchanges would not be allowed to operate a mechanism limited, in whole or in part, to segmented orders, including RLPs, barring an exception from Proposed Rule 615. *See infra* notes 258, 259 and accompanying text.

[185] *See, e.g., infra* section VII.C.1.b (discussing anticipated benefits of improved execution quality for retail orders exposed in qualified auctions).

rather than first submitting segmented orders to qualified auctions when market conditions suggest that auction would be unlikely to generate better prices than the NBBO. Proposed Rule 615 is designed to give broker-dealers sufficient flexibility to obtain best execution of individual investor orders in the full range of market conditions.

B. Coverage of Proposed Rule 615

1. Definition of Segmented Order

The term ''segmented order,'' as proposed to be defined in Proposed Rule 600(b)(91) [186] of Regulation NMS, would have two parts. First, the order for an NMS stock must be for an account of a natural person, or an account held in legal form on behalf of a natural person or group of related family members. Second, for such an account, the average daily number of trades executed in NMS stocks must be less than 40 in each of the preceding six calendar months. The intent of the proposed definition is to encompass the marketable orders of individual investors with expected low adverse selection costs that retail brokers currently route to wholesalers for handling and execution. These orders already are segmented in practice.

The proposed definition's limitation to ''natural persons'' draws on the approach in existing rules designed to identify the orders of individual investors. For example, the definition of ''retail customer'' in the Commission's Regulation Best Interest (''Regulation BI'') is limited to a ''natural person.'' [187] Moreover, several national securities exchanges operate programs for trading ''retail'' orders that are limited to accounts of natural persons or certain accounts on behalf of natural persons.[188] The proposed definition of segmented order is closely related to these rules,[189] as well as to FINRA's fee schedule for Nasdaq's Trade Repository Facility.[190] Patterning the definition of segmented order on existing SRO rules is designed to leverage market knowledge and to facilitate compliance with Proposed Rule 615. This would help reduce the costs of compliance because broker-dealers would already be familiar with identifying orders as for the accounts of natural persons, or for related accounts, in these other contexts. In addition to the accounts of natural persons themselves, the definition would, again consistent with SRO rules, cover accounts held in legal form on behalf of natural persons or groups of related family members.

For purposes of the definition of ''segmented order,'' a ''group of related family members'' would be defined broadly to include a group of natural persons with any of the following relationships: child, stepchild, grandchild, great grandchild, parent, stepparent, grandparent, great grandparent, domestic partner, spouse, sibling, stepbrother, stepsister, niece, nephew, aunt, uncle, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive and foster relationships; and any other natural person (other than a tenant or employee) sharing a household with any of the foregoing natural persons.[191] This definition is designed to be broad so as not to restrict the types of arrangements that may be set up to benefit family groups, including individual retirement accounts, corporations, and limited liability companies for the benefit of related family members.[192]

The second part of the proposed definition of segmented orders focuses on the frequency of trading in an account. It would limit the average daily number of trades executed in NMS stocks in an account to less than 40 for each of the six preceding calendar months. This part of the proposed definition would exclude very active traders whose orders are likely to impose a much higher level of adverse selection costs on liquidity providers than the less-active accounts that are more typical of individual investors. For example, very active traders may use sophisticated trading tools, such as application programming interfaces (APIs) and computer algorithms, to submit their orders. These tools can enable highly active trading strategies that impose much higher adverse selection costs on liquidity providers than the manual placement of orders by a natural person. Rather than prohibiting any opportunity for investors to use potentially beneficial trading tools,[193] however, the proposed

[186] Rule 600(b) of Regulation NMS sets forth defined terms. Rule 600(b) would be amended to insert new defined terms used in Proposed Rule 615, and existing defined terms would be renumbered accordingly. Cross references to Rule 600(b) throughout the rules and regulations under the Exchange Act would also be amended to reflect the new numbering.

[187] 17 CFR 240.15l 1(b)(1) (defining ''retail customer'' as, among other things, as a natural person who receives a recommendation of any securities transaction from a broker-dealer and uses the recommendation primarily for personal, family, or household purposes). Proposed Rule 615 does not incorporate all of the definition of ''retail customer'' in Regulation BI, because that definition is limited to when there is a recommendation to a retail customer. Proposed Rule 615, in contrast, is designed to promote competition for individual investor orders, regardless of whether such investor is self-directed. Moreover, Proposed Rule 615 is focused on limiting the extent to which an account may generate orders with a high level of adverse selection costs. As discussed below, Proposed Rule 615 includes a trading activity threshold designed to address this policy concern. The definition of ''retail investor'' for purposes of 17 CFR 249.641 (''Form CRS'') (Relationship Summary for Brokers and Dealers Providing Services to Retail Investors) is also limited to ''natural persons'' and defines ''retail investor'' as a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes. In the context of Form CRS, the term ''retail investor'' is used in connection with disclosures to prospective customers, and as in the context of Regulation BI, relates to the relationship between an investor and a financial professional. *See* Securities Exchange Act Release No. 86031 (June 5, 2019), 84 FR 33318, 33345 (July 12, 2019) (adopting Regulation Best Interest: The Broker-Dealer Standard of Conduct) (''Regulation BI Adopting Release''). Because Proposed Rule 615 is intended to improve competition for individual investor orders, and is not related to the relationship between an investor and a financial professional, the Commission is not proposing to include the phrase ''primarily for personal, family, or household purposes'' in the definition of segmented order. For purposes of Proposed Rule 615, limiting segmented orders to orders for the accounts of natural persons, and specifically those with less than 40 trades in NMS stocks in each of the preceding 6 months, is intended to address adverse selection costs and is not related to the purposes for which a natural persons may be seeking the services of a broker-dealer.

[188] *See supra* note 151 (generally describing exchange RLPs).

[189] *E.g.,* IEX Rule 11.190(b)(15) (providing, among other things, that ''[a] Retail order must reflect trading interest of a natural person'' and that ''[a]n order from a retail customer can include orders submitted on behalf of accounts that are held in a corporate legal form—such as an Individual Retirement Account, Corporation, or a Limited Liability Company—that have been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual.''); and Nasdaq, Equity 7, section 118 (defining a ''Designated Retail Order'' as originating from a ''natural person'' and explaining that ''[a]n order from a 'natural person' can include orders on behalf of accounts that are held in a corporate legal form—such as an Individual Retirement Account, Corporation, or a Limited Liability Company—that has been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual'').

[190] FINRA Rule 7620A (defining a ''Retail Order'' as originating from a ''natural person'' and explaining that ''[a]n order from a 'natural person' can include orders on behalf of accounts that are held in a corporate legal form, such as an Individual Retirement Account, Corporation, or a Limited Liability Corporation that has been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual'').

[191] Proposed Rule 600(b)(91)(iii).

[192] Given the proposed broad definition of ''group of related family members'' in Proposed Rule 600(b)(91), an account held in legal form on behalf of a group of related family members could include some accounts with an extensive portfolio of NMS stocks. The second prong of the definition of segmented order, however, would exclude accounts with average daily trades of 40 or more and likely would exclude many accounts with large portfolios.

[193] Some SRO rules, for example, prohibit the use of any computerized technology for submitting retail orders. *See, e.g.,* NYSE Rule 7.44(a)(3) (defining ''retail order'' in the context of NYSE's

Continued

definition specifies a maximum level of trading activity as a means to limit the level of adverse selection costs.

The proposed level is supported by an analysis of the distribution of order activity across accounts reported to the Consolidated Audit Trail as being held for the benefit of an ''Individual Customer'' for the first six months of 2022.[194] Across this period, slightly more than 99.9% of Individual Customer accounts originated, on an average daily basis, 40 or fewer orders associated with a trade. The median number of daily-average orders associated with a trade from accounts at or below this threshold was less than one.[195] The median number of daily-average orders associated with a trade from accounts above this threshold was approximately 68.[196] Accordingly, the threshold in the proposed rule is designed to capture the overwhelming majority of individual investor accounts that could benefit from strengthened competition for their orders, while excluding accounts that might impose a high level of adverse selection costs on liquidity providers. Including orders highly likely to impact short-term price changes in qualified auctions could detract from the quality of execution prices for segmented orders as a whole.[197] Specifically, including orders with high adverse selection costs in qualified auctions would increase the overall level of adverse selection costs of the order flow submitted to qualified auctions. Because auction responders could not know in advance whether any particular order was likely to impose high adverse selection costs, they would need to adjust the prices of all their auction responses to reflect the higher level of adverse selection costs of qualified auction order flow as a whole.

The proposed definition of segmented order does not have a size limitation and therefore encompasses orders of all sizes, whether large or small. As discussed in section IV.B.5 below, however, the execution of large orders with sizes of $200,000 or more would be eligible for an exception from the order competition requirement of Proposed Rule 615(a). Such orders would, however, remain segmented orders and, if consistent with a broker-dealer's best execution responsibilities, could be submitted for execution in a qualified auction.

Orders with small sizes would also be included in the proposed definition of segmented orders and would be subject to the order competition requirement. These include both odd lot orders with a size of less than one round lot (generally less than 100 shares) and orders with a fractional share component (less than one share). As discussed further below, while orders for less than one share and orders for more than one share with a fractional share component would also fall within the proposed definition of a segmented order, Proposed Rule 615 would include an exception for orders for less than one share and for the fractional component of a segmented order, if there is no qualified auction available for such orders.[198]

Finally, the proposed definition of a segmented order does not include a limit price component. All segmented orders that are market orders would be subject to the order competition requirement prior to execution because, by definition, such orders are instructed to be executed immediately at the best available prices. For segmented orders that are limit orders, compliance with the order competition requirement would depend on the relation of the segmented order's limit price to the NBBO at the time it was received by the restricted competition trading center. For segmented orders with limit prices that are equal to or more favorable for the segmented order than the NBBO midpoint at the time of receipt (lower for buy orders and higher for sell orders), execution of the order would qualify for the exceptions from the order competition requirement in paragraphs (b)(3) and (b)(4) of Proposed Rule 615. Given the favorable price at which these non-marketable orders would be executed, however, they often may be publicly displayed as a means to attract contra-side trading interest (as well as to comply with Rule 604 of Regulation NMS).

Segmented orders with a limit price that is less favorable for the segmented order than the NBBO midpoint at the time of receipt (*i.e.,* segmented buy orders with a limit price higher than the NBBO midpoint and segmented sell orders with a limit price lower than the NBBO midpoint) often would not be executed at the NBBO midpoint or better (and therefore would not qualify for the exceptions in paragraphs (b)(3) or (b)(4) of Proposed Rule 615(b)(3)). Those orders not executed at the NBBO midpoint or better necessarily will pay a half-spread of some amount on the transaction (*i.e.,* orders executed beyond the NBBO midpoint, by definition, are paying a spread), even if it is less than the full NBBO half-spread. These include segmented orders that are marketable and a subset of non-marketable limit orders with limit prices that are beyond the NBBO midpoint but within the far-side NBBO (lower than the national best offer for segmented orders to buy and higher than the national best bid for segmented orders to sell) (hereinafter referred to as ''beyond-the-midpoint non-marketable limit orders''). A broker-dealer responsible for handling this subset of segmented orders that are non-marketable would need to determine how to achieve best execution of such orders. Under the limit order display requirements of Rule 604 of Regulation NMS, as discussed in section III.B.2.a above, such an order generally would need to be immediately displayed (which would narrow the NBBO spread) or immediately executed. To immediately execute the order, a restricted competition trading center would need to comply with the order competition requirement of Proposed Rule 615(a).

RLP to require that ''the order does not originate from a trading algorithm or any other computerized methodology'').

[194] Analysis of Consolidated Audit Trail data for all orders originated from an account marked as held for the benefit of an Individual Customer, Jan. 1, 2022, through June 30, 2022. This analysis counted any order associated with one or more trades or fills in an order lifecycle. For the Consolidated Audit Trail, account type definitions are available in Appendix G to the CAT Reporting Technical Specifications for Industry Members (*https://catnmsplan.com*), for the field name ''accountHolderType.'' Account types represent the beneficial owner of the account for which an order was received or originated, or to which the shares or contracts are allocated. Possible types are: Institutional Customer, Employee, Foreign, Individual Customer, Market Making, Firm Agency Average Price, Other Proprietary, and Error. An Institutional Customer account is defined by FINRA Rule 4512(c) as a bank, investment adviser, or any other person with total assets of at least $50 million. An Individual Customer account means an account that does not meet the definition of an ''institution'' and is also not a proprietary account. Therefore, the CAT account type ''Individual Customer'' includes natural persons as well as corporate entities that do not meet the definitions for other account types.

[195] *Id.*

[196] *Id.*

[197] In other contexts, national securities exchanges currently characterize certain types of orders according to the level of activity associated with a market participant's account. With respect to trading in listed options, several exchanges include the concept of ''Professional'' order, and these orders, which must be identified as such, are distinguished from other customer orders. For example, pursuant to Cboe Exchange, Inc. (''CBOE'') Rule 1.1, ''Professional'' means any person or entity that is not a broker or dealer in securities and places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). Under CBOE's rules, all Professional orders are distinguished from other public customer orders (*i.e.,* orders for persons other than broker-dealers), must be marked as such, and are handled by CBOE's trading platform in the same manner as broker-dealer orders unless otherwise specified. *See* CBOE Rule 1.1. *See also* NYSE Arca Rule 1.1; Nasdaq, Options 1, section 1(a)(47); and BOX Rule 100(a)(52).

[198] *See infra* section IV.B.5.

2. Definition of Open Competition Trading Center

The term ''open competition trading center,'' as proposed to be defined in Rule 600(b)(64), determines the scope of coverage of Proposed Rule 615 in two important respects. First, it identifies those trading centers that would be authorized to operate qualified auctions. Second, it conversely specifies those trading centers that would be subject to the order competition requirement of paragraph (a) of Proposed Rule 615 because a ''restricted competition trading center'' is defined as any trading center other than an open competition trading center or a national securities exchange.

The proposed definition of open competition trading center is designed to address three primary concerns. First and foremost, trading centers that operate qualified auctions must offer sufficient access, transparency, and trading by a wide range of market participants to support the goal of fair competition in auctions to provide the best prices for investor orders. Second, the proposed definition of open competition trading center seeks to establish as level a regulatory playing field as possible regarding Proposed Rule 615 between the national securities exchanges and NMS Stock ATSs [199] that are eligible to operate a qualified auction, while recognizing the distinct regulatory regimes for national securities exchanges under the Exchange Act and for NMS Stock ATSs under Regulation ATS.[200] As described in section III.A above, section 11A(c)(1)(F) of the Exchange Act grants rulemaking authority to the Commission to assure equal regulation of all markets for NMS stocks, with equal regulation defined in section 3(a)(36) to mean that no member of a class has a competitive advantage over any other member of a class resulting from a regulatory disparity that the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of the Exchange Act.[201] Qualified auctions would be a new trading mechanism, mandated by rule in some contexts, that could be operated by both national securities exchanges and NMS Stock ATSs, and open competition trading centers would be a new class of market participants. Because national securities exchanges and NMS Stock ATSs operating as open competition trading centers would fall within the same class of market participant, and given the functional similarity between these two types of trading centers, neither type should have a competitive advantage in operating qualified auctions that is attributable to an unfair and unnecessary regulatory disparity.[202] Third, the proposed definition of open competition trading center is designed to address a concern that qualified auctions, as a new mandatory mechanism for execution of segmented orders, should not further exacerbate the fragmentation of trading interest in NMS stocks among different trading centers that already characterizes the NMS. As discussed in section VII.B.1 below, trading centers for NMS stocks include 16 national securities exchanges, 32 NMS Stock ATSs,[203] 6 wholesalers, and more than 230 other broker-dealers. Allowing only national securities exchanges and NMS Stock ATSs that meet the prescribed transparency and volume thresholds to meet the proposed definition of open competition trading center is also designed to prevent additional complexity and connectivity costs to market participants arising from the introduction of qualified auctions. Such trading centers that meet the proposed definition are likely to have already attracted a wide variety of market participants with the established connectivity necessary to promote vigorous competition in qualified auctions.

Given the differing regulatory regimes for national securities exchanges and NMS Stock ATS that were described in section III above, the elements of the proposed definition of open competition trading center vary for national securities exchanges and NMS Stock ATSs. As discussed in section IV.D below, paragraph (d) of Proposed Rule 615 would prohibit both national securities exchanges and NMS Stock ATSs from operating a qualified auction if they do not meet the elements of the definition of an open competition trading center.

a. National Securities Exchanges

As discussed in section III.A above, the Exchange Act sets forth a comprehensive regulatory regime for national securities exchanges with a variety of requirements that address, among other things, access and competition. For example, national securities exchanges must allow any registered broker-dealer to become a member, subject to the limitations of section 6(c) of the Exchange Act, and their rules cannot impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission has crafted the proposed definition of open competition trading center for national securities exchanges having taken into account that such exchanges already are subject by statute to this regulatory regime.

The proposed definition of open competition trading center for national securities exchanges has four elements. First, such an exchange would be required to operate a trading facility that is an automated trading center and displays automated quotations that are disseminated in consolidated market data pursuant to Rule 603(b) of Regulation NMS. The terms ''automated trading center'' and ''automated quotation'' are defined in Rule 600(b)(8) and Rule 600(b)(7) of Regulation NMS. Each is an element of the definition of a ''protected bid or protected offer'' in Rule 600(b)(70), which are eligible for protection against trade-throughs pursuant to Rule 611 of Regulation NMS. Rule 603(b) provides for the dissemination of consolidated market data by SROs. This element of the proposed definition of an open competition trading center would help ensure transparency of quotations and fair and efficient access to such quotations. It is also designed to ensure that qualified auctions are held on lit

[199] The Commission is proposing that for purposes of Regulation NMS, which would include Proposed Rule 615, NMS Stock ATS, as would be defined in Proposed Rule 600(b)(59), will have the meaning provided in 17 CFR 242.300(k) (Rule 300(k) of Regulation ATS).

[200] A trading center that operates a qualified auction for segmented orders necessarily would fall within the definition of an exchange under section 3(a)(1) of the Exchange Act [15 U.S.C. 78c(a)(1)], and 17 CFR 240.3b–16(a) (''Rule 3b–16(a)'') thereunder, because it would be bringing together the orders of multiple buyers and sellers using established non-discretionary methods (*i.e.,* the qualified auction trading facility) under which such orders would interact and the buyers and sellers would agree upon terms of a trade. If a trading center falls within the definition of an exchange, it either must register as an exchange or comply with an exemption to such registration, such as the exemption for ATSs under Regulation ATS.

[201] 15 U.S.C. 78c(a)(36). In discussing equal regulation in the context of Exchange Act Section 11A(c)(1), the Commission stated that the legislative history of section 3(a)(36) emphasizes that equal regulation ''is a competitive concept intended to guide the Commission in its oversight and regulation of the trading markets and the conduct of the [s]ecurities industry.'' *See* Securities Exchange Act Release No. 42208 (Dec. 1999), 64 FR 70613, 70623 n.80 (Dec. 17, 1999) at 70623 n.80 (Concept Release on Market Information Fees and Revenues) (quoting S. Rep. No. 94–75, 94th Cong., 1st Sess. 7 (1975) at 94).

[202] The Commission has expressed, in other contexts, its belief that the regulatory differences between NMS Stock ATSs and national securities exchanges may create a competitive imbalance between two functionally similar trading centers, and sought to address those concerns by more closely aligning certain requirements for NMS Stock ATSs with those of national securities exchanges. *See, e.g.,* ATS–N Adopting Release, *supra* note 159, 83 FR at 38775–76.

[203] As of Sept. 30, 2022, there were 32 NMS Stock ATSs that had filed an effective Form ATS–N with the Commission.

trading centers, and that the requirements for open competition trading centers are consistent between national securities exchanges and NMS Stock ATSs. Also, incorporating the requirements for an automated trading center and automated quotations would help ensure that such exchange has the necessary technology to run qualified auctions efficiently.

Second, a national securities exchange would be required to provide transaction reports identifying it as the venue of execution that are disseminated in consolidated market data pursuant to Rule 603(b). Identifying the venue of execution would help market participants assess where liquidity for an NMS stock can be found in the NMS, including for qualified auctions. Current arrangements for disseminating consolidated market data provide this execution venue information for exchanges, but not, as discussed below, for NMS Stock ATSs. This requirement is designed to provide a parallel requirement for national securities exchanges and NMS Stock ATSs operating qualified auctions, and require the identification of the venue of execution by rule for national securities exchanges operating as open competition trading centers.

Third, a national securities exchange would be required to have had an average daily share volume of 1.0 percent or more of the aggregate average daily share volume for all NMS stocks as reported by an effective transaction reporting plan during at least four of the preceding six calendar months.[204] The proposed 1.0 percent threshold across all NMS stocks, and not merely for a single NMS stock, is designed to help ensure that, prior to operating a qualified auction, the national securities exchange has attracted a wide range of market participants with connectivity to such exchange already in place that would be sufficient to support vigorous competition in qualified auctions to provide the best prices for segmented orders. As of September 30, 2022, 6 of the 16 national securities exchanges trading NMS stocks reported less than 1% of share volume in NMS stocks.[205] Five of these (Nasdaq BX, Nasdaq Phlx, NYSE American, NYSE CHX, and NYSE National), however, were part of exchange groups with other national securities exchanges that reported more than 1% of share volume in NMS stocks. Any exchange that was below the 1% threshold, even if it were part of a group of exchanges with some exchanges that meet the threshold, would not meet the definition of an open competition trading center and could not operate a qualified auction. The one remaining national securities exchange that reported less than 1% of share volume in NMS stocks was LTSE, with less than 0.01% of share volume in NMS stocks.

The 1% threshold also would impose a hurdle for a new entrant that wished to register as a national securities exchange to become an open competition trading center. In the absence of a minimum volume threshold, however, the introduction of qualified auctions as a new trading mechanism mandated by regulation could lead to the entry of multiple new national securities exchanges intended solely to operate qualified auctions, which could result in either (1) a substantial increase of connectivity costs and complexity for market participants to connect to every open competition trading center, or (2) a refusal of many market participants to incur such costs and complexity, which could detract from the level of competition to provide the best prices for segmented orders at open competition trading centers with relatively few connected market participants. The 1% threshold is designed to be low enough to help ensure that the core competition objective of Proposed Rule 615 is achieved through qualified auctions operated by multiple national securities exchanges, while being high enough to demonstrate that a national securities exchange has attracted a sufficient level of interest from market participants to avoid unduly exacerbating the already substantial level of fragmentation in NMS stocks.

Given that only a small percentage of marketable orders of individual investors currently are routed to national securities exchanges, the competitive opportunity to operate qualified auctions that would enable their members and members' customers to interact with low-cost marketable order flow is likely to be an attractive new line of business. If, for example, a single national securities exchange began operating qualified auctions, it would have a monopoly on the business, which would be quite likely to attract multiple additional competitors. It therefore is likely that each of the three exchange groups associated with CBOE, Nasdaq and NYSE would select one of their national securities exchanges to operate qualified auctions,[206] and the three non-group national securities exchanges that exceed the 1% threshold would operate qualified auctions as well.

Fourth and finally, a national securities exchange would be required to operate pursuant to its own rules providing that such exchange will comply with the proposed requirements for qualified auctions in paragraph (c) of Proposed Rule 615. This element would help to ensure that the operation of a qualified auction would be fully described in the exchange's rules and that the exchange's compliance with those rules would be subject to the examination and enforcement tools in place for exchange rules.[207] Market participants therefore would be able to reference the rules of a national securities exchange to determine whether it operates a qualified auction and the material terms of such auctions, including the hours of operation.

b. NMS Stock ATSs

As discussed above in section III.B, NMS Stock ATSs are subject to a quite different set of statutory and regulatory requirements than national securities exchanges. The definition of open competition trading center for NMS Stock ATSs would reflect these differences and includes seven elements.

First, an NMS Stock ATS would be required to display quotations through an SRO display-only facility (currently, the only such facility is FINRA's ADF) in compliance with Rule 610(b) of Regulation NMS.[208] To add an NMS Stock ATS as a new ADF participant, FINRA would need to file a proposed rule change that, after an opportunity for public notice and comment and review by the Commission, became effective pursuant to section 19(b) of the Exchange Act and Rule 19b–4 thereunder.[209] An NMS Stock ATS, by displaying quotations in the ADF that

[204] As discussed in section IV.B.2.b below, NMS Stock ATSs operating as open competition trading centers would be subject to the same volume threshold.

[205] *See, e.g.,* Cboe, U.S. Historical Market Volume Data, *available at https://cboe.com/us/equities/market_statistics/historical_market_volume/.*

[206] *See infra* note 276 and accompanying text.

[207] Also, because national securities exchanges must file with the Commission proposed changes to their rules, an exchange's adoption of rules for operating qualified auctions would be subject to public notice, comment, and Commission review, as well as Commission oversight. *See* 15 U.S.C. 78s(b).

[208] Under Rule 600(b)(88), the term ''SRO display-only facility'' means a facility operated by or on behalf of a national securities exchange or national securities association that displays quotations in a security, but does not execute orders against such quotations or present orders to members for execution. As discussed above in section III.B.3, FINRA's ADF is the only SRO display-only facility, but currently has no participating members.

[209] *See* Regulation NMS Adopting Release, *supra* note 78, 70 FR at 37543 (addition of ADF participant would constitute a change to a material aspect of FINRA's facilities that would require the filing of a proposed rule change).

FINRA provides to the SIPs, would have established an ability to disseminate information in consolidated market data, as would be required for auction messages under Proposed Rule 615(c)(1). In addition, as discussed in section III.B above, Rule 610(b) imposes heightened connectivity obligations on an NMS Stock ATS that displays quotations in the ADF, which would help assure that market participants have fair and efficient access to any NMS Stock ATS that wished to operate a qualified auction. This requirement is not needed for national securities exchanges, which, as discussed in section III.A above, are subject to a series of Exchange Act access requirements.

Second, an NMS Stock ATS would be required to operate as an automated trading center and display automated quotations that are disseminated in consolidated market data pursuant to Rule 603(b) of Regulation NMS. This element matches an element of the proposed definition of open competition trading center for national securities exchanges and is proposed for the same reason.

Third, an NMS Stock ATS would be required to identify the NMS Stock ATS as the venue of execution in transaction reports that are disseminated in consolidated market data pursuant to Rule 603(b). As discussed above, this element also would be required for national securities exchanges and is designed to help market participants assess where liquidity can be found in the NMS for a particular NMS stock. In contrast to the transaction reports of national securities exchanges, the transaction reports of off-exchange venues that FINRA currently provides for dissemination in consolidated market data do not identify the particular FINRA member (including both NMS Stock ATSs and broker-dealers) that reported the trade. For NMS Stock ATSs that display quotations in the ADF and operate qualified auctions, full post-trade transparency concerning the identity of the NMS Stock ATS that executed trades, including the execution of segmented orders in qualified auctions, would be needed to promote fair competition among markets and the practicability of broker-dealers determining the best market for executing customer orders. For example, real-time dissemination of a transaction report indicating that an NMS Stock ATS had executed a segmented order in an NMS stock in a qualified auction could assist broker-dealers in identifying where to route segmented orders, as well as market participants in identifying where they could interact with segmented orders in qualified auctions. Accordingly, if Proposed Rule 615 were adopted, an NMS Stock ATS would not be able to meet the definition of an open competition trading center unless the effective NMS plans for NMS stocks were conformed to provide for the collection and dissemination of an identification of the NMS Stock ATS as the venue of execution in its transaction reports.

Fourth, an NMS Stock ATS would be required to permit any registered broker-dealer to become a subscriber,[210] except those with statutory disqualifications or financial responsibility or operational capability concerns. This element parallels the Exchange Act section 6(b)(2) requirement that, subject to the provisions of section 6(c), a national securities exchange must permit any registered broker-dealer to become a member. It thereby would help ensure that all market participants seeking to trade on an NMS Stock ATS, whether they be broker-dealers trading proprietarily or investors trading through the services of a broker-dealer, would have access to the NMS Stock ATS in the same manner as they have access to national securities exchanges. An NMS Stock ATS could not, however, permit a registered broker-dealer subject to a statutory disqualification to become a subscriber.[211] In contrast, national securities exchanges may, subject to Commission oversight, allow a registered broker-dealer with a statutory disqualification to become a member.[212] The stricter standard for NMS Stock ATSs is appropriate because, as non-SROs, they are not subject to the same level of Commission oversight as national securities exchanges.[213] For example, section 6(c)(2) of the Exchange Act provides that a national securities exchange must file notice with the Commission not less than thirty days prior to admitting any person to membership, if the exchange knew, or in the exercise of reasonable care should have known, that such person was subject to a statutory disqualification. An NMS Stock ATS is not subject to this notice requirement. An NMS Stock ATS could, however, pursuant to written policies and procedures, prohibit any registered broker-dealer from becoming a subscriber, or impose conditions upon such a subscriber, that did not meet specified standards of financial responsibility and operational capability.[214] This ability to prohibit or limit subscribers is patterned on the ability of national securities exchanges under section 6(c)(3)(A) of the Exchange Act,[215] which also permits a national securities exchange to deny or condition membership to a broker-dealer that has engaged, and is reasonably likely to engage again, in acts or practices inconsistent with just and equitable principles of trade. It would not be appropriate for NMS Stock ATSs, as non-SROs, to have this disciplinary authority over its subscribers.

Fifth, an NMS Stock ATS would be required to provide equal access among all subscribers of the NMS Stock ATS and the registered broker-dealer of the NMS Stock ATS to all services that are related to a qualified auction operated by the NMS Stock ATS under Proposed Rule 615(c) and to any continuous order book operated by the NMS Stock ATS.

[210] NMS Stock ATSs generally have subscribers, unlike national securities exchanges with self-regulatory responsibilities for members. The proposed definition of ''subscriber'' in Rule 600(b)(100) of Regulation NMS is a cross-reference to the definition of ''subscriber'' in 17 CFR 242.300(b) (Rule 300(b) of Regulation ATS). The Regulation ATS definition is being proposed to be used in this context to leverage industry experience and help minimize compliance costs.

[211] Proposed Rule 600(b)(64)(ii)(D)(1).

[212] Pursuant to Exchange Act section 6(c)(2), a national securities exchange may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection of investors shall, deny membership to any registered broker or dealer or natural person associated with a registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. If a national securities exchange knowingly allows a registered broker-dealer with a statutory disqualification to become a member, or should have known in the exercise of reasonable care, section 6(c)(2) further requires the national securities exchange to file notice with the Commission.

[213] *See, e.g.,* Regulation ATS Adopting Release, 63 FR at 70858 (discussing when ATS regulation may not be appropriate and stating that ''it may be necessary for the Commission's greater oversight authority over registered exchanges to apply'').

[214] An NMS Stock ATS must disclose on its Form ATS–N whether it can exclude, in whole or in part, any subscriber from the ATS's services, and if so, it must provide a summary of the conditions for excluding, in whole or in part, a subscriber from those services. Form ATS–N, Part III, Item 3.a. Consequently, an NMS Stock ATS would be required to disclose its policies and procedures for excluding a broker-dealer on its Form ATS–N. Additionally, an NMS Stock ATS that is subject to the fair access requirements of Rule 301(b)(5) (*see supra* section III.B.3), must also disclose a list of all persons granted, denied, or limited access to the ATS during the quarterly period covered by the report, and, among other things, the nature of any denial or limitation of access. Form ATS–R, Instruction 8 and Item 7.

[215] Pursuant to Exchange Act section 6(c)(3), a national securities exchange may deny membership to, or condition the membership of, a registered broker or dealer if such broker or dealer does not meet such standards of financial responsibility or operational capability or such broker or dealer or any natural person associated with such broker or dealer does not meet such standards of training, experience, and competence as are prescribed by the rules of the exchange.

This equal access element would require an NMS Stock ATS to provide access on the same terms and conditions among all subscribers and the registered broker-dealer of the NMS Stock ATS. It therefore would impose a more stringent standard on NMS Stock ATSs than the ''no unfair discrimination'' standard for national securities exchanges under section 6(b)(5) of the Exchange Act. The more stringent standard is designed to reflect the different statutory and regulatory regimes for NMS Stock ATSs and national securities exchanges and particularly to help achieve the goal of equal regulation, as defined in section 3(b)(36) of the Exchange Act and described in section III.A above.

For example, as discussed in section III above, national securities exchanges must comply with a variety of statutory requirements that are not applicable to NMS Stock ATSs. While they fall within the statutory definition of an exchange, NMS Stock ATSs have been exempted from compliance with the statutory requirements for registered national securities exchanges if they are registered as a broker-dealer and comply with Regulation ATS. Among other things, the rules for all national securities exchanges (1) must be designed affirmatively to remove impediments to and perfect the mechanism of a free and open market and an NMS; (2) must not be designed to permit unfair discrimination between customers, issuers, or broker-dealers; and (3) must not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.[216]

Each of the foregoing requirements promotes the objective of ensuring fair and efficient access to the trading services of national securities exchanges, which is essential for promoting fully competitive pricing in qualified auctions, but none applies to NMS Stock ATSs. While they must file amendments to Form ATS–N, the amendments are not published for public comment and do not require Commission approval prior to implementation. Moreover, the standards for access to NMS Stock ATSs are much more limited than those that apply to national securities exchanges.[217] An NMS Stock ATS must comply with the fair access requirement of Rule 301(b)(5) only for a particular NMS stock in which it exceeds 5% of volume.[218] As discussed above in sections II.B and III.B.3.b, only one NMS Stock ATS discloses on its Form ATS–N that it is subject to this fair access requirement for securities that are available for trading on its platform. Most importantly, in light of the core order competition requirement of Proposed Rule 615, Regulation ATS does not impose any requirement on NMS Stock ATSs that is equivalent to section 6(b)(8) of the Exchange Act, which prohibits national securities exchanges from imposing any burden on competition not necessary or appropriate in furtherance of the provisions of the Exchange Act.

Given that NMS Stock ATSs currently are subject to different requirements for promoting fair and efficient access to their trading services than are national securities exchange, the Commission believes an NMS Stock ATS should be required to meet a more stringent standard to help ensure equal regulation regarding Proposed Rule 615 and sufficient access and transparency for a wide range of market participants. Accordingly, an NMS Stock ATS would, if it wished to operate a qualified auction under Proposed Rule 615, be required to provide equal access to all trading services related to its qualified auctions, as well as to all trading services related to a continuous order book operated by the NMS Stock ATS. The extension of equal access to services related to a continuous order book is needed because, as discussed in section IV.C below, such a book would be required to be integrated with qualified auctions.[219] The proposed equal access requirement is designed to help ensure a level playing field regarding Proposed Rule 615 for competition among national securities exchanges and NMS Stock ATSs and thereby promote the Exchange Act principle of equal regulation. Specifically, consistent with the NMS objective in section 11A(1)(C)(ii) of promoting fair competition among markets, neither type of trading center should have a significant regulatory advantage for operating qualified auctions that could drive volume in such auctions to either type, whether it be national securities exchanges or NMS Stock ATSs.

Sixth, an NMS Stock ATS would be required to have had an average daily share volume of 1.0 percent or more of the aggregate average daily share volume for NMS stocks as reported by an effective transaction reporting plan during at least four of the preceding six calendar months.[220] The methodology for this calculation would be the same as prescribed for application of the fair access requirements of ATSs by Rule 301(b)(5)(i)(A) of Regulation ATS, except that the numerator and denominator in the percent calculation is volume in all NMS stocks, rather than in any particular NMS stock. As with the fair access requirement, the proposed methodology is designed to encompass NMS Stock ATSs that have demonstrated a consistent historical level of volume. To promote fair competition and equal regulation, this proposed element is the same as that proposed for national securities exchanges and is proposed for the same primary reasons—(1) to help ensure that an NMS Stock ATS has attracted a wide range of market participants with connectivity already in place that would be sufficient to support vigorous competition in qualified auctions to provide the best prices for segmented orders; and (2) to avoid exacerbating the costs and complexity of fragmentation that already exists of trading interest in NMS stocks.

Seventh and finally, an NMS Stock ATS would be required to operate pursuant to an effective Form ATS–N that sets forth the operations of the qualified auction and compliance by the NMS Stock ATS with the requirements of Proposed Rule 615(c) for a qualified auction, as well as with all of the other elements of the definition of open competition trading center for NMS Stock ATSs that are discussed above. This proposed disclosure element is designed to ensure that an NMS Stock ATS fully discloses material operating

[216] As discussed above, in comparison, national securities exchanges are also required to file proposed rule changes to establish or modify trading services, which must be published for public comment. *See supra* notes 68–71, 207, and accompanying text.

[217] *See, e.g.,* ATS–N Adopting Release, *supra* note 159, 83 FR at 38841.

[218] 17 CFR 242.301(b)(5)(i).

[219] As discussed below in section IV.C.5, a displayed order resting on the continuous order book would have priority over an equally-priced auction response, and an undisplayed order resting on the continuous order books would have priority if it provided a better price for a segmented orders than an auction response.

[220] A 1% volume threshold in NMS stocks is also one of the thresholds used to determine whether an NMS Stock ATS is an SCI entity subject to the requirements of 17 CFR 242.1000 through 242.1007 (''Regulation SCI''). *See* 17 CFR 242.1000 paragraph (1)(ii) of ''SCI alternative trading system or SCI ATS'' definition, and ''SCI entity'' definition. Among other things, each SCI entity is required to comply with the capacity, integrity, resiliency, availability, and security requirements of Rule 1001 of Regulation SCI. In adopting a volume threshold for NMS Stock ATSs for purposes of Regulation SCI, the Commission recognized that certain ATSs play an important role in today's securities markets, and that higher volume ATSs collectively represent a significant source of liquidity for NMS stocks, with some ATSs having similar and, in some cases, greater trading volume than some national securities exchanges. *See* Securities Exchange Act Release No. (Nov. 19, 2014), 73639 79 FR 72252, 72262 (Dec. 5, 2014) (adopting Regulation SCI and related amendments to Regulation ATS).

practices to the public on Form ATS–N, and that these operating practices are subject to the examination and enforcement tools in place for NMS Stock ATSs. Market participants therefore would be able to reference the Form ATS–N of an NMS Stock ATS to determine whether it operates a qualified auction and the material terms of such auctions, including the hours of operation.

3. Definition of Restricted Competition Trading Center

The proposed definition of restricted competition trading center [221] encompasses any trading center that is neither an open competition trading center nor a national securities exchange. Some national securities exchanges may not meet all of the elements of the proposed definition of an open competition trading center, such as the minimum 1% volume threshold. Nevertheless, all national securities exchanges, as well as open competition trading centers, would be excluded from the definition of restricted competition trading center because both these types of trading centers either are not permitted by the Exchange Act (in the case of all national securities exchanges) or would not be permitted by Proposed Rule 615(d)(1) and its incorporation of the proposed definition of an open competition trading center (in the case of NMS Stock ATSs) to unfairly restrict access to their platforms.

Currently, no NMS Stock ATS displays quotations in the ADF. Unless this changes,[222] no NMS Stock ATS would meet the proposed definition of an open competition trading center, and therefore all would be restricted competition trading centers. The three other types of broker-dealer trading centers are exchange market makers, OTC market makers (including wholesalers), and internalizing broker-dealers.[223] These broker-dealers, as stated in section IV.B.2 above, could not operate a qualified auction without falling within the Exchange Act definition of exchange.[224] Unless such a broker-dealer became an NMS Stock ATS and met all of the elements of the proposed definition of an open competition trading center, it would fall within the definition of a restricted competition trading center and would be subject to the order competition requirements of Proposed Rule 615(a).

4. Definition of Originating Broker

As discussed in section IV.E below, originating brokers would perform several vital functions under Proposed Rule 615, including making the original determination that an order falls within the definition of a segmented order and identifying the order as such when routed for execution. The proposed definition of originating broker [225] reflects these important functions. It would cover any broker with responsibility for handling a customer account, including, but not limited to, opening and monitoring the customer account and accepting and transmitting orders for the customer account.[226] As such and as discussed further below, there may be more than one originating broker for a particular customer account.

The Commission understands that broker business practices can vary widely in terms of how customer accounts are handled. Some brokers may perform this entire function internally, while others may work with additional brokers to handle customer orders. A single broker that is solely responsible for the handling of a customer account would be an originating broker. To the extent that multiple brokers perform different functions for a customer account (sometimes referred to as ''introducing brokers,'' ''carrying brokers,'' or ''clearing brokers''), each such broker would be an originating broker. In addition, as discussed further in section IV.E below, different types of brokers enter into agreements with one another to allocate certain responsibilities with respect to their handling of customer accounts.[227] As discussed in section IV.C.1 below, paragraph (c)(1)(ii) of Proposed Rule 615 specifies that, if multiple brokers for a segmented order fall within the proposed definition of originating broker, the broker responsible for approving the opening of accounts for customers (commonly performed by an introducing broker) would be required to be identified in auction messages under Proposed Rule 615(c)(1).

5. Exceptions

Paragraph (b) of Proposed Rule 615 sets forth five exceptions from the order competition requirement of paragraph (a). The first exception is for a segmented order that is received and executed by a restricted competition trading center during a time period when no open competition trading center is operating a qualified auction for the segmented order. This exception would be necessary to enable segmented orders to trade during such a time period, since compliance with Proposed Rule 615 would otherwise be impossible if no qualified auction were available. Proposed Rule 615 does not specify any particular time period during which an open competition trading center must operate a qualified auction. Given, however, the requirement in paragraph (c)(3) of Proposed Rule 615 that auction messages must be provided for dissemination in consolidated market data,[228] a qualified auction could not operate at any time when the facilities for disseminating consolidated market data were not operating. As discussed in section III.B above, such facilities currently are operated by the SIPs. The current SIP hours of operation are from 4 a.m. to 8 p.m. eastern time on trading days for the U.S. equity markets. While the trade-through restrictions of Rule 611 of Regulation NMS apply only

[221] Proposed Rule 600(b)(87).

[222] *See supra* note 208.

[223] *See supra* section II.B.

[224] *See supra* note 200 and accompanying text.

[225] Proposed Rule 600(b)(69).

[226] The broker-dealer functions specifically enumerated in the proposed definition of originating broker are included in the list of responsibilities that FINRA requires its members to allocate for accounts that are carried on an omnibus or fully disclosed basis. *See infra* note 227. *See also* Securities Investment Advisers Act Release No. 5429 (June 5, 2019), 84 FR 33681 (July 12, 2019) (clarifying the scope of the broker-dealer exclusion from the definition of ''investment adviser'' under the Investment Advisers Act of 1940 for broker-dealers whose performance of advisory services is ''solely incidental'' to the conduct of its business as a broker-dealer and for which the broker-dealer ''receives no special compensation''); and Regulation BI Adopting Release, *supra* note 187, at 33358 (discussing disclosure requirements for broker-dealers related to ''monitoring the performance of the retail customer's account'').

[227] FINRA Rule 4311 addresses the allocation of responsibilities between members for accounts that are carried on an omnibus or fully disclosed basis. FINRA Rule 4311(c)(1) specifies the minimum requirements for carrying agreements in which accounts are carried on a fully disclosed basis. FINRA Rule 4311(c)(1) (''Each carrying agreement in which accounts are to be carried on a fully disclosed basis shall specify the responsibilities of each party to the agreement, including at a minimum the allocation of the responsibilities set forth in paragraphs (c)(1)(A) through (I) and (c)(2) of this Rule.''); FINRA Rules 4311(c)(1)(A) through (I) (''(A) Opening and approving accounts. (B) Acceptance of orders. (C) Transmission of orders for execution. (D) Execution of orders. (E) Extension of credit. (F) Receipt and delivery of funds and securities. (G) Preparation and transmission of confirmations. (H) Maintenance of books and records. (I) Monitoring of accounts.''); FINRA Rule 4311(c)(2) (prescribing the requirements for how each carrying agreement in which accounts are to be carried on a fully disclosed basis must allocate responsibility for the safeguarding of funds and securities, and the preparing and transmitting of statements of accounts to customers). FINRA Rules are *available at https://www.finra.org/rules-guidance/rulebooks/finra-rules*.

[228] The phrase ''provided for dissemination in consolidated market data'' reflects that, while national securities exchanges send quotation and transaction information directly to the SIPs, NMS Stock ATSs would provide such information to the ADF operated by FINRA, which would send the information to the SIPs.

during regular trading hours of 9:30 a.m. to 4:00 p.m. eastern time,[229] the order competition requirement of Proposed Rule 615(a) is needed for additional hours given the enhanced risks for individual investors. Unlike Rule 611, Proposed Rule 615 is narrowly targeted on protecting the interests of individual investors and the risks they face when using marketable orders to trade in NMS stocks. These include the risks of lower liquidity and wider spreads that are particularly significant in after-hours trading and that qualified auctions could address effectively.[230]

The second exception from Proposed Rule 615 would be for large orders with a market value of at least $200,000 calculated with reference to the NBBO midpoint when the order is received by a restricted competition trading center. This exception is designed to address the heightened liquidity need of large orders that often may be more appropriately addressed outside of a qualified auction. The $200,000 threshold is the same dollar amount as in other Regulation NMS rules to exclude orders or trades that are so large as to warrant different treatment than smaller orders.[231] A specific methodology for calculating market value (NBBO midpoint at time of order receipt) is prescribed to provide additional clarity for restricted competition trading centers on complying with Proposed Rule 615 that should be readily implementable when qualified auctions are operating. The $200,000 threshold is designed to except orders that may be difficult to execute efficiently in qualified auctions at prices that generally would be at or within the NBBO. While these large orders are eligible for an exception, they still would meet the definition of a ''segmented order'' and could be routed for execution in a qualified auction if the broker-dealer handling the order determines that such routing would promote best execution of the segmented order.

The third exception, provided by Proposed Rule 615(b)(3), is for segmented orders that are executed by a restricted competition trading center at a price that is equal to the NBBO midpoint or more favorable for the segmented order (*i.e.,* the NBBO midpoint or lower for segmented orders to buy or the NBBO midpoint or higher for segmented orders to sell), as determined with reference to the NBBO at the time the segmented order was received by the restricted competition trading center. For trades at these prices, an investor would either be paying no spread (with a price at the NBBO midpoint) or earning a spread (with a buy order executed at a price lower than the NBBO midpoint and a sell order executed at a price higher than the NBBO midpoint). In such circumstances, the submission of a segmented order to a qualified auction would not be necessary to obtain a competitive price for such order.

The fourth exception, provided by Proposed Rule 615(b)(4), is for segmented orders that are limit orders with a limit price selected by the customer that is equal to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the restricted competition trading center. This exception is designed so that when the customer has selected a limit price that will result in a favorable execution, submission of the segmented order to a qualified auction would not be necessary to obtain a competitive price. This exception would work in conjunction with the third exception for executions of segmented orders at a price equal to the midpoint or more favorable to the segmented order. As discussed above in section IV.B.1, this exception would not apply to beyond-the-midpoint non-marketable limit orders.

Finally, the fifth exception, provided by Proposed Rule 615(b)(5), is for the fractional share component of a segmented order. Fractional share orders typically are submitted by individual investors in dollar sizes rather than share sizes, and often are referred to as ''cash orders.'' If the dollar size of an order is less than the share price for an NMS stock (such as a $200 order for a $450 stock), the size of the order will be less than one share. If the dollar size of the order is greater than the share price for an NMS stock (such as a $1000 order for a $450 stock), the size of the order will be greater than one share and have a fractional share component. While these orders for less than one share and orders for more than one share or with a fractional share component would fall within the definition of segmented order, they raise practical difficulties for executing in qualified auctions because currently, most trading centers, including all national securities exchanges, only accept orders with whole share sizes and do not accept orders for less than one share or orders with a fractional share component. The Commission is concerned that applying the requirements of Proposed Rule 615 to orders for less than one share and orders for more than one share with a fractional component would interfere with broker-dealers willingness to accept such customer orders. For these reasons, Proposed Rule 615 would provide an exception for orders less than one share and the fractional component of a segmented order, if no qualified auction is available for such orders. Specifically, the rule would provide an exception if the segmented order is received and executed by the restricted competition trading center during a time period when no open competition trading center is operating a qualified auction for the segmented order that accepts orders that are not entirely in whole shares, and the customer selected a size for a segmented order that is not entirely in whole shares of an NMS stock, in which case any portion of such segmented order that is less than one whole share of the NMS stock, and only such portion, would not be subject to the order competition requirement of Proposed Rule 615(a).[232] As is the case with each of the exceptions, a broker-dealer's responsibilities with respect to best execution of a segmented order, including the fractional share portion of a segmented order, would remain in effect. The exception would only address whether the segmented order, or fractional portion thereof, is required to be exposed in a qualified auction.

Proposed Rule 615 does not provide an exception for orders directed by a customer to a particular restricted competition trading center for execution. Currently, 98% of the marketable orders of individual investors routed to wholesalers are not directed to any particular trading center, with the investor instead relying on their broker-dealer, and their broker-dealer's best execution responsibilities, for order routing.[233] Moreover, because the rule would only apply to the internalization of segmented orders by a restricted competition trading center, customers could continue to direct segmented orders to any trading center

[229] *See* Rule 600(b)(94) of Regulation NMS (limiting definition of trade-through to regular trading hours); Rule 600(b)(77) of Regulation NMS (defining regular trading hours).

[230] *See* FINRA Rule 2265 (Extended Hours Trading Risk Disclosure) (requiring disclosure to customers of the risks of extended hours trading, including the risks of lower liquidity and wider spreads).

[231] *See, e.g.,* Rule 604(b)(4) of Regulation NMS (providing an exception for orders of block size from required limit order display) and Rule 600(b)(12) of Regulation NMS (defining ''block size'' as, in part, an order for a quantity of stock having a market value of at least $200,000).

[232] Proposed Rule 615(b)(5).

[233] *See infra* section VII.B.2.a for a discussion of the routing of individual investor orders in today's market structure.

that was not a restricted competition trading center (*i.e.,* an open competition trading center or national securities exchange, which are excluded from the definition of restricted competition trading center) without their orders being subject to the requirement for exposure in a qualified auction. Segmented orders directed to a restricted competition trading center would need to comply with Proposed Rule 615 and, absent an exception, be exposed to competition in a qualified auction. Any delay would be limited, however, to a very short, sub-second time period (as specified in Proposed Rule 615(c)(2)) and would give individual investors an opportunity to obtain fully competitive prices for their segmented order, as well as give other market participants, including institutional investors, an opportunity to interact with segmented orders.

C. Qualified Auction Requirements

The term ''qualified auction'' is proposed to be defined in Proposed Rule 600(b) of Regulation NMS as an auction that is operated by an open competition trading center pursuant to paragraph (c) of Proposed Rule 615.[234] Paragraph (c), in turn, sets forth a series of specific requirements for qualified auctions, which could be operated only by national securities exchanges and NMS Stock ATSs that meet the definition of an open competition trading center. Given that routing segmented orders to qualified auctions would be mandated by rule in some contexts, these auctions should be operated in a manner that primarily promotes the core order competition objective of Proposed Rule 615.[235] The proposed requirements for qualified auctions are designed to achieve this competition objective.

1. Auction Messages

Proposed Rule 615(c)(1) specifies the requirements for an auction message that announces the initiation of a qualified auction for a segmented order. The first is that the message must be provided for dissemination in consolidated market data pursuant to Rule 603(b) of Regulation NMS. As stated in section III.B.1 above, the Commission has adopted amendments to Regulation NMS that expand the information required to be included in consolidated market data, which would include auction information.[236] Because these amendments have not yet been implemented, if Proposed Rule 615 is adopted, the effective NMS plans for NMS stocks would need to be conformed to provide for the collection and dissemination of auction messages pursuant to Proposed Rule 615(c)(1)(i). The wide dissemination of qualified auction messages in consolidated market data would help ensure the broadest possible participation of market participants in qualified auctions and the best prices for segmented orders.

The phrase ''provided for dissemination in consolidated market data'' reflects that, while national securities exchanges send quotation and transaction information directly to the SIPs, NMS Stock ATSs would provide such information to the ADF operated by FINRA, which would send the information to the SIPs.[237] The primary purpose of an auction message is to promote competition by soliciting potential auction responses from a wide spectrum of market participants. The inclusion of the auction messages in consolidated market data, rather than being limited to the proprietary data feed of a national securities exchange or NMS Stock ATS, is designed to help achieve this purpose. In addition, wide dissemination of auction messages would help address some of the problems raised by the current level of fragmented trading interest in NMS stocks. For example, market participants that wish to interact with segmented orders would not need to predict the trading center to which segmented orders are likely to be routed and post a resting order in that trading center in advance of the arrival of a segmented order. Rather, market participants would be able to direct their auction responses to the particular open competition trading center that disseminated the auction message signaling that a segmented order was available for interaction.

Qualified auctions therefore may be useful, for example, to institutional investors that currently seek to trade with marketable order flow using resting undisplayed orders, often priced at the NBBO midpoint, that are intended to minimize information leakage concerning the typically large trading interest of institutional investors. Today, these market participants must select one or more trading centers on which to rest their orders based on predictions of the frequency and level of adverse selection costs of the marketable order flow with which they may interact at a particular trading center. With qualified auctions, such market participants would know the specific open competition trading centers where they could interact directly with segmented order flow that had low adverse selection costs. The Commission anticipates that qualified auctions thereby could benefit investors on both sides of the trades in qualified auctions—segmented orders could receive highly favorable prices (such as a ''no spread'' execution at the NBBO midpoint) and institutional investors would have a much greater opportunity to interact with the low-cost order flow of individual investors than they have today.[238] Information leakage would be limited because, as discussed below, an institutional investor's auction response would not be displayed, and, if the institutional investor traded in a qualified auction, the only displayed information would be a transaction report that maintained the anonymity of the parties to the transaction.

Proposed Rule 615(c)(1) also specifies the information content of an auction message, including disclosure that the auction is for a segmented order, the identity of the open competition trading center, NMS stock symbol, side (buy or sell), size, limit price, and identity of the originating broker for the segmented order. For auction responders, all of this information is necessary or useful in deciding whether to respond to the auction message and, if so, at what price. The fact that the order is a segmented order would indicate that the order is likely to have low adverse

[234] Proposed Rule 600(b)(81).

[235] A number of exchanges, for example, currently operate auctions for orders in listed options. *See, e.g.,* CBOE Rule 5.37 (Automated Improvement Mechanism (''AIM'' or ''AIM Auction'')). These auctions are not mandated by Commission rule, and trading in listed options varies in important respects from trading in NMS stocks. For example, there are far more series of listed options than NMS stocks, which contributes to a market structure in which market makers dominate liquidity provision (a ''quote-driven'' market), rather than the ''order-driven'' market that characterizes NMS stocks. Proposed Rule 615 is designed to achieve policy objectives that are particular to mandatory auctions in NMS stocks. *See also supra* section I (discussing the difference between the markets for listed options and NMS stocks).

[236] Rule 600(b)(19) defines consolidated market data to include, among other things, core data, consolidated across all national securities exchanges and national securities associations. Rule 600(b)(21) defines core data to include, among other things, auction information with respect to quotations for, and transactions in, NMS stocks.

[237] *See supra* section III.B.1 (discussing rules addressing dissemination of consolidated market data).

[238] In addition to participating in qualified auctions by submitting auction responses, institutional investors could interact with segmented orders by submitting orders, including undisplayed NBBO midpoint orders, to the continuous order book of an open competition trading center that operates qualified auctions. As discussed below in section IV.C.5, any better-priced order resting on the continuous order book would have priority over lesser-priced auction responses to trade with segmented orders in a qualified auction.

selection costs compared to other marketable order flow, such as orders routed to the continuous order books of national securities exchanges. Moreover, the identity of the originating broker likely would convey additional information concerning the level of adverse selection costs that an auction responder could expect. Data analysis indicates that adverse selection costs can vary substantially among different retail brokers.[239] Knowing the identity of the originating broker would therefore be a significant piece of information in pricing an auction response. Accordingly, if only some market participants knew the identity of the originating broker, other potential responders may not participate due to fear of the winner's curse (winning the least advantageous auctions and losing the most advantageous auctions because of an information disadvantage). Limited participation could harm the competitiveness of qualified auctions.

Paragraph (c)(1)(ii) of Proposed Rule 615 specifies that, if multiple broker-dealers fall within the proposed definition of originating broker, it would be the broker-dealer responsible for approving the opening of accounts with customers [240] (commonly performed by an introducing broker) that would be required to be identified by an open competition trading center in auction messages under Proposed Rule 615(c)(1). The business model of broker-dealers (including the types of services they offer and the nature of the commissions and fees they charge) determines the types of customers that broker-dealers will attract, and different business models may be associated with lower or higher adverse selection costs. As between an introducing broker and a clearing broker, it is the introducing broker that typically determines the business model for attracting customers. For this reason, knowing the identity of the introducing broker associated with a segmented order (*i.e.,* the broker typically with responsibility for approving the opening of the customer account) likely would be more important for market participants in assessing the potential adverse selection costs of trading with a segmented order than knowing the identity of other broker-dealers that may handle the segmented order during its lifecycle. Because the types of orders that would meet the definition of ''segmented order'' are generally associated with lower adverse selection costs,[241] most originating brokers with responsibility for approving the opening of customer accounts likely would choose to have their identity disclosed in auction message.

The Commission recognizes, however, that some originating brokers or their customers may not wish to have the identity of the originating broker for a segmented order publicly disseminated. Proposed Rule 615(c)(1)(iii) therefore would provide a choice for the originating broker. It could either allow its identity to be disclosed in an auction message or it could withhold this information by certifying that it has established, maintained, and enforced written policies and procedures reasonably designed to assure that its identity will not be disclosed, directly or indirectly, to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order. If the originating broker makes this certification, paragraph (c)(1)(iii) would prohibit disclosure of the identity of the originating broker in the auction message.[242] Proposed paragraph (c)(1)(iii) would also require that the certification be communicated to the open competition trading center conducting the auction. In addition, proposed paragraph (e)(3), discussed in section IV.E below, specifies the requirements for an originating broker that makes the certification, and proposed paragraph (f)(2), discussed in section IV.F below, specifies certain trading prohibitions for any broker-dealer with knowledge of where a segmented order is to be routed for execution. The overriding purpose of these proposed requirements is to help ensure fair competition among auction responders and persons that could otherwise trade with the segmented order. If one or more auction responders or persons that could otherwise trade with the segmented order knew the identity of the originating broker, but others did not, those that knew would have a substantial information advantage in pricing their orders over those that did not. The proposed requirements would give originating brokers a choice on whether to disclose their identity, while at the same time promoting fair competition among auction responders and persons that could otherwise trade with the segmented order, both when such identity is disclosed and when it is not. Under Proposed Rule 615(c)(1), (e)(3), and (f)(2), either all auction responders and persons that could otherwise trade with the segmented order would know the identity of the originating broker, or no auction responder or person that could otherwise trade with the segmented order would be permitted to know the identity of the originating broker. In either event, the fairness of qualified auctions would not be impacted.

2. Auction Responses

Proposed Rule 615(c)(2) specifies that the time period for a qualified auction must be no shorter than 100 milliseconds (1/10th of a second) and no longer than 300 milliseconds (3/10ths of a second) after an auction message is provided for dissemination in consolidated market data. The intent of these limits is to help ensure that a wide variety of market participants will have the technological capacity to submit responses to fast automated auctions, while also helping to assure that the execution of segmented orders is not unduly delayed. Several national securities exchanges operate auctions that fall within these time periods, which indicates that the time periods are workable with technologies that currently are available to market participants (*i.e.,* the fact that multiple national securities exchanges already operate auctions in these time frames indicates that market participants generally would be able to submit auction responses within the specified time periods).[243] The Commission anticipates individual investors would manually submit to their brokers the great majority of segmented orders. Proposing to limit the auction length to no more than 300 milliseconds is designed to promote competition to obtain the best prices for segmented orders, but without a delay long enough to be inconsistent with an investor's intent to trade immediately at the best available prices.

Paragraph (c)(2) would further require that auction responses remain undisplayed during the time frame of the auction and not be disseminated thereafter. This proposed requirement is designed to prevent the market participants with the fastest systems

[239] Table 12, *infra,* section VII.B.5.

[240] *See, e.g.,* FINRA Rule 4311(c)(1)(A); *supra* note 227 and accompanying text.

[241] *See infra* section VII.B.2 discussing why certain orders are segmented because they are low-cost flow.

[242] *See infra* section IV.E discussing potential procedures for an originating broker to assure that its identity will not be disclosed.

[243] *See, e.g.,* Securities Exchange Act Release No. 91423 (Mar. 26, 2021), 86 FR 17230 (Apr. 1, 2021) (SR-CboeBYX–2020–021) (order approving Cboe BYX's proposed rule change for periodic auctions in NMS stocks with a 100 millisecond auction period); Nasdaq PHLX Rule 3, section 13(b)(1)(D) (providing that the time period for PHLX's Price Improvement XL Mechanism (''PIXL'') auctions in listed options will be no less than 100 milliseconds and no more than one second).

from obtaining an advantage by observing the pricing of auction responses and submitting their auction responses near the end of the time period for the auction. It also is designed to prevent information leakage, both during auctions themselves and by analyzing historical auction data, concerning the trading interest of market participants, particularly institutional investors, that submit auction responses.

3. Pricing Increment

Under Proposed Rule 615(c)(3), segmented orders and auction responses must be priced in an increment of no less than $0.001 (or 0.1 cent) if their prices are $1.00 or more per share, in an increment of no less than $0.0001 (or 0.01 cent) if their prices are less than $1.00 per share, or at the midpoint of the NBBO.

These proposed increments are designed to balance the objectives of being sufficiently narrow to allow frequent price improvement for segmented orders (the wider the pricing increment, the greater the minimum amount of price improvement that is required, which could limit the frequency of price improvement), while being sufficiently wide to prevent market participants from attempting to gain execution priority by pricing their auction responses in very small increments. An analysis of current wholesaler trading in NMS stocks indicates that 18.64% of the price improved shares of wholesaler principal transactions received price improvement of less than 0.1 cent.[244] Accordingly, the 0.1 cent price increment for qualified auctions would allow much of the existing price improvement to continue in qualified auctions. Moreover, as discussed in section IV.C.5 below, one of the prescribed execution priority requirements for qualified auctions in paragraph (c)(5) of Proposed Rule 615 is that the auction responses of customers, including institutional investors, would have priority over the auction responses of broker-dealers at the same price, thereby furthering the NMS objective of promoting direct interaction of investor orders without the participation of a dealer. A smaller pricing increment (such as 0.05 cent per share (or 1/20th of a cent per share) would allow more price improvement, but also would double the number of increments at which auction responses could be priced, which would enable execution priority advantages at the larger number of increments. The objective of promoting direct interaction of investor orders could be undermined if broker-dealers with the most sophisticated algorithmic trading strategies could submit auction responses with very small pricing increments designed to obtain execution priority.

4. Fees and Rebates

Proposed Rule 615(c)(4) sets forth a number of requirements that would govern the fees and rebates of open competition trading centers with respect to qualified auctions.[245] In general, these requirements are designed to provide reasonable compensation for operating a qualified auction, while maximizing an opportunity for competitive forces to generate the best possible prices for segmented orders. Qualified auctions would be a new business line for open competition trading centers (both national securities exchanges and NMS Stock ATSs), which would provide them an opportunity to compete to attract the marketable orders of individual investors that, as discussed in section VII.B.2 below, are mostly routed to, and executed by, wholesalers in the current market structure. Accordingly, the proposed requirements for fees and rebates are designed to provide sufficient financial incentives for open competition trading centers to operate qualified auctions, but the primary objective of such requirements is to promote the regulatory objectives of Proposed Rule 615—better prices for individual investors and an enhanced opportunity for investors to interact directly with the marketable orders of individual investors.

First, no fee could be charged for submission or execution of a segmented order, or for submission of an auction response. Second, the fee for execution of an auction response could not exceed $0.0005 per share for auction responses priced at $1.00 per share or more, could not exceed 0.05% of the auction response price per share for auction responses priced at less than $1.00 per share, and otherwise would have to be the same rate for executed auction responses in all auctions. Third and similarly, any rebate for the submission or execution of a segmented order or for the submission or execution of an auction response could not exceed $0.0005 per share for segmented orders or auction responses priced at $1.00 per share or more, cannot exceed 0.05% of the segmented order or auction response price per share for segmented orders or auction responses priced at less than $1.00 per share, and otherwise must be the same rate for segmented orders in all auctions and must be the same rate for auction responses in all auctions.

Proposed Rule 615 would prohibit fees for the submission or execution of segmented orders in a qualified auction. As discussed in section II above, the trading economics of executing segmented orders, particularly their low adverse selection costs, has led to a market structure where restricted competition trading centers generally do not charge fees to the broker-dealers that route such orders and, indeed, often offer PFOF to retail brokers in return for routing such orders. With Proposed Rule 615, routing segmented orders to qualified auctions would often, absent an exception, be mandated by rule—a restricted competition trading center generally would be prohibited from executing a segmented order internally without first routing such order to a qualified auction. The Commission believes that broker-dealer compliance with a new rule requiring the routing of segmented orders to qualified auctions in certain circumstances should not lead to the imposition of fees by trading centers on broker-dealers that are not charged for the execution of such orders today. Instead, as discussed below, open competition trading centers could fund their operation of qualified auctions by imposing fees on auction responses that execute against segmented orders. In this respect, the market participants that benefit from the opportunity to trade with segmented orders, with their low adverse selection costs, would pay the open competition trading center for that trading service.

With respect to auction responses, no fee could be charged for the submission of an auction response that is not executed. Such a practice potentially could be used to deter a wide range of market participants from participating in qualified auctions and thereby dampen competition to provide the best prices for segmented orders. Fees could be charged for executed auction responses, consistent with the cap on such fees, which, for most NMS stocks, would be 0.05 cent per share, also known as 5 ''mils.'' The proposed 5 mils cap on fees is designed to be sufficient to provide reasonable compensation to an open competition trading center. For example, an analysis of financial data for national securities exchanges indicates that average total net capture (the difference between fees levied and rebates paid) for such exchanges is

[244] Table 7, *infra,* section VII.B.4.

[245] The Commission also is proposing to amend rules addressing fees and rebates more generally. *See* Minimum Pricing Increments Proposal, *supra* note 98. The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposing release.

currently around 4 mils for all trading types.[246] Accordingly, the proposed 5 mils fee cap would provide a revenue source to fund qualified auctions that is consistent with their revenue to fund their other trading services, particularly their services during continuous trading hours.[247] In addition, pursuant to Proposed Rule 615(c)(4), any fee charged for execution of an auction response must be the same rate for all auctions (*i.e.,* an open competition trading center would not be permitted to charge different fees for auctions for different securities, nor would an open competition trading center be permitted to charge different fees to different market participants or different classes of market participants, such as preferential fees based on volume). This proposed uniform rate for fees is designed to promote a level playing field among all potential market participants that may wish to trade with segmented orders. It would, for example, prohibit any volume discount that could give the largest participants an economic advantage in pricing their auction responses compared to other market participants. The uniform rate also would prevent a fee discount for the executed auction response of a broker-dealer that routed the segmented order to the qualified auction.

The proposed requirements for rebates mirror the requirements for fees in terms of the 5 mils cap and the requirement of a uniform rate for all auctions. In particular, rebates could not exceed the maximum fee for qualified auctions. The equivalent proposed 5 mils cap on rebates is designed to limit cross-subsidization of qualified auctions by the largest open competition trading centers in ways that would not be available to smaller competitors, because larger competitors may have more or larger alternative revenue sources. The uniform rate of rebates for all auctions is designed, as with the uniform rate of fees, to level the playing field among larger and smaller broker-dealers. The proposed requirements for rebates differ from those for fees, however, in that open competition trading centers would have discretion on whether to offer rebates for the submission of segmented orders and of auction responses, as well as the execution of segmented orders and of auction responses. If such rebates were offered, however, they would have to be a uniform rate among all auctions to promote a level playing field and fair competition among broker-dealers and among auction responders.

5. Auction Execution Priority

Proposed Rule 615(c)(5) would specify five requirements for the execution priority of auction responses and orders resting on the continuous order book of an open competition trading center, which can be divided into three categories. The first two would specify affirmative requirements for how priority among auction responses must be handled; the second two would specify negative requirements for how priority among auction responses cannot be handled; and the fifth requirement would address how qualified auctions must be integrated with a continuous order book operated by an open competition trading center. These five requirements would not exhaust all possible contexts for which additional priority rules may be needed, and, as discussed below, open competition trading centers would have flexibility to develop additional priority rules as long as such rules are consistent with the requirements in Proposed Rule 615(c)(5).

Pursuant to Proposed Rule 615(c)(5)(i), the first affirmative requirement would be price priority—the most favorable price for a segmented order would have priority of execution (the lowest priced auction response to a segmented order to buy and the highest priced auction response to a segmented order to sell). Price priority maximizes competitive incentives to obtain the best prices for segmented orders.

Pursuant to Proposed Rule 615(c)(5)(ii), the second affirmative requirement would be customer priority. ''Customer'' is defined in Rule 600(b)(23) of Regulation NMS to mean any person that is not a broker-dealer. When two auction responses have the best price, and one is submitted for the account of a customer and one is submitted for the account of a broker-dealer, the customer's auction response would be required to have priority. In such a case, the segmented order of an investor would interact directly with the auction response of another investor without the participation of a dealer, thereby promoting the NMS objective set forth in section 11A(a)(1)(C)(v) of the Exchange Act.

Pursuant to Proposed Rule 615(c)(5)(iii), the first negative requirement for execution priority would be the prohibition of time priority, subject only to an auction response being received by an open competition trading center within the time period prescribed in paragraph (c)(2) of Proposed Rule 615. Prohibiting time priority for equally priced auction responses eliminates the incentive for a speed race that otherwise could reward market participants with resources to spend the most on sophisticated, low-latency trading systems and connectivity.

Pursuant to Proposed Rule 615(c)(5)(iv), the second negative requirement for execution priority would be a prohibition against favoring the broker-dealer that routed the segmented order to the auction, the originating broker for the segmented order, the open competition trading center operating the auction, or any affiliate of the foregoing persons.[248] This requirement is designed to help maintain a level playing field among market participants submitting auction

[246] *See infra* section VII.C.1.a (discussing effects of 5 mils cap on competition to supply liquidity to the marketable orders of individual investors).

[247] *Id.* (net capture for the executions of orders during continuous trading hours (but not opening or closing auctions) priced at $1.00 per share or greater is likely close to 2 mils).

[248] ''Affiliate'' is proposed to be defined in Proposed Rule 600(b)(3) of Regulation NMS to mean, with respect to a specified person, any person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified person. ''Control'' is proposed to be defined in Proposed Rule 600(b)(23) of Regulation NMS to mean the power, directly or indirectly, to direct the management or policies of a broker, dealer, or open competition trading center, whether through ownership of securities, by contract, or otherwise. A person is presumed to control a broker, dealer, or open competition trading center if that person: (1) is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions); (2) directly or indirectly has the right to vote 25% or more of a class of voting securities or has the power to sell or direct the sale of 25% or more of a class of voting securities of the broker, dealer, or open competition trading center; or (3) in the case of a partnership, has contributed, or has the right to receive upon dissolution, 25% or more of the capital of the broker, dealer, or open competition trading center. Proposed Rule 600(b)(3) and Proposed Rule 600(b)(23). These definitions are substantially the same as the definitions of ''affiliate'' and ''control'' prescribed for purposes of an NMS Stock ATS's disclosures about its operations on Form ATS–N with the following modifications: the Form ATS–N definition of ''affiliate'' uses a separately defined term ''Person'' instead of the statutory definition of ''person,'' and Form ATS–N defines ''control'' as applicable to the ''broker-dealer of the alternative trading system'' instead of as applicable to a ''broker, dealer, or open competition trading center.'' It is appropriate to use substantially similar definitions of ''affiliate'' and ''control'' in the context of Proposed Rule 615 because, for purposes of Form ATS–N, the Commission defined such terms for use with respect to disclosures designed to enable market participants to better evaluate how relationships between certain persons could affect the handling of orders on a particular NMS Stock ATS. *See* ATS–N Adopting Release, *supra* note 159, 83 FR at 88318. The substantially similar proposed definitions, as used in the context of Proposed Rule 615, are similarly designed to recognize that relationships among certain persons may impact the handling of orders, and are designed to help ensure that the execution priority rules of an open competition trading center do not undermine full competition among auction responders in qualified auctions by favoring related parties that were involved in routing and executing the order at the open competition trading center.

responses and thereby focus competition in the auctions on providing the best prices for segmented orders. Assigning priority to any firm associated with the handling of the orders or their affiliates would be one means for an open competition trading center to attempt to attract order flow by rewarding the firms that control such flow coming from the customer, which could undermine competition among auction responders to provide the best prices in qualified auctions. Given that Proposed Rule 615 would require segmented orders to be routed to qualified auctions in some contexts, the competition among open competition trading centers to attract segmented orders should be focused on generating the best prices for investors.

Finally, the execution priority requirements set forth in paragraph (c)(5)(v) of Proposed Rule 615 address how auction responses would be required to be integrated with the continuous order book of an open competition trading center. A continuous order book is proposed to be defined in Rule 600(b) of Regulation NMS as a system that allows orders for NMS stocks to be accepted and executed on a continuous basis.[249] This definition would exclude single-priced auctions that are limited to a specified time, such as the opening and closing auctions of the primary listing exchanges, and that are not continuously available for trading based on the initiative of market participants or the open competition trading center. As discussed above, all open competition trading centers would operate as automated trading centers displaying automated quotations and therefore would have facilities in which orders from market participants are accepted and executed on a continuous basis.

The proposed execution priority requirements primarily are designed to balance the objectives of obtaining the best prices for segmented orders and maintaining fair competition both in qualified auctions and on continuous order books.[250] The first such requirement is that orders resting on the continuous order book of the open competition trading center operating the qualified auction, whether displayed or undisplayed, would have priority over auction responses at a less favorable price for the segmented order. This is another application of the principle of price priority that underlies proposed paragraph (c)(5)(i).

The second requirement is that displayed orders resting on the continuous order book would be required to have priority at the same price over auction responses, while, in turn, auction responses would be required to have priority at the same price over undisplayed orders resting on the continuous order book. Rewarding the display of orders serves the purpose of promoting public price transparency, consistent with the NMS objective in section 11A(a)(1)(C)(iii) of the Exchange Act. As between undisplayed orders and auction responses, however, giving priority to auction responses at the same price would encourage participation in qualified auctions, thereby promoting the core order competition objective of Proposed Rule 615. Moreover, unlike displayed orders that can be executed immediately because they present a known opportunity to trade for market participants, undisplayed orders on continuous order books are not known to other market participants and potentially create a risk of gaming behavior by broker-dealers with knowledge of segmented orders that could undermine competition in qualified auctions. As discussed in section IV.F below, this potential gaming behavior is prohibited in paragraph (f) of Proposed Rule 615. Assigning priority to auction responses over undisplayed orders at the same price would help address the root incentives for such behavior.

While Proposed Rule 615(c) sets forth a series of execution priority requirements for qualified auctions, open competition trading centers also would have flexibility to develop additional execution priority rules for their auction mechanism, as long as they were consistent with the proposed requirements. As one example, Proposed Rule 615(c) does not prescribe execution priority when an open competition trading center receives multiple best priced responses for the account of customers because multiple possibilities would be consistent with the objectives of Proposed Rule 615. An open competition trading center would be free to develop rules for assigning execution priority among such customer responses, as long as they were consistent with Proposed Rule 615(c).[251]

Moreover, Proposed Rule 615 allows flexibility for open competition trading centers in a variety of other contexts. For example, it does not specify whether an open competition trading center may or may not simultaneously operate multiple qualified auctions for the same NMS stock, and if so, the execution priority required for auction responses across such auctions. Proposed Rule 615 also would not impose requirements for auction responses, other than the requirement in paragraph (c)(1) that an auction message initiating a qualified auction would be required to invite ''priced'' auction responses.

D. Open Competition Trading Center Requirements

Paragraph (d) of Proposed Rule 615 sets forth requirements for national securities exchanges and NMS Stock ATSs that intend to act as open competition trading centers that operate qualified auctions for segmented orders. First, it would prohibit a national securities exchange or NMS Stock ATS from operating a qualified auction unless the exchange or ATS meets the definition of open competition trading center and complies with the provisions of Proposed Rule 615 for qualified auctions, which were discussed in section IV.B.2 and IV.C above. Second, it would prohibit an open competition trading center from operating a system, other than a qualified auction, that is limited in whole or in part to the execution of segmented orders, unless any segmented order executed through the system meets requirements that parallel those specified for an exception in paragraph (b) of Proposed Rule 615.[252] This proposed prohibition is

[249] Proposed Rule 600(b)(22).

[250] Trades executed in qualified auctions would not qualify for an exception from the trade-through requirements of Rule 611 of Regulation NMS, which are discussed in section III above. Accordingly, if a qualified auction did not generate a price that was at or within the best-priced protected quotations, the open competition trading center would, absent an exception, be prohibited by Rule 611 from executing the segmented order. If a restricted competition trading center subsequently decided to execute such segmented order, it would need, absent an exception, to comply both with the trade-through requirements of Rule 611 and with Proposed Rule 615(a) by immediately executing the segmented order at a price that was equal to or better for the segmented order than the specified limit price in the qualified auction.

[251] As discussed above in section IV.B.2, national securities exchanges must file proposed rules with the Commission to reflect material changes in their rules, while NMS Stock ATSs must update their Form ATS-Ns to reflect material changes in their rules.

[252] Proposed Rule 615(b); Proposed Rule 615(d)(2)(i) through (v). Specifically, a segmented order executed through such system of an open competition trading center would be required to: (1) be received and executed during a time period when no open competition trading center is operating a qualified auction for the segmented order; (2) have a market value of at least $200,000 calculated with reference to the midpoint of the NBBO when the segmented order was received by the open competition trading center; (3) be executed by the open competition trading center at a price that is equal to or more favorable for the segmented order than the midpoint of the NBBO when the segmented order was received by the open competition trading center; (4) be a limit order with a limit price selected by the customer that is equal

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identical to the prohibition in paragraph (g) of Proposed Rule 615 that would apply to all national securities exchanges, regardless of whether they meet the definition of an open competition trading center, and is discussed further in section V.G below.

E. Originating Broker Requirements

Paragraph (e) of Proposed Rule 615 sets forth three requirements for originating brokers. First, an originating broker would be required to establish, maintain, and enforce written policies and procedures reasonably designed to identify the orders of customers as segmented orders. Given that the order competition requirement of paragraph (a) would apply solely to segmented orders, it is imperative that customer orders be properly identified as such by the originating broker, which will have the knowledge of its customer accounts necessary to make such identification. As discussed above in section IV.B.1, the first part of the proposed definition of segmented order relating to the nature of the account is based on existing SRO rules and, accordingly, is designed to facilitate ease of compliance by originating brokers. The second part of the proposed definition relating to frequency of trading in an account would be based on customer trading information that originating brokers are required to maintain.[253]

Second, an originating broker would be prohibited from routing a customer order identified as a segmented order without also identifying the order to the routing destination as a segmented order.[254] This requirement would work together with an analogous requirement in paragraph (f) of Proposed Rule 615 for all broker-dealers that route segmented orders that is discussed in section IV.F below. Together, the proposed requirements are designed to ensure that a segmented order continues to be identified as such throughout the routing chain from origination through execution. Proper marking of segmented orders would be essential for a restricted competition trading center to know that it must comply with the order competition requirement of paragraph (a). The proposed identification requirements of paragraph (e) for originating brokers and paragraph (f) for all broker-dealers are designed to assure that no segmented order reaches a restricted competition trading center without the proper identification. If there is more than one originating broker for a segmented order, the broker that carries the individual investor's customer account would likely be the originating broker that maintains the policies and procedures to identify segmented orders as such, as well as identifies and marks the orders.

Third, an originating broker that makes the certification referred to in paragraph (c)(1)(iii) of Proposed Rule 615 would be required to establish, maintain, and enforce written policies and procedures reasonably designed to assure that the identity of the originating broker will not be disclosed, directly or indirectly, to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order. As discussed in section IV.C.1 above, knowing the identity of an originating broker could provide a significant information advantage to a market participant when pricing an auction response if other market participants did not have this information. The effect of the certification referred to in paragraph (c)(1)(iii) of Proposed Rule 615 would be that either all responders in a qualified auction would know the identity of the originating broker (if the certification is not made) or no responders in a qualified auction would know the identity of the originating broker (if the certification is made). In the absence of an appropriate certification from an originating broker, an open competition trading center would be required to identify the originating broker in the auction message disseminated in consolidated market data. The ''written policies and procedures'' requirement of proposed paragraph (e)(3) specifies the responsibility of an originating broker in making such a certification. As one potential example of such policies and procedures, an originating broker could provide that such originating broker will route all the segmented orders of its customers directly to an open competition trading center for a qualified auction, without disclosing the existence of such orders to any other person. Another potential example would be for the originating broker to use a single broker for routing segmented orders to open competition trading centers for qualified auctions, and the single executing broker represents in writing that it will not participate in any qualified auction for the segmented orders or otherwise trade with the segmented orders, and that it will not disclose the existence of such segmented orders to any other person.

As mentioned in section IV.B.4 above, broker business practices can vary in terms of how customer accounts are handled, and there may be multiple originating brokers for a segmented order. In addition, such brokers currently enter into agreements with one another to allocate certain responsibilities with respect to the handling of customer accounts, such as those referred to as carrying agreements. The Commission has designed Proposed Rule 615 to preserve brokers' existing flexibility to allocate responsibilities among themselves. Accordingly, paragraph (e)(4) of Proposed Rule 615 provides that, where there are multiple originating brokers for a segmented order, an originating broker shall not be deemed to be in violation of the provisions of paragraph (e)(1) through (3) arising solely from a failure to meet a responsibility that was specifically allocated by prior written agreement to another originating broker.

F. Broker-Dealer Requirements

Paragraph (f) of Proposed Rule 615 sets forth two requirements for all broker-dealers with respect to segmented orders. First, pursuant to proposed paragraph (f)(1), a broker-dealer that receives an order identified as a segmented order would be prohibited from routing such order without identifying the order to the routing destination as a segmented order. As discussed in section IV.E above, this requirement is designed to work together with an analogous requirement for originating brokers to

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to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the open competition trading center; or (5) be received and executed by the open competition trading center during a time period when no open competition trading center is operating a qualified auction for the segmented order that accepts orders that are not entirely in whole shares, and be a size, selected by the customer, that is not entirely in whole shares of an NMS stock, in which case any portion of such segmented order that is less than one whole share of the NMS stock, and only such portion, may be executed through such system.

[253] *See* 17 CFR 240.17a–3(a) (requiring broker-dealers to make and keep, among other things, current blotters containing an itemized daily record of all purchases and sales of securities and the account for which each such purchase and sale was effected).

[254] 17 CFR 242.613 (Rule 613 of Regulation NMS) requires each national securities exchange and national securities association to jointly file an NMS plan governing the creation, implementation, and maintenance of a consolidated audit trail (''CAT'') which is reported to a central repository. The rule specifies the type of data to be collected and reported. Pursuant to Rule 613(c)(7), any CAT plan participant or broker-dealer that receives, originates, or handles orders in NMS stocks must report certain information regarding those orders, including the ''material terms'' of each order. Rule 613(j)(7) defines ''material terms of an order'' to include ''any special handling instructions.'' Because Proposed Rule 615 would mandate special handling for segmented orders, the identification of the order as a segmented order, any exceptions applicable to its handling, and the identity of the originating broker or an indication of a certification of anonymity would be required by current Rule 613 to be reported as material terms in each event in the lifecycle.

help assure that no segmented order reaches a restricted competition trading center, even if routed through multiple broker-dealers or trading centers, without being properly identified as a segmented order.

Second, paragraph (f)(2) of Proposed Rule 615 sets forth a requirement for all broker-dealers, which includes originating brokers, that is designed to prevent gaming behavior that could undermine fair competition in qualified auctions and on continuous order books. In particular, it would prohibit a broker-dealer with knowledge of where a segmented order is to be routed from submitting an order, or enabling an order to be submitted by any other person, to the continuous order book of an open competition trading center or of a national securities exchange that could have priority to trade with the segmented order at such open competition trading center or national securities exchange.

The prohibition of paragraph (f)(2) is designed to address two types of potential gaming behavior by broker-dealers. First, absent this proposed prohibition, a broker-dealer with knowledge that a segmented order is to be routed to a qualified auction could submit, or enable another person to submit (such as by providing information to another person), to the open competition trading center conducting such auction a displayed contra-side order that was priced at or better than the specified limit price of the segmented order. As discussed in section IV.C above, displayed orders on the continuous order book of an open competition trading center could have priority to trade with a segmented order ahead of equally priced auction responses. The submission of contra-side orders to a continuous order book to avoid participating in a qualified auction, however, could undermine fair competition in the qualified auction and therefore would be prohibited by paragraph (f)(2).

A second type of gaming behavior prohibited by paragraph (f)(2) of Proposed Rule 615 relates to segmented orders that are not routed to qualified auctions, but rather to a continuous order book of an open competition trading center or a national securities exchange. As stated in section IV.A above, the order competition requirement of paragraph (a) of Proposed Rule 615 does not apply to an open competition trading center or to a national securities exchange, regardless of whether such exchange is an open competition trading center, and therefore, a broker-dealer could route a segmented order directly to an open competition trading center or a national securities exchange.[255] However, there remains an incentive for a broker-dealer to seek to trade with a segmented order outside of the fair competition of a qualified auction by submitting a contra-side order at the same time it submits the segmented order (*i.e.,* a ''paired order'') to a continuous order book of an open competition trading center or national securities exchange with the expectation of executing against the segmented order. Paragraph (f)(2) is designed to address this potential by prohibiting a broker-dealer with knowledge of where a segmented order is to be routed from submitting, or enabling any other person to submit (such as by providing information to another person), an order to an open competition trading center or a national securities exchange that could have priority to trade with the segmented order.

In addition to the requirements for broker-dealers set forth in Proposed Rule 615, all other existing obligations of broker-dealers for customer orders, including best execution discussed in section III.B above, would continue to apply. For example, an important consideration for broker-dealers in handling a segmented order would be the relative performance of qualified auctions at different open competition trading centers in terms of their order execution quality. Broker-dealers with best execution responsibilities for segmented orders generally should consider the available information on execution quality for segmented orders at different qualified auctions. To provide broker-dealers with relevant information on qualified auctions, if Proposed Rule 615 is adopted, the effective NMS plans for NMS stocks would need to be conformed to provide for the collection and dissemination of a sale condition in transaction reports for national securities exchanges and NMS Stock ATSs indicating that the transaction was executed in a qualified auction under Proposed Rule 615(c).[256]

G. National Securities Exchange Requirements

Exchanges are excluded from the proposed definition of a restricted competition trading center because, as discussed in section III.B above, they are subject to the extensive Exchange Act requirements for access and competition. Accordingly, the order competition requirement of paragraph (a) of Proposed Rule 615 does not apply to a national securities exchange, regardless of whether such exchange meets the definition of an open competition trading center. To the extent consistent with their best execution responsibilities, broker-dealers would be permitted to route segmented orders directly to any national securities exchange without first routing the order to a qualified auction. One potential example of when such a direct route could be consistent with best execution is a fast market when prices are moving rapidly away from a segmented order (prices increasing for buy orders and prices decreasing for sell orders). In this example, a broker-dealer could determine that obtaining a better price in a qualified auction than a displayed quotation is unlikely, and the broker-dealer could route a segmented order directly to execute against the best available price available at a national securities exchange or an open competition trading center. Competition in qualified auctions, however, could be undermined if national securities exchanges and open competition trading centers were permitted to siphon segmented order flow away from qualified auctions by operating trading mechanisms that were limited, in whole or in part, to segmented orders.

Accordingly, paragraphs (d)(2) (as discussed above) and (g) of Proposed Rule 615 would prohibit all open competition trading centers and national securities exchanges from operating a system, other than a qualified auction, that is limited, in whole or in part, to the execution of segmented orders, unless any segmented order executed through such system qualifies for exceptions that are the same as those in Proposed Rule 615(b).[257] This prohibition would apply

[255] As discussed elsewhere in this release, both of these types of trading centers are subject to rigorous requirements for access and competition, and they therefore would not be prohibited from executing a segmented order without it being submitted to a qualified auction. In addition to the applicable proposed requirements under Proposed Rule 615, a broker-dealer still would be required to satisfy its best execution responsibilities if bypassing a qualified auction and routing a segmented order directly to an open competition trading center or a national securities exchange.

[256] The technical specifications of the NMS plans for disseminating consolidated market data include sale condition modifiers for trade reports that specify various types of trades, including some auction trades.

[257] Proposed Rule 615(b); Proposed Rule 615(d)(2)(i) through (v); Proposed Rule 615(g)(1) through (5); and *supra* note 252 and accompanying text. Specifically, a segmented order executed through such system of a national securities exchange would be required to: (1) be received during a time period when no open competition trading center is operating a qualified auction for the segmented order; (2) have a market value of at least $200,000 calculated with reference to the

Continued

to many of the RLPs currently operated by national securities exchanges.[258] An example of a trading system that would not be prohibited under paragraphs (d)(2) and (g), however, would be one that is limited to the execution of segmented orders at prices equal to the NBBO midpoint, which would qualify for the exception in Proposed Rule 615(g)(3).[259]

V. Request for Comment

The Commission generally requests comment from the public on all aspects of Proposed Rule 615, including its objectives and its terms to achieve those objectives. The Commission also generally requests comment on the proposed definitions to be added to Rule 600 and their use in the context of Proposed Rule 615. More specific requests for comment are set forth below. With respect to any comments, the Commission notes that they are of the greatest assistance to this rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

1. The Commission requests comment on the operation and effectiveness of Proposed Rule 615. Would exposing segmented orders to competition in qualified auctions be likely to generate better prices for individual investors than are provided by current broker-dealer routing practices? Would the likelihood of better prices vary across different types of NMS stocks, such as those with different levels of liquidity and trading volume? Do commenters believe that the wide dissemination of auction messages for qualified auctions in NMS stocks would be likely to affect trading or quoting behavior in NMS stocks during the time period of the auction and, if so, would such an effect promote or detract from obtaining the best possible price for segmented orders in the qualified auctions?

2. Proposed Rule 615(c)(2) would prohibit display of auction responses. In the case of an execution in a qualified auction, a transaction report maintaining the anonymity of the parties would be displayed in consolidated market data. Does the proposed prohibition sufficiently mitigate the possibility of information leakage for participants in a qualified auction? Are there different or additional requirements that would better mitigate the possibility of information leakage?

3. Is focusing on the accounts of natural persons, as well as accounts held in legal form on behalf of a natural person or group of related family members, and the level of trading activity in such accounts an appropriate approach to identify orders that are included, and those that are excluded, from the proposed definition of a segmented order?

4. Should the proposed definition of ''group of related family members'' be more or less inclusive, and if so, in what regard?

5. Should the level of trading activity used to determine which accounts are associated with segmented orders be lower or higher than 40 trades per day? Is the six-month time frame is appropriate? If other metrics would be more appropriate, please explain why and, if possible, provide data to support your position.

6. Should any large orders be entirely excluded from the definition of segmented order and therefore not eligible to trade in qualified auctions, as opposed to the rule proposal which would provide an exception for orders of $200,000 or more and that allows a choice of whether to submit such orders to qualified auctions?

7. The proposed definition of an open competition trading center would require national securities exchanges to operate as an SRO trading facility that is an automated trading center and displays automated quotations that are disseminated in consolidated market data? Is this requirement appropriate or should it be modified in any respect?

8. Is requiring a minimum level of trading volume for national securities exchanges to qualify as open trading competition centers an appropriate means to achieve the objectives of Proposed Rule 615? If so, should the 1% level should be lower or higher? For example, should the 1% level be lowered to enable additional national securities exchanges to compete for segmented orders by operating qualified auctions, or should the 1% be increased to help limit the potential costs of market fragmentation? Are the other parameters of the volume threshold appropriate to achieve the objective of ensuring that qualified auctions are offered by trading centers that have sufficient volume to provide vigorous competition? Is average daily volume during at least 4 of the preceding 6 calendar months an appropriate parameter, or are there more appropriate parameters? Is there another approach that would be more effective to help limit the potential costs of market fragmentation that could be associated with the requirements of Proposed Rule 615?

9. Under the proposal, national securities exchanges would be required to operate pursuant to their own rules providing that such exchanges would comply with the requirements for qualified auctions. Would this requirement provide sufficient notice to market participants concerning the operation of qualified auctions by national securities exchanges?

10. Should an NMS Stock ATS, to meet the proposed definition of an open competition trading center, be required to display quotes through an SRO display-only facility? Also, should an NMS Stock ATS be required to operate as an automated trading center and display automated quotations that are disseminated in consolidated market data?

11. Do commenters believe that identifying an NMS Stock ATS as the venue of execution in transaction reports that are disseminated in consolidated market data would be helpful to market participants when assessing qualified auctions?

12. Should an NMS Stock ATS be required to permit any registered broker-dealer to become a subscriber, except for a broker-dealer that is subject to a statutory disqualification or, pursuant to written policies and procedures, does not meet standards of financial responsibility or operational capability?

13. Is an equal access standard appropriate for NMS Stock ATSs to meet the definition of an open competition trading center and operate qualified auctions? Alternatively,

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midpoint of the NBBO when the segmented order was received by the national securities exchange; (3) be executed by the national securities exchange at a price that is equal to or more favorable for the segmented order than the midpoint of the NBBO when the segmented order was received by the national securities exchange; (4) be a limit order with a limit price selected by the customer that is equal to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the national securities exchange; or (5) be received and executed by the national securities exchange during a time period when no open competition trading center is operating a qualified auction for the segmented order that accepts orders that are not entirely in whole shares, and be a size, selected by the customer, that is not entirely in whole shares of an NMS stock, in which case any portion of such segmented order that is less than one whole share of the NMS stock, and only such portion, may be executed through such system.

[258] As discussed in section III.B.2.c, RLPs are exchange trading mechanisms limited to retail orders, as defined in the exchanges' rules.

[259] IEX's RLP, for example, only permits retail liquidity provider orders to be midpoint peg orders. *See* Securities Exchange Act Release No. 93217 (Sep. 30, 2021), 86 FR 55663 (Oct. 6, 2021) (order approving an exemption from Rule 602 of Regulation NMS for IEX's retail price improvement program and describing that IEX's program is different because retail liquidity provider orders can only be midpoint peg orders); IEX Rules 11.190(b)(14) (Retail Liquidity Provider Order) and 11.232 (Retail Price Improvement Program). IEX has rules that will also permit orders in its RLP to be executed at prices better than the NBBO midpoint. *See* Securities Exchange Act Release No. 94884 (May 10, 2022), 87 FR 29768 (May 16, 2022) (SR–IEX–2022–04).

should other approaches be used to achieve the objective of a level playing field regarding Proposed Rule 615 between NMS Stock ATSs and national securities exchanges, given their different statutory and regulatory regimes? For example, should the existing fair access requirement in Rule 301(b)(5) of Regulation ATS be used instead of the proposed equal access requirement? Are there other aspects of access to an NMS Stock ATS operating as an open competition trading center offering qualified auctions that should be addressed by Proposed Rule 615?

14. Is requiring a minimum level of trading volume for NMS Stock ATSs an appropriate means to achieve the objectives of Proposed Rule 615? If so, should the 1% volume threshold should be lower or higher? Are the other parameters of the volume threshold appropriate to achieve the objective of ensuring that qualified auctions are offered by trading centers that have sufficient volume to provide vigorous competition? Is average daily volume during at least 4 of the preceding 6 calendar months an appropriate parameter, or are there more appropriate parameters? Is there another approach that would be more effective to help limit the potential costs of market fragmentation that could be associated with the requirements of Proposed Rule 615?

15. Would market participants have sufficient notice concerning the operation of qualified auctions by NMS Stock ATSs if they operate pursuant to an effective Form ATS–N that evidences compliance with the requirements for a qualified auction in Proposed Rule 615(c) and with the other provisions of the proposed definition of an open competition trading center?

16. Are there any other requirements, beyond those specified in the proposed definition of an open competition trading center, that national securities exchanges or NMS Stock ATSs should meet to be eligible to qualify as open competition trading centers and operate qualified auctions?

17. Should national securities exchanges that do not meet the proposed definition of an open competition trading center be excluded, as proposed, from the definition of a restricted competition trading center based on their statutory requirements relating to access and competition?

18. Does the proposed definition of originating broker appropriately capture the brokers that would make the determination of whether an order falls within the definition of a segmented order, as well as the broker that would be required to be identified in auction messages? Instead of allowing originating brokers to choose whether to be identified in auction messages, should Proposed Rule 615, as a means to promote greater uniformity of execution quality for segmented orders from different originating brokers, prohibit any identification of the originating broker in auction messages and require originating brokers to certify that their identity will not be disclosed for all segmented orders? Should originating brokers for a segmented order, other than the broker responsible for approving the opening of accounts with customers, be identified in the auction message? Should carrying or clearing brokers that are an originating broker for a segmented order also be disclosed in an auction message? Would such information be useful to market participants' decisions whether to submit auction responses and at what prices?

19. Are the five proposed exceptions in paragraph (b) of Proposed Rule 615 appropriate? Should additional exceptions be included, such as an exception for orders directed by the customer to a particular trading center?

20. Instead of providing an exception for executions of segmented orders during a time period when no open competition trading center is operating a qualified auction, should the execution of segmented orders during such a time period be prohibited? Is market value an appropriate approach to identifying large trades that should be excepted from Proposed Rule 615? If so, should the threshold amount of $200,000 be lower or higher? For example, do commenters believe that segmented orders in NMS stocks with a market value of up to $200,000 could be executed efficiently in qualified auctions at prices that mostly would be at or within the NBBO? If not, what market value should be used to achieve this objective and should it vary based on the trading characteristics of a particular NMS stock?

21. Would it be appropriate for Proposed Rule 615(b) to include an exception for executions at a price less favorable to the segmented order than a midpoint execution, so long as the segmented order is executed at a price with a specified amount of price improvement? If so, what would be the appropriate level of price improvement?

22. Is it appropriate for Proposed Rule 615(b) to include an exception for executions of a segmented order with a limit price selected by the customer that is equal to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the restricted competition trading center? Should there be an exception for a wider range of limit orders, in addition to, or instead of this proposed exception? For example, should there be an exception for all non-marketable limit orders (*i.e.,* any buy limit order with a price less than the NBO and any sell limit order with a price greater than the NBB)?

23. Is it appropriate for Proposed Rule 615(b) to include the exception for executions of segmented orders where no qualified auctions are being offered for orders that are not entirely in whole shares, and the customer selected a size for a segmented order that is not entirely in whole shares of an NMS stock, in which case any portion of such segmented order that is less than one whole share of the NMS stock, and only such portion, would not be subject to the order competition requirement of paragraph (a) of Proposed Rule 615? Would a broker-dealer's best execution responsibilities be sufficient to ensure that the fractional portion of the segmented order is executed in the best market available? Do commenters believe that, if Proposed Rule 615 were adopted, open competition trading centers would offer qualified auctions that accommodate fractional shares? If not, should a broker-dealer be required to round up a segmented order with a fractional component before submitting the order to a qualified auction, with the broker-dealer required to accept the rounded up portion of the order? Or would broker-dealers be less willing to offer their customers transactions in fractional shares if rounding up were required?

24. Should auction messages be required to include the side (buy or sell) of a segmented order? For example, if side were not included in auction messages, market participants could be allowed to provide auction responses for one or both sides, with only auction responses on the opposite side of the segmented order considered for execution. Do commenters believe that such an approach would limit the extent to which quoted price might move away from segmented orders during the pendency of a qualified auction?

25. Should the minimum or maximum time periods for qualified auctions be shorter or longer? Should a restricted competition trading center be permitted to execute a segmented order that was not executed in a qualified auction at the specified limit price as soon as reasonably possible, or should there be a specified time period for execution?

26. Should the pricing increment be smaller or larger than the proposed 0.1

cent for segmented orders and auction responses with prices of $1.00 or more per share? Would, for example, the potential benefit for segmented orders of a smaller pricing increment, such as 0.05 cent, outweigh the potential cost of less direct interaction of investor orders without the participation of a dealer?

27. Does Proposed Rule 615(c)(4) appropriately address the fees and rebates for qualified auctions? Is the proposed prohibition of any fee for the submission or execution of segmented orders appropriate? Should the proposed 5 mil cap on fees for executed auction responses priced at $1.00 per share or more be higher or lower? Should the proposed 5 mil cap on rebates for segmented orders priced at $1.00 per share or more be higher or lower? Is it appropriate to require that the rates for fees and rebates be flat in all auctions?

28. Are the execution priority requirements specified in Proposed Rule 615(c)(5) appropriate? Should auction responses of customers have priority over auction responses of broker-dealers at the same price? Is it appropriate to prohibit execution priority terms that favor the broker-dealer that routed the segmented order, the originating broker for the segmented order, and the open competition trading center operating the auction, as well as affiliates of the foregoing persons? Should the requirements for execution priority of orders resting on the continuous order book of an open competition trading center be modified? Should displayed orders on the continuous order book have priority over auction responses at the same price? Should auction responses have priority over undisplayed orders on the continuous order book at the same price?

29. Should an open competition trading center be permitted to give execution priority advantages to market makers that accept objective affirmative obligations, such as public quoting obligations or an obligation to fill segmented orders at the relevant NBBO if such orders do not otherwise receive an execution in qualified auctions? For example, Table 7 in section VII.B.4 below shows that 1.67% of marketable order shares are executed by wholesalers at prices outside the NBBO at the time the wholesaler received the order. Do commenters believe that, if Rule 615 were adopted as proposed, a larger percentage of marketable orders of individual investors would be executed at prices outside the NBBO when the order is received by a trading center?

30. Should the broker routing a segmented order to a qualified auction be required to execute the order, or any unexecuted portion thereof, at the specified limit price or some other price if the segmented order is not executed in full in the auction?

31. Should there be parameters for what the specified limit price selected by a broker routing a segmented order to a qualified auction could be? For example, should the specified limit price be required to be within a range that is tied to the midpoint of the NBBO at the time the segmented order is received?

32. Should an open competition trading center be permitted to operate multiple qualified auctions in the same NMS stock simultaneously?

33. Should open competition trading centers have flexibility to determine aspects of qualified auctions that are not specified by Proposed Rule 615? Are there additional aspects for qualified auctions that should be specified by rule? For example, are there additional aspects of execution priority that should be specified by rule or, alternatively, that open competition trading centers should have greater flexibility to determine?

34. Should open competition trading centers and national securities exchanges be allowed to continue to operate trading systems, other than qualified auctions, that are limited, in whole or in part, to the execution of segmented orders and that do not fall within one of the five exceptions in Proposed Rule 615(d)(2) and (g)? For example, should national securities exchanges be permitted to continue to operate RLPs that do not qualify for one of the exceptions in Proposed Rule 615(g)? Are there other types of limited trading facilities operated by national securities exchanges or open competition trading centers that should be permitted?

35. Is it appropriate, as provided in Proposed Rule 615(f)(4), to prohibit broker-dealers with knowledge of where a segmented order is to be routed for execution from submitting, or enabling the submission, of an order to the continuous order book of an open competition trading center that could trade with that segmented order? Do commenters believe that this prohibition could significantly interfere with broker-dealer handling of customer orders and, if so, would limiting the prohibition to the proprietary orders of a broker-dealer and its affiliates be consistent with the purposes of Proposed Rule 615?

36. Does Proposed Rule 615(e)(4) provide sufficient clarification as to which broker-dealer would be subject to the obligations of Proposed Rule 615(e) when there are multiple originating brokers for a segmented order and such originating brokers have in place a written agreement that allocates their responsibilities with respect to customer orders?

37. Does Rule 613 of Regulation NMS and the Consolidated Audit Trail NMS Plan require adequate reporting of all elements of this proposed rule so that regulators can evaluate compliance and study its effectiveness?[260]

VI. Paperwork Reduction Act Analysis

Certain provisions of Proposed Rule 615 contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[261] The Commission is submitting these collections of information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a currently valid control number. The title of the new collection of information is ''Order Competition Rule.'' The requirements of this collection of information would be mandatory for originating brokers, brokers and dealers that route segmented orders, national securities exchanges and NMS Stock ATSs that operate qualified auctions as open competition trading centers, and national securities associations that provide auction message information for dissemination in consolidated market data.

A. Summary of Collection of Information

Proposed Rule 615 and the proposed related amendments would create burdens under the PRA by creating the new collections of information described below for market participants that handle or execute segmented orders, or operate qualified auctions to provide competition for segmented orders.

1. Auction Messages

Proposed Rule 615 would require an open competition trading center to comply with the requirements of paragraph (c) for operation of a qualified auction for segmented orders.[262] Pursuant to paragraph (c)(1), an open competition trading center operating a qualified auction would be required to provide an auction message announcing

[260] *See supra* note 254 (discussing the type of data to be collected and reported pursuant to the CAT NMS Plan).

[261] 44 U.S.C. 3501 *et seq.*

[262] *Supra* section IV.C.

the initiation of a qualified auction for a segmented order for dissemination in consolidated market data. Each auction message shall invite priced auction responses to trade with a segmented order and shall include, among other things, the identity of the originating broker.[263]

2. Identifying and Marking Segmented Orders

a. Identification of Segmented Orders

Paragraph (e)(1) would require originating brokers to establish, maintain, and enforce written policies and procedures reasonably designed to identify the orders of customers as segmented orders.

b. Marking Segmented Orders

Paragraph (e)(2) of Proposed Rule 615 would require originating brokers to identify a segmented order as such to any destination the broker routes the order. Additionally, pursuant to paragraph (f)(1) of Proposed Rule 615, no broker-dealer that receives an order identified as a segmented order shall route the order without identifying the order as a segmented order to the routing destination. Thus, originating brokers and other broker-dealers that route segmented orders would be required to mark segmented orders as such.

3. Originating Broker Certification

Pursuant to paragraph (e)(3), if the originating broker for a segmented order that is the originating broker responsible for approving the opening of accounts with customers determines to make the certification referenced in paragraph (c)(1)(iii) of Proposed Rule 615, the originating broker shall establish, maintain, and enforce the required policies and procedures reasonably designed to assure that the identity of the originating broker will not be disclosed.[264] As discussed above, the certification must also be communicated to the open competition trading center operating the qualified auction.[265] The Commission believes that broker-dealers would likely use order marking systems to communicate to an open competition trading center whether an originating broker has made the certification referenced in Proposed Rule 615(c)(1)(iii). Accordingly, the originating broker with responsibility for transmitting orders for a customer's account would mark segmented orders to indicate that the certification has been made, and other broker-dealers that receive and route such orders would also mark such orders accordingly. As discussed below, the Commission believes that broker-dealers would have an initial burden to modify their systems to be able to mark segmented orders as such, and an ongoing burden to mark segmented orders. The Commission also believes that broker-dealers would include in those systems modifications, the ability to communicate whether an originating broker has made the referenced certification, and on an ongoing basis would include the certification information, as applicable, when marking segmented orders. Thus, the Commission believes that the initial burden for broker-dealers to modify their systems to mark orders as segmented orders and the ongoing burden to mark segmented orders as such, as discussed below, would subsume the burden to mark orders to communicate when the certification has been made and therefore estimates no additional costs associated with communication of the certification.

4. NMS Stock ATS Policies and Procedures To Exclude Subscribers

Pursuant to paragraph (d)(1) of Proposed Rule 615, a national securities exchange or NMS Stock ATS shall not operate a qualified auction for segmented orders unless it meets the definition of open competition trading center in Proposed Rule 600(b)(64).[266] For an NMS Stock ATS to qualify as an open competition trading center eligible to operate a qualified auction, Proposed Rule 600(b)(64)(ii)(D) would require the NMS Stock ATS to permit any registered broker or dealer (other than a broker or dealer subject to a statutory disqualification) to become a subscriber of the ATS. The NMS Stock ATS could, however, pursuant to written policies and procedures, prohibit a broker or dealer from being or becoming a subscriber, or impose conditions on a broker or dealer subscriber, that does not meet standards of financial responsibility or operational capability, as are prescribed by the written policies and procedures. Thus, to be able to exclude a broker-dealer from becoming a subscriber (other than a broker or dealer subject to a statutory disqualification), or imposing conditions on such a subscriber, the NMS Stock ATS would be required to have written policies and procedures.

B. Proposed Use of Information

As discussed above,[267] Proposed Rule 615 is designed to benefit individual investors by enhancing the opportunity for their orders to receive more favorable prices than they receive in the current market structure, as well as to benefit investors generally by giving them an opportunity to interact directly with a large volume of individual investor orders that are mostly inaccessible to them in the current market structure, by requiring that individual investor orders be exposed to order-by-order competition in fair and open auctions designed to obtain the best prices before such orders could be internalized by wholesalers or any other type of trading center that restricts order-by-order competition.

1. Auction Messages

The auction messages provided under paragraph (c)(1) of Proposed Rule 615 would be disseminated in consolidated market data and would be used by market participants to determine whether to submit auction responses. As discussed above, the wide dissemination of these auction messages would promote competition by soliciting potential auction responses from a wide spectrum of market participants.[268]

2. Identifying and Marking Segmented Orders

a. Identification of Segmented Orders

The requirements of paragraph (e)(1) of Proposed Rule 615 are designed to ensure that originating brokers are able to properly identify segmented orders. Specifically, written policies and procedures established pursuant to Proposed Rule 615(e)(1) would help a broker develop a process, relevant to its customers and the nature of its business, for properly identifying the orders of its customers as segmented orders. Further, the maintenance of written policies and procedures would generally: (1) assist a broker-dealer in supervising and assessing its compliance with Proposed Rule 615; and (2) assist the Commission and SRO staff in connection with examinations and investigations.

b. Marking Segmented Orders

Marking segmented orders as such pursuant to paragraphs (e)(2) and (f)(1) of Proposed Rule 615 would inform other market participants that the orders must be handled in accordance with the requirements of Proposed Rule 615, which, as discussed above, is designed

[263] As discussed above in section IV.C.1, the identity of the originating broker is not required to be disclosed, however, if the originating broker makes the requisite certification.

[264] *Supra* section IV.E.

[265] *Supra* section IV.C.1.

[266] *Supra* section IV.B.2, and IV.D.

[267] *Supra* section I.

[268] *Supra* section IV.C.1.

to provide competition for individual investor orders in fair and open auctions.

3. Originating Broker Certification

Written policies and procedures established pursuant to Proposed Rule 615(e)(3) would help a broker develop a process, relevant to the nature of its business, to ensure that its identity will not be disclosed and to support its certification. Further, the maintenance of written policies and procedures would generally: (1) assist a broker in supervising and assessing its compliance with Proposed Rule 615(e)(3); and (2) assist the Commission and SRO staff in connection with examinations and investigations.

Communication of the certification to the relevant open competition trading center would enable the open competition trading center to comply with the requirements of Proposed Rule 615(c)(1) that an auction message disclose the identity of the originating broker for a segmented order, unless the originating broker has made the requisite certification.[269]

4. NMS Stock ATS Policies and Procedures To Exclude Subscribers

To qualify as an open competition trading center, an NMS Stock ATS would be required to permit any registered broker-dealer (other than a broker-dealer subject to a statutory disqualification) to become a subscriber of the NMS Stock ATS, and must provide equal access among all subscribers of the NMS Stock ATS.[270] These requirements are designed to help ensure a level playing field regarding Proposed Rule 615 for competition among NMS Stock ATSs and national securities exchanges, in light of the different regulatory regimes for each. Similar to the requirements for national securities exchanges, under Proposed Rule 600(b)(64)(ii)(D), NMS Stock ATSs could exclude a registered broker-dealer, or impose conditions on a broker-dealer becoming a subscriber, that does not meet certain standards of financial responsibility or operational capability, but may only do so pursuant to written policies and procedures. While national securities exchanges must prescribe rules, consistent with the Exchange Act, for denying membership to a broker-dealer, the requirements applicable to NMS Stock ATSs are less stringent.[271] Requiring NMS Stock ATSs to establish written policies and procedures would help an NMS Stock ATS to develop a process for identifying registered broker-dealers that should be excluded because they do not meet certain standards, and would help level the competitive playing field regarding Proposed Rule 615 between NMS Stock ATSs and national securities exchanges. Further, the written policies and procedures would generally: (1) assist an NMS Stock ATS in supervising and assessing its compliance with the access requirements of proposed Rule 600(b)(64)(ii)(D); and (2) assist the Commission and SRO staff in connection with examinations and investigations.

C. Respondents

A summary of the Commission's initial estimates of the number of respondents for each collection of information requirement is set forth below:

COLLECTION OF INFORMATION—ORDER COMPETITION RULE

Description of burden	Rule	Applicable respondents	Number of respondents
Dissemination of Auction Messages	Rule 615(c)(1)	National securities exchanges operating qualified auctions.	6
		National securities associations	1
		NMS Stock ATSs operating qualified auctions	3
Total			10
Policies and Procedures to Identify Segmented Orders.	Rule 615(e)(1)	Originating broker-dealers with responsibility for identifying segmented orders.	157
Identification of Segmented Orders by Originating Brokers.	Rule 615(e)(2)	Originating broker-dealers with responsibility for identifying segmented orders.	157
Marking of Segmented Orders:			
Marking of Segmented Orders by Originating Brokers.	Rule 615(e)(2)	Originating broker-dealers with responsibility for marking segmented orders.	157
Marking of Segmented Orders by Broker-Dealers.	Rule 615(f)(1)	Broker-dealers that route orders identified as segmented orders.	25
Total			182
Policies and Procedures for Rule 615(c) Certification.	Rule 615(e)(3)	Originating broker-dealers certifying that they established, maintained, and enforced policies and procedures reasonably designed to assure that their identity will not be disclosed.	20
NMS Stock ATS Policies and Procedures to Exclude Subscribers.	Rule 615(d)(1)	NMS Stock ATSs operating qualified auctions that may exclude subscribers.	3

1. Auction Messages

As discussed above,[272] the open competition trading centers that would be required to provide auction messages for dissemination in consolidated market data pursuant to paragraph (c)(1) of Proposed Rule 615 would be national securities exchanges and NMS Stock ATSs that meet certain requirements and are eligible to operate qualified auctions for segmented orders. As is currently the case for quotation and trading information in NMS stocks, auction information would be provided by national securities exchanges and FINRA, as the only national securities association, to the SIPs for

[269] As discussed above, the disclosure of the identity of the originating broker in an auction message, absent the corresponding certification, is designed to help ensure fair competition among auction responders and persons that could otherwise trade with the segmented order, while giving originating brokers a choice as to whether or not to disclose their identity. *Supra* section IV.C.1.

[270] *Supra* section IV.B.2.

[271] *Id.*

[272] *Supra* section IV.B.2.

dissemination in consolidated market data.[273]

Given that all national securities exchanges already have systems and processes for providing information for dissemination in consolidated market data as well as systems and processes for disseminating certain auction information,[274] the Commission estimates that it is likely that 6 of the 16 national securities exchanges that trade NMS stocks would choose to qualify as open competition trading centers and operate qualified auctions. Of the 16 registered national securities exchanges currently trading NMS stocks,[275] 12 are part of one of 3 corporate affiliate groups, and the Commission estimates that one of the national securities exchanges from each of the three corporate groups would likely choose to operate qualified auctions.[276] Of the four other national securities exchanges that currently trade NMS stocks, the Commission estimates that three exchanges would likely choose to operate qualified auctions.[277]

The Commission also estimates that some, but not all NMS Stock ATSs would chose to operate qualified auctions for segmented orders. One of the requirements of Proposed Rule 615 is that an open competition trading center must meet the definition set forth in Proposed Rule 600(b)(64), which would require that an NMS Stock ATS permit any registered broker or dealer (other than a broker or dealer subject to a statutory disqualification) to become a subscriber and provide equal access among all subscribers. To qualify as an open competition trading center, Proposed Rule 600(b)(64) would also require an NMS Stock ATS to display quotations through an SRO display-only facility and operate as an automated trading center that displays automated quotations disseminated in consolidated market data. Given that NMS Stock ATSs often differentiate between groups or classes of subscribers with respect to access to services and most have adopted a ''dark'' trading model,[278] of the 32 NMS Stock ATSs, the Commission estimates that approximately three are likely to make the business model modifications necessary to meet the open competition trading center definition and be eligible to operate qualified auctions.[279]

As discussed above, broker-dealers provide certain NMS stock information to FINRA through its facilities, and FINRA provides information for dissemination in consolidated market data. To qualify as open competition trading centers, the three NMS Stock ATSs would have systems and processes in place to display quotations disseminated in consolidated market data. These ATSs would provide auction message information to FINRA, and FINRA would transmit the information for dissemination in consolidated market data.

The Commission requests comment on its estimates of the number of exchanges and NMS Stock ATSs that would become open competition trading centers operating qualified auctions, including whether the estimates should be lower or higher.

2. Identifying and Marking Segmented Orders

As discussed above, Proposed Rule 615 would impose certain obligations on originating brokers, and all other broker-dealers, with respect to their handling of segmented orders. Proposed Rule 600(b)(69) defines ''originating broker'' to mean any broker with responsibility for handling a customer account,[280] and Proposed Rule 600(b)(91) defines ''segmented order'' as an order for the account of a natural person (or an account held on behalf of a natural person or group of related family members) that meets certain trading volume thresholds.[281] Most segmented orders are handled by large, customer-facing broker-dealers that accept orders from customers and then route these orders to various execution centers. Also, as discussed above, in section IV.B.4, broker business practices can vary widely in terms of how customer accounts are handled, with some brokers performing the entire function internally and others allocating various responsibilities of an originating broker to other brokers-dealers such as carrying or clearing brokers. Those originating brokers who have been assigned responsibilities that include the transmission of orders for execution would need to identify and mark segmented orders as such to comply with Proposed Rule 615.[282]

Based on FOCUS Report data,[283] the Commission estimates that as of June 30, 2022 there were 3,498 registered broker-dealers,[284] and of these there were 157 reporting that they carry public customer accounts [285] that would likely be subject to the requirements of paragraphs (e)(1) and (2) of Proposed Rule 615.

Paragraph (f)(1) of Proposed Rule 615 would also require every broker-dealer that receives a segmented order and routes that order to identify the order as such. This would include broker-dealers

[273] *Supra* sections III.B.1 and IV.C.1.

[274] *Supra* section IV.B.1. In addition to providing consolidated market data, national securities exchanges also sell their individual proprietary market data products, and their depth of book (''DOB'') products typically include, among other things, information about orders participating in auctions, including auction order imbalances. *See, e.g.,* Nasdaq Rule 123(a)(1)(B) *available at https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%20Equity%207#section_123_nasdaq_depth-of-book_data* (defining Nasdaq's ''Nasdaq TotalView'' data product); and *https://www.nyse.com/market-data/real-time/integrated-feed* (describing NYSE's ''NYSE Integrated'' data product).

[275] *Supra* note 82 and accompanying text.

[276] CBOE Holdings, Inc. is the parent company of Cboe BYX, Cboe BZX, Cboe EDGA, and Cboe EDGX; Nasdaq, Inc. is the parent company of Nasdaq BX, Nasdaq PhlX, and Nasdaq; Intercontinental Exchange, Inc. is the parent company of NYSE, NYSE American, NYSE Arca, NYSE CHX, and NYSE National.

[277] The remaining four national securities exchanges that trade NMS stocks are IEX, LTSE, MEMX, and MIAX PEARL, which is a subsidiary of MIAX International Holdings, Inc. Of these, based on examination of data related to national securities exchanges, for the month ended Nov. 30, 2022, only LTSE did not report more than 1% of share volume in NMS stocks. Proposed Rule 600(b)(64) requires a national securities exchange to have had an average daily share volume for NMS stocks of 1% or more during at least four of the preceding 6 calendar months to qualify as an open competition trading center eligible to operate a qualified auction. *See* Cboe, U.S. Historical Market Volume Data, *available at: https://cboe.com/us/equities/market_statistics/historical_market_volume/.*

[278] NMS Stock ATSs must publicly disclose information about their trading system and services, including differences in access, on Form ATS–N. Links to Form ATS–N filings are available on the Commission's website at *https://www.sec.gov/divisions/marketreg/form-ats-n-filings.htm. See also* ATS–N Adopting Release, *supra* note 159, 83 FR at 38886 n.1292 and accompanying text (discussing the dark trading model adopted by most NMS Stock ATSs).

[279] The Commission bases this estimate on the following considerations. While currently no NMS Stock ATS would qualify as an Open Competition Trading Center, there is currently one NMS Stock ATS that discloses that it crosses the 5% volume threshold for fair access under Regulation ATS for securities that are available for trading on its platform. This NMS Stock ATS may choose to make the necessary modifications to operate as an Open Competition Trading Center. In addition, given the low-cost nature of segmented order flow that is likely to be attractive to market participants, the Commission estimates that two additional NMS Stock ATSs would choose to make the necessary modifications to operate as Open Competition Trading Centers.

[280] *Supra* section IV.B.4.

[281] *Supra* section IV.B.1.

[282] *Supra* section IV.B.4.

[283] FOCUS Reports, or ''Financial and Operational Combined Uniform Single'' Reports, are monthly, quarterly, and annual reports that broker-dealers are generally required to file with the Commission and/or SROs pursuant to Exchange Act Rule 17a–5. *See* 17 CFR 240.17a–5.

[284] The data is obtained from FOCUS Reports, Part II filed for the second quarter of 2022.

[285] Information on the number broker-dealers that carry public customer accounts is from broker-dealers' responses on their most recently available FOCUS Report Form X–17A–5 Schedule I. Because ''public customer accounts'' may hold orders other than segmented orders, for example institutional customers would also fall within the definition of ''public customer'' for purposes of FOCUS Report Form X–17A–5 Schedule I, 157 is likely an overestimate.

that act as wholesalers that would be required to route a segmented order to be exposed in a qualified auction at a price prior to executing it, or that route the order to another execution center; and any other broker-dealer, including originating broker-dealers assigned responsibilities that include identifying and marking orders, that routes segmented orders. The Commission estimates that approximately 25 broker-dealers that do not also carry customer accounts would route retail orders.[286]

a. Identification of Segmented Orders

As discussed above, the Commission estimates that there are 157 originating brokers that would be required to establish, maintain, and enforce written policies and procedures reasonably designed to identify customer orders as segmented orders pursuant to paragraph (e)(1) of Proposed Rule 615. While there are additional broker-dealers, such as introducing brokers, that would meet the definition of ''originating broker,'' only those broker-dealers carrying customer accounts are likely to have been allocated responsibility for routing orders and therefore would have burdens and costs associated with implementing the requirements of paragraph (e)(1) of Proposed Rule 615.

The Commission requests comment on whether its estimate of the number of brokers that would fall within the scope of Proposed Rule 615(e)(1), including whether the estimate should be higher or lower.

b. Marking Segmented Orders

As discussed above, the Commission estimates that there would be 157 originating brokers that would be required to identify segmented orders as such prior to routing those orders pursuant to Proposed Rule 615(e)(2). Additionally, the Commission estimates that there would be an additional 25 broker-dealers that route customer orders, and would not also be originating brokers in the scope of paragraph (e)(2), that would be required, pursuant to Proposed Rule 615(f)(1) to identify any segmented orders received as such, when routing the order to a routing destination.

The Commission requests comment on its estimate of the number of broker-dealers that would fall within the scope of paragraphs (e)(2) and (f)(1) of Proposed Rule 615, including whether the estimate should be higher or lower.

3. Originating Broker Certification

It is likely that most originating brokers with segmented orders would choose to be identified as the originating broker of a segmented order because that information would be used by market participants to help predict the level of adverse selection costs associated with order flow from a given originating broker. Thus, originating brokers known to be associated with lower adverse selection costs would likely want auction responders to know their identity. Based on a review of data related to broker-dealers, the Commission estimates that there are approximately 1,267 broker-dealers that would meet the definition of ''originating broker'' and that have responsibility for monitoring customer accounts.[287] These broker-dealers would be required to maintain the policies and procedures required by paragraph(e)(3) of Proposed Rule 615 if they choose not to have their identity disclosed in auction messages. While it is very difficult for the Commission to know how many originating brokers would choose to certify that they established, maintained, and enforced written policies and procedures reasonably designed to assure that their identity will not be disclosed to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order routed by the originating broker, the Commission preliminarily estimates that 20 of the 1,267 originating brokers would choose not to disclose their identity and would be required to establish, maintain and enforce the written policies and procedures required by paragraph (e)(3) of Proposed Rule 615. While segmented orders, by definition, are limited to orders for accounts with an average daily number of trades in NMS stocks of less than 40 in each of the six preceding months, and thereby likely associated with lower adverse selection costs, there may be some broker-dealers that have order flow associated with higher levels of adverse selection costs or who have customers or business models that preference anonymity.[288]

As discussed above, the originating broker with responsibility for transmitting orders for a customer's account would likely also mark segmented orders to indicate that the certification has been made, and other broker-dealers that receive and route such orders would also need to mark such orders accordingly. The same broker-dealers that would mark orders as segmented orders pursuant to paragraphs (e)(2) and (f)(1) of Proposed Rule 615, discussed above in section VI.C.2.b, would also likely mark orders, as applicable, to communicate the certification to the open competition trading center.

The Commission requests comment on its estimate of the number of originating brokers that would certify that they have established, maintained, and enforced written policies and procedures reasonably designed to assure that the identity of the originating broker will not be disclosed, including whether the estimate should be higher or lower. The Commission also requests comment on whether it is reasonable to estimate that such certifications would be communicated to open competition trading centers via order marking and that the same broker-dealers that would mark orders as segmented orders would also mark orders for the purpose of communicating such certifications to the open competition trading centers operating qualified auctions.

4. NMS Stock ATS Policies and Procedures To Exclude Subscribers

As discussed above, of the 32 NMS Stock ATSs, the Commission estimates that approximately 3 would operate qualified auctions. To do so, those NMS Stock ATSs would need to meet the definition of open competition trading center, and as such, would be required to have written policies and procedures to prohibit any registered broker or dealer from being or becoming a subscriber, or impose conditions upon a such a subscriber, that does not meet the standards of financial responsibility or operational capability of the NMS Stock ATS. The Commission anticipates that all three NMS Stock ATSs operating qualified auctions would have standards

[286] This estimate is based broker-dealers' responses on their most recently available FOCUS Report Form X–17A–5 Schedule I, showing that there are 25 broker-dealers that effect public customer transactions in equity securities on a national securities exchange or OTC that do not carry public customer accounts.

[287] The Commission estimates that there are approximately 157 broker-dealers that carry at least one customer account trading in NMS stocks, and 1,110 broker-dealers that introduce at least one customer account trading in NMS stocks. The estimate of 157 broker-dealers that carry at least one customer account trading in NMS stocks and options is based on the number of broker-dealers that report carrying at least one customer account on their 2021 FOCUS Report Form X–17A–5 Schedule I; and the estimate of 1,110 broker-dealers that introduce at least one customer account trading in NMS stocks and options is based on estimates using broker-dealers' FDIDs identified in CAT data during the 2021 calendar year. As CAT data includes information only about NMS stocks and options, broker-dealers that introduce or carry customer accounts trading in other assets classes are not included in these numbers.

[288] These broker-dealers are likely to be larger broker-dealers that have customers who are more informed traders. Lower-volume broker-dealers with fewer orders are not likely to have this type of customer.

for financial responsibility or operational capability for their subscribers.[289]

The Commission requests comment on whether its estimate that all NMS Stock ATSs operating qualified auctions would have standards for financial responsibility or operational capability for their subscribers is reasonable.

D. Burdens

1. Auction Messages

As discussed above, the estimated six national securities exchanges operating as open competition trading centers operating qualified auctions would be required to collect and provide the information necessary to generate auction messages in consolidated market data. These entities currently operate auctions for which messages are disseminated in their proprietary data feeds, and already provide other information regarding NMS stocks for dissemination in consolidated market data. The auction messages would be a new data element that the national securities exchanges would have to make available for inclusion in the dissemination of consolidated market data. Because the national securities exchanges currently collect and calculate data necessary to generate other elements of consolidated market data, and also currently provide auction information to subscribers of proprietary data, the requirements of Rule 615(c)(1) would likely impose minimal initial and ongoing burdens on these respondents, including any changes to their systems.

The Commission estimates that a national securities exchange would require an average of 220 initial burden hours of legal, compliance, information technology, and business operations personnel time to prepare and implement a system to collect and provide the information necessary to generate auction messages for dissemination in consolidated market data, at a monetized cost per exchange of $78,580.[290] And each national securities exchange would incur an annual average burden on an ongoing basis of 336 hours to collect and provide auction messages, at a monetized cost per exchange of $118,560.[291]

Proposed Rule 615(c)(1) would also require auction messages initiating qualified auctions held on NMS Stock ATSs operating as open competition trading centers to be provided for dissemination in consolidated market data. As discussed above, like national securities exchanges, FINRA already collects information from broker-dealers for dissemination in consolidated market data, and the addition of auction message information as a new data element would impose approximately the same burdens and costs on FINRA as for national securities exchanges.[292]

To qualify as an open competition trading center eligible to operate qualified auctions, an NMS Stock ATS would need to display quotations through an SRO display-only facility in compliance with Rule 610(b); display automated quotations disseminated in consolidated market data pursuant to Rule 603(b);[293] and provide trade reports identifying the NMS Stock ATS as the venue of execution that are disseminated in consolidated market data pursuant to Rule 603(b).[294] These ATSs would need to have systems in place to collect and calculate such information and transmit the information to FINRA for dissemination in consolidated market data. It is likely that NMS Stock ATSs that run qualified auctions would be operated by large, sophisticated broker-dealers that have in place systems that could be modified to collect and disseminate auction message information. The Commission estimates that the burdens and costs to these NMS Stock ATSs to modify their systems to also provide auction information for dissemination in consolidated data would be minimal, and would be the same as those for national securities exchanges and FINRA.[295]

The Commission estimates the initial total aggregate burden and cost for all 10 respondents would be 2,220 hours, at a monetized cost of $785,800,[296] and the ongoing total burden and cost would be 3,360 hours, at a monetized cost of $1.12 million.[297]

A summary of the initial and ongoing burdens and costs described above is set forth below:

TOTAL ESTIMATED BURDEN ASSOCIATED WITH PROVIDING AUCTION MESSAGES IN CONSOLIDATED MARKET DATA

	Respondents	Burden hours per respondent	Aggregate burden hours	Monetized cost per respondent	Aggregate monetized cost
Total Initial Burden	10	220	2,220	$78,580	$785,800
Total Ongoing Burden	10	336	3,360	118,560	1,185,600

The Commission requests comment on whether there would be different or additional burdens or costs for open competition trading centers to provide the information necessary to generate auction messages in consolidated market data. The Commission also requests comment on whether the burdens and costs for NMS Stock ATSs to provide the information necessary to generate auction messages in consolidated market data would be different from those for national securities exchanges.

[289] This estimate is based on a review of NMS Stock ATS disclosures on Form ATS–N.

[290] The Commission estimates the monetized initial burden for this requirement to be $78,580: (Compliance Manager at $344 for 105 hours) + (Attorney at $462 for 70 hours) + (Sr. Systems Analyst at $316 for 20 hours) + (Operations Specialist at $152 for 25 hours) = 220 initial burden hours, at a monetized cost of $78,580. Throughout this section VI.D, the Commission derived estimates for in-house personnel costs on per hour figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[291] The Commission estimates the monetized ongoing, annual burden for this requirement to be $118,560: (Compliance Manager at $344 for 192 hours) + (Attorney at $462 for 48 hours) + (Sr. Systems Analyst at $316 for 96 hours) = 336 initial burden hours, at a monetized cost of $118,560.

[292] *Supra* notes 290 and 291.

[293] The requirements of Rule 610(b) for trading centers that choose to display quotations in NMS stock are existing requirements under Regulation NMS, and the requirements of Rule 603(b) pertaining to the display of quotations from trading centers that qualify as automated trading centers, are existing requirements that are not modified by Proposed Rule 615 and the proposed new definitions under Rule 600 and do not constitute new collections of information.

[294] Proposed Rule 600(b)(64)(ii).

[295] *Supra* notes 290 and 291.

[296] The Commission estimates the monetized ongoing, annual burden for this requirement to be $785,800: $78,580 × (6 national securities exchange + 1 registered securities association + 3 NMS stock ATSs) = $785,800.

[297] The Commission estimates the monetized ongoing, annual burden for this requirement to be $1,185,600: $118,560 × (6 national securities exchange + 1 registered securities association + 3 NMS stock ATSs) = $1,185,600.

2. Identifying and Marking Segmented Orders

a. Policies and Procedures To Identify Segmented Orders

As discussed above, the 157 broker-dealers that would need to identify and mark orders to comply with paragraphs (e)(1) and (e)(2) of Proposed Rule 615 likely already would have policies and procedures to classify orders for compliance with SRO rules and other regulatory requirements, and would have access to the information that would enable them to identify orders as being for the account of a natural person or a group of related family members and to monitor the level of trading activity in the accounts of their customers, as well as systems and processes for marking orders.[298] For example, these broker-dealers either themselves collect data from their customers, or receive such information through an introducing broker for whom they are providing services. These broker-dealers will also be familiar with how to adapt their systems and processes to identify which customer accounts meet the proposed volume requirements that would cause their orders to meet the definition of segmented order in Proposed Rule 600(b)(89) and to accommodate the new order marks.

While most broker-dealers likely have capabilities to identify the characteristics of their customers' orders that would be necessary to identify orders as segmented orders, they would not have written policies and procedures regarding the identification of segmented orders, which would be a new classification for a subset of customer orders, as would be required by Proposed Rule 615(e)(1). The Commission estimates that, to initially comply with this obligation, broker-dealers would employ a combination of in-house and outside legal and compliance counsel to update existing policies and procedures.

Initial Burdens and Costs

The Commission estimates that each of the 157 broker-dealers that would be subject to the collection of information under Proposed Rule 615(e)(1) would incur an initial average internal burden of 40 hours for in-house legal and 10 hours for in-house compliance counsel to update existing policies and procedures to comply with paragraph (e)(1) of Proposed Rule 615, and an initial in-house burden of 5 hours each for a General Counsel and a Chief Compliance Officer to review and approve the updated policies and procedures, for a total of 60 burden hours, at a monetized cost of $28,800.[299] In addition, the Commission estimates a cost of $4,960 for outside counsel to review the updated policies and procedures on behalf of a broker-dealer.[300] The Commission therefore estimates the aggregate initial burden for originating brokers to be 9,420 burden hours [301] at a monetized cost of $4.52 million,[302] and the aggregate initial cost for outside counsel to be $778,720 to establish policies and procedures as required by Proposed Rule 615(e)(1).[303]

Ongoing Burdens and Costs

The Commission estimates that broker-dealers would review and update their policies and procedures for compliance with Proposed Rule 615 on an annual basis, and that they would perform the review and update using in-house personnel. The Commission estimates that each broker-dealer would annually incur an internal burden of twelve hours to review and update existing policies and procedures of 4 hours for legal personnel, 4 hours for compliance personnel, and 4 hours for business-line personnel at a monetized cost of $4,476.[304] The Commission therefore estimates an ongoing, aggregate burden for broker-dealers of 1,884 hours, at a monetized cost of $702,732.[305]

A summary of the initial and ongoing burdens and costs described above is set forth below:

TOTAL ESTIMATED OUTSIDE COSTS TO ESTABLISH POLICIES AND PROCEDURES TO IDENTIFY SEGMENTED ORDERS

	Respondents	Outside cost per respondent	Aggregate outside cost
Total Initial Outside Costs	157	$4,960	$778,720

TOTAL ESTIMATED BURDEN TO ESTABLISH AND MAINTAIN POLICIES AND PROCEDURES TO IDENTIFY SEGMENTED ORDERS

	Respondents	Burden hours per respondent	Aggregate burden hours	Monetized cost per respondent	Aggregate monetized cost
Total Initial Burden	157	60	9,420	$28,800	$4,521,600
Total Ongoing Burden	157	12	1,884	4,476	702,732

[298] *Supra* section IV.B.1 (discussing the definition of segmented order, which is designed to facilitate compliance and minimize the costs of compliance) and note 253 and accompanying text.

[299] The Commission estimates the monetized initial burden for this requirement to be: (Attorney at $462 for 40 hours) + (Compliance Counsel at $406 for 10 hours) + (Deputy General Counsel at $663 for 5 hours) + (Chief Compliance Officer at $589 for 5 hours) = 60 initial burden hours and a monetized cost of $28,800.

[300] The Commission's estimates of the relevant wage rates for outside legal services takes into account staff experience, a variety of sources including general information websites, and adjustments for inflation. The Commission estimates that the average hourly rate for legal services is $496/hour. This cost estimate is therefore based on the following calculation: (10 hours of review) × ($496/hour for outside counsel service) = $4,960 in outside counsel costs.

[301] This estimate is based on the following calculation: (60 burden hours of review per broker-dealer) × (157 broker-dealers) = 9,420 aggregate burden hours.

[302] This estimate is based on the following calculation: ($28,800 per broker-dealer) × (157 broker-dealers) = $4,521,600.

[303] This estimate is based on the following calculation: ($4,960 for outside costs per broker-dealer) × (157 broker-dealers) = $778,720 in outside counsel costs.

[304] The Commission estimates the monetized ongoing, annual burden for this requirement to be: (Attorney at $462 for 4 hours) + (Compliance Counsel at $406 for 4 hours) + (Intermediate Business Analyst at $251 for 4 hours) = 12 ongoing burden hours and $4,476.

[305] These estimates are based on the following calculations: (12 burden hours per broker-dealer) × (157 broker-dealers) = 1,884 aggregate ongoing burden hours; and $4,476 per broker-dealer × 157 broker-dealers = $702,732.

The Commission requests comment on whether there would be different or additional burdens or costs for originating brokers to establish and maintain written policies and procedures to identify segmented orders.

b. Identifying and Marking Segmented Orders

As discussed above, the Commission estimates that there are 157 broker-dealers that would need to mark segmented orders as such to comply with paragraph (e)(2) of Proposed Rule 615, and an additional 25 broker-dealers that would not be required to comply with the marking requirements of paragraph (e)(2) of Proposed Rule 615, but would be required to mark orders prior to routing as required by paragraph (f)(1) of Proposed Rule 615.[306]

Initial Burdens and Costs

For purposes of complying with Proposed Rule 615(e)(2), for an originating broker to identify whether a customer order meets the definition of ''segmented order'' and must be marked accordingly, a broker-dealer would first need to establish mechanisms to proactively and systematically identify which orders for NMS stocks are for the account of customers that are natural persons or held in a legal form on behalf of a natural person or group of related family members; and of those, which are orders for an account in which the average daily number of trades in NMS stocks was less than 40 in each of the six preceding months.[307] For purposes of this analysis, and as discussed above, the Commission believes that most broker-dealers already collect information about their customers' accounts, or receive information about customer accounts from an introducing broker, and would already have an existing technological infrastructure in place, and the Commission assumes that such infrastructure would need to be modified to effect compliance with Proposed Rule 615.

Acknowledging that costs and burdens may vary greatly according to the size or complexity of the broker-dealer and that some broker-dealers would implement the changes in-house, while others would engage a third party vendor. The Commission estimates that approximately one third of the 157 broker-dealers (or 52) would implement the changes in-house, while the remaining 105 would engage a third-party vendor. The Commission expects that the modification of a broker-dealer's existing technology performed in-house would require 260 hours at a monetized cost of $95,480.[308] The Commission estimates that the burden for a broker-dealer engaging a third-party to implement the modifications would be 50 hours at a monetized cost of $18,385,[309] and $35,000 for the third-party service provider to perform the necessary work.[310] The aggregate burden for those broker-dealers to modify existing technology to identify segmented orders that perform the modification in-house would therefore be 13,520 burden hours, at a monetized cost of $4,964,960;[311] and the aggregate costs and burdens for those broker-dealers employing a third-party service provider would be $3,675,000[312] and 5,250 burden hours, at a monetized cost of $1,930,425.[313]

For purposes of compliance with Proposed Rule 615(f)(1), a segmented order received by a routing broker-dealer would already have been identified as such by the originating broker pursuant to Proposed Rule 615(e)(2). Like originating broker-dealers, these 25 broker-dealers, would however, need to modify their systems to enable them to mark orders as segmented orders prior to routing such orders to a routing destination.

The Commission estimates that the 157 originating brokers and the additional 25 routing broker-dealers would each incur ongoing burdens to mark orders as ''segmented orders'' (and as applicable to communicate an originating broker's certification), which are discussed further below, as well as initial, one-time technology project costs to update their existing order marking systems. The Commission estimates the initial one-time technology project costs for originating brokers to add the ''segmented order'' and certification marks to their existing marking systems to comply with paragraph (e)(2) of Proposed Rule 615, and the initial one-time technology project costs for routing broker-dealers to add the ''segmented order'' and certification marks to their existing marking systems to comply with paragraph (f)(1) of Proposed Rule 615, to be $170,000 per broker-dealer,[314] for a an aggregate total cost of $30.94 million.[315]

Ongoing Burdens and Costs

The Commission estimates that a total of approximately 2.2 billion ''segmented orders'' would be entered annually.[316] This would make the average number of annual ''segmented order'' order marks by each of the 182 broker-dealers to be 11.9 million.[317] Each instance of marking an order as a ''segmented order,'' and as applicable to communicate that an originating broker has certified that it has established, maintained, and enforced the requisite policies and procedures to assure that its identity will not be disclosed, is estimated to take between approximately 0.00001158 and 0.000139 hours (0.042 and 0.5 seconds) to

[306] As discussed above, these broker-dealers would also mark orders, as applicable, to communicate that an originating broker certifies that it established, maintained, and enforced the requisite policies and procedures to assure that its identity would not be disclosed.

[307] *Supra* sections IV.B.1 and IV.E.

[308] The Commission estimates the monetized initial burden for this requirement to be: (Sr. Programmer at $368 for 160 hours) + (Sr. Database Administrator at $379 for 40 hours) + (Sr. Business Analyst at $305 for 40 hours) + (Attorney at $462 for 20 hours) = 260 initial burden hours and a monetized cost of $95,480.

[309] The Commission estimates the monetized initial burden for this requirement to be: (Sr. Business Analyst for 15 hours at $305 per hour) + (Compliance Manager for 20 hours at $344 per hour) + (Attorney for 15 hours at $462 per hour) = 50 initial burden hours at a monetized cost of $18,385.

[310] The Commission's estimate is based on prior estimates for the cost of systems modifications to capture additional order handling information. Securities Exchange Act Release No. 84528 (Nov. 2, 2018) 83 FR 58338 (Nov. 19, 2018) at 58383, n.492 and accompanying text.

[311] This cost estimate is based on the following calculation: (260 initial burden hours at a monetized cost of $95,480) × (52 broker-dealers) = 13,520 initial burden hours and a monetized cost of $4,964,960.

[312] This cost estimate is based on the following calculation: ($35,000 in third-party service provider costs per broker-dealer) × (105 broker-dealers) = $3,675,000 in aggregate outside third-party provider costs.

[313] The Commission estimates the aggregate monetized initial burden for this requirement to be: (50 initial burden hours at a monetized cost of $18,385) × (105 broker-dealers) = 5,250 initial burden hours and a monetized cost of $1,930,425.

[314] This estimate is based on industry sources of the cost to program systems to add a new marking classification and adjusted for inflation. *See, e.g.,* Securities Exchange Act Release No. 94313 (Feb. 25, 2022), 87 FR 14950, 14976 (Mar. 16, 2022) (proposing amendments to Regulation SHO) (''Regulation SHO Amendment Proposal'').

[315] This cost estimate is based on the following calculation: ($170,000 system project costs per broker-dealer) × (157 originating broker-dealers + 25 routing broker-dealers) = $30,940,000 in aggregate system project costs.

[316] This estimate is based on CAT data for individual investor stock orders handled by wholesalers during Q1 2022. *See* Tables 7 and 10, *infra,* sections VII.B.4 and VII.B.5 (showing a total of approximately 271,310,000 orders handled during the period). Because as discussed in section VII.B.4 below, this number excludes certain orders, it likely significantly understates the total number of individual investor orders handled by wholesalers. We have therefore doubled the number for purposes of our estimate, and multiplied by four to arrive at an estimated annual number of segmented orders of 2,170,480,000.

[317] This figure was calculated as follows: 2,170,480,000 ''segmented orders'' orders requiring order marking divided by 182 broker-dealers.

complete.[318] Thus, it would take each of the 182 broker-dealers between approximately 138 to 1,658 hours to mark segmented orders annually; [319] and the Commission estimates the aggregate burden to be between approximately 25,134 and 301,697 hours.[320] This estimate is based on a number of factors, including: previously estimated burdens for the current marking requirements of other Federal securities rules and regulations; [321] that broker-dealers should already have the necessary mechanisms and procedures in place and already be familiar with processes and procedures to comply with other marking requirements under Federal securities rules and regulations (such as the requirements of Rule 200(g) of Regulation SHO); and that broker-dealers should be able to continue to use the same or similar mechanisms, processes and procedures to comply with Proposed Rule 615.

A summary of the estimated initial and ongoing burdens and costs described above is set forth below:

TOTAL ESTIMATED INITIAL BURDENS AND COSTS TO IDENTIFY SEGMENTED ORDERS

	Respondents	Burden hours	Monetized cost per respondent	Third-party cost	Aggregate burden hours	Aggregate cost
Initial Burden to Modify In-house	52	260	$95,480		13,520	$4,964,960
Initial In-house Burden in connection with use of Third-party	105	50	18,385		5,250	1,930,425
Outside Costs for Third-party Services	105			$35,000		3,675,000

TOTAL ESTIMATED INITIAL SYSTEM MODIFICATION COSTS TO MARK SEGMENTED ORDERS

	Respondents	Cost per respondent	Aggregate cost
Initial Technology Costs	182	$170,000	$30,940,000

TOTAL ESTIMATED ONGOING BURDEN TO MARK SEGMENTED ORDERS

Originating brokers with individual accounts and routing brokers	Annual segmented orders	Annual segmented orders per originating broker	Estimated burden hours per segmented order	Total annual industry burden hours	Annual burden per originating broker
182	2,170,480,000	11,925,714	0.00001158 to 0.000139	25,134 to 301,697	138.10 to 1,657.68.

The Commission requests comment on whether there would be different or additional burdens or costs for brokers to identify and mark segmented orders as such. Would the burdens and be lower or higher? Are broker-dealers more likely to perform these function in-house, or use third-party service providers? Should the estimated cost to employ a third-party service provider be lower or higher?

3. Originating Broker Certification

Those originating brokers that do not want their identity to be disclosed in the auction message initiating a qualified auction would be required to establish, maintain and enforce written policies and procedures reasonably designed to assure that the identity of the originating broker will not be disclosed, directly or indirectly, to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order. The Commission believes that originating brokers choosing to make certifications referred to in Proposed Rule 615(c)(1)(iii) would be familiar with how to adapt their systems and processes to assure that the identity of the originating broker is not disclosed, in compliance with the requirements of Proposed Rule 615(e)(3). The Commission acknowledges that policies and procedures may vary greatly by broker-dealer, given the differences in size and the complexity of broker-dealer business models. Accordingly, the Commission believes that the need to update policies and procedures, as well as the ongoing compliance costs, might also vary greatly.

Initial Burdens and Costs

The Commission estimates that there would be 20 broker-dealers that would chose to make a Proposed Rule 615(c)(1)(iii) certification. To initially comply with the obligation to establish written policies and procedures to comply with Proposed Rule 615(e)(3), broker-dealers would employ a combination of in-house and outside

[318] The upper end of this estimate—0.5 seconds—is based on the same time estimate for marking sell orders ''long'' or ''short'' under Rule 200(g) of Regulation SHO. *See* Regulation SHO Amendment Proposal, *supra* note 314, 87 FR at 14975 (citing Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48023 (Aug. 6, 2004) (''Regulation SHO Adopting Release''). *See also* Securities Exchange Act Release No. 48709 (Oct. 28, 2003) 68 FR 62972, 63000 n. 232 (Nov. 6, 2003) and Securities Exchange Act Release No. 59748 (Apr. 10, 2009), 74 FR 18042, 18089 (Apr. 20, 2009) (providing the same estimate—0.5 seconds—for marking sell orders ''short exempt'' under Rule 200(g) of Regulation SHO)). The lower end of this estimate—0.042 seconds—is based on a Commission estimate that computing speeds are twelve times faster today than they were in 2007. Regulation SHO Amendment Proposal, *supra* note 314, 87 FR at 14975, 15000 (stating that according to an industry performance evaluation for server processors, computing speed has increased by at least 12 times since 2007 (the earliest year in the data and citing Year on Year Performance (for server processors), PassMark Software Pty. Ltd., *available at https://www.cpubenchmark.net/year-on-year.html*).

[319] These figures were calculated as follows: (11,925,714 ''segmented orders'' orders per broker-dealer) × (0.00001158 hours) = 138.10 hours; and (11,925,714 ''segmented orders'' orders per broker-dealer) × (0.000139 hours) = 1,657.67 hours.

[320] These figures were calculated as follows: (2,170,480,000 ''segmented orders'' orders requiring order marking) × (0.00001158 hours) = 25,134.16 hours; and (2,170,480,000 ''segmented orders'' orders) × (0.000139 hours) = 301,696.70 hours.

[321] *See, e.g.,* Regulation SHO Amendment Proposal, *supra* note 314, 87 FR at 14975 (discussing estimated marking requirements to comply with Rule 200(g) of Regulation SHO which requires broker-dealers to mark sell orders ''long,'' ''short,'' or ''short exempt'').

legal and compliance counsel to update their existing policies and procedures. The Commission estimates that each of these 20 broker-dealers would incur a one-time average internal burden of 40 hours for in-house legal and 10 hours for in-house compliance counsel to update existing policies and procedures to comply with paragraph (e)(3) of Proposed Rule 615, and a one-time burden of 5 hours each for a General Counsel and a Chief Compliance Office to review and approve the updated policies and procedures, for a total of 60 burden hours.[322] In addition, the Commission estimates a cost of $4,960 for outside counsel to review the updated policies and procedures on behalf of a broker-dealer.[323] The Commission therefore estimates the aggregate initial burden for originating brokers to be 1,200 burden hours [324] at a monetized cost of $576,000,[325] and the aggregate total cost for outside counsel to be $99,200 to establish policies and procedures as required by Proposed Rule 615(e)(3).[326]

Ongoing Burdens and Costs

The Commission estimates that broker-dealers would review and update their policies and procedures for compliance with Proposed Rule 615 on an annual basis, and that they would perform the review and update using in-house personnel. The Commission estimates that each broker-dealer would annually incur an internal burden of twelve hours to review and update existing policies and procedures: four hours for legal personnel, four hours for compliance personnel, and four hours for in-line business personnel, at a monetized cost of $4,476.[327] The Commission therefore estimates an ongoing, aggregate burden for broker-dealers of approximately 240 hours [328] and a monetized cost of $89,520.[329] The ongoing burden to communicate certifications is included with the cost for ''segmented order'' marking discussed above in section VI.D.2.b. A summary of the estimated initial and ongoing burdens and costs described above in this section VI.D.3 are set forth below:

TOTAL ESTIMATED OUTSIDE COSTS TO ESTABLISH POLICIES AND PROCEDURES REASONABLY DESIGNED TO ASSURE THAT THE ORIGINATING BROKER OF A SEGMENTED ORDER WILL NOT BE DISCLOSED

	Respondents	Outside cost per respondent	Outside aggregate cost
Initial Outside Costs	20	$4,960	$99,200

TOTAL ESTIMATED BURDEN TO ESTABLISH AND MAINTAIN POLICIES AND PROCEDURES REASONABLY DESIGNED TO ASSURE THAT THE ORIGINATING BROKER OF A SEGMENTED ORDER WILL NOT BE DISCLOSED

	Respondents	Burden hours per respondent	Aggregate burden hours	Monetized cost per respondent	Aggregate monetized cost
Initial Burden	20	60	1,200	$28,800	$576,000
Ongoing Burden	20	12	160	4,476	89,520

The Commission requests comment on whether there would be different or additional burdens or costs for originating brokers to establish and maintain written policies and procedures reasonably designed to assure that its identity will not be disclosed. For example, do brokers have existing policies and procedures related to ensuring confidentiality in other contexts that could be expanded upon or are there are additional burdens and costs associated with review of a broker's internal systems that should be factored into the Commission's estimate? Are originating broker's likely to perform the function of establishing and maintaining these policies and procedures in-house or would they employ third-party service providers, such as outside counsel? Would originating brokers also have costs to modify their internal systems to prevent disclosure of the identity of the originating broker in support of a Proposed Rule 615(c)(1)(iii) certification or other costs in support of such a certification?

4. NMS Stock ATS Policies and Procedures for Excluding Subscribers

The Commission believes that NMS Stock ATSs—in particular those whose broker-dealer operators are large, multi-service broker-dealers—generally have,[330] and likely maintain in writing, standards of financial responsibility and operational capability for subscribers to their system, and also generally have policies and procedures for admitting new persons as subscribers or limiting access to services. NMS Stock ATSs are not, however, currently required to have written policies and procedures for granting access to their trading system, unless they meet the fair access threshold of Rule 301(b)(5).[331] NMS Stock ATSs are, however, required to disclose on Form ATS–N whether there are any conditions the ATSs requires a person to satisfy to become a subscriber and whether there are any limitations

[322] The Commission estimates the monetized ongoing, annual burden for this requirement to be: (Attorney at $462 for 40 hours) + (Compliance Counsel at $406 for 10 hours) + (Deputy General Counsel at $663 for 5 hours) + (Chief Compliance Officer at $589 for 5 hours) = 60 initial burden hours and $28,800.

[323] This cost estimate is based on the following calculation: (10 hours of review) × ($496 per hour for outside counsel service) = $4,960 in outside counsel costs.

[324] This estimate is based on the following calculation: (60 burden hours of review per broker-dealer) × (20 broker-dealers) = 1,200 aggregate burden hours.

[325] This estimate is based on the following calculation: ($28,800 per broker-dealer) × (20 broker-dealers) = $576,000.

[326] This estimate is based on the following calculation: ($4,960 for outside costs per broker-dealer) × (20 broker-dealers) = $99,200 in outside counsel costs.

[327] The Commission estimates the monetized ongoing, annual burden for this requirement to be: (Attorney at $462 for 4 hours) + (Compliance Counsel at $406 for 4 hours) + (Compliance Counsel at $406 for 4 hours) + (Intermediate Business Analyst at $251 for 4 hours) = 12 ongoing burden hours and $4,476.

[328] This estimate is based on the following calculation: (12 burden hours of review per broker-dealer) × (20 broker-dealers) = 240 aggregate burden hours.

[329] The Commission estimates the monetized ongoing, annual burden for this requirement to be: ($4,476 per broker-dealer) × 20 broker-dealers = $89,520.

[330] This belief is based on a review of NMS Stock ATS disclosures on Form ATS–N.

[331] *See supra* note 214 and accompanying text. As discussed above, currently only one NMS Stock ATS discloses that it meets the fair access threshold. *Supra* section IV.B.2.b.

on access to services.[332] The Commission therefore estimates that the burdens and cost for an NMS Stock ATS to comply with Proposed Rule 600(b)(64)(ii)(D) to qualify as an open competition trading center eligible to operate a qualified auction pursuant to Proposed Rule 615(d)(1) to be minimal. The Commission acknowledges that policies and procedures may vary greatly by NMS Stock ATS, given the differences in size and the complexity of business models. Accordingly, the Commission would expect that the need to update policies and procedures, as well as the ongoing compliance costs, might also vary. As discussed above, the Commission estimates that three NMS Stock ATSs may determine to modify their systems to operate as open competition trading centers and operate qualified auctions. To comply with this obligation, these NMS Stock ATSs would likely employ in-house legal and compliance counsel.[333]

Initial Burdens and Costs

For NMS Stock ATSs that have not recorded in writing their policies and procedures to prohibit any registered broker or dealer from being or becoming a subscriber, or impose conditions upon such a subscriber, that does not meet the standards of financial responsibility or operational capability as are prescribed by such written policies and procedures, the Commission estimates the initial burden and cost for an NMS Stock ATS that choses to comply with Proposed Rule 600(b)(64)(ii)(D) to be minimal. The Commission estimates that the initial burden for an NMS Stock ATS to review its existing policies and procedures for consistency with the proposed rule, to make modifications as appropriate, and to put the policies and procedures in writing would be approximately 8 hours, at a monetized cost of $3,106.[334] Thus, the Commission estimates the aggregate initial burden to be 24 hours, at a monetized cost of $9,318.[335]

Ongoing Burdens and Costs

For purposes of this analysis, the Commission has assumed that NMS Stock ATSs would review and update their policies and procedures for compliance with Proposed Rule 600(b)(64)(ii) on an annual basis, and that they would perform the review and update using in-house personnel. The Commission estimates that each NMS Stock ATS would annually incur an internal burden of 8 hours to review and update existing policies and procedures, made up of four hours for legal personnel and four hours for compliance personnel, at a monetized cost of $2,680.[336] The Commission therefore estimates an ongoing, aggregate burden for NMS Stock ATSs of approximately 24 hours at a monetized cost of $8,040.[337]

A summary of the estimated initial and ongoing burdens and costs described above is set forth below:

TOTAL ESTIMATED BURDEN TO ESTABLISH AND MAINTAIN POLICIES AND PROCEDURES TO EXCLUDE SUBSCRIBERS BASED ON FINANCIAL RESPONSIBILITY OR OPERATIONAL CAPABILITY STANDARDS

	Respondents	Burden hours per respondent	Aggregate burden hours	Monetized cost per respondent	Aggregate monetized cost
Initial Burden	3	8	24	$3,106	$9,318
Ongoing Burden	3	8	24	2,680	8,040

The Commission is requesting comment on whether NMS Stock ATSs that would operate as open competition trading centers operating qualified auctions would have different or additional burdens and costs to maintain written policies and procedures to exclude a broker-dealer subscriber, or impose conditions on such a subscriber, that does not meet standards of financial responsibility and operational capability.

E. Collection of Information Is Mandatory

The collections of information required by Proposed Rule 615(c)(1) would be mandatory for national securities exchanges and NMS Stock ATSs that operate qualified auctions, and the one national securities association. The collections of information required by Proposed Rule 615(e)(1) and (2) would be mandatory for broker-dealers that meet the proposed definition of ''originating broker.'' The collection of information required by Proposed Rule 615(e)(3) would be mandatory for originating brokers that communicate a certification to an open competition trading center pursuant to Proposed Rule 615(c)(1). The collection of information required by Proposed Rule 615(f)(1) would be mandatory for broker-dealers that receive and route segmented orders. The collection of information required by Proposed Rule 615(d)(1), in conjunction with Proposed Rule 600(b)(64)(ii)(D), would be mandatory for NMS Stock ATSs that operate as open competition trading centers and prohibit any broker or dealer from becoming a subscriber, or impose conditions upon such a subscriber, based on standards of financial responsibility or operational capability.

F. Confidentiality of Information Collected

The Commission would not typically receive confidential information as a result of Proposed Rule 615 or the related proposed amendments. To the

[332] *See supra* note 214.

[333] The Commission based its estimate on the burden hour estimate provided in connection with the adoption of amendments to Rule 301(b)(10), which as amended requires all ATSs to maintain in writing their safeguards and procedures to protect subscribers' confidential trading information, as well as the oversight procedures to ensure such safeguards and procedures are followed. *See* ATS–N Adopting Release, *supra* note 278, 83 FR at 38868.

[334] This estimate is based on the following: (Compliance Attorney at $406 for 7 hours) + (Sr. Compliance Examiner at $264 for 1 hour) = 8 burden hours and a monetized cost of $3,106.

[335] These estimates are based on the following calculations: (8 burden hours per NMS Stock ATS) × (3 NMS Stock ATSs) = 24 burden hours; and ($3,106 per NMS Stock ATS) × (3 NMS Stock ATSs) = $9,318.

[336] The Commission estimates the monetized ongoing burden for this requirement to be: (Compliance Attorney at $406 for 4 hours) + (Sr. Compliance Examiner at $264 for 4 hours) = 8 initial burden hours and a monetized cost of $2,680).

[337] These estimates are based on the following calculations: (8 burden hours per NMS Stock ATS) × (3 NMS Stock ATSs) = 24 burden hours; and at ($2,680 per NMS Stock ATS) × 3 NMS Stock ATSs = $8,040.

extent that the Commission receives—through its examination and oversight program, through an investigation, or by some other means records or disclosures from a broker-dealer that relate to or arise from Proposed Rule 615 or the related amendments that are not publicly available, such information would be kept confidential, subject to the provisions of applicable law.[338]

1. Auction Messages

As discussed above, auction messages initiating a qualified auction would be publicly disseminated in consolidated market data. These messages would include the identity of the open competition trading center, symbol, side, size, limit price, and identify of the originating broker, unless the originating broker made the certification specified in paragraph (c)(1)(iii) of Proposed Rule 615.

2. Identifying and Marking Segmented Orders

The identification of an order as a segmented order would be made available to any destination to which the order has been routed. The information would also be available to the Commission and its staff, and to other regulators.

3. Originating Broker Certification

If an originating broker determines to make a certification referred to in paragraph (c)(1)(iii) of Proposed Rule 615, such certification must be communicated to the open competition trading center operating the applicable qualified auction, and any interim broker-dealer routing a segmented order associated with a certification would also need to be made aware of the certification for purposes of communicating the certification to the open competition trading center. The information would also be available to the Commission and its staff, and to other regulators. Also, the originating broker's written policies and procedures pursuant to Proposed Rule 615(e)(3) would be available to the Commission and its staff, and to other regulators.

4. NMS Stock ATS Policies and Procedures To Exclude Subscribers

An NMS Stock ATSs' written policies and procedures to comply with Proposed Rule 600(b)(64)(ii)(D), if necessary, to qualify as an open competition trading center eligible to operate a qualified auction pursuant to Proposed Rule 615(d)(1) would be available to the Commission and its staff, and to other regulators. As described above, NMS Stock ATSs are also required to publicly disclose certain information on Form ATS–N.[339]

G. Retention Period for Recordkeeping Requirements

Proposed Rule 615 and the related amendments, would not establish any new record retention requirements. National securities exchanges and national securities associations are required to retain records and information pursuant to 17 CFR 240.17a–1 (''Rule 17a–1''), and broker-dealers are required to retain records and information pursuant to 17 CFR 240.17a–4 (''Rule 17a–4'').

H. Request for Comments

The Commission requests comment on whether the estimates for burden hours and costs are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) determine whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File Number S7–31–22. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–31–22 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE, Washington, DC 20549–2736. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

[338] *See, e.g.,* 5 U.S.C. 552 *et seq.;* 15 U.S.C. 78x (governing the public availability of information obtained by the Commission).

[339] *Supra* note 278.

VII. Economic Analysis

A. Introduction

The Commission is mindful of the economic effects that may result from Proposed Rule 615, and the amendments proposed in this release (the ''Proposal''), including the benefits, costs, and the effects on efficiency, competition, and capital formation. Exchange Act section 3(f) requires the Commission, when it is engaged in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[340] In addition, Exchange Act section 23(a)(2) requires the Commission, when making rules pursuant to the Exchange Act, to consider among other matters the impact that any such rule would have on competition and not to adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.[341] The following economic analysis identifies and considers the costs and benefits—including the effects on efficiency, competition, and capital formation—that may result from the Proposal.

Investors participate in capital markets to save for the future, to diversify, and to maximize returns given a desired level of risk, among other reasons. This participation can involve both trades based on information and trades based on liquidity needs. Many individuals participate indirectly in equity markets, such as through mutual funds or through pension funds. However, many individuals participate directly in equity markets, and this direct participation has grown in recent years.[342] While some of this direct participation may be transitory, forces operating over the long run, such as technological improvements, may lead the trend to continue.

This increase in participation, coming on top of various other trends discussed below, motivates concern over the current isolation of retail orders. At present, the vast majority of retail orders (over 90% of marketable NMS stock orders) are routed to wholesalers, where they are frequently executed in isolation, on a captive basis.[343] This execution is subject to competitive forces that apply at the level of average execution quality. Execution of these orders is not subject to order-by-order competition that occurs when order interactions are subject to exchange protocols. The empirical analysis below suggests that this results in suboptimal execution quality compared to an alternative market structure in which the marketable orders of individual investors were subject to order-by-order competition.[344] While wholesalers generally achieve price improvement relative to the NBBO, Commission analysis indicates that there is the potential for individual investors to receive additional price improvement in line with the low adverse selection risk of individual investor order flow. While acknowledging there is substantial uncertainty in the eventual outcome, the Commission estimates that qualified auctions as designed by the Proposal would result in additional price improvement for the marketable orders of individual investors that could reduce the average transactions costs of these orders by 0.86 basis points (''bps'') to 1.31 bps.[345] The Commission estimates that segmented orders that would be eligible to be included in qualified auctions could account for 7.3% [346] to 10.1%[347] of total executed dollar volume. Given this estimate, the Commission preliminarily estimates that the Proposal could potentially result in a total average annual savings in individual investor transaction costs ranging from $1.12 billion to $2.35 billion.[348] These estimated gains would be generated primarily through increased competition to supply liquidity to marketable orders of individual investors, which in turn would lower transaction costs for individual investors, potentially enhance order execution quality for institutional investors, and improve price discovery. More generally, it would broaden the set of market participants that directly interact with individual investor orders of NMS stocks.[349] For example, Commission analysis indicates that there is often liquidity available at the NBBO midpoint on exchanges or NMS Stock ATSs when a wholesaler executes the marketable orders of individual investors at prices less favorable (for the customer) than the NBBO midpoint.[350] Qualified auctions would act as a coordination mechanism and make the submitters of these resting midpoint orders aware there was an individual investor order they could potentially trade with. By increasing competition and enhancing the direct exposure of individual investor orders to a broader spectrum of market participants, the Proposal would help achieve the objectives for an NMS set forth in section 11A of the Exchange Act.[351]

The Proposal could have additional benefits with respect to trading costs, liquidity, and capital formation, though the Commission acknowledges that these are uncertain. The large

[340] *See* 15 U.S.C. 78c(f).

[341] *See* 15 U.S.C. 78w(a)(2).

[342] *See, e.g.,* SIFMA Insights, *Gauging the New Normal for Volatility, Volumes, Market Levels & Retail Investor Participation* (May 2021), *available at https://www.sifma.org/wp-content/uploads/2021/05/SIFMA-Insights-Market-Structure-Survey-FINAL-FOR-WEB.pdf*; *see also* Jennifer J. Schulp, *GameStop and the Rise of Retail Trading,* 41 Cato J. 511 (2021). For example, one study estimates that retail market share has increased from around 23% (as a percentage of share volume) in Jan. 2020 to around 34% by July 2021; *see* Rosenblatt Securities, *How Can the Buy Side Interact with Retail Flow?* (Feb. 14, 2022), *available at https://www.rblt.com/market-reports/how-can-the-buy-side-interact-with-retail-flow.*

[343] *See* analysis in *infra* Table 3. In the current market structure, retail brokers provide wholesalers with large blocks of orders, leaving it to the discretion of wholesalers how to execute each order, consistent with their best execution responsibilities. Broker-dealers are required to provide best execution for customer orders, both pursuant to common law and FINRA rules. *See* discussion of broker-dealer best execution responsibilities in *supra* section III.B.2. The obligation for wholesalers to provide best execution is required under FINRA Rule 5310 (Best Execution and Interpositioning). *See also supra* note 133. The Commission is also separately proposing a new rule addressing the best execution obligations of broker-dealers. *See* Regulation Best Execution Proposal, *supra* note 130. The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposal.

[344] *See infra* section VII.B.4 for analysis and discussion of the potential adverse execution quality effects from the isolation of individual investor marketable orders.

[345] *See* analysis in Table 19 and corresponding discussion in *infra* section VII.C.1.b. This estimate accounts only for potential changes in individual order transaction costs and assumes the PFOF wholesalers currently pay to retail brokers would be converted into additional price improvement for the individual investor order, and does not include costs that may arise in the form of potential increases in (or the return of) commissions retail brokers charge to individual investors or other reductions in the services that retail brokers currently offer. *See infra* note 514 for further discussion.

[346] *See infra* note 533.

[347] *See infra* note 535.

[348] *See* analysis in Table 19 and corresponding discussion in *infra* section VII.C.1.b.

[349] As discussed above, Proposed Rule 615 covers only NMS stocks, and as such, the economic analysis includes quantitative and qualitative analysis of only NMS stocks.

[350] Commission analysis of CAT data in *infra* Table 20 found that, on average, 51% of the shares of individual investor marketable orders internalized by wholesalers are executed at prices less favorable than the NBBO midpoint. Out of these individual investors shares that were executed at prices less favorable than the midpoint, on average, 75% of these shares could have hypothetically executed at a better price against the non-displayed liquidity resting at the NBBO midpoint on exchanges and NMS Stock ATSs. *See infra* section VII.C.1.b for further discussion on the analysis in Table 20.

[351] *See* discussion in *supra* section III.A.

percentage of individual investor orders executed off-exchange confers a substantial competitive advantage on wholesalers and other market makers with a significant presence both on and off-exchange, as they observe order flow more quickly and in a more granular fashion than others. This advantage contributes to asymmetric information and increased adverse selection on exchanges. Such adverse selection may reduce market quality for all participants and may ultimately reduce efficiency and lower capital formation.

The Commission acknowledges considerable uncertainty in the costs that would arise from Proposed Rule 615, due to whether the current market practice of routing through wholesalers would persist. First, the Proposal would likely cause wholesalers and some retail brokers to incur significant adjustment costs to their operations, as well as a possible decline in profitability. The Proposal could also result in costs to individual investors, such as some retail brokers potentially resuming charging commissions for NMS stock trades, although the likelihood of this may be low.[352] There may also be an increase in trading costs for retail broker customers that carry greater adverse selection risks and individual investors whose orders would not meet the definition of a segmented order because they averaged 40 or more daily trades in NMS stocks over the six preceding calendar months.[353] Retail brokers could also experience costs from wholesalers reducing the amount of PFOF they pay to retail brokers or from reducing or charging for the order handling services they offer to retail brokers, which could ultimately be passed on to individual investors.

Open competition trading centers would also face costs associated with creating qualified auctions, as would broker-dealers and trading centers that would incur costs related to establishing policies and procedures for identifying and handling segmented orders and identifying the originating retail brokers that submit segmented orders.[354] There would also be compliance costs faced by the respective NMS plans and FINRA to update the consolidated market data feed and ADF to broadcast qualified auction messages. There may also be a decrease in displayed liquidity if qualified auctions attract liquidity away from exchange Limit Order Books (''LOBs''). However, because the majority of individual investor orders are already segmented from exchange LOBs, there is the potential that the effect of qualified auctions on LOB liquidity may not be significant.[355]

The Commission recognizes that there would likely be significant competitive effects associated with the introduction of qualified auctions as mandated by Proposed Rule 615. Qualified auctions could reduce wholesaler market share for the execution of the orders of individual investors, which could result in the transfer of revenue and profit from wholesalers to other market participants that end up supplying more liquidity to the marketable orders of individual investors. Proposed Rule 615 could also affect competition in the market for trading services by enhancing the competitive position of exchanges and ATSs that operate qualified auctions relative to wholesalers as well as exchanges and ATSs that do not meet the criteria to operate qualified auctions. The introduction of qualified auctions would likely lead to a reduction of PFOF in equity markets, which in turn may weaken the competitive position of retail brokers that are dependent on PFOF revenue but strengthen the competitive position of retail brokers that are not. In addition, Proposed Rule 615 could also increase competition for market access among routing broker-dealers if the competitive position of wholesalers declines, and retail brokers that had previously relied on wholesalers for routing services, choose to route their own orders to qualified auctions.

The Commission has considered the economic effects of the Proposal and wherever possible, the Commission has quantified the likely economic effects of the Proposal. The Commission is providing both a qualitative assessment and quantified estimates of the potential economic effects of the Proposal where feasible. The Commission has incorporated data and other information to assist it in the analysis of the economic effects of the Proposal. However, as explained in more detail below, because the Commission does not have, and in certain cases does not believe it can reasonably obtain, data that may inform the Commission on certain economic effects, the Commission is unable to quantify certain economic effects. Further, even in cases where the Commission has some data, quantification is not practicable due to the number and type of assumptions necessary to quantify certain economic effects, which render any such quantification unreliable. The Commission's inability to quantify certain costs, benefits, and effects does not imply that the Commission believes such costs, benefits, or effects are less significant. The Commission requests that commenters provide relevant data and information to assist the Commission in quantifying the economic consequences of the Proposal.

B. Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the Proposal are measured consists of the existing routing practices and execution quality for the marketable orders of individual investors, the current state of interactions between institutional investors and the orders of individual investors, and the current business practices of retail brokers. These aspects of the baseline are framed by the statutory and regulatory baseline described above.[356]

[352] *See* discussion of potential changes in retail broker commissions in *infra* section VII.C.2.b.ii.

[353] *See supra* note 186 and corresponding text discussing the definition of ''segmented order.''

[354] If NMS Stock ATSs opted to operate qualified auctions, they may also incur costs to update their business models and systems in order to meet the requirements to be an open competition trading center. *See infra* section VII.C.2.e.

[355] *See* discussion on the effects of the Proposal on exchange LOB liquidity in *infra* section VII.C.2.g.

[356] The regulatory baseline includes the changes to the current arrangements for consolidated market data in the MDI Rules; but those amendments have not been implemented, so they likely have not affected market practice. *See supra* section III.B.1 and *infra* section VII.B.7. Where implementation of the changes may affect certain numbers in the baseline, the description of the baseline below notes those effects.

Retail brokers route most of their customers' marketable order flow to wholesalers.[357] Wholesalers do not typically directly charge retail brokers for their order routing and execution services. In fact, they may pay some retail brokers for the opportunity to handle their order flow with PFOF. Typically, wholesalers' vertical integration of routing and execution services for the orders of individual investors provides them flexibility with regard to their handling of order flow. They utilize sophisticated algorithmic trading technology to deliver their services.[358] In particular, wholesalers determine which orders to internalize (*i.e.,* execute in a principal capacity) and which to execute in a riskless principal or agency capacity.[359] Commission analysis indicates that wholesalers internalize over 90% of the dollar volume from individual investor marketable orders that are routed to them and executed.[360]

The wholesaler business model relies in part on the ability to segment the order flow of individual investors, which typically have lower adverse selection risk than the orders of other types of market participants.[361] Wholesalers are market makers that can identify orders with low adverse selection risk.[362] Through segmentation, wholesalers typically internalize marketable orders with lower adverse selection risk and generally execute them at prices better than the current NBBO, *i.e.,* because of segmentation, wholesalers are typically able to execute the marketable orders of individual investors at better prices than these orders would receive if they were routed to an exchange. An analysis of marketable NMS stock orders presented in Table 10 below indicates that the orders that wholesalers internalize present lower adverse selection risk and receive higher execution quality relative to marketable orders wholesalers receive and execute in a riskless principal or agency capacity.[363] Furthermore, results from Table 13 below show that wholesalers internalize a lower share of orders from retail brokers with the highest adverse selection risk. Additional results [364] show that, relative to orders executed on exchanges, orders internalized by wholesalers are associated with lower price impacts (*i.e.,* lower adverse selection risk),[365] lower effective half-spreads (*i.e.,* higher price improvement),[366] and higher realized half-spreads (*i.e.,* higher potential profitability).[367]

Though wholesaler internalization generates price improvement for individual investors relative to the NBBO, the Commission posits that the potential isolation of marketable order flow routed to wholesalers results in suboptimal price improvement for individual investor orders relative to what the Commission estimates would be achieved under the Proposal. Specifically, due to the isolation of this order flow by wholesalers from order-by-order competition, the amount of price improvement individual investors receive does not fully compensate for the lower adverse selection risk of their orders. Commission analyses presented below provide results that support this point.[368]

The baseline section below is organized as follows. The baseline first discusses relevant features of trading services, including segmentation and interactions between institutional and retail order flows. Next, the baseline presents the Commission's empirical findings on execution quality. The

[357] Commission analysis of broker-dealer Rule 606 report order routing data in *infra* Table 3 indicates that retail brokers route over 90% of their marketable orders to wholesalers.

[358] Wholesalers, similar to OTC market makers and exchange liquidity suppliers must establish connections with the numerous venues in which they wish to operate and provide liquidity. They also typically design smart order routers that can locate and provide liquidity in real time, as well as maintain fast data processing capabilities that enable them to respond to market conditions while abiding by the relevant trade execution regulations. Wholesalers also face the costs associated with price risk. As wholesalers trade against market participants, they takes positions at the opposite side, accumulating inventory. Holding inventory exposes wholesaler profits to inventory (price) risk, where the value of inventory, and hence, that of the wholesaler's holdings may fluctuate as security prices vary. Scaling up the size of the business to ensure steady incoming flow from opposite sides of the markets is a common strategy pursued by wholesalers. This strategy enables them to execute buy and sell transactions, offsetting order flow from opposite sides, reducing the possibility of accumulating prolonged unwanted inventory. However, among other costs, scaling up requires more comprehensive, efficient connectivity networks and adds to the costs of establishing and maintaining such networks.

[359] *See* discussion in *infra* section VII.B.5.a.

[360] *See* analysis in *infra* Table 10.

[361] Wholesalers and other liquidity providers (including other market-makers) face adverse selection risk when they accumulate inventory, for example by providing liquidity to more informed traders, because of the risk of market prices moving away from wholesalers and other market makers before they are able to unwind their positions. Wholesalers and other market makers are usually not privy to the motives or information of the investors with whom they are trading. As such, should the liquidity provider trade with an investor possessing short-lived price information about the security price, it is exposing its inventory to adverse selection risk. Hence, liquidity providers, including wholesalers and other market-makers normally choose their trading strategies to minimize their interaction with order flow with increased adverse selection risk. Wholesalers do this by attracting marketable orders of individual investors, known to be the order flow with the lowest adverse selection risk.

[362] *See infra* note 405 and corresponding discussion. Adverse selection risk is based on various characteristics of the order, including the identity of the originating broker.

[363] *See* analysis in *infra* Table 10.

[364] *See infra* Table 6 and *infra* Table 7 and corresponding discussion in section VII.B.4 for a comparison of exchange and wholesaler execution quality.

[365] *See supra* notes 47–48 and accompanying text for a definition and discussion of price impact as a measure of adverse selection risk. By measuring the difference between the NBBO midpoint at the time of execution and the NBBO midpoint some fixed period of time after the transaction (*e.g.,* one minute), price impact measures the extent of adverse selection costs faced by a liquidity provider. For example, if a liquidity provider provides liquidity by buying shares from a trader who wants to sell, thereby accumulating a positive inventory position, and then wants to unwind this inventory position by selling shares in the market, it will incur a loss if the price has fallen in the meantime. In this case, the price impact measure will be positive, reflecting the liquidity provider's exposure to adverse selection costs.

[366] *See also* results in Thomas Ernst & Chester Spatt, *Payment for Order Flow and Asset Choice* (last revised Mar. 13, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=4056512* (retrieved from SSRN Elsevier database) (hereinafter ''Ernst and Spatt Working Paper''). *See supra* note 46 and accompanying text for a definition and discussion of effective half-spreads. The effective half-spread is calculated by comparing the trade execution price to an estimate of the stock's value (*i.e.,* the midpoint of the prevailing NBBO at the time of order receipt) and thus captures how much more than the stock's estimated value a trader has to pay for the immediate execution of their order. The effective spread will be smaller (or less positive) when the execution price is closer to the NBBO midpoint, reflecting price improvement received on that order. *See, e.g.,* Bjorn Hagströmer, *Bias in the Effective Bid-Ask Spread,* 142 J. Fin. Econ. 314 (2021). For the remainder of this analysis, we will use the term ''effective spread'' to refer to the ''effective half-spread'' as defined in *supra* section II.D.1.

[367] *See supra* notes 49–50 and accompanying text for a definition and discussion of realized half-spreads. *See, e.g.,* Securities Exchange Act Release No. 43590 (Nov. 17, 2000), 65 FR 75423–75424 (Dec. 1, 2000) (Disclosure of Order Execution and Routing Practices) (''The smaller the average realized spread, the more market prices have moved adversely to the market center's liquidity providers after the order was executed, which shrinks the spread 'realized' by the liquidity providers. In other words, a low average realized spread indicates that the market center was providing liquidity even though prices were moving against it for reasons such as news or market volatility.''); *see also* Larry Harris, *Trading and Exchanges: Market Microstructure for Practitioners* (2003) at 286. *See infra* note 420 discussing the limitations of realized spreads for estimating the profits earned by market makers. For the remainder of this analysis, we will use the term ''realized spread'' to refer to the ''realized half-spread'' as defined in *supra* section II.D.1.

[368] *See infra* sections VII.B.4 and VII.B.5.

section ends with a discussion of retail broker services and rules addressing consolidated market data.

1. Competition for Liquidity Provision in NMS Stocks

Investors trade for a variety of reasons, whether because of informational advantages or because of hedging and liquidity needs. In an idealized competitive market, these investors would meet and trade amongst themselves, without the need of an intermediary. In such cases, trades would occur at the midpoint and neither side would pay the spread. In real-life markets, not all investors meet at the same time. Furthermore, investors may avoid trading with one another if they believe their counterparty has information that they do not, as opposed to trading for liquidity reasons. Moreover, investors often utilize the technology and services of a broker-dealer in order to find and interact efficiently with the trading interest of other investors. For these reasons, there are broker-dealers who incur fixed costs for routing orders and charge a spread for acting as a dealer and supplying liquidity when end investors are not available to directly trade with each other.

Market centers compete to attract order flow from these broker-dealers. As shown in Table 1, in Q1 of 2022, NMS stocks were traded on 16 registered securities exchanges,[369] and off-exchange at 32 NMS Stock ATSs and at over 230 other FINRA members, including OTC market makers.[370] OTC market makers include the 6 wholesalers that internalize the majority of individual investor marketable orders.[371] These numerous market centers match traders with counterparties, provide a framework for price negotiation and/or provide liquidity to those seeking to trade.

TABLE 1—NMS STOCK TRADED SHARE VOLUME PERCENTAGE OF ALL NMS STOCKS BY MARKET CENTER TYPE

Market center type	Venue cnt	Share volume (percent)	Off-exchange share volume (percent)
Exchanges	16	59.7	.....
NMS Stock ATSs	32	10.2	25.2
Wholesalers [a]	6	23.9	59.4
Other FINRA Members	232	6.3	15.6

This table reports the percentage of all NMS stock executed share volume and the percentage of NMS stock share volume executed off-exchange for different types of market centers for Q1 2022. Venue Cnt lists the number of venues in each market center category. Share Volume Pct is the percentage of all NMS stock share volume (on plus off-exchange) executed by the type of market center. Off-Exchange Share Volume Pct is the percentage of off-exchange share volume executed by the type of market center. Exchange share volume and total market volume are based on CBOE Market Volume Data on monthly share volume executed on each exchange and share volume reported in FINRA Trade Reporting Facilities (TRFs).[b] NMS Stock ATS, wholesaler and FINRA member share volume are based on monthly FINRA OTC Transparency data on aggregated NMS stock trading volume executed on individual ATSs and over-the-counter at Non-ATS FINRA members.[c] Off-Exchange Share Volume Pct is calculated by dividing the NMS Stock ATS, wholesaler and FINRA member share volume from the FINRA Transparency Data by the total TRF share volume reported in CBOE Market Volume Data.

[a] *See supra* note 371 for details regarding how FINRA member OTC market makers are classified as wholesalers for purposes of this release.

[b] Cboe, U.S. Historical Market Volume Data, *available at https://cboe.com/us/equities/market_statistics/historical_market_volume/.* Trade Reporting Facilities (TRFs) are facilities through which FINRA members report off-exchange transactions in NMS stocks, as defined in SEC Rule 600(b)(47) of Regulation NMS. *See https://www.finra.org/filing-reporting/trade-reporting-facility-trf.*

[c] FINRA OTC (Non-ATS) Transparency Data Monthly Statistics, *available at https://otctransparency.finra.org/otctransparency/OtcData;* FINRA ATS Transparency Data Monthly Statistics, *available at https://otctransparency.finra.org/otctransparency/AtsBlocksDownload.* The FINRA OTC (Non-ATS) Transparency Data may not contain all share volume transacted by a wholesaler or FINRA member because FINRA aggregates security-specific information for firms with ''de minimis'' volume outside of an ATS and publishes it on a non-attributed basis.

Market centers' primary customers are broker-dealers that route their own orders or their customers' orders for execution. Market centers may compete with each other for these broker-dealers' order flow on a number of dimensions, including execution quality. They also may innovate to differentiate themselves from other trading centers to attract more order flow. While registered exchanges cater to a broader spectrum of investors, ATSs and OTC market makers, including wholesalers, tend to focus more on providing trading services to either institutional or individual investor orders.

Table 1 displays NMS stock share volume percentage by market center

[369] Most of these 16 registered securities exchanges are owned by three exchange groups. Currently, the CBOE exchange group owns: Cboe BYX Exchange, Inc. (''Cboe BYX''), Cboe BZX Exchange, Inc. (''Cboe BZX''), Cboe EDGA Exchange, Inc. (''Cboe EDGA''), and Cboe EDGX Exchange, Inc. (''Cboe EDGX''); the Nasdaq exchange group owns: Nasdaq BX, Inc. (''Nasdaq BX''), Nasdaq PHLX LLC (''Nasdaq Phlx''), and The Nasdaq Stock Market LLC (''Nasdaq''); and the NYSE exchange group owns: NYSE, NYSE American LLC (''NYSE American''), NYSE Arca, Inc. (''NYSE Arca''), NYSE Chicago, Inc. (''NYSE CHX''), and NYSE National, Inc. (''NYSE National''). Other registered securities exchanges that trade NMS stocks and do not belong to one of these exchange groups include: Investors Exchange LLC (''IEX''), Long-Term Stock Exchange, Inc. (''LTSE''), MEMX LLC (''MEMX''), and MIAX Pearl, LLC (''MIAX PEARL'').The Commission approved rules proposed by BOX Exchange LLC (''BOX'') for the listing and trading of certain equity securities that would be NMS stocks on a facility of BOX known as BSTX LLC (''BSTX''), but BSTX is not yet operational. *See* Securities Exchange Act Release Nos. 94092 (Jan. 27, 2022), 87 FR 5881 (Feb. 2, 2022) (SR–BOX–2021–06) (approving the trading of equity securities on the exchange through a facility of the exchange known as BSTX); 94278 (Feb. 17, 2022), 87 FR 10401 (Feb. 24, 2022) (SR–BOX–2021–14) (approving the establishment of BSTX as a facility of BOX). BSTX cannot commence operations as a facility of BOX until, among other things, the BSTX Third Amended and Restated Limited Liability Company Agreement approved by the Commission as rules of BOX is adopted. *Id.* at 10407.

[370] *See supra* section II.B for further details on the types of trading centers that execute trades in NMS stocks. *See also* Form ATS–N Filings and Information (for a list of ATSs that trade NMS stocks and have a Form ATS–N filed with the Commission), *available at https://www.sec.gov/divisions/marketreg/form-ats-n-filings.htm.* Some academic studies attribute the fragmented nature of the market for NMS stocks, in part, to certain provisions of Regulation NMS. *See, e.g.,* Maureen O'Hara & Mao Ye, *Is Market Fragmentation Harming Market Quality?,* 100 J. Fin. 459 (2011); Amy Kwan, Ronald Masulis & Thomas H. McInish, *Trading Rules, Competition for Order Flow and Market Fragmentation, 115* J. Fin. 330 (2015).

[371] The six OTC market makers that are classified as wholesalers for purposes of this release are the OTC market makers to which the majority of marketable orders originating from retail brokers were routed as identified from information from retail broker Rule 606(a)(1) reports from Q1 2022. These market makers also reported executing a significant percentage of shares routed to them on their Rule 605 reports. Rule 606(a)(1) requires broker-dealers to produce quarterly public reports containing information about the venues to which the broker-dealer regularly routed non-directed orders for execution, including any payment relationship between the broker-dealer and the venue, such as any PFOF arrangements. *See* 17 CFR 242.606(a)(1).

type for Q1 2022. Exchanges execute approximately 60% of total share volume in NMS stocks, while off-exchange market centers execute approximately 40%. The majority of off-exchange share volume is executed by wholesalers, who execute almost one quarter of total share volume (23.9%) [372] and about 60% of off-exchange share volume.[373] NMS Stock ATSs execute approximately 10% of total NMS stock share volume and 25% of off-exchange share volume. Other FINRA members, besides wholesalers and ATSs, execute approximately 15% of off-exchange share volume.

There is evidence that the percentage of trading volume executed off-exchange has been increasing over time. One industry group study found that volume traded off-exchange as a percent of total volume has increased since 2018, when off-exchange trading was 36.8% of total volume.[374] According to another study by an exchange, an increase in orders executed by off-exchange venues other than ATSs has been the driving factor behind this increase in off-exchange trading, which has been particularly significant for lower-priced stocks.[375] At the same time, some have highlighted a decline in liquidity displayed at or near the NBBO on exchanges.[376] Industry participants have raised concerns regarding a ''monopolistic environment,'' in which information off-exchange becomes sufficiently concentrated and determinative as to widen spreads on exchange.[377] For example, a liquidity provider deciding whether to rest an order on the book would face the possibility of a wholesaler or other off-exchange market maker gleaning information from the posted liquidity to determine a price to execute off-exchange that accounts for the lack of adverse selection risk in off-exchange flow.[378] This limits the execution possibilities on exchange. On the other hand, any posted liquidity (which grants an option to liquidity demanders or to those engaged in latency arbitrage) is vulnerable to being ''picked off''—namely executed against exactly when the price is (in the case of a resting buy order) moving lower or (in the case of a sell order) moving higher. These dynamics lower the incentives to post liquidity on exchange.

Exchanges (via their rules) and ATSs determine how orders compete with each other, wherein liquidity suppliers set prices and wait for execution at their prices by liquidity demanders. This interaction between liquidity providers and demanders encompasses order-by-order competition. Unlike exchanges, for which each exchange's rules determine competition in a non-discretionary fashion, wholesalers execute or route orders in a discretionary fashion.[379] While some orders may be routed to a central limit order book against which institutional investors may execute (on the discretion of the wholesaler), institutional investors generally consider order flow routed to a wholesaler to be ''inaccessible.'' [380]

As a proxy for expected execution quality, quoted prices are a dimension on which exchanges compete to attract order flow. Specifically, exchanges are required to post the best bid and ask prices available on the exchange at that time,[381] and broker-dealers can observe those prices and choose to route orders to the exchange posting the best prices at a given point in time. However, others who provide trading services, such as ATSs and OTC market makers, do not usually compete on this dimension.[382] In other words, wholesalers generally do not compete for order flow by posting competitive prices the way exchanges do. They do not display or otherwise advertise the prices at which they are willing to internalize individual investor orders at a given point in time. This suggests that wholesalers attract order flow by offering retail brokers more than just competitive prices at a point in time on a specific order. Instead, wholesalers generally attract order flow by offering to on average execute orders at prices that are better than displayed prices. Additionally, wholesalers bundle their market access services with execution services, thereby vertically fully integrating order handling and execution services for their retail broker customers.

2. Segmentation of Individual Investor Order Flow

Individual investor orders typically carry lower adverse selection risk, in part because individual investors may

[372] Of the six wholesalers identified in Q1 2022, two accounted for approximately 66% of wholesalers' total executed share volume of NMS stocks. One study finds that the concentration of wholesaler internalization, as measured by the Herfindahl-Hirschman Index (HHI) of share volume executed across wholesalers, has increased from 2018 to 2021. *See* Edwin Hu & Dermot Murphy, *Competition for Retail Order Flow and Market Quality* (last revised Oct. 7, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=4070056* (retrieved from Elsevier database).

[373] The share volume reported for wholesalers in FINRA OTC Transparency Data includes both individual investor orders executed by wholesalers in a principal capacity as well as other orders executed by wholesalers in a principal capacity, such as institutional orders executed on their SDPs. It does not include share volume that they executed in a riskless principal capacity or share volume that was routed and executed at another market center.

[374] *See* SIFMA Insights, *Analyzing the Meaning Behind the Level of Off-Exchange Trading* (Sept. 2021), *available at https://www.sifma.org/wp-content/uploads/2021/09/SIFMA-Insights-Analyzing-Off-Exchange-Trading-09-2021.pdf.* The study found off-exchange trading to be 44.2% of total YTD trading volume as of Sept. 2021.

[375] *See* NYSE Data Insights, *Market Volume and Off-Exchange Trading: More than a Retail Story* (June 15, 2020), *available at https://www.nyse.com/data-insights/market-volume-and-off-exchange-trading.* In particular, the study found that, for stocks priced lower than $5, off-exchange trading market share increased from 45.4% in Oct. 2019 to 54.8% in June 2020, and that ATS market share decreased from 14.2% to 11.5% of consolidated average daily volume and non-ATS OTC market share increased from 20.5% to 27.8% over the same time period.

[376] *See, e.g.,* Gunjan Banerji, *Buying or Selling Stocks? It Isn't Always Easy,* Wall St., J., Jan. 2, 2020, showing a greater than 90% reduction in the number of shares available at the best prices in the SPDR S&P 500 ETF from 2007 to 2018, as one example of the overall reduction in market liquidity. Furthermore, in a comment letter to the Commission responding to comments on an SRO proposed rule change, an exchange found that the COVID crisis lead to a further substantial decrease in the depth of liquidity at the NBBO, as the average displayed quote size declined by 69% from Jan. to Mar. 2020 for S&P 500 stocks. *See* Letter from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, dated May 10, 2020 (File No. SR–IEX–2019–15), *available at https://www.sec.gov/comments/sr-iex-2019-15/sriex201915-7169827-216633.pdf.*

[377] *See* Hitesh Mittal & Kathryn Berkow, *The Good, The Bad & The Ugly of Payment for Order Flow* (May 3, 2021), *available at https://bestexresearch.com/the-good-the-bad-the-ugly-of-payment-for-order-flow/.*

[378] Mitigating this information asymmetry is that off-exchange trades also print to a consolidated post-trade tape, though with latency compared with on-exchange trades.

[379] A study estimates that the volume of individual investor orders executed by wholesalers accounted for approximately 16% to 17% of consolidated share volume during Q1 2022. *See* Rosenblatt Securities, *An Update on Retail Market Share in US Equities* (June 24, 2022), *available at https://www.rblt.com/market-reports/trading-talk-an-update-on-retail-market-share-in-us-equities.* However, wholesalers are not completely focused on individual investor order flow and some do offer services to institutional order flow. *See infra* section VII.B.3 for a discussion of their interaction with institutional order flow.

[380] *See supra* note 37 (citing Jennifer Hadiaris, *Cowen Market Structure: Retail Trading—What's going on, what may change, and what can you do about it?,* Cowen (Mar. 23, 2021), *available at https://www.cowen.com/insights/retail-trading-whats-going-on-what-may-change-and-what-can-institutional-traders-do-about-it/*). Further, wholesalers are also not subject to a statutory or regulatory requirement to provide fair access. *See supra* section III.B.3 for further discussion of requirements that do and do not apply to wholesalers.

[381] *See* Rule 602 of Regulation NMS.

[382] ATSs typically compete for institutional order flow by offering innovative trading features such as distinct trading protocols and segmentation options. They may also compete on fees. In addition, they could include their ATS access in the broader set of bundled services that the broker-dealer director of the ATS offers to their institutional investors.

have less information on market conditions than other market participants and in part because their orders tend to be small. Both of these factors make individual investor orders less likely to be followed by orders in the same direction.[383] The lower adverse selection risk of individual investor orders makes them more valuable for segmentation by liquidity providers that want to execute these orders in a principal capacity, since they are less costly to liquidity providers such as wholesalers to execute (*i.e.,* have lower price impacts) than orders with higher adverse selection risk. Due to this lower cost, wholesalers are able to provide price improvement to these orders and still earn higher profits, as discussed in *supra* section II.D.2.

Regulation NMS allows an order to be executed off-exchange, provided that an off-exchange trading venue executes the order at a price equal to the NBBO or better.[384] To the extent that a liquidity provider is able to segment [385] low-risk individual investor order flow, this order flow can be executed against with higher profitability for the liquidity provider. Since exchanges are limited in their ability to segment order flow (with the exception of retail liquidity programs),[386] the ability of off-exchange venues to segment orders is one reason why orders are routed off-exchange. Furthermore, off-exchange trading venues are often more flexible in determining prices than national securities exchanges.[387]

The ability to segment is one reason why many individual investor orders are executed off-exchange. Another reason is potential efficiency in outsourcing routing services. Maintaining market access at many venues is costly, so broker-dealers have an incentive to use the services of other broker-dealers who maintain market access at most, if not all, market centers. Wholesalers are the dominant providers of market access for retail brokers and bundle their market access services with execution services. Yet another reason arises from economies of scale stemming from the information that can be gleaned from large quantities of individual orders.[388] Because of the profitability in these segmented orders, wholesalers will sometimes pay for them, a practice known as payment for order flow. For some retail brokers, this may create an additional incentive for routing to the wholesalers.

a. Routing and Market Access

Most individual investor orders are non-directed, so individual investor order routing choices are largely made by retail brokers. Specifically, retail brokers choose how to access the market in order to fill their individual investor customers' orders. Many broker-dealers that handle customer accounts, including many retail brokers, do not directly access national securities exchanges or ATSs for their orders, relying on other broker-dealers to facilitate market access for them.[389] For example, only members of exchanges or subscribers to (or owners of) ATSs can directly access those particular market centers.[390] As a result, some broker-dealers that are exchange members or ATS subscribers/owners provide access to other brokers-dealers by rerouting their customer orders to these market centers. The broker-dealers (including wholesalers) who provide market access can choose to compete on a number of dimensions, such as by charging lower fees or paying for order flow, by facilitating better execution quality, and by providing other valued services.[391]

Retail brokers may route to wholesalers because the cost of sending orders to wholesalers is lower than the various alternatives available to their customers for market access. While some broker-dealers have SORs,[392] exchange memberships, and ATS subscriptions, and are thus able to provide market access to retail brokers, these other broker-dealers incur costs in handling order flow for retail brokers in the form of exchange access fees, ATS access fees, and administrative and regulatory costs such as recordkeeping and the risk management controls of Rule 15c3–5. While wholesalers could incur some of these marginal costs as well, they benefit on the margin from individual investor order flow because they have the option to internalize the most profitable of that order flow, *i.e.,* the individual investor orders with the lowest adverse selection risk.[393] This ability to capture, identify, and internalize profitable orders from individual investors allows wholesalers to provide market access to retail brokers at low explicit cost, either by providing PFOF or by not charging retail brokers explicitly for market access. This service of obtaining market access on behalf of retail brokers assists retail brokers by allowing them to avoid routing expenses (even in cases where the wholesaler further routes the order instead of internalizing) or costly liquidity searches, and may increase retail brokers' reliance on wholesalers beyond any payment they receive for routing their order flow to wholesalers.

Indeed, Table 2 shows that retail brokers who accept PFOF (''PFOF brokers'') pay less to route their orders to wholesalers than to route them elsewhere.[394] In fact, they are paid to route their order flow to wholesalers for every order type reported in the table. On average, rates paid by wholesalers for both market and marketable limit orders are higher than those paid by alternative venues, with wholesalers paying an average of 13 cents per 100 shares for market orders and 12.6 cents for marketable limit orders across S&P 500 and non-S&P 500 stocks during Q1 2022. In contrast, exchanges, on average, charged PFOF brokers when they routed their marketable order flow to exchanges. This likely indicates that most of the volume that PFOF brokers sent to exchanges was routed to maker-taker exchanges (where fees are assessed on marketable orders).[395] Furthermore,

[383] While this characterization of individual orders is generally true, there are also individual investors that are highly sophisticated and informed of market conditions. *See infra* section VII.B.5.b for an empirical analysis and discussion of variation in execution quality based on variation in adverse selection risk of retail broker order flow.

[384] *See supra* section III.B.2.b.

[385] *See supra* section I for a definition of segmentation.

[386] *See infra* section VII.B.2.c.

[387] For example, Rule 612 does not prevent wholesalers, after they receive an order from a broker, from choosing to execute that order in a transaction at a sub-penny price. *See supra* note 148 and corresponding discussion.

[388] *See infra* note 406 for a discussion of the informational advantages that routing can provide to wholesalers.

[389] Providing market access can mean rerouting customer orders and it can also involve sponsoring access for the broker to send customer orders directly to a market center.

[390] The number of broker-dealers providing access is thus limited due to the expenses of being an exchange member and ATS subscriber. In addition, membership on an exchange also gives the broker-dealer access to exchange-provided order routers that re-route orders to other exchanges at a per-order fee. Thus, membership on one exchange can effectively provide access, though not directly, to all exchanges.

[391] Although some retail brokers are members of exchanges, they may still prefer to rely on wholesalers' expertise for the handling and routing of their customers' orders.

[392] Individual investors and professional traders relying on displayed screens to access financial markets generally do not have access to these low-latency (algorithmic, high speed) technologies.

[393] *See infra* section VII.B.2.b for further discussion of wholesaler internalization.

[394] In Table 2, average payment rates reported in Rule 606 reports for PFOF brokers in S&P 500 stocks and non-S&P 500 stocks in Q1 2022 are broken down by trading venue and order type, with rates given in cents per 100 shares.

[395] Furthermore, wholesaler rates for non-marketable orders are more than double the rates for marketable orders, averaging 27.1 cents per hundred shares compared to 13 cents for market orders and 12.6 cents for marketable limit orders. Additionally, Table 2 shows that the average payment rates PFOF brokers receive from routing

Continued

since retail brokers that do not accept PFOF (''non-PFOF brokers'') also incur fees when they route marketable orders to exchanges, they are also incentivized to route their marketable order flow to wholesalers, who do not charge them explicit costs to route and execute their orders.

TABLE 2—AVERAGE RULE 606 PAYMENT RATES FOR Q1 2022 TO PFOF BROKERS BY TRADING VENUE TYPE

		Market orders	Marketable limit orders	Non-marketable limit orders	Other orders
S&P 500	Exchange	−5.9	−23.9	30.9	20.8
	OTC Market Maker—Wholesaler	15.2	21.8	41.1	24.1
	Other	4.5	−0.6	−0.6	7.5
Non-S&P 500	Exchange	−14.9	−15.3	17.9	16.5
	OTC Market Maker—Wholesaler	12.5	11.8	24.6	10.1
	Other	1.5	−3.7	−4.6	1.5
Combined	Exchange	−12.4	−15.7	19.3	17.1
	OTC Market Maker—Wholesaler	13.0	12.6	27.1	11.9
	Other	1.7	−3.7	−4.5	2.0

This table shows the average payment rates (in cents per 100 shares) made from different types of trading venues in Q1 2022 to 14 retail PFOF brokers from wholesalers based on their Rule 606 reports. The table breaks out average rates from exchanges, wholesalers, and other trading venues for market orders, marketable limit orders, non-marketable limit orders, and other orders in S&P 500 stocks and non-S&P 500 stocks. Other venues include any other venue to which a retail broker routes an order other than a wholesaler or an exchange. The 43 broker-dealers were identified from the 54 retail brokers used in the CAT retail analysis (*see infra* note 466). This analysis uses the retail broker's Rule 606 report if it publishes one or the Rule 606 report of its clearing broker if it did not publish a Rule 606 report itself (the sample of 43 broker-dealer Rule 606 reports include some broker-dealers that were not included in the CAT analysis because some clearing broker Rule 606 reports are included). Some broker-dealers reported handling orders only on a not held basis and did not have any Rule 606.

Table 3 reflects that wholesalers dominate the business of providing market access for retail brokers and indicates that PFOF is a factor in retail broker routing decisions.[396] Data from Table 3 indicates that orders of individual investors for NMS stocks are primarily routed to wholesalers, although a small fraction of individual investor orders are routed to exchanges and other broker-dealers providing market access or other market centers (*i.e.,* ATSs), some of which may be affiliated with the broker that received the original order.

TABLE 3—RETAIL BROKER ORDER ROUTING IN NMS STOCKS FOR Q1 2022, COMBINING PFOF AND NON-PFOF BROKERS

Venue type	Market (percent)	Marketable limit (percent)	Non-marketable limit (percent)	Other (percent)	Total (percent)
Panel A: Non S&P 500 Stocks					
Other	6.0	4.7	3.1	1.5	3.6
Exchange	0.2	5.5	22.5	0.8	8.5
Wholesaler	93.9	89.8	74.4	97.6	87.9
Total	26.5	12.6	33.6	27.3	100.0
Panel B: S&P 500 Stocks					
Other	6.6	5.9	1.8	1.7	3.6
Exchange	0.2	4.6	25.1	0.8	9.1
Wholesaler	93.3	89.6	73.1	97.5	87.3
Total	30.6	9.6	33.5	26.4	100.0

This table aggregates Rule 606 reports from retail brokers and shows the percentage of market orders, marketable limit orders, non-marketable limit orders, and other orders that retail brokers route to different types of venues in Q1 2022. Other venues include any other venue to which a retail broker routes an order other than a wholesaler or an exchange. Order type classifications are based on the order types broker-dealers are required to include in their Rule 606 reports.

non-marketable limit orders to wholesalers is greater than the average rates they receive from routing them to exchanges. This may be driven by wholesalers passing through exchange rebates for these orders, for which they may receive higher volume-based tiering rates compared to retail brokers, back to broker-dealers.

[396] Table 3 summarizes order routing decisions of 43 of the most active retail brokers about non-directed orders; *see infra* note 466. Routing choices are summarized separately for 14 PFOF brokers in equity markets and non-PFOF brokers. Note that some brokers do not accept PFOF for orders in equities but do accept PFOF for orders in options. Consistent with Rule 606, routing statistics are aggregated together in Rule 606 reports based on whether the stock is listed in the S&P500 index. Rule 606 reports collect routing and PFOF statistics based on four different order types for NMS stocks: (1) market orders, resulting in immediate execution at the best available price; (2) marketable limit orders, resulting in immediate execution at the best price that is not worse that the order's quoted limit price; (3) non-marketable limit orders whose quoted limit price less aggressive than the NBBO, often preventing immediate execution; and (4) all other orders. *See supra* note 371 for a summary of the requirements of Rule 606(a)(1) of Regulation NMS

Table 3 aggregates routing information from 43 broker-dealer Rule 606 reports from Q1 2022. The 43 broker-dealers were identified from the 54 retail brokers used in the CAT retail analysis (*see infra* note 466). This analysis uses the retail broker's Rule 606 report if it publishes one or the Rule 606 report of its clearing broker if it did not publish a Rule 606 report itself (the sample of 43 broker-dealer Rule 606 reports include some broker-dealers that were not included in the CAT analysis because some clearing broker Rule 606 reports are included). Some broker-dealers reported handling orders only on a not held basis and did not have any Rule 606 reports. Because Rule 606 only include percentages of where their order flow is routed and not statistics on the number of orders, the reports are aggregated together using a weighting factor based on an estimate of the number of non-directed orders each broker-dealer routes each month. The number of orders is estimated by dividing the number of non-directed market orders originating from a retail broker in a given month (based on estimates from CAT data) by the percentage of market orders as a percent of non-directed orders in the retail broker's Rule 606 report (the weight for a clearing broker consists of the aggregated orders from the introducing brokers in the CAT retail analysis that utilize that clearing broker).

TABLE 4—RETAIL BROKER ORDER ROUTING IN NMS STOCKS FOR MARCH 2022

Venue type	Market (percent)	Marketable limit (percent)	Non-marketable limit (percent)	Other (percent)	Total (percent)
Panel A: Non-S&P 500 Stocks Non-PFOF Brokers					
Other	24.1	22.3	4.2	41.6	16.0
Exchange	<0.1	25.3	80.8	19.7	39.8
Wholesaler	76.0	52.4	15.0	38.8	44.2
Total	38.4	12.4	44.2	5.0	100.0
PFOF Brokers					
Other	<0.1	1.2	2.8	0.3	1.1
Exchange	0.2	1.5	5.8	0.2	2.1
Wholesaler	99.7	97.3	91.4	99.5	96.8
Total	24.1	12.7	31.5	31.8	100.0
Panel B: S&P 500 Stocks Non-PFOF Brokers					
Other	24.8	27.0	3.2	23.4	15.4
Exchange	<0.1	19.6	83.2	8.2	39.0
Wholesaler	75.2	53.4	13.6	68.3	45.6
Total	39.0	9.2	43.8	8.0	100.0
PFOF Brokers					
Other	<0.1	0.5	1.3	0.3	0.6
Exchange	0.2	0.9	3.4	0.3	1.3
Wholesaler	99.8	98.6	95.3	99.5	98.2
Total	28.4	9.7	30.7	31.2	100.0

This table aggregates Rule 606 reports from PFOF and non-PFOF retail brokers and separately shows the percentage of market orders, marketable limit orders, non-marketable limit orders, and other orders PFOF brokers and non-PFOF brokers route to different types of venues in Q1 2022. PFOF brokers are retail brokers that receive payments for routing marketable orders to wholesalers. Other venues include any other venue to which a retail broker routes an order other than a wholesaler or an exchange. Order type classifications are based on the order types broker-dealers are required to include in their Rule 606 reports.

Table 4 aggregates routing information from PFOF and non-PFOF broker-dealer Rule 606 reports from Q1 2022. Fourteen retail brokers are identified as PFOF brokers that receive payments for routing orders in NMS stocks to wholesalers. Non-PFOF brokers are identified as retail brokers that do not receive monetary compensation when they route orders in NMS stocks to wholesalers. The 43 broker-dealers were identified from the 54 retail brokers used in the CAT retail analysis (*see infra* note 466). This analysis uses the retail broker's Rule 606 report if it publishes one or the Rule 606 report of its clearing broker if it did not publish a Rule 606 report itself (the sample of 43 broker-dealer Rule 606 reports include some broker-dealers that were not included in the CAT analysis because some clearing broker Rule 606 reports are included). Some broker-dealers reported handling orders only on a not held basis and did not have any Rule 606 reports. Because Rule 606 only include percentages of where their order flow is routed and not statistics on the number of orders, the reports are aggregated together using a weighting factor based on an estimate of the number of non-directed orders each broker-dealer routes each month. The number of orders is estimated by dividing the number of non-directed market orders originating from a retail broker in a given month (based on estimates from CAT data) by the percentage of market orders as a percent of non-directed orders in the retail broker's Rule 606 report (the weight for a clearing broker consists of the aggregated orders from the introducing brokers in the CAT analysis that utilize that clearing broker).

CAT data analysis indicates that about 80% of the share volume and about 74% of the dollar volume of individual investor marketable orders that were routed to wholesalers and executed comes from PFOF brokers.[397] Data from Table 4 indicate that, while retail brokers who accept PFOF from wholesalers tend to send more of their orders to those wholesalers, wholesalers even dominate the market access services for non-PFOF brokers, though non-PFOF brokers route a significantly lower fraction (*i.e.,* 75.2% to 76%) of their market orders to wholesalers, compared to 99.7% to 99.8% of market orders for PFOF brokers. Moreover, non-PFOF brokers route 24.1% to 24.8% of their market orders to other non-exchange market centers, *e.g.,* ATSs,

[397] *See infra* Table 14.

while PFOF brokers route less than 1% of their market orders to these market centers. However, regardless of whether the retail broker accepts PFOF, the order type, or the S&P500 index inclusion of the stock,[398] Table 3 shows that retail brokers route over 87% of their customer orders to wholesalers.

This result suggests that, while PFOF is an important factor in retail brokers routing decisions, wholesalers likely also compare favorably to other market access centers (including retail brokers pursuing their own market access) along other dimensions. The routing behavior in Table 4 may, in part, reflect a tendency of non-PFOF brokers to route individual investor orders to market centers such as their own ATSs for mid-point execution and the lack of an affiliated ATS for PFOF brokers. However, even broker-dealers with their own ATSs do not route the majority of their individual investor order flow to those ATSs and typically do not internalize order flow. Further, retail brokers with membership on multiple exchanges primarily route their marketable orders to wholesalers. These results could point to a lower marginal cost of routing to wholesalers relative to other routing and execution alternatives. Table 5 below shows that wholesalers appear to compare favorably to exchanges in the execution quality of orders routed to them, suggesting that execution quality could be another key factor in the decision of retail brokers to route to wholesalers.[399] In particular, marketable orders routed to wholesalers appear to have higher fill rates, lower effective spreads, and lower E/Q ratios.[400] These orders are also more likely to receive price improvement and, conditional on receiving price improvement, receive greater price improvement when routed to wholesalers as compared to exchanges.

In addition, wholesalers may provide additional valuable services to retail brokers that route order flow to them. Based on staff experience, the Commission understands that wholesalers are more responsive to retail brokers that provide them with order flow, including, for example, following customer instructions not to internalize particular orders. More broadly, wholesalers appear to provide retail brokers with a high degree of consistency with regard to execution quality. More specifically, while wholesalers receive order flow from retail brokers that contains variation in quoted spreads and adverse selection risk, wholesalers can target an average level of price improvement across this heterogeneous order flow, resulting in a relatively consistent degree of execution quality.

b. Wholesaler Internalization

Wholesalers provide market access for retail brokers and generally choose to internalize the order flow they receive from these brokers,[401] thereby vertically integrating (*i.e.,* bundling) their market access and execution services. This vertical integration helps wholesalers achieve a competitive advantage in both market access and execution services. Wholesalers are distinct from other broker-dealers that provide market access and execution services, in that they focus on marketable order flow from individual investors and internalize the large majority of orders routed to them.

Wholesalers determine which orders to execute internally and which to reroute to other trading venues, often using a riskless principal transaction. For example, after receiving an order from a retail broker, a wholesaler may send a principal marketable order similar to the retail broker order to an exchange and, upon execution of the principal order at the exchange, provide the same execution terms to the original retail broker order. Alternatively, a wholesaler can achieve the same economic result by rerouting the original order in an agency capacity as well. In this way, the wholesaler is providing the market access service, but another market center is providing the execution service.

Commission analysis shows that wholesalers internalize over 90% of the executed dollar value in NMS stocks from the marketable order flow routed to them by retail brokers, which amounts to more than 80% of share volume.[402] Results also show that the marketable NMS stock orders wholesalers choose to internalize have less adverse selection risk: orders that wholesalers execute in a principal capacity have a price impact of 0.9 bps, compared to a price impact of 4.6 bps for those executed via other methods.[403] These results stem from the incentives wholesalers face. As dealers, wholesalers will wish to hold inventory that is not subject to short-term adverse price moves. Because orders with greater adverse selection risk will, on average, be followed by adverse price moves, wholesalers will on average internalize fewer of these orders.[404]

Wholesalers employ algorithms to predict price impact using information to which only they have access, such as the identity of the retail broker, and information any market center would have, such as order characteristics and stock or market characteristics.[405] Indeed, Table 12 shows significant variation in average price impacts across retail brokers. Because wholesalers know which retail brokers sent them the order, they can use that information in combination with other information to make internalization and pricing decisions.[406] The results in Table 13 support this conclusion, indicating that wholesalers internalize a higher percentage of individual investor orders from retail brokers whose customers' orders on average exhibit lower price impact.

c. Exchange Retail Liquidity Programs

Retail liquidity programs provide an on-exchange means of segmentation. Indeed, the RLPs offered by many registered exchanges are specifically set up to segment the marketable order flow of individual investors,[407] allowing liquidity suppliers to interact with this order flow without the risk that their orders will trade against the marketable orders of other market participants that may impose greater adverse selection risk. The pricing increments, both for quoting and trading, in RLPs, are usually 0.1 cents,[408] although some

[398] Rule 606 reports require that broker-dealers separate their disclosure information for S&P 500 stocks, non-S&P 500 stocks, and options.

[399] *See infra* section VII.B.4 for a full discussion of Table 5 and section VII.B.5 for a discussion of how the Commission preliminarily believes that the execution quality of orders routed to wholesalers could be even better if most of such orders were not isolated from order-by-order competition.

[400] The E/Q ratio is the ratio of a stock's effective spread over quoted spread. A lower value indicates smaller effective spreads (*i.e.,* trading costs) as a percentage of the quoted spread.

[401] *See* analysis in *infra* Table 10.

[402] *See* analysis in *infra* Table 10.

[403] *Id. See also supra* note 365 for a definition and discussion of price impact as a measure of adverse selection risk.

[404] *See infra* Table 10 in section VII.B.5.a for analysis indicating that individual investor orders wholesalers internalize have lower adverse selection risk and earn higher economic profits, as measured by price impacts and realized spreads, than orders wholesalers effectively reroute.

[405] While these provide a few examples of information that could be used by wholesalers, the Commission lacks information on what information wholesalers actually use. Further, while the analysis presented here shows associations between characteristics, price impacts, and internalization, the analysis cannot determine that the expected price impact based on a particular characteristic caused the wholesaler to internalize the order.

[406] Having aggregate information on retail order flow could help the wholesaler assess the direction of the market, which could also be beneficial for business lines beyond the firm's wholesaler business.

[407] *See, e.g.,* NYSE Rule 7.44 (concerning RLPs).

[408] *See, e.g.,* description of NYSE Retail Liquidity program, *available at https://www.nyse.com/*

exchanges have RLP programs that allow liquidity suppliers to quote only at the midpoint.[409] RLP programs typically do not charge an access fee to individual investor orders executed in RLP programs.[410] Quotes in RLP programs are not displayed.[411] Instead, the SIP disseminates a flag indicating the side of the market for which an exchange has an RLP quote available at a price better than the NBBO available. However, the SIP does not make known the price or the size of the RLP quote, which creates opacity in the liquidity available in RLP programs. The goal of these programs is to compete with wholesalers and to attract marketable order flow of individual investors to trade on national securities exchanges.[412]

However, it is the Commission's understanding that the share of individual investor trading volume executed through RLPs is small. For example, in 2021, less than 0.2% of consolidated volume executed in exchange RLP programs.[413] This low market share could be the result of several factors. For example, many retail brokers lack direct access to exchanges offering RLPs and the means of indirect access may be too costly for RLPs compared to routing to wholesalers. Further, wholesalers who compete with RLPs lack the incentives to route the individual investor order flow with lower adverse selection risk to the RLPs. If only the individual investor order flow with higher adverse selection risk goes to RLPs, the liquidity providers in RLPs would widen spreads to reflect the increased adverse selection.[414] This in turn, makes RLPs less competitive relative to wholesalers. Thus, even retail brokers with exchange membership may find wholesalers more attractive than RLPs for cost or execution quality reasons.

3. Institutional Investor Interactions With Retail Orders

Several wholesalers operate SDPs through which they execute institutional orders in NMS stocks against their own inventory.[415] Because wholesalers also execute individual investor orders against their own inventory, the use of SDPs amounts to an indirect interaction between institutional and individual investor orders. The trading volume on SDPs is economically significant. For example, a study found that in Q1 2022, the SDPs affiliated with the two highest-volume wholesalers accounted for around 3% of consolidated average daily trading volume in NMS stocks.[416] Institutional clients often communicate their trading interest to SDPs using Immediate or Cancel Orders (''IOCs'') or respond to Indication of Interest (''IOIs'') issued by the SDP.

On an SDP, the single dealer, *i.e.,* the wholesaler, is privy to the identities of the counterparties, *i.e.,* institutional investors. One academic paper has found that this information revelation may have adverse execution consequences for the institutional investor.[417] On the other hand, there also may be benefits relative to other trading venues. The trading interest of investors who submit IOCs to an SDP for liquidity are only exposed to the single dealer operating a platform. In contrast, submission of the same order to an exchange or an ATS may alert many other market participants to the underlying trade interest, triggering reactions. As such, institutional investors may view SDPs as an opportunity to tap into a pool of liquidity that reduces their orders' price impact and avoids triggering significant reactions by other market participants.

4. Execution Quality of Individual Investor Marketable Orders in NMS Stocks

publicdocs/nyse/markets/liquidity-programs/RLP_Fact_Sheet.pdf.

[409] *See, e.g.,* IEX retail liquidity program, *available at https://exchange.iex.io/products/retail-program/.*

[410] *See, e.g.,* NYSE Price List, *available at https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf*; NYSE Arca Trading Fee, *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf;* and IEX Exchange Fee Schedule, *available at https://exchange.iex.io/resources/trading/fee-schedule/.*

[411] RLPs operate under an exemption from Rule 612, and are therefore allowed to use sub-penny pricing. As part of this exemption, however, they are only eligible for individual investors to execute against and cannot display quotes. *See supra* note 152 for further discussion.

[412] *See supra* note 151 regarding the purpose and operation of RLPs.

[413] *See* Rosenblatt Securities, *How Can the Buy Side Interact With Retail Flow?* (Feb. 14, 2022) *available at https://www.rblt.com/market-reports/how-can-the-buy-side-interact-with-retail-flow.*

[414] Unlike wholesalers, liquidity suppliers in RLP programs are not aware of the identity of the retail broker that the individual investor originated from. Therefore, they are not able to offer tighter spreads to individual investor orders from retail brokers whose orders on average have lower adverse selection risk. Instead, liquidity suppliers in RLP need to price their quotes based on the average expected adverse selection risk of all orders routed to the RLP. *See, e.g.,* Lawrence R. Glosten & Paul R. Milgrom, *Bid, Ask, and Transaction Prices in a Specialist Market With Heterogeneously Informed Traders,* 14 J. Fin. Econ. 71 (1985).

[415] Wholesalers and OTC market makers can execute orders themselves or instead further route the orders to other venues. An SDP always acts as the counterparty to any trade that occurs on the SDP. *See Where Do Stocks Trade?,* FINRA (Dec. 3, 2021), *available at https://www.finra.org/investors/insights/where-do-stocks-trade* for further discussion.

[416] *See* Rosenblatt Securities, *Rosenblatt's 2022 US Equity Trading Venue Guide* (May 24, 2022), *available at https://www.rblt.com/market-reports/rosenblatts-2021-us-equity-trading-venue-guide-2.* The study also found that SDPs accounted for approximately 10% of off-exchange trading volume in Q1 2022.

[417] *See, e.g.,* Robert H. Battalio, Brian C. Hatch & Mehmet Saglam, *The Cost of Exposing Large Institutional Orders to Electronic Liquidity Providers* (last revised Nov. 7, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=3281324* (retrieved from Elsevier database).

The wholesaler business model relies in part on segmentation and internalization of marketable order flow of individual investors, which is characterized by low adverse selection risk. An analysis of the execution quality of market and marketable limit orders handled by wholesalers retrieved from Rule 605 reports [418] and presented in Table 5 [419] shows that orders in NMS stocks handled by wholesalers are associated with lower price impact [420] compared to those executed on exchanges, indicating that orders handled by wholesalers on average have lower adverse selection costs.[421] This lower adverse selection cost allows wholesalers to provide these orders with better execution quality, manifested in lower effective spreads [422] and E/Q ratios compared to exchanges. The realized spreads [423] observed in Table 5 [424] adjust effective spreads for adverse selection costs (*i.e.,* price impact).[425] Thus orders handled by wholesalers have higher realized spreads, despite the fact that they may execute at better prices than those received by and executed on exchanges, as observed by their lower effective spreads in Table 5.

Realized spreads are a proxy for the potential economic profit that liquidity suppliers may earn on a trade.[426] Therefore, the higher realized spreads earned by wholesalers suggest that the isolation of individual investor orders routed to wholesalers results in wholesalers potentially earning higher economic profits relative to a venue where market makers compete with each other and other market participants to supply liquidity at the individual order level (*e.g.,* an exchange).

Additionally, the results in Table 5 show that approximately 79% of the executed dollar volume in marketable orders handled by wholesalers are market orders. The Commission believes that these outcomes reflect the heavy utilization of market orders for NMS stocks by individual investors whose orders are primarily handled by wholesalers, contrary to the heavy utilization of limit orders by other market participants.

Table 5 also highlights significantly higher fill rates, *i.e.,* the percentage of the shares in an order that execute in a trade, for marketable orders sent to wholesalers as compared to those sent to exchanges.[427] Wholesalers execute the vast majority of orders that they receive against their own capital, *i.e.,* they internalize the vast majority of

[418] Rule 605 requires market centers to make available, on a monthly basis, standardized information concerning execution quality for covered orders in NMS stocks that they received for execution. *See* 17 CFR 242.605. Covered orders are defined in 17 CFR 242.600(b)(22) to include orders (including immediate-or-cancel orders) received by market centers during regular trading hours at a time when a national best bid and national best offer is being disseminated, and, if executed, is executed during regular trading hours, and excludes orders for which the customer requests special handling for execution (such as not held orders). Rule 605 reports are required to contain a number of execution quality metrics for covered orders, including statistics for all NMLOs with limit prices within ten cents of the NBBO at the time of order receipt as well as separate statistics for market orders and marketable limit orders. Under the Rule, the information is categorized by individual security, one of five order type categories (*see* 17 CFR 242.600(b)(14)), and one of four order size categories, which does not include orders for less than 100 shares or orders greater than or equal to 10,000 shares (*see* 17 CFR 242.600(b)(11)). As such, Rule 605 does not require reporting for orders smaller than 100 shares, including odd-lot orders. Rule 605 requires market centers to report execution quality information for all covered orders that the market center receives for execution, including orders that are executed at another venue (*i.e.,* because they are effectively rerouted to another trading center by the market center).

[419] The following filters were applied to the Rule 605 data to remove potential data errors: Observations where the total shares in covered orders were less than the sum of the canceled shares, share executed at the market center, and share executed away from the market center were deleted; Observations with missing order size code, order type code, total covered shares, or total covered orders were deleted; Realized and effective spread values are set to missing values if the total shares executed at and away from the market center are zero; and Per share dollar realized spreads, per share dollar effective spreads, and per share dollar price improvements were winsorized at 20% of the volume weighted average price of the stock for the month as calculated from NYSE Daily TAQ data.

[420] *See supra* note 365 and accompanying text for a definition and discussion of price impact. Table 5 estimates the average price impact associated with marketable orders routed to wholesalers to be 1.2 bps. This means that for a $10 stock the NBBO midpoint would move up (down) by an average of 0.12 cents in the five minutes following the execution of marketable buy (sell) order.

[421] Once implemented, the changes to the current arrangements for consolidated market data in the MDI Adopting Release, 86 FR at 18621, may impact the numbers in Table 5, including by reducing those for realized spread, effective spread, and amount of price improvement. The NBBO will narrow in stocks priced greater than $250 because it will be calculated based off a smaller round lot size. This narrower NBBO will decrease price improvement statistics in Rule 605 reports, which is measured against the NBBO. The effects on effective and realized spreads is more uncertain, because they are measured against the NBBO midpoint, which may not change if both the NBB and NBO decrease by the same amount. However, if marketable orders are more likely to be submitted when there are imbalances on the opposite side of the limit order book (*i.e.,* more marketable buy orders are submitted when there is more size on the offer side of the limit order book than the bid side), then the NBBO midpoint may change such that it is closer to the quote the marketable order executes against, which may decrease the effective and realized spreads in stocks above $250 when the MDI Rules are implemented. It is uncertain how likely this NBBO midpoint is to change. It is also uncertain how or to what degree these changes would differ between exchange and wholesaler Rule 605 reports. If both changed similarly, then there would not be changes in relative differences between their reported spread measures. *See supra* note 356.

[422] *See supra* note 366 for a definition and discussion of effective spreads.

[423] *See supra* note 367 and accompanying text for a definition and discussion of realized spreads as a measure of the economic profits earned by liquidity providers. *See infra* note 426 discussing the limitations of realized spreads for estimating the profits earned by market makers.

[424] The exception to this result is market orders executed on exchanges, which have average higher realized spreads than wholesaler market orders. However, market orders represent only 0.2% of the overall marketable orders executed on exchanges and therefore do not accurately represent exchange realized spreads. More specifically, *marketable limit orders* executed on exchanges in Q1 2022 had a share volume of 179.10 billion shares while *market orders* executed on exchanges had a share volume of 0.39 billion shares. *See infra* Table 5.

[425] The execution quality information required pursuant to Rule 605 combines information about orders executed at a market center with information on orders received for execution at a market center but executed by another market center; *see supra* note 407. As such, the execution quality statistics presented in Table 5 include orders that are effectively rerouted by wholesalers. Furthermore, note that Rule 605 does not specifically require market centers to prepare separate execution quality reports for their SDPs, and as such these calculations reflect all covered market and marketable limit orders in NMS stocks received and executed by wholesalers, including those on SDPs.

[426] *See supra* note 367 for the definition of the realized spread. Realized spreads do not measure the actual trading profits that market makers earn from supplying liquidity. In order to estimate the trading profits that market makers earn, we would need to know at what times and prices the market maker executed the off-setting position for a trade in which it supplied liquidity (*e.g.,* the price at which the market maker later sold shares that it bought when it was supplying liquidity). If market makers offset their positions at a price and time that is different from the NBBO midpoint at the time lag used to compute the realized spread measure (Rule 605 realized spread statistics are measured against the NBBO midpoint 5 minutes after the execution takes place), then the realized spread measure is an imprecise proxy for the profits market makers earn supplying liquidity. *See* Conrad and Wahal (2020) (for discussions showing how realized spreads decline when measured over time horizons and for further discussions regarding how realized spreads are affected when measured over different time horizons). Differences in inventory holding periods of different market makers could also create differences in the trading profits that market makers earn that would not be captured in the realized spread measure if it is estimated over the same time horizon for all market makers. *See* Lingyan Yang & Ariel Lohr, *The Profitability of Liquidity Provision* (last revised Feb. 18, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=4033802.* Additionally, realized spread metrics do not take into account any transaction rebates or fees, including PFOF, that a market maker might earn or pay, which would also affect the profits they earn when supplying liquidity. Furthermore, realized spreads also do not account for other costs that market makers may incur, such as fixed costs for setting up their trading infrastructure and costs for connecting to trading venues and receiving market data.

[427] Marketable orders may not fully execute if there isn't sufficient liquidity on the exchange to fill the orders within their limit price and/or if they contain other instructions that limit their execution, such as if they are designated as IOC orders or there are instructions not to route the orders to another exchange.

orders they receive.[428] Wholesalers expose themselves to inventory risk when internalizing order flow, but mitigate this risk by internalizing orders that possess low adverse selection risks.

TABLE 5—COMPARISON OF RULE 605 EXECUTION QUALITY STATISTICS BETWEEN EXCHANGES AND WHOLESALERS FOR NMS COMMON STOCKS AND ETFS IN Q1 2022

	Combined marketable orders		Market		Marketable limit	
	WH	EX	WH	EX	WH	EX
Average Price	$47.89	$58.14	$56.19	$85.45	$30.66	$58.08
Share Volume (billion shares)	106.97	179.49	72.20	0.39	34.77	179.10
Dollar Volume (billion $)	$5,122.91	$10,436.02	$4,056.85	$33.53	$1,066.06	$10,402.49
Fill Rate (%)	69.32%	25.77%	99.79%	58.08%	34.81%	25.77%
Effective Spread (bps)	1.81	2.06	1.47	3.29	3.11	2.06
Realized Spread (bps)	0.61	−0.38	0.39	2.40	1.43	−0.39
Price Impact (bps)	1.20	2.44	1.08	0.90	1.68	2.45
E/Q ratio	0.48	1.01	0.40	1.65	0.83	1.01
Pct of Shares Price Improved	83.17%	8.78%	88.99%	15.95%	61.01%	8.75%
Conditional Amount of Price Improvement (bps)	2.17	1.50	2.33	1.92	1.24	1.50

This table computes aggregated execution quality statistics for marketable covered orders received by exchanges and wholesalers from Rule 605 reports for Q1 2022 for NMS common stocks and ETFs. *See supra* note 418 for a definition of covered orders. Individual wholesaler and exchange Rule 605 reports are aggregated together at the stock-month level, into two categories, WH and EX, such that aggregate execution quality data is averaged for, (a) wholesalers (WH) and, (b) exchanges (EX), for each stock during each month.

The following metrics were calculated: Average Price is the stock's average execution price from the Rule 605 data (Dollar Volume/Share Volume), Share Volume is the total executed shares (in billions) from the Rule 605 data. Dollar Volume is the total executed dollar volume (in billions), calculated as the executed share volume from the Rule 605 data multiplied by the stock's monthly VWAP price, as derived from NYSE Daily Trade and Quote data (TAQ). Fill Rate is the weighted average of the stock-month total executed share volume/total covered shares from the Rule 605 data. Effective Spread is the weighted average of the stock-month percentage effective half spread in basis points (bps). Realized Spread is the weighted average of the stock-month percentage realized half spread in basis points (bps). Price Impact is the weighted average of the stock-month percentage price impact in basis points (bps). E/Q ratio is the weighted average of the stock-month ratio of the effective spread/quoted spread. Pct of Shares Price Improved is the weighted average of the stock-month ratio of shares executed with price improvement/total executed share volume. Conditional Amount of Price Improvement is the weighted average of the stock-month of the amount of percentage price improvement in basis points (bps), conditional on the executed share receiving price improvement.

Aggregated effective and realized percentage spreads are measured in half spreads in order to show the average cost of an individual investor order and are calculated by dividing the aggregated Rule 605 reported per share dollar amount by twice the stock's monthly volume weighed average price (VWAP), as derived from NYSE Daily Trade and Quote data (TAQ), for trades executed during regular market hours during the month. Percentage price impact is calculated as the aggregated Rule 605 reported per share dollar effective spreads minus per share dollar realized spreads divided by twice the stock's monthly volume weighed average price (VWAP), as derived from NYSE Daily Trade and Quote data (TAQ). Percentage amount of price improvement is calculated as the aggregated Rule 605 reported per share dollar amount of price improvement divided by the stock's monthly volume weighed average price (VWAP), as derived from NYSE Daily Trade and Quote data (TAQ). Percentage spreads and amount of price improvement percentages are reported in basis points (bps). The Combined Market and Marketable Limit order type category is constructed for each security-month-order size category by combining the market and marketable limit order categories and computing the total and share weighted average metrics for the order size category for each security-month.

The sample includes NMS common stocks and ETFs that are present in the CRSP 1925 US Stock Database, Ctr. Rsch. Sec. Prices, U. Chi. Booth Sch. Bus. (2022). The CRSP 1925 US Indices Database, Ctr. Rsch. Sec. Prices, U. Chi. Booth Sch. Bus. (2022), was used to identify if a stock was a member of the S&P 500. The stock did not have to be in the CRSP 1925 US Indices Database to be included in the analysis. NMS Common stocks and ETFs are identified, respectively, as securities in TAQ with a Security Type Code of 'A' and 'ETF'. For each stock-month-order-type (such that aggregate execution quality data is averaged for, (a) wholesalers and, (b) exchanges, for each stock during each month) the per dollar share weighted measures from Rule 605 reports are aggregated together by share-weighting across different trading venues and order-size categories within the stock-month-order-type and venue type (*i.e.,* trading venue Rule 605 reports for exchanges and wholesalers are aggregated into different categories). Percent values are then calculated for each stock month by dividing by the stock's monthly volume weighed average price (VWAP). These percentage stock-month values are averaged together into order-type categories (market orders, marketable limit orders, and the combined market and marketable limit order type category, for both wholesalers and exchanges) based on weighting by the total dollar trading volume for the wholesaler or exchange category in that stock-month-order type, where dollar trading volume is estimated by multiplying the Rule 605 report total executed share volume, *i.e.,* the share volume executed at market center + share volume executed away from the market center, for the stock-month-order type by the stock's monthly VWAP. *See supra* note 419 for a discussion of filters that were applied to the Rule 605 data in this analysis.

Because segmented orders valued at $200,000 and greater would be excepted from Proposed Rule 615,[429] we limit our analysis to Rule 605 order size categories where the average dollar value of orders received by wholesalers was under $200,000.[430] Table 6 summarizes Rule 605 data comparing the execution quality of marketable orders (*i.e.,* the combined market and marketable limit order category in Table 5) under $200,000 routed to wholesalers and exchanges for different security types.[431] In Table 6, the average realized spreads for marketable orders routed to exchanges are negative for all security types,[432] while orders routed to wholesalers have positive realized spreads in all securities, with larger realized spreads in Non-S&P 500 stocks. The positive realized spreads for marketable orders routed to wholesalers seem to indicate that the amount of price improvement these orders receive in the form of lower effective spreads does not fully offset the lower adverse selection costs they impose on liquidity suppliers (as measured by lower price impacts) compared to negative realized

[428] *See* analysis in *infra* Table 10 and corresponding discussion.

[429] *See supra* section IV.B.5 discussing exceptions to the Proposed Rule.

[430] We estimated the average dollar value of the orders received by wholesalers based on their Rule 605 reports by multiplying the average order size for a stock-month-order-size-category (estimated as the number of total covered shares divided by the number of total covered orders) by the stock's average monthly VWAP price estimated from NYSE TAQ data.

[431] Both the wholesaler and exchange average execution metrics in Table 6 are calculated based on weighting by the total wholesaler dollar trading volume in that stock-month. This weighting method calculates averages across stocks similarly for exchanges and wholesalers when aggregating their Rule 605 reports, which helps ensure the averages across stocks are comparable between exchanges and wholesalers.

[432] A negative average realized spread on exchanges does not necessarily mean that market makers on exchanges are not earning trading profits for supplying liquidity on exchanges. The realized spread observed on exchanges is a mix of liquidity supplied by market makers and limit orders submitted by other traders who may be interested in trading but not earning a spread (*e.g.,* limit or midpoint orders of individual or institutional investors that potentially don't want to pay the spread to trade). Additionally, as discussed in *supra* note 426, the realized spread is a proxy and does not measure the actual trading profits that market makers earn from supplying liquidity. It does not include exchange rebates liquidity suppliers may earn and also makes assumptions about the time and price at which the liquidity suppliers exit the position. After accounting for exchange rebates, liquidity suppliers on exchanges could potentially earn average positive trading profits if they exit their positions at a different time or price than the estimated NBBO midpoint at the time horizon used to estimate the realized spread (5 minutes for realized spreads reported in Rule 605). *See* Conrad and Wahal (2020) for discussions on how realized spreads vary when calculated over different time horizons.

spreads for orders routed to exchanges.[433]

Table 6 also shows realized spreads adjusted to reflect share-level PFOF payments paid by wholesalers [434] and rebates paid by exchanges.[435] After these respective costs are netted out, although wholesaler realized spreads are reduced and exchange realized spreads increase (*i.e.,* are less negative), wholesaler realized spreads continue to exceed exchange realized spreads. Adjusting for rebates on the one hand and PFOF on the other allows us to estimate a marginal profit to a liquidity supplier in each venue (note that a rebate substitutes one-for-one with a spread, as does PFOF, and in an idealized perfect-competition setting both would be zero). Acknowledging that there may be differences not captured by these measures, this calculation suggests a higher marginal profit for orders off-exchange versus on-exchange, and suggests greater on-exchange competition.[436] While an accounting measure of profit would need to take, say, fixed costs into account, fixed costs alone would not explain the difference as liquidity suppliers on both types of venues may have similar fixed costs.

TABLE 6—RULE 605 WHOLESALER (WH) AND EXCHANGE (EX) EXECUTION QUALITY COMPARISON FOR MARKETABLE ORDERS UNDER $200,000 FOR Q1 2022 BY SECURITY TYPE

	All NMS stocks	S&P 500	Non-S&P 500	ETF
Average Price	$33.99	$97.03	$13.52	$51.19
WH Share Volume (billion shares)	96.51	15.00	62.32	19.18
WH Dollar Volume (billion $)	$3,280.03	$1,455.40	$842.66	$981.98
EX Share Volume (billion shares)	172.08	39.89	86.67	45.52
EX Dollar Volume (billion $)	$9,025.52	$3,448.64	$1,899.61	$3,677.27
WH Fill Rate (%)	69.06%	73.17%	66.65%	65.03%
EX Fill Rate (%)	27.31%	32.53%	29.56%	17.63%
WH Effective Spread (bps)	2.05	0.72	5.70	0.89
EX Effective Spread (bps)	3.11	1.45	7.86	1.49
WH Realized Spread (bps)	0.72	0.30	1.55	0.64
EX Realized Spread (bps)	−0.67	−0.30	−1.97	−0.12
WH Realized Spread Adj PFOF (bps)	0.43	0.17	0.86	0.45
EX Realized Spread Adj Rebate (bps)	−0.001	−0.05	−0.24	0.28
WH Price Impact (bps)	1.33	0.42	4.15	0.25
EX Price Impact (bps)	3.78	1.74	9.83	1.61
WH E/Q Ratio	0.42	0.35	0.49	0.45
EX E/Q Ratio	1.00	0.98	1.00	1.01
WH % Pct of Shares Price Improved	84.7%	86.7%	82.5%	83.4%
EX % Pct of Shares Price Improved	8.8%	10.9%	9.5%	5.2%
WH Conditional Amount of Price Improvement (bps)	2.62	1.49	6.27	1.17

[433] Other studies have also used realized spreads to examine competition between liquidity suppliers. *See, e.g.,* Roger Huang & Hans Stoll, *Dealer versus auction markets: A paired comparison of execution costs on NASDAQ and the NYSE,* 41 J. Fin. Econ. 313 (1996) (finding that in 1991 realized spreads for a sample of NASDAQ stocks were higher than realized spreads for a matched sample of NYSE stocks and concluding that important explanations for the higher spreads observed on NASDAQ were the internalization and preferencing of order flow and the presence of alternative interdealer trading systems, factors that limited dealers' incentives to narrow spreads); Jonathan Brogaard & Corey Garriott, *High-Frequency Trading Competition,* 54 J. Fin. & Quantitative Analysis 1469 (2019) (looking at the effects of the entry of new high-frequency traders that compete to supply liquidity on the Canadian Alpha exchange and finding that realized spreads decreased for the marketable orders of non-high-frequency traders after new high-frequency traders entered the market; the study observed that the reduction in realized spreads was not attributable to changes in the price impact of the orders of non-high-frequency traders and that the reduction in realized spreads was attributable to increased competition among liquidity suppliers); and Hank Bessembinder & Herbert Kaufman, *A cross-exchange comparison of execution costs and information flow for NYSE-listed stocks,* 46 J. Fin. Econ. 293 (1997) (finding in 1994 that effective bid-ask spreads for trades in NYSE issues completed on the NYSE are slightly smaller than for trades completed with the NASD dealer market and the regional stock exchanges but the realized bid-ask spreads for trades on the NYSE are lower by a factor of two to three; the authors conclude that this differential is attributable to the successful 'cream skimming' of uninformed trades by market makers off of the NYSE exchange; the authors also raise concerns as to whether the trades being diverted from the NYSE might have received better execution if they were not diverted and whether existing rules governing order flow effectively fostered competition).

[434] Wholesaler realized spreads are adjusted to account for the PFOF they pay to retail brokers. Because we are not able to identify the broker-dealer from which the orders originated in Rule 605 reports, we estimate PFOF rates for the Rule 605 data sample by multiplying the estimated PFOF rates retail brokers receive in Table 2 by 74% in order to adjust for an estimated 26% of the marketable order flow wholesalers receive coming from retail brokers that do not accept PFOF, as estimated by the percentage of share volume received from non-PFOF brokers in *infra* Table 14. The estimated PFOF rates are 12 mils for market orders in S&P 500 stocks, 10 mils for market orders in ETFs and non-S&P 500 stocks, 17 mils for marketable limit order in S&P 500 stocks, and 9 mils for marketable limit orders in ETFs and non-S&P 500 stocks. For the Rule 605 data sample, the wholesalers' PFOF adjusted realized spread is computed by subtracting the relevant PFOF rate from a stock's average dollar realized spread for orders routed to wholesalers and then dividing by twice the stock's average monthly VWAP price estimated from NYSE TAQ data.

[435] Estimates of exchange rebates that liquidity suppliers earn on maker-taker venues and the fees they pay on inverted and flat fee venues are assumed as follows: exchange rebates to liquidity suppliers on maker-taker venues are 27 mils; exchange fees for supplying liquidity on inverted venues are 15 mils; exchange fees for supplying liquidity on flat fee venues are 7 mils; and there is no fee on exchanges that do not charge fees and rebates. Exchange rebates are assumed to be 27 mils based on the average rate exchanges pay retail brokers for their non-marketable limit orders in Table 2. Fee rates for inverted and flat fee venues (which charge fees to both liquidity suppliers and demanders and do not pay rebates) were estimated based on exchange fee and rebate tables and were adjusted by 3 mils to account for volume-based tiering (for inverted venues) or differences in fees supplying liquidity using displayed vs. non-displayed orders (for flat fee venues). For both the Rule 605 and CAT data samples (*see infra* Table 7), a stock's rebate adjusted exchange realized spread is calculated by adding/subtracting the exchange rebate/fee to/from the average dollar realized spread and then dividing by twice the stock's average monthly VWAP price estimated from NYSE TAQ data.

[436] One caveat to the difference in transaction costs on and off-exchange is that, on-exchange execution, to the extent it is driven by institutional order flow, may be accompanied by commissions. While this should not affect the interpretation of realized spreads as marginal profit to liquidity provision, it does reflect the interpretation as either the transaction cost of the customer or marginal profit of the liquidity supplier handling customer order flow.

TABLE 6—RULE 605 WHOLESALER (WH) AND EXCHANGE (EX) EXECUTION QUALITY COMPARISON FOR MARKETABLE ORDERS UNDER $200,000 FOR Q1 2022 BY SECURITY TYPE—Continued

	All NMS stocks	S&P 500	Non-S&P 500	ETF
EX Conditional Amount of Price Improvement (bps)	2.36	1.04	5.88	1.28

This table compares aggregated execution quality statistics broken out for different security types for marketable covered orders with average order size under $200,000 received by exchanges and wholesalers as reported from Rule 605 reports for Q1 2022 for NMS common stocks and ETFs. *See supra* note 418 for a definition of covered orders. Individual wholesaler and exchange Rule 605 reports are aggregated together at the stock-month level into two categories, EX and WH. EX shows aggregated statistics from Rule 605 reports from exchanges and WH shows aggregated statistics from Rule 605 reports from wholesalers. Marketable orders are constructed separately for wholesalers and exchanges by combining the Market and Marketable Limit order type categories in Rule 605 reports for each security-month-order size category and computing the total and share weighted average metrics from the combined order types for the order size category for each security-month.

See supra Table 5 for the descriptions of the reported metrics: Average Price, Share Volume, Dollar Volume, Fill Rate, Effective spread, Realized spread, Price Impact, E/Q Ratio, Pct Shares Price Improved, and Conditional Amount of Price Improvement. WH Realized Spread Adj PFOF is the weighted average of the stock-month percentage realized half spread in basis points (bps) from wholesaler 605 reports after adjusting for the estimated PFOF paid by the wholesaler using the methodology described in *supra* note 434. EX Realized Spread Adj Rebate is the weighted average of the stock-month percentage realized half spread in basis points (bps) from exchange 605 reports after adjusting for the estimated rebates (access fees) exchanges pay (charge) to liquidity suppliers using the methodology described in *supra* note 435.

Percentage spreads are measured in half spreads in order to show the average cost of an individual investor order and are calculated by dividing the Rule 605 report per share dollar amount by twice the stock's monthly VWAP, as derived from NYSE Daily Trade and Quote data (TAQ), for trades executed during regular market hours during the month. Percentage spreads are reported in basis points (bps).

The sample includes NMS common stocks and ETFs that are present in the CRSP 1925 US Stock Database, Ctr. Rsch. Sec. Prices, U. Chi. Booth Sch. Bus. (2022). The CRSP 1925 US Indices Database, Ctr. Rsch. Sec. Prices, U. Chi. Booth Sch. Bus. (2022), was used to identify if a stock was a member of the S&P 500. The stock did not have to be in the CRSP 1925 US Indices Database to be included in the analysis. NMS Common stocks and ETFs are identified, respectively, as securities in TAQ with a Security Type Code of 'A' and 'ETF. The exchange and wholesaler metrics in the table are each reported for the combined marketable order type, which was constructed for this analysis separately for exchange and wholesalers by combining the Market and Marketable Limit order type categories in Rule 605 reports at the stock-month-order-size level and computing the total and share weighted average metrics from the combined order types. For each stock-month, share weighted metrics (for both exchange and wholesalers) are then calculated by share-weighting across different order-size categories based on the number of shares executed (at the market center + away) in wholesalers' Rule 605 reports in that order-size category. Order size categories with wholesaler average order dollar values greater than or equal to $200,000 were excluded. The average order dollar values were determined for each order-size category stock-month by dividing the wholesaler total number of covered shares in the order size category by the wholesaler total number of covered orders and then multiplying by the stock-month's average VWAP, as derived from NYSE Daily Trade and Quote data (TAQ). Stock-month values are averaged together (for both wholesalers and exchanges) based on weighting by the total wholesaler dollar trading volume in that stock-month for the combined marketable order type (wholesaler dollar trading volume is estimated by multiplying the Rule 605 report wholesaler total executed share volume, *i.e.,* the share volume executed at market center + share volume executed away from the market center, for the stock-month-order type by the stock's monthly VWAP). This weighting method calculates averages across stocks similarly for exchanges and wholesalers when aggregating their Rule 605 reports, which helps ensure the averages across stocks are comparable between exchanges and wholesalers. *See supra* note 419 for a discussion of filters that were applied to the Rule 605 data in this analysis.

Because Rule 605 requires market centers to report execution quality statistics only for covered orders that fall within specific order size and type categories,[437] a number of order types and sizes that may be particularly relevant for individual investors are excluded from the above analyses, including orders for less than 100 shares.[438] Additionally Rule 605 data does not allow us to distinguish between orders that wholesalers execute on a principal basis from those they execute on riskless principal basis, since they are both reported as being executed at the market center. Furthermore, it is not possible in Rule 605 data to distinguish between orders that a wholesaler received from individual investors from those it received from other types of market participants. For example, wholesaler Rule 605 reports may include both individual investor orders that they receive, as well as institutional orders they receive on their SDPs. Lastly, effective and realized spread measures as required to be reported in Rule 605 reports are calculated using a five-minute time horizon, which some academic literature argues has become inappropriate for a high-frequency environment.[439] Therefore, to supplement the analyses using Rule 605 data and test for the robustness of the results[440] that it generated, CAT data[441] was analyzed to look at the execution

[437] *See supra* note 407 for a definition of covered orders and a discussion of the order type and size categories included in Rule 605 reporting requirements.

[438] There is evidence that individual investors tend to use smaller trading sizes. *See, e.g.,* Robert P. Bartlett, Justin McCrary & Maureen O'Hara, *The Market Inside the Market: Odd-Lot Quotes* (last revised Feb. 11, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=4027099* (retrieved from Elsevier database); Matthew Healey, *An In-Depth View Into Odd Lots,* Cboe (Oct. 2021), *available at https://www.cboe.com/insights/posts/an-in-depth-view-into-odd-lots/.*

[439] *See, e.g.,* Maureen O'Hara, *High Frequency Market Microstructure,* 116 J. Fin. Econ. 257 (2015) (''O'Hara 2015''); Maureen O'Hara, Gideon Saar & Zhuo Zhong, *Relative Tick Size and the Trading Environment,* 9 Rev. of Asset Pricing Stud. 47 (2019) (''O'Hara et al.''); Jennifer S. Conrad & Sunil Wahal, *The Term Structure of Liquidity Provision,* 136 J. Fin. Econ. 239 (2020) (''Conrad and Wahal''). Conrad and Wahal suggest that a one-minute horizon may be appropriate for small stocks, and a 15-second horizon may be appropriate for large stocks. The following analyses using CAT data will use a one-minute horizon for calculating the realized spread; *see supra* note 50.

[440] Rule 605 data is publicly available and the consistency of the results generated by analysis of these data supports the veracity of the results generated by CAT data, despite the fact that CAT data is not publicly available.

[441] This analysis used CAT data to examine the execution quality of marketable orders in NMS Common stocks and ETFs that belonged to accounts with a CAT account type of ''Individual Customer'' and that originated from a broker-dealer MPID that originated orders from 10,000 or more unique ''Individual Customer'' accounts during Jan. 2022. The number of unique ''Individual Customer'' accounts associated with each MPID was calculated as the number for unique customer account identifiers with an account customer type of ''Individual Customer'' that originated at least one order during the month of Jan. 2022. The Commission found that 58 broker-dealer MPIDs associated with 54 different broker-dealers originated orders from 10,000 or more unique Individual Customer accounts in Jan. 2022. As discussed in *supra* note 194, the CAT account type ''Individual Customer'' may not be limited to individual investors because it includes natural persons as well as corporate entities that do not meet the definitions for other account types. The Commission restricted that analysis to MPIDs that originated orders from 10,000 or more ''Individual Customer'' accounts in order to ensure that these MPIDs are likely to be associated with retail brokers to help ensure that the sample is more likely to contain marketable orders originating from individual investors. NMS Common stocks and ETFs are identified, respectively, as securities in TAQ with a Security Type Code of ''A'' and ''ETF.''

quality of marketable orders of individual investors in NMS Common Stocks and ETFs that were less than $200,000 in value and that executed and were handled by wholesalers during Q1 2022 (''CAT retail analysis'').[442] This was compared to a sample of CAT data examining the execution quality of executed market and marketable limit orders in NMS Common Stocks and ETFs received by exchanges that were less than $200,000 in value over the same time period (''CAT exchange analysis'').[443]

Table 7, which reports results from CAT data, contains some statistics that are not available in Rule 605 reports, including statistics on midpoint executions and sub-penny trades.[444] In NMS common stock and ETF orders, wholesalers execute approximately 44% of shares at prices at or better than the NBBO midpoint. However, wholesalers also offer less than 0.1 cents price improvement to approximately 18.6% of shares that they execute. Wholesalers execute more than 65% of shares at sub-penny prices, with over 40% of shares being executed at prices with four decimal points (*i.e.,* the fourth decimal place is not equal to zero).

Results from this analysis are highly consistent with results from the analysis of Rule 605 data from Table 6. Specifically, wholesalers display lower price impacts and E/Q ratios, indicating that orders internalized by wholesalers receive better execution quality than orders executed on exchanges. Despite this enhanced execution quality, realized spreads of wholesalers exceed those produced by exchanges.[445] This finding remains even after netting out PFOF payments made by wholesalers[446] and rebates made by exchanges.[447]

TABLE 7—WHOLESALER CAT ANALYSIS OF EXCHANGE INDIVIDUAL INVESTOR ORDER EXECUTION QUALITY FOR MARKETABLE ORDERS IN NMS COMMON STOCKS AND ETFS BY TYPE OF STOCK

Variable	All	SP500	Non-SP500	ETF
Panel A: Wholesaler and Exchange Execution Quality				
Average Price	$29.87	$110.31	$10.52	$53.14
WH Principal Execution Rate	90.44%	93.07%	87.66%	88.12%
WH Share Volume (billion shares)	87.11	11.63	63.17	12.31
EX Share Volume (billion shares)	281.90	66.98	140.82	74.10
WH Dollar Volume (billion $)	$2,601.44	$1,282.62	$664.41	$654.41
EX Dollar Volume (billion $)	$16,194.84	$6,479.89	$3,246.09	$6,468.85
WH Effective Spread (bps)	2.11	0.67	6.23	0.76
EX Effective Spread (bps)	3.18	1.52	8.11	1.42
WH Realized Spread (bps)	0.85	0.42	2.00	0.51
EX Realized Spread (bps)	−1.22	−0.28	−3.90	−0.34
WH Realized Spread Adj PFOF (bps)	0.49	0.29	0.99	0.36
EX Realized Spread Adj Rebate (bps)	−0.40	−0.06	−1.54	0.08

[442] Fractional share orders with share quantity less than one share were excluded from the analysis. The analysis included market and marketable limit orders that originated from one of the 58 retail broker MPIDs and were received by a market center that was associated with one of the six wholesalers CRD numbers (FINRA's Central Registration Depository number) during some point in the order's lifecycle. Orders that were received by the wholesaler or executed outside of normal market hours were excluded. Orders were also excluded if they had certain special handling codes so that execution quality statistics would not be skewed by orders being limited in handling by special instructions (*e.g.,* pegged orders, stop orders, post only orders, etc.) Orders identified in CAT as Market and Limit orders with no special handling codes or one of the following special handling codes were included in the analysis: NH (not held), CASH (cash), DISQ (display quantity), RLO (retail liquidity order), and DNR (do not reduce). These special handling codes were identified based on their common use by retail brokers and descriptions of their special handling codes. The marketability of a limit order was determined based on the consolidated market data feed NBBO at the time a wholesaler first receives the order. Limit orders that were not marketable were excluded. The dollar value of an order was determined by multiplying the order's number of shares by either its limit price, in the case of a limit order, or by the far side quote (*i.e.,* NBO for a market buy order and NBB for a market sell) of the consolidated market data feed NBBO at the time the order was first received by a wholesaler, in the case of a market order. Orders with dollar values greater than or equal to $200,000 were excluded from the analysis. The analysis includes NMS Common Stocks and ETFs (identified by security type codes of 'A' and 'ETF' in NYSE TAQ data) that are also present in CRSP data. Price improvement, effective spreads, realized spreads, quoted spreads, and price impacts were winsorized if they were greater than 20% of a stock's VWAP during a stock-week. *See* Table 7 for a detailed description of the analysis.

[443] The Commission analysis used CAT data to examine the execution quality of market and marketable limit orders in NMS Common Stocks and ETFs that were under $200,000 in value that were received and executed by exchanges during normal market hours in Q1 2022. The analysis employed filters to clean the data and account for potential data errors. The analysis is limited to orders identified in CAT as market and limit orders accepted by exchanges. Orders were excluded from the analysis if they had certain special handling codes, such as post or add-liquidity only orders, midpoint orders, orders that can only execute in opening and closing auctions, orders with a minimum execution quantity, pegged orders, or stop order or stop-loss orders. Orders were also required to execute in normal trades during normal trading hours to be included in the analysis. Normal trades are identified in CAT data by sale conditions ''blank, @, E, F, I, S, Y'' which correspond to regular trades, intermarket sweep orders, odd lot trades, split trades, and yellow flag regular trades. For orders submitted to exchanges, the NBBO the exchange records seeing at the time of order receipt is used to measure the NBBO and NBBO midpoint for calculating statistics that are based on the time of order receipt (*e.g.,* effective spreads, price improvement, quoted spreads, etc.). The marketability of exchange orders was determined based on the NBBO observed by the exchange at the time of order receipt. The dollar value for a market order was calculated as the price of the far side NBBO quote (NBO for a market buy order and NBB for a market sell) times the shares in the order. The dollar value for a limit order was calculated as the price of the limit order times the number of shares in the order. Orders with dollar values greater than or equal to $200,000 were excluded from the analysis. The consolidated market data feed NBBO was used to calculate statistics that use the NBBO or NBBO one minute after execution (*e.g.,* realized spreads, price impacts, etc). The analysis includes NMS Common Stocks and ETFs (identified by security type codes of 'A' and 'ETF' in NYSE TAQ data) that are also present in CRSP data. Price improvement, effective spreads, realized spreads, quoted spreads, and price impacts were winsorized if they were greater than 20% of a stock's VWAP during a stock-week. *See* Table 7 for a detailed description of the analysis.

[444] Certain items in Table 7 may also be affected by the MDI rules once they are implemented. *See supra* notes 356 and 421.

[445] The relative differences between exchanges and wholesalers in price impacts and realized spreads are even more pronounced with the CAT data, which (unlike 605 data) include odd lots, exclude orders greater than $200,000, and measure realized spreads from 1 minute rather than 5 minutes after execution.

[446] For CAT data, we estimate the PFOF each retail broker receives based on data from their Q1 Rule 606 reports. For each month we separately estimate the average per share PFOF rate they receive from wholesalers based on the order type (market and marketable limit orders) and security type (S&P500 and non-S&P500 stocks), which we then combine with the same order and stock type in the CAT data. If a retail broker does not produce a Rule 606 report, then we use the PFOF rates from its clearing broker's Rule 606 report, if it is available (some retail brokers' websites disclosed that they share in payments their clearing broker receives for their order flow). A PFOF rate of 20 cents per 100 shares was used for the introducing broker-dealers and clearing broker that reported handled orders on a not held basis and did not disclose PFOF information in their Rule 606 report but disclosed on their website that they received PFOF for their order flow. 20 cents per 100 shares was the PFOF rate that the clearing broker that handles orders on a not held basis disclosed on their website that they received.

[447] *See supra* note 435 for discussion of how exchange rebates are calculated.

TABLE 7—WHOLESALER CAT ANALYSIS OF EXCHANGE INDIVIDUAL INVESTOR ORDER EXECUTION QUALITY FOR MARKETABLE ORDERS IN NMS COMMON STOCKS AND ETFS BY TYPE OF STOCK—Continued

Variable	All	SP500	Non-SP500	ETF
WH Price Impact (bps)	1.26	0.25	4.22	0.25
EX Price Impact (bps)	4.40	1.80	12.00	1.75
WH E/Q Ratio	0.39	0.32	0.50	0.41
EX E/Q Ratio	1.04	1.01	0.98	1.17
Panel B: Wholesaler Price Improvement				
WH Pct Executed with Price Improvement	89.95%	93.33%	85.43%	87.93%
WH Conditional Amount Price Improvement (bps)	2.54	1.47	6.16	0.99
WH Pct Shares Executed at Midpoint or Better	44.57%	47.37%	39.76%	43.97%
WH Pct Shares Executed at Midpoint	31.69%	32.47%	28.46%	33.44%
WH Pct Shares Executed at NBBO	8.38%	5.86%	10.97%	10.69%
WH Pct Shares Executed Outside NBBO	1.67%	0.81%	3.61%	1.38%
WH Pct Shares Executed with <0.1 cent Price Improvement	18.64%	16.62%	20.58%	20.64%
WH Pct of Shares Executed as Subpenny Prices	66.98%	65.10%	64.16%	73.55%
WH Pct of Shares Executed at Subpenny Prices without Midpoint Trades	47.60%	46.82%	47.03%	49.68%
WH Pct of Shares Executed at Subpenny Prices with 4 Decimals	41.36%	40.80%	41.76%	42.06%

This table uses CAT data to compare aggregated execution quality statistics for Q1 2022 broken out for different security types for executed marketable orders with order size under $200,000 in NMS Common Stocks and ETFs received by wholesalers from individual investors to similar orders received by exchanges. Aggregated statistics in the table labeled WH are based on analysis of CAT data of executed marketable orders in NMS Common Stocks and ETFs from individual investors for under $200,000 in value belonging to one of 58 retail broker MPIDs that were handled by one of 6 wholesalers during normal market hours in Q1 2022 (*see supra* note 442 for additional discussions on the CAT data used in the CAT retail analysis). Aggregated statistics in the table labeled EX are based on a corresponding analysis of CAT data of executed marketable orders in NMS Common Stocks and ETFs receive by exchanges that were under $200,000 in value and received and executed during normal market hours in Q1 2022 (*see supra* note 443 for additional discussions on the CAT data used in CAT exchange analysis).

The following metrics are calculated for all stocks and for each of the stock-types. EX indicates aggregated statistics for executed marketable orders routed to exchanges and WH indicates aggregated statistics for executed marketable orders from individual investors that were routed to wholesalers. Average Price is the average execution price. WH Principal Execution Rate is the percentage of dollar volume of individual investor trades that a wholesaler executed in a principal capacity. Share Volume is the total executed share volume. Dollar Volume is the total executed dollar volume. Effective Spread is the weighted average of the percentage effective half spread in basis points (bps) (measured as average (execution price—NBBO midpoint at time of order receipt) * average transaction price). Realized Spread is the weighted average of the percentage one minute realized spread in bps (measured as average (execution price—NBBO midpoint one minute after execution) * average transaction price). WH Realized Spread Adj PFOF is the estimated realized spread in bps earned by the wholesaler after adjusting the realized spread for the estimated PFOF they pay to retail brokers (*see supra* note 446 for further details on adjusting wholesaler realized spreads for PFOF in CAT data). EX Realized Spread Adj Rebate is the estimated realized spread in bps earned by exchange liquidity suppliers after adjusting the realized spread for the estimated exchange rebates they receive or access fees they pay for supplying liquidity (*see supra* note 435 for further details on adjusting realized spreads for exchange fees and rebates). Price Impact is the weighted average of the percentage one-minute price impact spread in bps (measured as average (NBBO midpoint one minute after execution—NBBO midpoint at time of order receipt)/average transaction price). E/Q Ratio is the weighted average of the ratio of the effective dollar spread divided by its quoted spread at the time of order receipt. WH Pct Executed with Price Improvement is the weighted average of the percentage of share volume that is routed to wholesalers and executed at a price better than the NBBO. WH Conditional Amount Price Improvement is the weighted average amount of percentage price improvement given by wholesalers conditional on the order receiving price improvement in bps (measured for a marketable buy order as average (NBO at time of order receipt—execution price) and measured for a marketable sell order as average (execution price—NBB at time of order receipt) and then dividing the difference by the average transaction price). WH Pct Share Executed at Midpoint or Better is the weighted average of the percentage of shares that are routed to a wholesaler and executed at prices equal to or better than the NBBO midpoint at the time of order receipt. WH Pct Share Executed at Midpoint is the weighted average of the percentage of shares that are routed to a wholesaler and executed at a price equal to the NBBO midpoint at the time of order receipt. WH Pct Shares Executed at NBBO is the weighted average of the percentage of share volume routed to a wholesaler and executed at the NBBO at the time of order receipt (executed at the NBB for marketable sell orders and the NBO for marketable buy orders). WH Pct Shares Executed Outside NBBO is the weighted average of the percentage of share volume routed to wholesalers and executed at prices outside the NBBO at the time of order receipt (executed at a price less than the NBB for marketable sell orders and a price greater than the NBO for marketable buy orders). WH Pct Shares Executed with <0.1 cent Price Improvement is the weighted average of the percentage of shares that are executed with an amount of price improvement less than 0.1 cents measured against the NBBO at the time of order receipt. WH Pct Shares Executed Subpenny Prices is the weighted average of the percentage of shares that execute at a subpenny price (a dollar execution price with a non-zero value in the third or fourth decimal place). WH Pct Shares Executed at Subpenny without Midpoint Trades is the weighted average of the percentage of shares that execute at a subpenny price (a dollar execution price with a non-zero value in the third or fourth decimal place), excluding executions with subpenny prices that occur at the NBBO midpoint. WH Pct Shares Executed at Subpenny Prices with 4 Decimals is the weighted average of the percentage of shares that execute at a subpenny price where there is a dollar execution price with a non-zero value in the fourth decimal place. Average transaction prices used in calculating the metrics are calculated as the total dollar trading volume divided by the total share trading volume in the category and time period.For the wholesaler (WH) CAT metrics used in the sample, the analysis includes marketable orders for under $200,000 in value that originate from a customer with a CAT account type of ''individual'' at one of the 58 retail broker MPIDs and are routed to a wholesaler (*see supra* note 441 for more info on CAT account types and retail broker identification methodology and *supra* note 442 for more details on how the CAT retail analysis sample was constructed). Fractional share orders with share quantity less than one share were excluded from the analysis. Orders were also excluded if they had certain special handling codes. The marketability of a limit order is determined based on the consolidated market data feed NBBO at the time a wholesaler first receives the order.

For the exchange (EX) CAT metrics, executed market and marketable limit orders received by exchanges during normal market hours over the same period were used to calculate the exchange execution quality statics (*see supra* note 443 for more details on how the CAT exchange sample was constructed). Exchange orders were filtered if they had certain special handling codes. The marketability of exchange orders was determined based on the NBBO observed by the exchange at the time of order receipt.

The dollar value of an order was determined by multiplying the order's number of shares by either its limit price, in the case of a limit order, or by the far-side quote of the NBBO at the time of order receipt, in the case of a market order. The analysis includes NMS Common Stocks and ETFs (identified by security type codes of 'A' and 'ETF' in NYSE TAQ data) that are also present in CRSP data from CRSP 1925 US Stock Database, Ctr. Rsch. Sec. Prices, U. Chi. Booth Sch. Bus. (2022). The CRSP 1925 US Indices Database, Ctr. Rsch. Sec. Prices, U. Chi. Booth Sch. Bus. (2022), was used to identify if a stock was a member of the S&P 500. The stock did not have to be in the CRSP 1925 US Indices Database to be included in the analysis. Time of order receipt is defined as the time the wholesaler or exchange first receives the order. Wholesaler metrics based on the time of order receipt are measured against the NBBO from the consolidated market data feed. Exchange metrics based on time of order receipt are measured against the NBBO the exchange reports observing. Realized spreads for both exchange and wholesaler metrics are calculated with respect to the NBBO midpoint from the consolidated market data feed observed one minute after the time of order execution.

Separately, for both the exchange and wholesaler samples, total share volume, total dollar volume, average transaction prize, percentage volume metrics, and share weighted average dollar per share spread, price impact, and price improvement metrics were calculated at a stock-week-order size category level by aggregating together execution quality statistics calculated for individual orders. The order-size categories were defined as orders less than 100 shares, 100–499 shares, 500–1,999 shares, 2,000–4,999, 5,000–9,999 shares, and 10,000+ shares. For each stock-week-order size category, percentage spread, price impact, and price improvement metrics were calculated by dividing the average dollar per share metric by the average transaction price calculated for each stock-week-order size category. E/Q ratios were calculated for each stock-week-order size category by dividing the average dollar per share effective spread by the average dollar per share quoted spread.

Exchange sample metrics for E/Q ratios and percentage spread, price impact, and price improvement metrics for each stock-week-order size category were then merged with the corresponding stock-week-order size category in the wholesaler sample. Weighted averages for both wholesaler and exchange metrics and the wholesaler percentage volume metrics are then calculated for the security type in the sample by averaging across stock-week-order size category levels based on their total dollar transaction volume during the sample period in the wholesaler CAT sample (*i.e.,* for both exchanges and wholesalers, using the stock's total dollar trading volume in wholesaler executed transactions as the weight when averaging the share weighted average stock-week- size category values). Weighting the exchange and wholesaler execution metrics by the same weights helps to ensure the samples are comparable across stocks. Total dollar volume and share volume for the exchange and wholesaler samples are calculated by summing across all executions in a security type in each sample. The wholesaler Principal Execution Rate is calculated for a security type in the wholesaler sample by summing the total dollar volume in trades wholesalers executed in a principal capacity across the security type in the wholesaler sample and dividing by the total dollar volume in trades in the security type in the wholesaler sample.

In sum, analyses from Table 6 and Table 7 show that wholesaler realized spreads exceed exchange realized spreads for comparable marketable order transactions (*e.g.,* similar stocks and order sizes) on exchanges. If orders internalized by wholesalers were subject to competition from multiple liquidity suppliers at the individual order level,[448] we would expect realized spreads to be similar to the realized spreads earned by liquidity providers of similar orders routed to exchanges.[449] That is, the wholesaler could respond to the lower price impact (adverse selection risk) of its internalized orders by providing large enough price improvement so that its realized spread (potential profits) matched exchange realized spreads generated by the larger price impact (adverse selection risk) and smaller price improvement of orders executed by liquidity suppliers on exchanges. Since wholesaler price improvement is not commensurate their lower costs (*i.e.,* smaller price impacts due to lower adverse selection risk), their realized spreads exceed exchange realized spreads.

Further evidence and granularity regarding the difference between wholesaler and exchange realized spreads are found in Table 8 and Table 9. Table 8 compares the execution quality between orders routed to wholesalers and exchanges and provides estimates of effective and realized spreads as well as price impacts and E/Q ratios for NMS common stocks and ETFs sorted into buckets based on their average dollar quoted spread. Realized spreads are also adjusted for per-share PFOF payments made by wholesalers and rebates paid by exchanges in order to account for the impact of these costs on potential economic profits. Differences in realized spreads between exchanges and wholesalers appear to be largest in stocks with quoted spreads less than 1.1 cents or stocks with quoted spreads greater than 5 cents (the buckets in which wholesalers earn the largest realized spreads). This appears to be partially driven by orders routed to wholesalers receiving the least price improvement (as measured by the E/Q ratio) in stocks with quoted spreads less than 1.1 cents and orders routed to exchanges receiving the most price improvement in stocks with quoted spreads greater than 5 cents.[450]

TABLE 8—ESTIMATES OF WHOLESALER AND EXCHANGE EXECUTION QUALITY FOR MARKETABLE ORDERS UNDER $200,000 BY QUOTED SPREAD RANGE

Variable	Quoted spread bucket				
	<1.1 cents	1.1–2 cents	2–3 cents	3–5 cent	5+ cents
WH Effective Spread (bps)	2.74	1.09	1.30	2.00	2.74
EX Effective Spread (bps)	3.83	1.48	1.84	2.70	4.54
WH E/Q Ratio	0.48	0.41	0.34	0.34	0.35
EX E/Q Ratio	1.05	1.20	1.10	1.04	0.92
WH Price Impact (bps)	1.76	0.73	0.93	1.30	1.43
EX Price Impact (bps)	6.11	2.26	2.47	3.56	5.73
WH Realized Spread (bps)	0.99	0.36	0.37	0.69	1.31
EX Realized Spread (bps)	−2.28	−0.78	−0.63	−0.85	−1.20
WH Realized Spread Adj PFOF (bps)	−0.15	0.12	0.17	0.50	1.22
EX Realized Spread Adj Rebate (bps)	0.18	−0.21	−0.16	−0.38	−0.98

This table uses the CAT retail analysis data and CAT exchange analysis data to estimate exchange and wholesaler effective spreads, price impacts, realized spreads, E/Q ratios and wholesaler and exchange realized spreads after accounting for exchange rebates and PFOF across all NMS stocks and ETFs for marketable orders under $200,000 based on the stock's average quoted spread. *See supra* Table 7 for additional details on how the sample and metrics are calculated. Stocks are grouped into buckets based off of their time weighted average quoted spread for a week as measured in NYSE TAQ. Share-weighted percentage metrics are averaged together at the individual stock-week-order size category level for the exchange and wholesaler sample using the methodology in Table 7. Weighted averages for both wholesaler and exchange metrics are then calculated for each quoted spread bucket by averaging across stock-week-order size category levels based on their total dollar transaction volume during the sample period in the wholesaler CAT sample (*i.e.,* for both exchanges and wholesalers, using the stock's total dollar trading volume in wholesaler executed transactions as the weight when averaging the share weighted average stock-week-order size category values). Weighting the exchange and wholesaler execution metrics by the same weights helps to ensure the samples are comparable across stocks.

Table 9 compares execution quality between wholesalers and exchanges and provides estimates of the effective and realized spreads as well as price impacts and E/Q ratios for stocks sorted into buckets based on their security type and then sub-sorted into buckets based on their price and, for Non-S&P 500 stocks and ETFs, into liquidity buckets based on their total share trading volume in a week. Once again, realized spreads are adjusted for (per-share) PFOF payments made by wholesalers and rebates paid by exchanges in order to account for their impact on potential economic profits. The results show that differences in realized spreads are larger in stocks with lower liquidity. This suggests that the isolation of individual investor orders due to wholesaler internalizations may result in larger losses in potential price improvement for individual investors on their orders in less liquid stocks.

[448] The analysis in Table 7 shows that 9.6% of executed dollar volume from orders routed to wholesalers may be effectively rerouted and potentially subject to competition at the individual order level.

[449] Despite receiving more price improvement, the analyses in *supra* Table 5, Table 6, and Table 7 show that individual investor orders sent to wholesalers still had significantly positive realized spreads, indicating their price improvement does not fully offset the lower adverse selection costs they pose. Thus, while the higher price impact of orders executed on exchanges compresses exchange realized spreads, one might expect (under competitive conditions) that the lower price impact of orders internalized by wholesalers would pressure wholesalers to provide sufficiently high price improvement such that wholesaler realized spreads would face a similar compression.

[450] Results also indicate that, after adjusting for exchange rebates, average exchange realized spreads are positive for stocks with average quoted spreads less than 1.1 cents, unlike stocks where average quoted spreads exceed 1.1 cents, which still have negative average realized spreads after adjusting for exchange rebates. It is possible that one-cent minimum tick size on exchanges limits competition in stocks with quoted spreads less than 1.1 cents, leading to higher realized spreads for these stocks. Furthermore, PFOF-adjusted realized spreads are negative for stocks with quoted spreads less than 1.1 cents, unlike the realized spreads for stocks with wider quoted spreads, indicating that potential marginal economic profit is larger for these stocks.

TABLE 9—ESTIMATES OF EXECUTION QUALITY FOR MARKETABLE ORDERS UNDER $200,000 BY STOCK TYPE, PRICE GROUP, AND LIQUIDITY BUCKET

Stock type	Price group	Liquidity bucket	WH effective spread (bps)	EX effective spread (bps)	WH E/Q Ratio	EX E/Q Ratio	WH realized spread (bps)	EX realized spread (bps)	WH realized spread Adj PFOF (bps)	EX realized spread adj rebate (bps)
S&P 500	(1) <$30		1.18	2.47	0.45	1.01	0.67	−1.39	−0.14	−0.22
S&P 500	(2) $30–$100		0.49	1.32	0.30	1.06	0.12	−0.62	−0.08	−0.18
S&P 500	(3) $100+		0.67	1.50	0.31	1.00	0.46	−0.15	0.39	−0.03
Non-S&P 500	(1) <$30	Low	56.26	53.61	0.72	0.94	28.98	−0.43	27.66	3.52
Non-S&P 500	(1) <$30	Medium	31.70	26.91	0.80	0.96	11.70	−8.69	9.91	−3.77
Non-S&P 500	(1) <$30	High	8.84	10.25	0.65	1.02	2.21	−6.61	0.12	−1.85
Non-S&P 500	(2) $30–$100	Low	22.91	23.60	0.54	0.92	11.83	0.12	11.71	0.57
Non-S&P 500	(2) $30–$100	Medium	7.81	10.03	0.44	0.95	4.31	−1.03	4.19	−0.59
Non-S&P 500	(2) $30–$100	High	2.64	4.89	0.38	0.97	0.76	−2.48	0.58	−1.99
Non-S&P 500	(3) $100+	Low	14.86	17.82	0.42	0.88	11.83	2.41	11.81	2.51
Non-S&P 500	(3) $100+	Medium	6.79	10.07	0.36	0.90	5.12	0.35	5.08	0.48
Non-S&P 500	(3) $100+	High	2.43	5.33	0.30	0.90	1.47	−0.56	1.41	−0.41
ETF	(1) <$30	Low	14.98	19.86	0.67	0.97	12.76	8.61	12.49	9.68
ETF	(1) <$30	Medium	11.69	15.23	0.62	0.96	9.52	4.89	9.29	5.96
ETF	(1) <$30	High	2.79	4.31	0.55	1.04	1.36	−1.39	0.62	0.20
ETF	(2) $30–$100	Low	8.06	10.62	0.59	0.94	6.98	4.62	6.88	5.10
ETF	(2) $30–$100	Medium	4.22	6.70	0.42	0.93	3.83	1.81	3.75	2.25
ETF	(2) $30–$100	High	0.66	1.43	0.40	1.12	0.51	−0.41	0.36	0.05
ETF	(3) $100+	Low	2.54	4.69	0.39	0.92	2.39	1.05	2.36	1.20
ETF	(3) $100+	Medium	1.21	2.34	0.33	0.98	1.17	0.02	1.15	0.16
ETF	(3) $100+	High	0.20	0.44	0.39	1.27	0.15	−0.10	0.12	−0.02

This table uses the CAT retail analysis data and CAT exchange analysis data to estimate exchange and wholesaler effective spreads, realized spreads, E/Q ratios and wholesaler and exchange realized spreads after accounting for exchange rebates and PFOF across all NMS stocks and ETFs for marketable orders under $200,000 based on the stock's type, VWAP, and traded share volume. *See supra* Table 7 for additional details on how the sample and metrics are calculated. Stocks are broken out into buckets based on their security type, price, and liquidity. Stock type is based on whether a security is an ETF, or a common stock in the S&P 500 or Non-S&P 500. Price buckets are based on a stock's average VWAP price over a week as estimated from TAQ (*see supra* Table 7 for additional details). Stocks within each security type-price bucket, except S&P 500 stocks, are sorted into three equal liquidity buckets based on the stock's total share trading volume during the week estimated using TAQ data. Share-weighted percentage metrics are averaged together at the individual stock-week-order-size category level for the exchange and wholesaler sample using the methodology in Table 7. Weighted averages for both wholesaler and exchange metrics are then calculated for each security-type-price-liquidity bucket by averaging across stock-week-order size category levels based on their total dollar transaction volume during the sample period in the wholesaler CAT sample (*i.e.,* for both exchanges and wholesalers, using the stock's total dollar trading volume in wholesaler executed transactions as the weight when averaging the share weighted average stock-week-order size category values). Weighting the exchange and wholesaler execution metrics by the same weights helps to ensure the samples are comparable across stocks.

5. Variation in Wholesaler Execution Quality

The previous section provided evidence that wholesalers earn greater realized spreads relative to exchanges and these differences are larger in less liquid stocks. In the following section, we present additional evidence on the variation in execution quality that wholesalers provide to individual investor orders.

a. Principal vs. Non-Principal Capacity

Table 10 uses CAT retail analysis to summarize how individual investor marketable NMS stock order execution quality varies based on whether the wholesaler executes the order in a principal capacity (*i.e.,* internalizes the order) or effectively reroutes the order (*i.e.,* executes in a riskless principal or handles it in an agency capacity). This analysis supports the interpretation that wholesalers identify and tend to internally execute individual investor orders associated with the lower adverse selection costs.[451] Internalized orders have a lower price impact (0.91 bps as compared to 4.63 bps for those effectively rerouted), and lower effective spreads (1.77 compared to 5.36 for other transactions). Wholesalers also earn higher realized spreads on the orders they execute as principal (0.86 bps for principal transactions compared to 0.72 bps earned by those providing liquidity for the riskless principal or agency transactions), despite executing them at lower effective spreads.

TABLE 10—WHOLESALER CAT ANALYSIS OF INDIVIDUAL INVESTOR ORDER EXECUTION QUALITY BY WHOLESALER EXECUTION CAPACITY

Variable	Internalized	Effectively rerouted
Average Price	$33.48	$14.78
WH Orders (million)	236.95	34.36
WH Trades (millions)	251.32	74.36
WH Share Volume (billion shares)	70.28	16.83
WH Pct of Executed Share Volume	80.68%	19.32%
WH Dollar Volume (billion $)	$2,352.80	$248.64
WH Pct of Executed Dollar Volume	90.44%	9.56%
WH Effective Spread (bps)	1.77	5.36
WH Realized Spread (bps)	0.86	0.72
WH Price Impact (bps)	0.91	4.63
WH E/Q Ratio	0.35	0.70

[451] Certain items in Table 10 may also be affected by MDI Rules once they are implemented. *See supra* notes 356 and 421.

TABLE 10—WHOLESALER CAT ANALYSIS OF INDIVIDUAL INVESTOR ORDER EXECUTION QUALITY BY WHOLESALER EXECUTION CAPACITY—Continued

Variable	Internalized	Effectively rerouted
WH Pct Executed with Price Improvement	93.37%	57.65%
WH Conditional Amount Price Improvement (bps)	2.45	3.74
WH Pct Shares Executed at Midpoint or Better	46.05%	30.65%
WH Pct Shares Executed at Midpoint	32.23%	26.53%
WH Pct Shares Executed at NBBO	5.51%	35.49%
WH Pct Shares Executed Outside NBBO	1.12%	6.86%
WH Pct Shares Executed with <0.1 cent Price Improvement	20.38%	2.22%

The table summarizes execution quality statistics from the CAT retail analysis based on whether the wholesaler executed the individual investor NMS stock order in a principal capacity or in another capacity (*i.e.,* in an agency or riskless principal capacity). The majority of the other transactions are executed by the wholesaler in a riskless principal capacity. *See supra* Table 7 for additional details on the sample and metrics used in the analysis. Share-weighted percentage metrics are averaged together at the individual execution capacity-stock-week-order-size category level for the wholesaler sample using the methodology in Table 7. Weighted averages for the metrics are then calculated for each execution capacity by averaging across execution capacity-stock-week-order size category levels based on their total dollar transaction volume during the sample period in the wholesaler CAT sample.

Table 11 provides data on the duration of time to execution for orders routed to wholesalers. While there is substantial variation in time to execution for both internalized orders and orders routed to other market centers, internalized order are executed more quickly, especially for orders with the slowest execution times (*i.e.,* greater than or equal to the 75th percentile). The median execution time for rerouted orders was 24 milliseconds (0.024 seconds), about seven times longer than the median execution time for internalized orders, which equaled 3.6 milliseconds (*i.e.,* 0.0036 seconds). The execution time for the slowest 5% of internalized orders was under 1.3 seconds, substantially faster than the slowest 5% of rerouted orders, which took around two minutes to execute.

TABLE 11—DISTRIBUTION OF SHARE-WEIGHTED TIME-TO-EXECUTION

[in milliseconds]

Execution capacity	5th Pctl	10th Pctl	25th Pctl	50th Pctl	75th Pctl	90th Pctl	95th Pctl
Internalized	0.47	0.90	1.56	3.56	8.65	80.69	1,269.03
Effectively rerouted	2.00	4.55	10.38	24.36	2,983.30	35,166.76	119,284.18

This table presents the time-to-execution of orders handled by wholesalers that are either internalized or effectively rerouted. Time-to-execution statistics are share weighed across observations. *See supra* Table 7 for additional details on the sample.

b. Adverse Selection Risk

While individual investor NMS stock orders are generally viewed as possessing less adverse selection risk than orders of other investors, there is nevertheless variation in adverse selection risk across this order flow.[452] Table 12 shows the distribution of the average percentage price impact across 58 retail broker MPIDs in the CAT retail analysis in NMS Common Stocks and ETFs.[453] The results indicate there is substantial variation in price impact across the order flow from different retail brokers, with the price impact of the 90th percentile retail broker's orders being approximately 20 times greater than that of the 10th percentile retail broker's orders and more than 4 times greater than the median retail brokers orders.

TABLE 12—DISTRIBUTION OF INDIVIDUAL RETAIL BROKER-DEALER AVERAGE PERCENTAGE PRICE IMPACT (bps) IN QUALITY IN NMS COMMON STOCKS AND ETFS DURING Q1 2022

N	Mean	Std Dev	Min	10th Pctl	25th Pctl	50th Pctl	75th Pctl	90th Pctl	Max
58	1.07	2.35	−12.34	0.16	0.43	0.83	1.39	3.38	7.00

This table summarizes the distribution of the retail broker MPID's average price impact for the 58 retail broker MPIDs in the CAT retail analysis in NMS Common Stocks and ETFs. Each Retail Broker MPID's price impact is determined by share weighting their average percentage price impact half spread within an individual NMS common stock or ETF and then averaging across stocks using the weighting of the dollar volume the retail broker MPID executed in each security (Dollar Volume weighted). *See supra* Table 7 for additional details on the sample and metrics used in the analysis. NMS Common stocks and ETFs are identified, respectively, as securities in TAQ with a Security Type Code of 'A' and 'ETF'.

Analysis suggests that wholesalers tend to provide lower execution quality to retail brokers that have higher adverse selection costs (*i.e.,* price impact). Table 13 sorts the 58 retail broker MPIDs in the CAT retail analysis

[452] Certain retail brokers tend to have more sophisticated customers than other retail brokers. Order flow from these retail brokers carries greater adverse selection risk, while order flow from retail brokers with generally less sophisticated customers carries less adverse selection risk. For the purposes of this release, the Commission discusses retail brokers as carrying different levels of adverse selection risk, although this is actually a description of the order flow of the customer base of these retail brokers, not the actual retail brokers.

[453] Certain items in Table 12 may also be affected by the amendments in the MDI Adopting Release once they are implemented. *See supra* notes 356 and 421.

in NMS Common Stocks and ETFs into quintiles based on their price impact.[454] The results indicate that the orders of retail brokers in the higher adverse selection quintiles handled by wholesalers receive worse execution quality, as measured by higher effective spreads and E/Q ratios, than the orders of retail brokers in the lower adverse selection quintiles.[455] More specifically, the E/Q ratio of the broker-dealers with the highest price impact (quintile 5) is more than twice as large as the E/Q ratio of the broker-dealers with the lowest price impact (quintile 1).

TABLE 13—EXECUTION QUALITY IN NMS COMMON STOCKS AND ETFS FOR RETAIL BROKERS SORTED INTO QUINTILES BASED ON THEIR AVERAGE PERCENTAGE PRICE IMPACT (bps)

BD Average price impact quintile	Avg WH price impact (bps)	Avg WH principal execution rate	Avg WH effective spread (bps)	Avg WH realized spread (bps)	Avg WH E/Q ratio
1	−1.04	88.62(%)	2.86	3.90	0.43
2	0.48	86.63(%)	1.87	1.39	0.46
3	0.79	88.65(%)	2.15	1.36	0.48
4	1.32	83.86(%)	3.48	2.17	0.61
5	3.85	64.01(%)	7.24	3.39	0.88

This table summarizes how execution quality varies in NMS Common Stocks and ETFs based on a retail broker MPID's price impact by grouping the 58 retail broker MPIDs in the CAT retail analysis in NMS Common Stocks and ETFs into quintiles based on their average price impact. Each Retail Broker MPID's price impact is determined by share weighting its average percentage price impact within an individual NMS common stock or ETF and then averaging across stocks using the weighting of the dollar volume the retail broker executed in each security (Dollar Volume weighted). Average price impacts, effective spreads, realized spreads, and E/Q ratios are also calculated for each retail broker MPID by share weighting within an individual NMS common stock or ETF and then averaging across stocks using the weighting of the dollar volume the retail broker MPID executed in each security (Dollar Volume weighted). The E/Q ratio is the share weighted average of the ratio of each transaction's effective spread divided by its quoted spread at the time of order receipt. Retail broker MPIDs are sorted into quintiles based on their average percentage price impact (bps) and then averages for each quintile are determined by equally weighting the average statistic for each retail broker MPID. *See supra* Table 7 for additional details on the sample and metrics used in the analysis. NMS Common stocks and ETFs are identified, respectively, as securities in TAQ with a Security Type Code of 'A' and 'ETF'. This analysis uses data from prior to the implementation of the MDI Rules and specific numbers may differ following the implementation of the MDI Rules. *See infra* section VII.B.7.

c. Disparate Treatment of Broker-Dealers by PFOF

Although wholesalers provide individual investor orders with price improvement relative to exchanges, the magnitude of this price improvement is not uniform across retail brokers. The previous section provided evidence of variation in execution quality based on adverse selection risk. There is also evidence that execution quality varies based on whether the retail broker receives PFOF for NMS stock orders. Commission analysis in this section shows that the PFOF a wholesaler pays to a retail broker affects the price improvement wholesalers provide, and wholesalers provide worse execution quality to broker-dealers whose customers' orders pose a greater adverse selection risk. [456]

Commission analysis presented in Table 14 compares average execution quality for PFOF and non-PFOF brokers for marketable orders of individual investors under $200,000 in NMS Common stocks and ETF orders that are routed to wholesalers.[457] Results are divided between orders that were executed on a principal basis (*i.e.,* internalized) and those executed via other methods (the majority of which are in a riskless principal capacity).

[454] Certain items in Table 13 may also be affected MDI Rules once they are implemented. *See supra* notes 356 and 421.

[455] Several recent working papers also found that price improvement varies across retail brokers; *see* Christopher Schwarz et al., *The 'Actual Retail Price' of Equity Trades* (last revised Sept. 15, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=4189239* (retrieved from Elsevier database) (''Schwarz et al. (2022)''); and Bradford Lynch, *Price Improvement and Payment for Order Flow: Evidence from A Randomized Controlled Trial* (last revised Oct. 3, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=4189658* (retrieved from Elsevier database) (''Lynch (2022)''). These studies only included trades that were initiated by the authors, and do not include other trades that were handled by the brokers in their samples. In contrast, the Commission's analysis is based on the data reflecting all orders routed by 58 brokers.

[456] Schwarz et. al. (2022) do not find a relationship between the amount of PFOF a retail broker receives and the amount of price improvement their customers' orders receive. However, they noted that the variation in the magnitude of price improvement they saw across retail brokers was significantly greater than the amount of PFOF the retail broker received, which could indicate their sample was not large enough to observe a statistically significant effect. Similarly, the difference we observe between the effective spreads of PFOF and non-PFOF brokers *infra* Table 14 is significantly smaller than the differences observed across broker-dealers in *supra* Table 13. Lynch (2022) reports a broker deriving high PFOF revenues provides small price improvements to customer orders, while a broker deriving low PFOF revenue offers large price improvement. Importantly, both studies only included trades that were initiated by the authors and do not include other trades that were handled by the brokers in their samples, preventing them from examining the attributes of a typical retail order handled by each broker. As such, these studies would not observe the variation in price improvements that reflect differences in the adverse selection risk associated with the order flow of different brokers, and hence, would likely conflate the impacts of PFOF with that of adverse selection risk. That is, these studies cannot control for the possibility that a wholesaler would offer smaller price improvement to order flows with higher adverse selection risk. In contrast, the Commission relies on CAT data to examine the adverse selection risk at the broker level, which is a determinant of the amounts of price improvements that a given wholesaler would offer to different brokers. The regression framework in Table 15 controls for the adverse selection risk of the retail broker and finds that is has a negative relationship with the magnitude of price improvement their customers' orders receive. We also find a negative relationship between the amount of PFOF a broker-dealer receives and the magnitude of the price improvement their customers' orders receive after controlling for the retail broker adverse selection risk.

[457] Some brokers that do not accept PFOF for orders in equities accept PFOF for orders in options. Certain items in Table 14 may also be affected by MDI Rules once they are implemented. *See supra* notes 356 and 421.

TABLE 14—COMPARISON OF PFOF AND NON-PFOF BROKER EXECUTION QUALITY IN NMS COMMON STOCKS AND ETFS

	Principal transactions		Other transactions	
	Non-PFOF	PFOF	Non-PFOF	PFOF
Average Price	$41.79	$31.35	$23.90	$12.47
WH Share Volume (billion shares)	14.32	55.96	3.40	13.43
WH Dollar Volume (billion $)	$598.44	$1,754.36	$81.23	$167.41
Pct of Executed Dollar Volume	23.00%	67.44%	3.12%	6.44%
WH Effective Spread (bps)	1.50	1.86	4.57	5.75
WH Realized Spread (bps)	0.88	0.85	0.83	0.66
WH Realized Spread Adj PFOF (bps)	0.88	0.43	0.83	−0.55
WH Price Impact (bps)	0.62	1.01	3.74	5.07
WH E/Q Ratio	0.30	0.37	0.78	0.67
WH Pct Executed with Price Improvement	90.59%	94.32%	46.89%	62.87%
WH Conditional Amount Price Improvement (bps)	2.75	2.34	2.31	4.30

The table summarizes execution quality statistics from the CAT retail analysis in Common Stocks and ETFs based on whether the retail broker MPID receives PFOF from wholesalers (PFOF) or does not (Non-PFOF) and whether the wholesaler executed the individual investor order in a principal capacity or in another capacity (*i.e.,* in an agency or riskless principal capacity). A broker-dealer MPID was determined to be a PFOF broker if the broker-dealer reported receiving PFOF on its Q1 2022 606 report, or if the report of its clearing broker reported receiving PFOF in the event that the broker did not publish a Rule 606 report. Broker-dealers or clearing brokers that handled orders on a not held basis and did not disclose PFOF information in their Rule 606 report were classified as PFOF brokers if disclosures on their websites indicated they received PFOF. Twenty-two MPIDs belonging to 19 retail brokers were classified as receiving PFOF. The majority of the other transactions are executed by the wholesaler in a riskless principal capacity. *See supra* Table 7 for additional details on the sample and metrics used in the analysis. Share-weighted percentage metrics are averaged together at the individual PFOF-execution capacity-stock-week-order-size category level for the wholesaler sample using the methodology in Table 7. Weighted averages for the metrics are then calculated for each PFOF-execution capacity category by averaging across execution capacity-stock-week-order size category levels based on their total dollar transaction volume during the sample period in the wholesaler CAT sample.

The results in Table 14 show that wholesaler internalized orders (Principal Transactions) originating from PFOF brokers are associated with (1) higher effective spreads, (2) higher E/Q ratios, and (3) slightly smaller price improvement on orders that achieved at least some price improvement (WH Conditional Amount Price Improvement), relative to wholesaler internalized orders originating from non-PFOF brokers. However, the results also show that orders internalized from non-PFOF brokers also have lower adverse selection risk and similar realized spreads (before PFOF is paid), indicating the lower adverse selection risk could help explain differences in the observed execution quality.

Because the results in Table 14 are averages across broker-dealers, they cannot disentangle the effects of PFOF on execution quality from differences in the adverse selection risk of different broker-dealers.[458] In order to control for these differences, the Commission analyzed the effects of PFOF and differences in broker-dealer adverse selection risk on execution quality in a regression framework that controls for other factors that could affect the price improvement provided by wholesalers.

Table 15 displays regression results from Commission CAT retail analysis of NMS Common stock and ETF orders.[459] The regression tests whether there is a statistically significant relationship between execution quality and the amount of PFOF a broker-dealer receives and includes several individual stock- and market-level controls[460] as well as the retail broker's average price impact and size (as measured by percent of executed individual investor dollar volume). Four different measures of execution quality are used for the dependent variable, including E/Q ratio, effective spread, realized spread, and price improvement.[461] The results in Table 15 show that the Table 14 results indicating brokers that receive PFOF receive inferior execution quality are robust to the inclusion of controls for differences in the type of order flow coming from different broker-dealers.

[458] They also cannot disentangle the effects of differences in the stocks traded by PFOF and non-PFOF brokers.

[459] Certain items in this Table 15 may also be affected by the amendments in the MDI Rules once they are implemented. *See supra* notes 356 and 421.

[460] Broker-dealer cents per 100 shares PFOF rates (dollar PFOF rates) are determined from their Q1 2022 Rule 606 reports (*see supra* Table 2) or the Rule 606 reports of its clearing broker reported receiving PFOF in the event that the broker did not publish a Rule 606 report. A PFOF rate of 20 cents per 100 shares was used for the introducing broker-dealers and clearing broker that reported handled orders on a not held basis and did not disclose PFOF information in their Rule 606 report but disclosed on their website that they received PFOF for their order flow. 20 cents per 100 shares was the PFOF rate that the clearing broker that handles orders on a not held basis disclosed on their website that they received. Twenty-two MPIDs belonging to 19 retail brokers were classified as receiving PFOF. Dollar PFOF rates for each retail broker were merged with the corresponding stock (S&P 500 and non-S&P 500) and order type in the CAT sample. For the regressions in Table 15, percentage PFOF rates are estimated in basis points by dividing the PFOF cents per 100 share values from Rule 606 reports (after converting them to dollar per share values) by the stock-week VWAP for the security in the CAT sample. Stock-level controls include average share volume, VWAP, return, average effective spread, average realized spread, and average quote volatility during a week. Market-level controls include market volatility, market return, and the market's average daily trading volume during week.

[461] The regression also includes variables to control for differences in execution quality across different wholesalers and across different order size categories. The analysis examines trades in Q1 2022 that wholesalers execute in a principal capacity from market and marketable limit orders from individual investors that are under $200,000 in value and are in NMS Common stocks and ETFs. *See supra* Table 7 for further discussion on the sample. The unit of observation for the regression is the average execution quality provided to trades that are aggregated together based on having the same stock, week, order type, order size category, wholesaler, and retail broker MPID. The coefficients are estimated by weighting each observation by the total dollar volume of trades executed in that observation.

TABLE 15—REGRESSION ANALYSIS SHOWING RELATIONSHIP BETWEEN EXECUTION QUALITY AND PFOF IN NMS COMMON STOCKS AND ETFS

Variables	(1) E/Q ratio	(2) Effective spread (bps)	(3) Realized spread (bps)	(4) Amount price improvement (bps)
PFOF Rate	0.0132***	0.217***	0.211***	−0.170***.
	[2.82]	[6.31]	[7.13]	[−5.52]
Stock Share Volume	0.0379	−0.0462	−0.886*	−0.533**.
	[0.51]	[−0.14]	[−1.65]	[−2.53].
Stock VWAP	−0.000028	0.000233	−0.000450	0.000014.
	[−1.06]	[0.61]	[−0.78]	[0.04].
Stock Return	−0.000273	−0.0200*	−0.0120	0.00840.
	[−0.21]	[−1.93]	[−0.36]	[0.84].
VIX	0.00968***	0.0122*	0.0607***	−0.000256.
	[7.29]	[1.79]	[2.85]	[−0.05].
Market Return	−0.00710**	0.00787	0.00686	−0.0150.
	[−2.02]	[0.36]	[0.15]	[−0.96].
Market Dollar Volume	0.0306***	0.0641***	0.164***	−0.0390***.
	[9.70]	[3.44]	[3.07]	[−2.69].
Stock Avg Effective spread	0.00700***	0.122***	−0.0455*	0.00746.
	[3.34]	[6.07]	[−1.94]	[0.52].
Stock Avg Realized spread	−0.00169*	−0.00902	0.0730***	−0.00552.
	[−1.87]	[−1.45]	[2.98]	[−1.48].
Stock Quote Volatility	0.457**	2.232	−1.799	4.458**.
	[2.09]	[1.05]	[−0.65]	[2.03].
Broker-Dealer Average Price Impact	0.145***	0.414***	0.316***	−0.417***.
	[14.74]	[9.83]	[8.50]	[−10.21].
Broker-Dealer Pct Volume	−2.45e–05	−0.00207*	−0.00546***	0.000124.
	[−0.07]	[−1.76]	[−3.77]	[0.12].
Average Trade Qspread	−0.00720***	0.517***	0.378***	0.392***.
	[−10.12]	[19.78]	[10.84]	[21.14].
Wholesaler Fixed Effects	Yes	Yes	Yes	Yes.
Order Size Category Fixed Effects	Yes	Yes	Yes	Yes.
Stock Fixed Effects	Yes	Yes	Yes	Yes.
Observations	13,365,122	13,365,122	13,365,122	12,453,440.
Adjusted R-squared	0.279	0.574	0.060	0.594.

This table presents the results of a regression analysis examining the effect of retail brokers receiving PFOF from wholesalers on levels of price improvement and the execution quality of their customers' orders when the wholesaler internalizes the order on a principal basis.

The analysis examines trades in Q1 2022 that wholesalers execute in a principal capacity from market and marketable limit orders from individual investors that are under $200,000 in value and are in NMS Common stocks and ETFs. *See supra* Table 7 for further discussion on the CAT retail sample. The unit of observation for the regression is the average execution quality provided to trades that are aggregated together based on having the same stock, week, order type, order size category, wholesaler, and retail broker MPID. Weighted regression are performed based on the total dollar value executed by the wholesaler in that observation (*i.e.,* total shares executed for all orders that fit within that stock-week-retail broker-wholesaler-order type-order size category). This means that the regression coefficients capture the effect on execution quality on a per-dollar basis.

Dependent variables include: the average E/Q ratio of the shares traded; the average percentage effective spread of the shares traded measured in basis points; the average percentage realized spread of the shares traded measured in basis points; and the average percentage value of the amount of price improvement measured in basis points, conditional on the order being price improved. These variables are from the CAT retail analysis and described in *supra* Table 7.

Explanatory variables include: PFOF Rate is the retail brokers' PFOF rates in bps (the per share rates were determined from retail broker Rule 606 reports and divided by the VWAP of the executed shares in the sample to determine the PFOF rate on a percentage basis, *see supra* note 460); Broker-Dealer Pct Volume is the retail broker size (in terms of percentage total executed dollar trading volume in the sample); Stock Share Volume is the stock's total traded share volume during the week (from TAQ in billions of shares); Stock VWAP is the VWAP of stock trades during the week (from TAQ); Stock Return is the stock's return during the week (from CRSP 1925 US Stock Database, Ctr. Rsch. Sec. Prices, U. Chi. Booth Sch. Bus. (2022)); VIX is the average value of the VIX index during the week (from CBOE VIX data); Market Return is the average CRSP value weighted market return during the week, Market Dollar Volume is the total market dollar trading volume during the week (from CRSP 1925 US Stock Database, Ctr. Rsch. Sec. Prices, U. Chi. Booth Sch. Bus. (2022)); Stock Avg Effective spread is the stock's share weighted average percent effective half spread during the week measured in basis points (from TAQ); Stock Avg Realized spread is the stock's share weighted average percent realized half spread during the week measured in basis points (from TAQ); Stock Quote Volatility is the stock's average 1 second quote midpoint volatility measured in basis points (from TAQ); Broker-Dealer Average Price Impact is the retail broker's average price impact over the sample measured in basis points (*see supra* Table 12 for more details on how the metric is calculated); Average Trade Qspread is the average percentage quoted half spread at the time of order submission for orders in that stock-week-retail broker-wholesaler-order type-order size category measured in basis points; wholesaler fixed effects (*i.e.,* indicator variables for each wholesaler that control for time-invariant execution quality differences related to each wholesaler); order-size category fixed effects (*i.e.,* indicator variables for each order-size category that control for time-invariant execution quality differences related to order-size category); and individual stock fixed effects (*i.e.,* indicator variables for each stock that control for time-invariant execution quality differences related to individual stocks). The order size categories include less than 100 shares, 100–499 shares, 500–1,999 shares, 2,000–4,999, 5,000–9,999 shares, and 10,000+ shares. Brackets include t-statistics for the coefficients based on robust standard errors that are clustered at the stock level. ***, **, and * indicate the t-statistics for the coefficients are statistically significant at the 0.01, 0.05, and 0.1 levels, respectively.

This analysis uses data from prior to the implementation of the MDI Rules and specific numbers may be different following the implementation of the MDI Rules. *See supra* note 356 and section VII.B.7.

Regression results in Table 15 support the conclusion that wholesalers provide worse execution quality to brokers that receive more PFOF.[462] The coefficients on the PFOF Rate variable indicates that, all else equal, for the orders wholesalers internalize, execution quality declines as the amount of PFOF paid to the retail broker increases. Orders from retail brokers that receive a greater amount of PFOF have higher E/Q ratios and effective spreads and receive less price improvement. The regression results (as measured by the coefficient on the PFOF Rate variable) indicate that, all else equal, wholesalers earn higher realized spreads on orders for which they pay more PFOF. Note that PFOF is not taken out of the realized spread measure, so the realized spread proxies for wholesaler's economic profits before any fees are taken out.

Regression results in Table 15 also show that the retail broker's adverse selection risk (as measured by the coefficient on the Broker-Dealer Average Price Impact variable) has a statistically significant effect on the execution quality wholesalers give on trades they internalize. The positive coefficient indicates that wholesalers provide worse execution quality to broker-dealers whose customers' orders pose a greater adverse selection risk.

In sum, Commission analysis indicates that wholesalers deliver execution quality that varies across broker-dealers based on their adverse selection risk. Wholesalers also deliver execution quality that varies based on characteristics of the order (lot size, principal capacity vs. riskless principal or agency capacity, market vs. marketable limit, S&P 500 vs. non-S&P 500). The business model of wholesalers relies on their ability to parse the adverse selection risk of individual investors' orders based on these numerous characteristics and to deliver some price improvement while still generating the potential for high profits for themselves in the form of a high realized spread. The lack of *additional* price improvement that could otherwise be provided to individual investors stems from the isolation of marketable orders by wholesalers, which results in a lack of order-by-order competition.

6. Retail Broker Services

Wholesalers do not charge retail brokers for the routing and execution that they provide, and pay a segment of these brokers PFOF for the right to handle their order flow. Proposed Rule 615 could therefore impact retail brokers as well as wholesalers, due to their interdependence. In order to analyze the economic effects of the Proposal on retail brokers, we first provide relevant detail of the retail broker industry.

There are approximately 2,440 retail brokers in the U.S., earning quarterly revenues of approximately $86.7 billion and handling 228.9 million customer accounts.[463] Retail brokers provide a range of services that assist their customers in the purchase of securities, which include stocks, bonds, mutual funds, ETFs, options, futures, foreign exchange, and crypto asset securities. Proposed Rule 615, however, would cover only NMS stocks, and many customer accounts include assets that include or exclusively contain securities that are not NMS stocks. The Commission does not know what share of these accounts contain exclusively NMS stocks, but estimates that approximately 1,000 retail brokers originated NMS stock orders from individual investors in 2021.[464]

Retail broker services are sometimes divided into two generally defined categories: ''discount brokers'' and ''full-service'' brokers. Discount brokers typically provide commission-free trading for online purchases of stocks and ETFs, but often charge fees for purchases of other securities. Some discount brokers manage proprietary mutual funds and ETFs, which earn them revenue (based on the funds' ''expense ratio'') paid by the investors that purchase these funds. Full-service brokers (as they are commonly called and as used in this release) typically charge commissions and advisory fees, frequently as a share of the client's total assets under management, in exchange for more detailed financial guidance.

Retail brokers distinguish themselves by the range of securities that they sell, as well accessibility and functionality of their trading platform, which can be geared towards less experienced or more sophisticated investors. Discount brokers can also differentiate themselves by providing more extensive customer service as well as tools for research and education on financial markets.

a. PFOF Revenue

Most marketable orders of individual investors are routed by retail brokers to wholesalers. Wholesalers do not directly charge retail brokers for their order routing and execution and pay PFOF to some of these retail brokers in exchange for this order flow. Wholesalers paid $235 million in PFOF in NMS stocks in Q1 2022.[465]

Table 16 below indicates that a single firm received more than 43% of all PFOF stemming from NMS stock orders during Q1 2022. Furthermore, the number one and number four firms on this list merged in 2020, implying that a single firm received slightly more than 55% of all PFOF stemming from NMS stock orders. Along with this firm, the other three firms at the top of this list collectively received almost 94% of all PFOF from NMS stocks.

TABLE 16—TOP BROKER-DEALER RECIPIENTS OF PFOF FROM NMS STOCKS AND TOTAL REVENUE

	PFOF received (Q1 2022-)	Total firm revenue (Q1 2022-)	PFOF share of revenue (percent)	Share of total PFOF disbursed (percent)
BD1	$101,509,456	$1,766,885,957	5.7	43.12
BD2	35,019,397	403,037,037	8.7	14.88
BD3	32,611,006	435,731,084	7.5	13.85
BD4	28,919,376	1,876,198,891	1.5	12.28
BD5	22,816,637	94,176,227	24.2	9.69
BD6	7,810,943	50,207,346	15.6	3.32

[462] While results from the regression analysis indicate that orders routed by PFOF-brokers receive reduced execution quality from wholesalers, there could be ways that PFOF is indirectly passed on to customers by their retail brokers. However, the Commission lacks evidence on the extent to which this is occurring.

[463] Data are from Q2 2022, FOCUS Part II Schedule SSOI.

[464] This number is estimated using CAT data for broker-dealers that originated an order from an ''Individual Customer'' CAT account type in 2021. This larger sample is refined down to a sample of 54 broker-dealers fort the CAT data analysis presented above, beginning in *supra* Table 7. *See supra* note 441 for a description of how the sample of 54 brokers was chosen.

[465] In NMS stocks in Q1 2022, wholesalers paid $94 million in PFOF for market orders, $53 million for marketable limit orders, $69 million for non-marketable limit orders, and $19 million for other order types.

TABLE 16—TOP BROKER-DEALER RECIPIENTS OF PFOF FROM NMS STOCKS AND TOTAL REVENUE—Continued

	PFOF received (Q1 2022-)	Total firm revenue (Q1 2022-)	PFOF share of revenue (percent)	Share of total PFOF disbursed (percent)
BD7	4,123,125	64,850,454	6.4	1.75
BD8	835,652	10,855,447	7.7	0.35
BD9	696,482	9,406,401	7.4	0.30
BD10	590,124	12,341,917	4.8	0.25
BD11	268,754	499,731	53.8	0.11
BD12	145,943	38,249,831	0.4	0.06
BD13	68,552	19,462,153	0.4	0.03
BD14	4,122	4,977,874	0.1	0.002

This table includes data from Rule 606 reports and lists all PFOF payments stemming from NMS stock orders paid by wholesalers to broker-dealers. The Commission analyzed Rule 606 reports for the most active 50 broker-dealers, and the summary payments to the fourteen firms in the table above represent all PFOF payments made by wholesalers for NMS stock orders during Q1 2022. The table also contains the total revenue earned by these firms during the same period. The PFOF share of revenue is calculated by dividing PFOF by revenue for each broker-dealer.

Table 16 also reveals that dependence on PFOF as a source of revenue is not equally shared among these firms. The average PFOF share of revenue of these firms is 9.6%. However, setting aside the disproportionately high PFOF revenue share of 53.8% from the smallest firm (by revenue) on this list, the average share of revenue stemming from PFOF falls to 6.5%. This is almost identical to the median PFOF revenue share of 6.4%.

Besides receiving different overall disbursements of PFOF revenue, broker-dealers receive different PFOF rates. Table 17 below displays the distribution of PFOF rates (in cents per 100 shares) paid by wholesalers to retail brokers.

TABLE 17—DISTRIBUTION ACROSS PFOF BROKERS OF AVERAGE RULE 606 PAYMENT RATES FROM WHOLESALERS FOR Q1 2022

[Cents per 100 shares]

	Distribution statistic	Market orders	Marketable limit orders	Non-marketable limit orders	Other orders
S&P 500	Average	40.3	37.8	49.7	43.1
	Min	7.0	6.5	6.1	4.8
	25th Pct	14.4	14.4	15.0	11.5
	Median	15.0	16.0	28.6	16.6
	75th Pct	22.0	22.4	32.4	22.2
	Max	280.7	247.6	338.0	310.8
Non S&P 500	Average	14.7	11.9	18.5	11.6
	Min	6.2	3.3	4.6	2.1
	25th Pct	11.1	9.4	13.2	8.2
	Median	13.7	10.9	18.2	9.9
	75th Pct	18.8	14.4	25.1	17.0
	Max	22.7	20.9	28.9	18.6
Combined	Average	16.2	12.7	20.1	13.2
	Min	6.3	3.4	4.6	2.5
	25th Pct	11.3	9.9	13.6	8.3
	Median	13.8	12.1	21.9	10.4
	75th Pct	21.5	15.7	28.3	19.1
	Max	36.4	21.0	31.0	27.2

This table displays the distribution across retail brokers (that received PFOF from wholesalers) of average PFOF payment rates from wholesalers for Q1 2022 (cents per 100 shares). The data were obtained by analyzing rule 606 Reports from the 14 BDs that accepted PFOF from wholesalers. The table shows the distribution of PFOF rates broken down by S&P 500 and non-S&P 500 stocks, across market orders, marketable limit orders, non-marketable limit orders, and other orders that retail brokers route to different types of venues in Q1 2022. *See supra* Table 2 for additional details on the sample.

PFOF rates vary along several dimensions. For marketable orders, including market and marketable limit orders, the combined median rate in Table 17 is 12–14 mils, significantly less than the median rate for the non-marketable orders median rate of 22 mils. In addition, variation is wider in non-marketable limit orders, with a wider range between the 25th and 75th percentile compared to market and marketable limit orders. It is also evident that the maximum values in S&P 500 stocks, all of which are above 200 mils, are far greater than non-S&P 500 stocks, all of which are below 35 mils, and those higher maximum values may be driven by the fact that two particular firms that get PFOF rates proportional to the bid-ask spread.

b. Other Revenues

Retail brokers have numerous sources of revenue, including commissions, account management and advisory fees, interest income, as well as PFOF. Retail brokers that currently receive PFOF tend to earn a somewhat larger share of their revenue from interest on margin loans provided to clients. Lending rates tend to be highest for margin amounts under $25,000, and fall successively as

the size of the loan increases, with the lowest rates on loans exceeding $1 million. PFOF brokers earned 12% of their income from margin interest in 2021, compared to only 1.6% of revenue earned by non-PFOF brokers during the same period.[466] Another source of revenue is securities borrowing, making up 5.1% of revenues for PFOF brokers and 0.9% of non-PFOF brokers revenue during 2021. In contrast, other revenue lines are relatively underutilized by PFOF brokers, such as account supervision fees, which made up 1.3% of revenue for PFOF-brokers but 26.5% of non-PFOF brokers.

7. Rules Addressing Consolidated Market Data

In 2020, the Commission adopted a new rule and amended existing rules to establish a new infrastructure for consolidated market data,[467] and the regulatory baseline in this proposal includes these changes to the current arrangements for consolidated market data. However, as discussed in more detail above, the MDI Rules have not been implemented, and so they have not yet affected market practice.[468] As a result, the data used to measure the baseline below reflects the regulatory structure in place for consolidated market data prior to the implementation of the MDI Rules.[469] Accordingly, this section will discuss the Commission's assessment of the potential effects that the implementation of the MDI Rules could have on the baseline estimations.

Among other things, the unimplemented MDI Rules update and expand the content of consolidated market data to include: (1) certain odd-lot information[470]; (2) information about certain orders that are outside of an exchange's best bid and best offer (*i.e.,* certain depth of book data)[471]; and (3) information about orders that are participating in opening, closing, and other auctions.[472] The rules also introduced a four-tiered definition of round lot that is tied to a stock's average closing price during the previous month.[473] For stocks with prices greater than $250, a round lot is defined as consisting of between 1 and 40 shares, depending on the tier.[474] The rules also introduce a decentralized consolidation model under which competing consolidators, rather than the existing exclusive SIPs, will collect, consolidate, and disseminate certain NMS information.[475]

Given that the MDI Rules have not yet been implemented, they likely have not affected market practice and therefore data that would be required for a comprehensive quantitative analysis of a baseline that includes the effects of the MDI Rules is not available. It is possible that the baseline (and therefore the economic effects relative to the baseline) could be different once the MDI Rules are implemented. The following discussion reflects the Commission's assessment of the anticipated economic effects of the MDI Rules as described in the MDI Adopting Release.[476]

The Commission anticipated that, for stocks priced above $250, the new round lot definition will mechanically narrow NBBO spreads for most stocks with prices greater than $250.[477] This could cause statistics that are measured against the NBBO to change because they will be measured against the new, narrower NBBO. For example, execution quality statistics on price improvement for higher priced stocks may show a reduction in the number of shares of marketable orders that received price improvement because price improvement will be measured against a narrower NBBO. In addition, the Commission anticipated that the NBBO midpoint in stocks priced higher than $250 could be different under the MDI Rules than it otherwise would be, resulting in changes in the estimates for statistics calculated using the NBBO midpoint, such as effective spreads. In particular, at times when bid odd-lot quotations exist within the current NBBO but no odd-lot offer quotations exist (and vice versa), the midpoint of the NBBO resulting from the rule will be higher than the current NBBO midpoint.[478] More broadly, the Commission anticipated that the adopted rules will have these effects whenever the new round lot bids do not exactly balance the new round lot offers. However the Commission stated that it does not know to what extent or direction such odd-lot imbalances in higher priced stocks currently exist, so it is uncertain of the extent or direction of the change.[479]

The Commission also anticipated that the MDI Rules could result in a smaller number of shares at the NBBO for most stocks in higher-priced round lot tiers.[480] To the extent that this occurs, there could be an increase in the frequency with which marketable orders must ''walk the book'' (*i.e.,* consume available depth beyond the best quotes) to execute. This would affect statistics that are calculated using consolidated depth information, such as measures meant to capture information about whether orders received an execution of more than the displayed size at the quote, *i.e.,* ''size improvement.''

The MDI Rules may also result in a higher number of odd-lot trades, as the inclusion of odd-lot quotes that may be priced better than the current NBBO in consolidated market data may attract more trading interest from market participants that previously did not

[466] Statistics on broker-dealer revenues are from their FINRA Supplemental Statement of Income Form for 2021. The sample in this discussion is limited to 54 retail brokers that were identified in the CAT analysis in Table 7. 19 of these 54 broker-dealers were identified as a PFOF broker if they reported receiving PFOF on their Q1 2022 606 report, or if the report of their clearing broker reported receiving PFOF in the event that the broker did not publish a Rule 606 report. Broker-dealers or clearing brokers that handled orders on a not held basis and did not disclose PFOF information in their Rule 606 report were classified as PFOF brokers if disclosures on their websites indicated they received PFOF. The remaining 35 firms comprise the sample of non-PFOF brokers. We use the broad definition of sales as we preliminarily believe that many firms will just mark ''sales'' if they have both retail and institutional activity. However, we note that this may capture some broker-dealers that do not have retail activity, although we are unable to estimate that frequency.

[467] The MDI Rules expanded the data that will be made available for dissemination within the national market system (''NMS data''). *See* 17 CFR 242.600(b)(59); MDI Adopting Release, 86 FR at 18613.

[468] For more information about the implementation timeline for the MDI Rules, *see supra* section III.B.1.b.i.

[469] For more information about the regulatory structure for consolidated market data prior to the implementation of the MDI Rules, *see supra* section III.B.1.a.

[470] *See* 17 CFR 242.600(b)(59); MDI Adopting Release, 86 FR at 18613. The Commission outlined a phased transition plan for the implementation of the MDI Rules, including the implementation of odd-lot order information. *See* MDI Adopting Release, 86 FR at 18698–701.

[471] *See* MDI Adopting Release, 86 FR at 18625.

[472] *See* MDI Adopting Release, 86 FR at 18630.

[473] *See* MDI Adopting Release, 86 FR at 18617.

[474] *See id.* The Commission adopted a four-tiered definition of round lot: 100 shares for stocks priced $250.00 or less per share, 40 shares for stocks priced $250.01 to $1,000.00 per share, 10 shares for stocks priced $1,000.01 to $10,000.00 per share, and 1 share for stocks priced $10,000.01 or more per share.

[475] *See* MDI Adopting Release, 86 FR at 18637.

[476] *See* MDI Adopting Release, 86 FR at 18741–18799.

[477] An analysis in the MDI Adopting Release showed that the new round lot definition caused a quote to be displayed that improved on the current round lot quote 26.6% of the time for stocks with prices between $250.01 and $1,000, and 47.7% of the time for stocks with prices between $1,000.01 and $10,000. *See* MDI Adopting Release, 86 FR at 18743.

[478] For example, if the NBB is $260 and the national best offer is $260.10, the NBBO midpoint is $260.05. Under the adopted rules a 40 share buy quotation at $260.02 will increase the NBBO midpoint to $260.06. Using this new midpoint, effective spread calculations will be lower for buy orders but higher for sell orders.

[479] *See* MDI Adopting Release, 86 FR at 18750.

[480] However, this effect will depend on how market participants adjust their order submissions. *See* MDI Adopting Release, 86 FR at 18746, for further discussion.

have access to this information.[481] However, the magnitude of this effect depends on the extent market participants who rely solely on SIP data and lack information on odd-lot quotes choose to receive the odd-lot information and would have traded frequently against odd-lot quotes had they known about them. The Commission states in the MDI Adopting Release that it believes it is not possible to observe this willingness to trade with existing market data.[482]

The MDI Rules may have implications for broker-dealers' order routing practices. For those market participants that rely solely on SIP data for their routing decisions and that choose to receive the expanded set of consolidated market data, the Commission anticipated that the additional information contained in consolidated market data will allow them to make more informed order routing decisions. This in turn would help facilitate best execution, which would reduce transaction costs and increase execution quality.[483]

The MDI Rules may also result in differences in the baseline competitive standing among different trading venues, for several reasons. First, for stocks with prices greater than $250, the Commission anticipated that the new definition of round lots may affect order flows as market participants who rely on consolidated data will be aware of quotes at better prices that are currently in odd-lot sizes, and these may not be on the same trading venues as the one that has the best 100 share quote.[484] Similarly, it anticipated that adding information on odd-lot quotes priced at or better than the NBBO to expanded core data may cause changes to order flow as market participants take advantage of newly visible quotes.[485] However, the Commission stated that it was uncertain about the magnitude of both of these effects.[486] To the extent that it occurs, a change in the flow of orders across trading venues may result in differences in the competitive baseline in the market for trading services.

Second, exchanges and ATSs have a number of order types that are based on the national best bid and offer, and so the Commission anticipated that the changes in the NBBO caused by the new round lot definitions may affect how these order types perform and could also affect other orders with which they interact.[487] The Commission stated that these interactions may affect relative order execution quality among different trading platforms, which may in turn affect the competitive standing among different trading venues, with trading venues that experience an improvement/decline in execution quality attracting/losing order flow.[488] However, the Commission stated that it was uncertain of the magnitude of these effects.[489]

Third, the Commission anticipated that, as the NBBO narrows for securities in the smaller round lot tiers, it may become more difficult for the retail execution business of wholesalers to provide price improvement and other execution quality metrics at levels similar to those provided under a 100 share round lot definition.[490] To the extent that wholesalers are held to the same price improvement standards by retail brokers in a narrower spread environment, the wholesalers' profits from execution of individual investor orders might decline,[491] and to make up for lower revenue per order filled in a narrower spread environment, wholesalers may respond by changing how they conduct their business in a way that may affect retail brokers. However, the Commission stated that is was uncertain as to how wholesalers may respond to the change in the round lot definition, and, in turn, how retail brokers may respond to those changes, and so was uncertain as to the extent of these effects.[492] To the extent that this occurs, this may impact wholesalers' competitive standing in terms of the execution quality offered particularly to individual investor orders. Where implementation of the above-described MDI Rules may affect certain numbers in the baseline, the description of the baseline below notes those effects.

C. Economic Effects

The Commission preliminarily believes that the introduction of qualified auctions for NMS stocks would increase competition to supply liquidity to marketable orders of individual investors. This might enhance order execution quality for individual and institutional investors as well as improve price discovery. The magnitude of the improvements in order execution quality that individual and institutional investors may experience as a result of this Proposal might be less than indicated for a variety of reasons (though it may also be greater), including the implementation of MDI Rules, the effect of which is not yet in the data. Under the MDI Rules, the availability of faster consolidated market data with more data on odd-lot information, auctions information, and depth of book information from competing consolidators could result in improved execution quality for customer orders were their broker-dealers who currently utilize SIP data switch to using the expanded consolidated market data.[493] Nevertheless, the Commission preliminarily believes that the Proposal would lead to improvements in individual and institutional investor order execution quality, as well as improvements in price discovery, relative to a baseline in which MDI Rules are implemented.

The Commission acknowledges considerable uncertainty in the costs and benefits of this rule because the Commission cannot predict how different market participants would adjust their practices in response to this rule. The Proposal would likely cause wholesalers and some retail brokers to incur significant adjustment costs to their operations. It is unknown whether the current industry practice of routing nearly all retail order flow to wholesalers would persist were the Commission to adopt this rule, because wholesalers might charge for this service and retail brokers might find it more profitable to develop their own routing services. On the other hand, wholesalers may still find the practice of routing to be profitable were there to remain an information advantage, and due to the proposed exception to be able to execute a segmented order at a price equal to or better than NBBO midpoint without exposing it in a qualified auction.

Among the possible effects are a decline in profitability for wholesalers. Some retail brokers could also experience costs from wholesalers reducing the amount of PFOF they pay

[481] *See* MDI Adopting Release, 86 FR at 18754.

[482] *See id.*

[483] *See* MDI Adopting Release, 86 FR at 18725.

[484] *See* MDI Adopting Release, 86 FR at 18744.

[485] *See* MDI Adopting Release, 86 FR at 18754.

[486] *See* MDI Adopting Release, 86 FR at 18745, 18754.

[487] *See* MDI Adopting Release, 86 FR at 18748.

[488] *See id.*

[489] *See id.*

[490] *See* MDI Adopting Release, 86 FR at 18747.

[491] Individual investor orders typically feature lower adverse selection than other types of orders, such as institutional orders. *See supra* section II.D.2 and *supra* section VII.B.2 for discussion of why it is generally more profitable for liquidity providers to execute against orders with lower adverse selection risk.

[492] *See* MDI Adopting Release, 86 FR at 18748.

[493] *See supra* note 421 for further details on how the MDI Rules adopted in the MDI Adopting Release could affect the NBBO. It is unclear how benefits in execution quality will change because of uncertainty regarding how the price improvement wholesalers provide to individual investors will change as well as uncertainty regarding how the NBBO midpoint will change for stocks with prices above $250 once the MDI Rules are implemented.

to retail brokers or from reducing or charging for the order handling services they offer to retail brokers. Some of these costs could ultimately be passed on to individual investors, such as through the resumption of commissions for NMS stock trades being charged by some retail brokers.[494] Market participants would also incur compliance costs, such as exchanges and NMS Stock ATSs incurring costs for creating qualified auctions, as well as broker-dealer and trading center compliance costs related to establishing policies and procedures for identifying and handling segmented orders and originating brokers that submit segmented orders. NMS plans and their participants (including the exchanges and FINRA) would incur compliance costs in order to update the consolidated market data feeds and to broadcast qualified auction messages. FINRA would incur compliance costs to update the ADF and to broadcast qualified auction messages.

As discussed above, this section measures the economic effects of the proposed amendments relative to a regulatory baseline that includes the implementation of the MDI Rules.[495] Furthermore, this section reflects the Commission's assessment of the anticipated economic effects of the proposed amendments, including potentially countervailing or confounding economic effects from the MDI Rules.[496] However, given that the MDI Rules have not yet been implemented, they likely have not affected market practice and therefore data that would be required for a comprehensive quantitative analysis of the economic effects that includes the effects of the MDI Rules are not available. It is possible that the economic effects relative to the baseline could be different once the MDI Rules are implemented. Where implementation of the above-described MDI Rules may affect certain numbers, the description of the economic effects below notes those effects.

1. Benefits

a. Increased Competition To Supply Liquidity to Marketable Orders of Individual Investors

The Commission believes that the Proposal would increase competition among market participants to provide liquidity to marketable orders of individual investors.[497] The majority of individual investors' marketable orders are currently internalized by wholesalers without competition at the order-by-order level.[498] The Commission believes that, by introducing an auction mechanism that allows market participants to bid for individual investor orders that would otherwise be internalized by wholesalers, Proposed Rule 615 and the proposed amendments to Rule 600 would facilitate competition to provide liquidity to individual investors by drawing additional liquidity from market participants other than the wholesalers that handle the majority of individual investor orders.[499] Marketable orders internalized by wholesalers feature lower price impacts, *i.e.,* have lower adverse selection risk.[500] Thus, the lower adverse selection risk of the order flow that would be routed to qualified auctions would incentivize market participants to trade against this flow via auction participation, as market participants would find providing liquidity against this order flow more attractive relative to the LOB or to individual investor orders with greater adverse selection that may currently be routed to exchanges.

The Commission is mindful of the limitations faced by investors who lack access to algorithmic trading technologies, *e.g.,* individual investors and professional traders relying on displayed screens, to determine when to provide liquidity in qualified auctions. The proposed 100-millisecond minimum auction length would be too short for such investors to be able to participate in these auctions unless they have to access algorithmic trading technology.[501] Additionally, the Proposal would prohibit exchange RLPs (unless they operated via one of the exceptions to qualified auctions), which would further constrain the ability of these market participants to compete to supply liquidity to segmented orders by limiting their ability to quote at sub-penny increments.[502] However, the Commission believes that market participants with access to algorithmic trading technology, including SORs used for trading institutional orders, would be able to participate in qualified auctions and thereby enhance the competition to provide liquidity to individual investors.

Competition to supply liquidity through qualified auctions would further be enhanced by the proposed implementation of a 5 mil (*i.e.,* $0.0005) per share auction fee and rebate cap for executed auction responses and a 5 mil per share rebate cap for segmented orders priced at $1.00 per share or greater.[503]

First, the Commission believes that the proposed auction fee and rebate caps would help ensure that exchanges and ATSs have sufficient incentives to operate qualified auctions. Using information from the financial statements of the three major exchange

[494] *See infra* section VII.C.2.b.ii for a discussion of the possibility of the return of commission fees.

[495] *See supra* section VII.B.7.

[496] *See supra* section VII.B.7 for a discussion of the Commission's anticipated economic effects of the MDI Rules as stated in the MDI Adopting Release.

[497] The Proposal would also increase competition among market participants to supply liquidity to beyond-the-midpoint non-marketable limit orders of individual investors because these orders could not be executed at restricted competition trading centers at prices beyond the midpoint unless they met one of the other exceptions to Proposed Rule 615. However, as shown below in Table 20, the majority of beyond-the-midpoint non-marketable limit orders are not internalized. Additionally, Table 20 also shows that the executed volume of beyond-the-midpoint non-marketable limit orders submitted by individual investors and routed to wholesalers is significantly smaller than the volume of marketable limit orders. Therefore, an increase in competition to supply liquidity to these orders may be more limited than for the marketable orders of individual investors. The Commission does not believe that the Proposal would have a significant effect on the competition to execute the fractional share portions of individual investor orders that may qualify for the exception in Proposed Rule 615(b)(5).

[498] *See supra* note 454.

[499] Although the Proposal is predicted to improve execution quality for individual investors, it is likely that profits for some market participants would be reduced, including some wholesalers and some retail brokers. *See infra* sections VII.C.2.c and VII.C.2.d for a discussion of these potential costs. Potential costs to other market participants are discussed elsewhere in *infra* section VII.C.2.

[500] *See supra* section VII.B.2.b.

[501] The possibility of adverse price movement (''adverse fade'' probability) during an auction is discussed in *infra* section VII.C.2.b.

[502] Consequently, these market participants could only compete to provide liquidity to segmented orders via exchange LOBs or ATSs. However, quoting on exchanges and ATSs can only take place at 1-cent price increments and the quoted midpoint. Therefore, if these participants wanted to provide a more competitive price relative to qualified auctions, they would be required to quote at the next better full-penny price or at the midpoint (for a tick-constrained stock). In contrast, participants of qualified auctions would be able to compete by providing liquidity at prices that are only 0.1 cents better than the existing auction price. As such, under qualified auctions, competition to provide liquidity to segmented order flow at better prices would be incrementally more costly for investors who lack access to smart order routers, placing these participants at a disadvantage relative to participants with access to smart order routers.

[503] Qualified auction fee and rebate caps would be limited to 0.05% of the auction response price per share for executed auction responses and segmented orders priced at less than $1.00 per share in Proposed Rule 615(c)(4). Additionally, the Proposal would require that qualified auction fees and rebates be the same for all of its auction participants, *i.e.,* volume-based tiering, which tends to advantage large liquidity suppliers who transact in sufficient volumes to trigger lower fees and/or higher rebates, would not apply to qualified auction fees and rebates. Under the proposed rule, no fee could be charged for submission or execution of a segmented order, or for submission of an auction response. *See supra* section IV.C.4.

groups which collectively account for the overwhelming majority of trading volume on exchanges, the Commission estimates that the average total net capture [504] for exchanges is currently around 4 mils for all trading types.[505] However, the Commission understands based on Staff conversations with industry members that the net capture for the executions of orders during continuous trading hours (but not open or close auctions) priced at $1.00 per share or greater is likely close to 2 mils. The Commission expects that in response to the 5 mil auction fee and rebate cap for executed auction responses priced at $1.00 per share or greater, open competition trading could charge fees of around 5 mils to executed auction responses and provide rebates of approximately 3 mils to broker-dealer submitting the segmented order to the qualified auction, and thus maintain a net capture of approximately 2 mils for these transactions. For the executions of orders priced below $1.00 per share on exchange LOBs, the Commission estimates that exchanges have an average net capture of around 0.28% of the transaction value; [506] thus, for these orders under $1.00, the net capture may be lower than what they earn on exchange LOB transactions. However, qualified auction hosts may be able to compensate for this decline, *e.g.,* by reducing rebates for segmented orders priced at $1.00 per share or greater to 1 mil or otherwise cross-subsidizing segmented orders priced below $1.00 per share with access fees charged on their LOB, with the overall goal to at least maintain their overall total net capture of around 2 mils for trading on their exchange.[507]

Second, the proposed 5 mil auction fee and rebate cap for executed auction responses priced at $1.00 per share or greater would likely result in qualified auction fees and rebates that would be unlikely to have a significant impact on the price improvement auction bidders would be able to offer because the 5 mil fee and rebate cap is smaller than the minimum pricing increment in qualified auctions. Since larger fees limit the ability of liquidity suppliers to offer better prices, setting a lower auction fee cap could result in improved execution quality for the segmented order. Furthermore, the auction rebate cap of 5 mils for segmented orders is likely to limit the competitive bidding advantage of the broker-dealer submitting the segmented order to the qualified auction. The maximum rebate of 5 mils is smaller than the minimum pricing increment in the auction, which limits the ability of the broker-dealer submitting the segmented order to use the rebate to subsidize the price improvement they offer in their qualified auction bids.

Third, the Commission believes that the caps on qualified auction fees and rebates would incentivize open competition trading centers to compete more on the basis of execution quality, rather than fees and rebates, in order to attract segmented orders. The 5 mil rebate cap for segmented orders priced at $1.00 per share or greater would result in rebates that are significantly lower than the rebates that are currently offered by most exchanges in these stocks. Academic literature has shown that the presence of high liquidity fees and rebates on some market centers may impact broker-dealer routing decisions based on where they can receive the highest rebate (or pay the lowest fee), rather than where they can receive better execution quality on behalf of their customers.[508] In contrast, with the 5 mil rebate cap, the effect of rebates on qualified auction participants for stocks with prices greater than $1.00 may be sufficiently small as to have a minimal impact on overall market structure or behavior.[509] This would limit the degree to which open competition trading centers could use rebates to attract segmented orders to their qualified auctions and help incentivize them to compete more on the basis of the execution quality of their auctions.

In addition, the Commission believes that proposed minimum price increments under Proposed Rule 615(c)(3) [510] would further enhance competition to supply liquidity to marketable individual investor orders through qualified auctions, as smaller price increments are likely to encourage greater amounts of price improvement. However, lowering the price increment beyond that proposed may increase the possibility of market participants seeking to gain execution priority by pricing their auction responses in economically small increments. Thus, the size of the proposed price increment that has been chosen for qualified auctions is intended to increase price improvement while still reducing the likelihood of participants using economically insignificant price increments.

b. Improvements to Segmented Order Execution Quality

The Proposal likely would reduce transaction costs for individual investors due to improved competition to supply liquidity to individual investor orders.[511] By making marketable order flow from individual investors that is currently internalized by wholesalers and executed at prices less favorable than midpoint accessible to other market participants in qualified auctions, the Proposal would allow additional market participants an opportunity to compete to directly trade with these individual investor orders.[512] The Commission estimates that the potential benefit to individual investors from this increased competition, the

[504] Net capture refers to the difference between average fees levied and rebates paid.

[505] Intercontinental Exchange, the parent firm of NYSE, reports on page 51 of its 2021 10k filing that its net capture for U.S. equity transactions was approximately 4.2 mils in 2021. Nasdaq did not report its net capture in their 10K filing, however Nasdaq provides information on their investor relations web page which, when we average the relevant 2021 volumes, indicates that the average net capture across all Nasdaq platforms for U.S. equity transactions was 5.9 mils (*see* Nasdaq 2022/2021 Monthly Volumes, *available at https://ir.nasdaq.com/static-files/465d2157-c476-4546-a9f7-8d7ad0c9be77*). Cboe reports in their 2021 Form 10–K filing that their net capture for U.S. equity transactions was approximately 2 mils.

[506] The estimate for the 0.28% net capture, which is the difference between fees received and rebates paid out by the exchange, is obtained by an analysis of current fee and rebate schedules based on Rule 19b-4 filings with the Commission for each of the equity exchanges operating in the United States as of June 1, 2022, as well as a review of the transaction prices that each exchange posts. This amount is because, for transactions under $1.00 per share, most exchanges set their baseline fee at 0.30% but do not offer baseline rebates, and some charge fees to both sides of the transaction leading to more than 0.30% per trade earned by the exchange.

[507] The assumption that the exchanges earn an average 2 mil spread on trading behavior is discussed above in this section. The Commission believes that it is reasonable to assume that the exchanges would fund qualified auction rebates through access fees, either from qualified auctions or the continuous order book. The Commission believes that it is reasonable to assume that the exchanges overall would try to continue to earn approximately 2 mils per transaction under the Proposal, but the Commission acknowledges that there is some uncertainty regarding this assumption and seeks public comment.

[508] *See, e.g.,* Robert H. Battalio, Shane A. Corwin & Robert Jennings, *Can Brokers Have It All? On the Relation Between Make-Take Fees and Limit Order Execution Quality,* 71 J. Fin. 2193 (2016).

[509] All but two exchanges do not offer a rebate for transactions priced below $1.00 per share. Thus, for these transactions, the proposed auction fee and rebate cap for executed auction responses would likely not result in lower rebates.

[510] Under proposed Rule 615(c)(3), segmented orders and auction responses must be priced in an increment of no less than $0.001 (or 0.1 cent) if their prices are $1.00 or more per share, in an increment of no less than $0.0001 (or 0.01 cent) if their prices are less than $1.00 per share, or at the midpoint of the NBBO. *See supra* section IV.C.3.

[511] *See supra* section VII.C.1.a for discussion of improvements in competition to supply liquidity to segmented orders in qualified auctions.

[512] *See infra* section VII.C.1.c for discussions of how the Proposal could also enhance the order execution quality of other market participants that would be able to compete to supply liquidity to individual investor orders, including institutional investors.

competitive shortfall rate, would range between an average of 0.86 bps to 1.31 bps for marketable orders that met the definition of a segmented order.[513] Based on Commission estimates that between 7.3% to 10.1% of total executed dollar volume would be segmented orders that would be eligible to be included in qualified auctions, the Commission preliminarily estimates that this could potentially result in a total average annual savings in individual investor transaction costs, *i.e.,* a total competitive shortfall, ranging between $1.12 billion to $2.35 billion dollars.[514] The Commission acknowledges that there is considerable uncertainty in these estimates.[515] Additionally, these estimates account only for potential changes in individual order transaction costs and assumes that the PFOF wholesalers currently pay to retail brokers would be converted into additional price improvement for the individual investor order. Furthermore, the estimates do not account for the potential return of commission fees charged by retail brokers.[516] As discussed in further detail below,[517] the Commissioner does not believe that retail brokers will respond to the loss of PFOF revenue by resuming commission fees, but even in the event that total PFOF revenue disappears ($940 million, based on Q1 2022 data) [518] and PFOF brokers charge commission fees to fully replace this revenue, this cost increase to traders would still be less than the estimated $1.12 billion to $2.35 billion annual gain in price improvement estimated by the Commission.

As shown by analyses in Table 6, Table 7 and Table 8, the realized spreads earned from supplying liquidity to individual investor marketable orders routed to wholesalers are greater than realized spreads for comparable marketable order transactions (*e.g.,* similar stocks and order sizes) on exchanges, indicating that the additional price improvement that these individual investor orders receive does not fully offset the lower adverse selection risk associated with these orders.[519] The Commission estimates the competitive shortfall rate, *i.e.,* the potential additional price improvement (and reduction in transaction costs) that the marketable orders of individual investors would receive from having their order being exposed to greater competition among liquidity suppliers in qualified auctions, as the difference in the realized spreads between marketable orders executed on exchanges and individual investor marketable orders that were executed after being routed to wholesalers,[520] after adjusting for exchange rebates that are currently paid to liquidity suppliers on exchanges, as well as for fees (5 mils) that would potentially be charged to liquidity suppliers in qualified auctions.[521]

To illustrate the logic behind this calculation, it is useful to go through the following thought experiment. Pick a stock, a day, and a range of order size that is executed by wholesalers. Based on Rule 605 data or CAT data, one can calculate the transaction costs that retail investors incur for this stock, on this day, and for this range of order size. The question is: what would be the transaction costs for those orders if they were sent to competitive auctions? Although such auctions as those being proposed here do not exist, the marginal profit required to incentivize provision of liquidity on exchanges' order books can serve as a proxy. This marginal profit to liquidity provision can be estimated as the on-exchange realized spread (for a given stock, on a given day, and within a given range of order size) plus the estimated rebate that exchanges pay the liquidity providers. The estimated transaction cost for the auction equals the estimated marginal profit of liquidity providers on exchange order books plus the maximum 5 mil fee (a lower fee would result in a higher competitive shortfall). The competitive shortfall is the difference between the current transaction cost of retail investors off-exchange wholesalers and the estimated transaction cost in the auction. Equivalently, one can view this as the difference in marginal profits to liquidity provision on and off-exchange (where spreads are adjusted by the auction fee rather than by PFOF).

Competitive shortfall rates are calculated using three different estimates of exchange rebates. The first Rebate Base method is calculated based on Commission estimates of average exchange rebates paid to liquidity suppliers on maker-taker exchanges (*i.e.,* exchanges that pay a rebate to orders supplying liquidity and charge a

[513] As discussed in *supra* section VII.B.7, the Commission believes that the implementation of qualified auctions would lead to improvements in execution quality relative to a baseline in which the MDI Rules are implemented, *i.e.,* over and above any improvements in execution quality that may result from the implementation of the MDI Rules. Once implemented, the changes to the current arrangements for consolidated market data in the MDI Adopting Release may impact the magnitude of the benefit from the proposal for individual investors, but the effects are uncertain. Trading costs are measured against the NBBO midpoint and, as discussed in *supra* note 421, there is uncertainty regarding how the NBBO midpoint will change for stocks priced above $250 when the MDI Rules are implemented. It is also uncertain how or to what degree changes in trading costs would differ between trades executed at exchanges and wholesalers. Since the benefit is measured based on the differences in exchange and wholesaler realized spreads, if both realized spread measures changed similarly, then there would not be changes in relative differences between their reported spread measures and the estimated benefit would not change.

[514] *See infra* Table 19. The Commission preliminarily believes that, in order for a wholesaler to effectively compete against other bidders in qualified auctions, the wholesaler would have to reduce the PFOF it is paying to the retail broker in order to bid more aggressively to potentially win the qualified auction. This would result in the reduction in PFOF instead going to the customer as additional price improvement, which would be reflected in the competitive shortfall calculation. The competitive shortfall estimates do not include costs that may arise in the form of potential increases in (or the return of) commissions retail brokers charge to individual investors or other reductions in the services that retail brokers currently offer, both of which may occur if the Proposal reduces the PFOF paid to retail brokers or results in wholesalers charging retail brokers for their order handling services. *See infra* section VII.C.2.b for a discussion of costs to individual investors and *infra* section VII.C.2.d for a discussion of costs to retail brokers.

[515] The Commission is uncertain about these estimates because the Commission does not know with certainty how different market participants would adjust their practices in response to this rule. There is also uncertainty in these estimates because of limitations in using the realized spreads to measure the trading profits earned by liquidity suppliers. *See supra* note 426 for additional discussions on the limitations of realized spreads.

[516] Most retail brokers have continued to charge commission fees for (human) broker-assisted orders, including those that dropped online trade commission fees.

[517] *See infra* section VII.C.2.b.ii.

[518] However, all PFOF revenue might not disappear because wholesalers may continue to pay PFOF for non-marketable limit orders, which may not be affected by the Proposal and may be based on exchange rebates that wholesalers pass through to retail brokers (*see supra* note 395). The annualized PFOF revenue from non-marketable limit orders is estimated to be approximately $275 million, based on Q1 2022 data. *See supra* note 465 for additional information on PFOF revenue in Q1 2022.

[519] *See supra* sections VII.B.4 and VII.B.5 for discussions of the differences in realized spreads between individual investor marketable orders routed to wholesalers compared to marketable orders routed to exchanges.

[520] This included marketable orders that the wholesalers internalized and also marketable orders that were routed to wholesalers and then executed on a riskless principal or rerouted to another venue and executed on an agency basis. The Commission does not adjust wholesaler realized spreads for the PFOF they pay to retail brokers because PFOF, while a cost to wholesalers, is not a cost to investors. *See supra* note 514 for further discussions on the assumed effects of PFOF for purposes of this analysis.

[521] The realized spreads after adjusting for potential exchange rebates to liquidity suppliers are estimated and discussed in *supra* section VII.B.4. In estimating the competitive shortfall rate we also deduct a 5 mil fee from the exchange adjusted realized spreads to account for the potential fees charged to liquidity suppliers in qualified auctions. The Commission acknowledges that realized spreads are a proxy for the trading profits earned by liquidity suppliers. *See supra* note 426 for further discussion on the limitations of realized spreads.

fee for orders demanding liquidity) and fees charged to liquidity suppliers on inverted exchanges (*i.e.,* exchanges that charge a fee for orders supplying liquidity and pay a rebate for orders demanding liquidity) and flat fee exchanges (*i.e.,* exchange that don't pay rebates, but may charge fees for orders both demanding and supplying liquidity).[522] The other two methods, which are calculated to see how the competitive shortfall rates vary based on differences in estimates of exchange fees and rebates, are calculated by varying the exchange fees and rebates estimated in the Rebate Base method by 25%. The Rebate High method estimates higher rebates and lower fees for supplying liquidity and assumes exchange rebates on maker-taker venues are 25% greater than in the Rebate Base method and exchange fees on inverted and flat fee exchanges are 25% lower than in the Rebate Base method.[523] The Rebate Low method estimates lower rebates and higher fees for supplying liquidity and assumes exchange rebates on maker-taker venues are 25% lower than in the Rebate Base method and exchange fees on inverted and flat fee exchanges are 25% higher than in the Rebate Base method.[524]

The estimates of the overall average competitive shortfall rates and the competitive shortfall rates for different types of NMS stocks are presented below in Table 18.[525] This analysis incorporates the contrasting levels of adverse selection risk (price impact) and price improvement provided to orders internalized by wholesalers and executed on exchanges. Ultimately, the increased price improvement of wholesalers does not match the lower price impact of individual investor orders, causing wholesaler realized spreads to exceed exchange realized spreads, and competitive shortfall rates to be positive. In order to ensure robustness of the results and to account for potential limitations of the coverage of Rule 605 reports,[526] the analysis estimates competitive shortfall rates using data from Rule 605 reports, as well as data from CAT. All CAT and Rule 605 estimates of the competitive shortfall rates are positive in all three methods, which indicates that the realized spreads earned by wholesalers on the marketable orders of individual investors tend to be higher than realized spreads earned by liquidity suppliers on exchanges after adjusting for exchange rebates. However, the average competitive shortfall rates calculated using data from Rule 605 reports tend to be lower than those estimated from CAT data. Rule 605 estimated competitive shortfall rates using the Rebate Base, Low, and High methods are 0.58 bps, 0.77 bps, and 0.38 bps, respectively, while CAT estimated competitive shortfall rates using the Rebate Base, Low, and High methods are 1.08 bps, 0.86 bps, and 1.31 bps, respectively. The differences appear to be mainly driven by differences between the exchange realized spreads calculated using Rule 605 and CAT data. Exchange realized spreads calculated using CAT data tend to be lower than those calculated using Rule 605 data, with CAT data estimating an average exchange realized spread of −1.22 bps for all stocks and Rule 605 data estimating an average exchange realized spread of -0.67 bps. This difference could be driven by the CAT data having broader coverage of marketable orders than Rule 605 data.[527] The analysis in Table 7 supports this by showing that sample from CAT data contains over $16 trillion in trading volume from marketable orders routed to exchanges in Q1 2022, while Table 6 shows that the sample from Rule 605 data is smaller, containing over $9 trillion in trading volume from marketable orders routed to exchanges.[528] Given the broader coverage of the CAT exchange data, the Commission believes that the estimates derived from sample from the CAT data provide a more complete estimate of the realized spreads for marketable orders executed on exchanges than the sample from the Rule 605 data. Therefore, the Commission believes that the range of the estimated competitive shortfall rate from the CAT data, 0.86 bps to 1.31 bps may be a more representative measurement of the realized spread difference between individual investor marketable orders executed by wholesaler and marketable orders executed on exchanges.[529]

The estimates in Table 18 indicate that the competitive shortfall rate appears to be higher in non-S&P 500 stocks than in S&P 500 stocks and ETFs, with non-S&P 500 competitive shortfall rates of 3.07 bps under the Rebate Base method computed using CAT data, compared to the competitive shortfall rates of 0.44 bps and 0.34 bps for S&P 500 stocks and ETFs respectively. These results are consistent with the results shown in Table 8, which indicate that the differences in realized spreads between individual investor marketable orders executed at wholesalers and marketable orders executed at exchanges are larger in less liquid stocks.[530] Additionally, the estimates in Table 18 indicate that exchanges' rebates tend to have a larger effect on the competitive shortfall rate for non-S&P 500 stocks, with these types of stocks showing the greatest variation in the competitive shortfall rates estimated by the Rebate Low and Rebate High methods.

[522] The estimated exchange rebates for orders supplying liquidity used to calculate the competitive shortfall exchange base method are the same as those used to calculate the Realized Spread Rebate differential in *supra* Table 6. *See supra* note 435 for a discussion of how these estimates of exchange rebates were determined. A 5 mil fee is then further deducted to account for the potential fee charged to liquidity suppliers in qualified auctions.

[523] The Rebate High method is calculated assuming that exchange rebates to liquidity suppliers on maker-taker exchanges are 34 mils; that exchange fees for supplying liquidity on inverted exchanges are 11 mils; and that exchange fees for supplying liquidity on flat fee exchanges are 5 mils. A 5 mil fee is then further deducted to account for the potential fee charged to liquidity suppliers in qualified auctions.

[524] The Rebate Low method assumes that rebates on maker-taker exchanges are 25% lower and fees on inverted and flat fee exchanges are 25% higher. For our adjustments we assume: exchange rebates to liquidity suppliers on maker-taker exchanges are 20 mils; exchange fees for supplying liquidity on inverted exchanges are 19 mils; exchange fees for supplying liquidity on flat fee exchanges are 9 mils. A 5 mil fee is then further deducted to account for the potential fee charged to liquidity suppliers in qualified auctions.

[525] Competitive shortfalls are calculated using the same methodology for calculating realized spreads that is described in Table 6 and Table 7, but the amount for exchange rebates adjustments may be different depending on the rebate method used. Additionally, the competitive shortfall deducts a 5 mil fee from the exchange adjusted realized spreads to account for the potential fees charged to liquidity suppliers in qualified auctions, which is not included in the realized spread differential calculations.

[526] *See supra* section VII.B.4 discussing limitations of Rule 605 coverage.

[527] The different time horizons used for the calculation of the realized spreads could also contribute to the observed difference in realized spreads between the samples, with the CAT sample calculating realized spreads at the one minute horizon and Rule 605 data calculating spreads at the 5 minute horizon. However, Conrad and Wahal (2020) examined realized spreads at different horizons and found that realized spreads measured at the 5 minute horizon tended to be lower than realized spreads measured at the 1 minute horizon, which indicates that the different time horizons may not be a significant driver of the difference in realized spreads between the two samples.

[528] Note that the samples in Table 6 and Table 7 are filtered to be limited to orders under $200,000 in value. However, the trading volume for the CAT sample is still larger than the exchange trading volume for the unfiltered sample from Rule 605 data shown in Table 5.

[529] The Commission acknowledges that there is uncertainty in these estimates. *See supra* note 515 for additional discussions.

[530] *See supra* section VII.B.4 for a discussion of the analysis in Table 8.

TABLE 18—COMPETITIVE SHORTFALL RATES ESTIMATES

Data source	Stock type	All	S&P 500	Non-S&P 500	ETF
Rule 605	WH Realized Spread (bps)	0.72	0.30	1.55	0.64
Rule 605	EX Realized Spread (bps)	−0.67	−0.30	−1.97	−0.12
Rule 605	EX Realized Spread Adj Rebate Base (bps)	−0.001	−0.05	−0.24	0.28
Rule 605	EX Realized Spread Adj Rebate High (bps)	0.19	0.02	0.25	0.41
Rule 605	EX Realized Spread Adj Rebate Low (bps)	−0.20	−0.12	−0.73	0.15
CAT	WH Realized Spread (bps)	0.85	0.42	2.00	0.51
CAT	EX Realized Spread (bps)	−1.22	−0.28	−3.90	−0.34
CAT	EX Realized Spread Adj Rebate Base (bps)	−0.40	−0.06	−1.54	0.08
CAT	EX Realized Spread Adj Rebate High (bps)	−0.18	0.00	−0.90	0.20
CAT	EX Realized Spread Adj Rebate Low (bps)	−0.63	−0.12	−2.19	−0.05
Rule 605	Competitive Shortfall Rebate Base (bps)	0.58	0.30	1.42	0.26
Rule 605	Competitive Shortfall Rebate High (bps)	0.38	0.23	0.93	0.13
Rule 605	Competitive Shortfall Rebate Low (bps)	0.77	0.37	1.91	0.38
CAT	Competitive Shortfall Rebate Base (bps)	1.08	0.44	3.07	0.34
CAT	Competitive Shortfall Rebate High (bps)	0.86	0.38	2.42	0.22
CAT	Competitive Shortfall Rebate Low (bps)	1.31	0.50	3.71	0.46

This table shows estimates of competitive shortfall rates, wholesaler realized spreads, and exchange realized spreads after adjusting for exchange rebates. Competitive shortfall is estimated by subtracting realized spreads on marketable orders routed to exchanges after adjusting for exchange rebates and fees for liquidity suppliers in qualified auctions from realized spreads on marketable orders routed to wholesalers. Estimates are calculated using three different competitive shortfall estimation methods to account for exchange rebates: (1) Competitive Shortfall Rebate Base (''Base'') method (*see supra* note 522); (2) Competitive Shortfall Rebate High (''High'') method (*see supra* note 523); and (3) Competitive Shortfall Rebate Low (''Low'') method (*see supra* note 524).

The competitive shortfall estimates are calculated separately for samples from Rule 605 data and CAT data and are derived from the execution quality stats for marketable orders under $200,000 described in detail in Table 6 (Rule 605 data) and Table 7 (CAT data). For the sample from Rule 605 data, the difference in dollar realized spread measures between exchanges and wholesalers are estimated by subtracting the average rebate adjusted exchange realized spread (using estimated exchange rebate rates from one of the competitive shortfall rebate method estimates) and also deducted a 5 mil fee (to account for the potential fee charged to liquidity suppliers in qualified auctions) from the adjusted wholesaler average realized spread at the stock-month-order size category level for the combined market and marketable limit order types with average order size category dollar values less than $200,000 (average order dollar values were determined for each order-size category stock-month by dividing the total number of covered shares in the order size category by the total number of covered orders and then multiplying by the stock-month's average VWAP), calculated from Rule 605 reports. The share weighted averages of the wholesaler and exchange realized spread differences are then determined at the individual stock-month level by share-weighting across different order-size categories based on the number of shares executed (at the market center + away) in wholesalers' Rule 605 reports in that order-size category. Percentage realized spread differences are then calculated by dividing the dollar realized spread differentials by the stock-months VWAP as estimated by TAQ. The weighted average of the individual stock-month percentage realized spread differentials are averaged together based on weighting by the total wholesaler dollar trading volume in that stock-month for the combined marketable order type (wholesaler dollar trading volume is estimated by multiplying the Rule 605 report wholesaler total executed share volume, *i.e.,* the share volume executed at market center + share volume executed away from the market center, for the stock-month-order type by the stock's monthly VWAP). A similar methodology was used to calculate the CAT competitive shortfall measures, but the share weighted volume estimates were calculated up to the individual stock-week-order-size level and then these values were aggregated together based on a weighted average using the total wholesaler dollar trade volume executed in that category. The realized spread measures reported are the average wholesaler and exchange adjusted rebates (adjusting for the exchange rebates reported under this method but not including the 5 mil fee deduction for the qualified auction fees) used to compute the competitive shortfall rates.

Table 18 estimates the average annual total competitive shortfall (*i.e.,* the average total annual estimated dollar value of improvements in individual investor transaction costs) by multiplying the competitive shortfall rate by an estimate of the total annual dollar volume of segmented orders that could potentially participate in qualified auctions. Because the Commission is uncertain about the volume of orders that would participate in qualified auctions, the analysis uses three different scenarios to estimate the dollar volume of individual investor orders that may participate in qualified auctions.[531] Under the Base segmented order volume scenario, the Commission analysis assumes that all individual investor orders under $200,000 would be exposed in qualified auctions, which is estimated to constitute 7.8% of total executed dollar volume.[532] Under the Low segmented order volume scenario, the Commission analysis assumes that only individual investor marketable orders under $200,000 would be exposed in qualified auctions, which is estimated to constitute 7.3% of total executed dollar volume.[533] Because some broker-dealers may submit segmented orders over $200,000 to qualified auctions if it would result in the order receiving better price improvement,[534] under the High segmented order volume scenario, the Commission analysis assumes that 50% of individual investor orders over $200,000 would also be exposed in qualified auctions, which is estimated to constitute 10.1% of total executed dollar volume.[535] These scenarios include orders executed by wholesalers at prices at or better than NBBO midpoint, though should these orders continue to receive this execution via the exception to the rule then they would not be sent to qualified auctions. This is appropriate given that these orders are also included in the analysis examining the execution quality of individual investor marketable orders routed to

[531] The percentage multipliers used in these volume estimates were estimated from an analysis of CAT data in Jan. 2022. The analysis found that wholesalers trading in an off-exchange principal capacity against orders originating from an FDID Individual customer account type accounted for 12.36% of the total consolidated dollar volume reported by the SIP during the month. Of these individual orders, 36.78% of the executed dollar volume originated from orders with dollar values of $200,000 or greater. Of the remaining orders, 5.90% of the executed dollar volume belonged to orders that were not market or marketable limit orders.

[532] The Base Scenario estimate of 7.80% as the percentage of total dollar volume that could potentially be segmented orders that could be exposed in qualified auctions is estimated by multiplying the 12.36% of total executed dollar volume belonging to individual accounts and executed by wholesalers in a principal capacity by the 63.22% (1–36.78%) of this executed dollar volume from orders that were less than $200,000.

[533] The Low Scenario estimate of 7.34% as the percentage of total dollar volume that could potentially be segmented orders that could be exposed in qualified auctions is estimated by multiplying the 12.36% of total executed dollar volume belonging to individual accounts and executed by wholesalers in a principal capacity by the 63.22% (1–36.78%) of this executed dollar volume from orders that were less than $200,000. This was then multiplied by 94.1% (1–5.9%) to account for the assumption that only market and marketable limit orders would be submitted to qualified auctions.

[534] Proposed Rule 615 would create an exception in which segmented orders with a dollar value of $200,000 or greater may be executed at a restricted competition trading center without being exposed in a qualified auction. However, the exception still allows these orders to be submitted to qualified auctions.

[535] The High Scenario estimate of 10.08% as the percentage of total dollar volume that could potentially be segmented orders that could be exposed in qualified auctions is estimated by multiplying the 12.36% of total executed dollar volume belonging to individual accounts and executed by wholesalers in a principal capacity by 81.61% (1–36.78%/2), which is the percentage of the remaining executed dollar volume of orders originating from individual investor that are less than $200,000 plus 50% of the executed dollar volume of individual orders that were $200,000 or greater, which would be submitted to qualified auctions under this scenario.

wholesalers.[536] Therefore, removing these orders from the analysis would serve to increase the realized spread for wholesalers and thus increase the competitive shortfall for the remaining percentage of total executed dollar volume.

Table 19 estimates the average annual total competitive shortfall under the three segmented order volume scenarios for each of the three different competitive shortfall rebate methods. The table presents estimates for both the sample from Rule 605 data and the sample from CAT data. The total competitive shortfalls estimated for the Rule 605 sample are smaller than those estimated for the CAT sample. The Rule 605 data sample Rebate Base method estimates total competitive shortfalls ranging between $800 million and $1.0 billion dollars for the Low and High segmented order volume scenarios, respectively, while the CAT data sample Rebate Base method estimates total competitive shortfalls ranging between $1.5 billion and $1.9 billion dollars. As discussed above in this section, given the broader coverage of the CAT exchange data, the Commission believes the estimated competitive shortfall rates derived from the CAT data are more representative than those derived from Rule 605 data. The total competitive shortfall estimated from the CAT data sample using the Rebate High method ranges between $1.1 billion and $1.5 billion dollars over the different segmented order volume scenarios, while the estimates from the Rebate Low method range between $1.7 billion to $2.3 billion dollars. Given the uncertainty regarding the estimates of average exchange rebates and the volume of segmented orders that would be exposed to qualified auctions, the Commission estimates that the average annual total competitive shortfall, *i.e.,* the total annual average reduction in individual investor transactions cost, from the Proposal may range between $1.1 billion dollars and $2.3 billion dollars.[537]

TABLE 19—TOTAL ANNUAL COMPETITIVE SHORTFALL DOLLAR VALUES UNDER DIFFERENT VOLUME SCENARIOS

Data source	Competitive shortfall scenario	Segmented order volume scenario		
		Base (7.80% of total executed dollar volume)	Low (7.34% of total executed dollar volume)	High (10.08% of Total Executed Dollar Volume)
Rule 605	Competitive Shortfall Rebate Base (0.58 bps)	$800 million	$753 million	$1.03 billion
Rule 605	Competitive Shortfall Rebate High (0.38 bps)	$530 million	$499 million	$684 million
Rule 605	Competitive Shortfall Rebate Low (0.77 bps)	$1.07 billion	$1.01 billion	$1.38 billion
CAT	Competitive Shortfall Rebate Base (1.08 bps)	$1.50 billion	$1.41 billion	$1.94 billion
CAT	Competitive Shortfall Rebate High (0.86 bps)	$1.20 billion	$1.12 billion	$1.54 billion
CAT	Competitive Shortfall Rebate Low (1.31 bps)	$1.82 billion	$1.71 billion	$2.35 billion

This table estimates the total annual competitive shortfall dollar amounts by multiplying the competitive shortfall rates for the different method in Table 18 by an estimate of the total annual dollar trading volume that could be exposed in qualified auctions under three different scenarios: The Base Volume Scenario (discussed in *supra* note 532), the Low Volume Scenario (discussed in *supra* note 533) and the High Volume Scenario (discussed in *supra* note 535). The total annual dollar trading volume that could be exposed in qualified auctions under a scenario is estimated by multiplying the scenario's estimate of the percentage of executed total dollar volume by four times the Total Executed Dollar Volume in Q1 2022, which equaled $44.54 trillion. Total Competitive Shortfall Dollar Value is estimated by multiplying Competitive Shortfall Rate by the estimate of the total annual dollar trading volume that could be exposed in qualified auctions under a scenario.

A proposed exception from being required to send individual investor orders to qualified auctions under the Proposal is if handling broker-dealers choose to execute individual investor orders at prices equal to the NBBO midpoint or better. The analysis in Table 10 presents evidence that wholesalers execute 46% of the shares they internalize at prices equal to or better than the midpoint. Analysis of CAT data indicates that there is often additional midpoint liquidity available on exchanges and NMS Stock ATSs

Table 20 uses CAT data from March 2022 to examine the non-displayed liquidity available at the NBBO midpoint on exchanges and NMS Stock ATSs at a moment in time when a wholesaler internalizes an individual investor marketable order at a price less favorable (to the customer) than the NBBO midpoint.[538] The results indicate that, on average,[539] 51% of the shares of individual investor marketable orders internalized by wholesalers are executed at prices less favorable than the NBBO midpoint (Wholesaler Pct Exec Shares Worse Than Midpoint). Out of these individual investors shares that were executed at prices less favorable than the midpoint, on average, 75% of these shares could have hypothetically

[536] Marketable orders that are routed to wholesalers and executed at the NBBO midpoint or a more favorable price are included in the analysis in Table 6, Table 7, Table 18, and Table 19, as well as additional analysis based on the data used in these table.

[537] This estimate only accounts for potential changes in individual order transaction costs and assumes the PFOF that wholesalers currently pay to retail brokers would be converted into additional price improvement for the individual investor order. The competitive shortfall estimates do not include costs that may arise in the form of potential increases in (or the return of) commissions retail brokers charge to individual investors or other reductions in the services that retail brokers currently offer. *See supra* note 514 for additional details.

[538] More specifically, the analysis uses CAT data to look at the total shares available at the NBBO midpoint that originate from hidden midpoint pegged orders on exchanges and NMS Stock ATSs. The analysis compares the size of an individual investor marketable order that was internalized in a principal capacity by a wholesaler at a price less favorable than the NBBO midpoint (measured at the time the wholesaler received the order) to the total shares of midpoint liquidity (originating from midpoint peg orders) at the NBBO midpoint on exchanges and NMS Stock ATSs at the time the individual investor order is executed in order to hypothetically see how many additional shares could have gotten price improvement if they had executed against the hidden liquidity available at the NBBO midpoint. A midpoint peg order is a type of hidden order whose price automatically adjusts with the NBBO midpoint. The analysis looks at midpoint peg orders on exchanges and ATSs during normal market hours (midpoint peg orders with an Immediate or Cancel or Fill or Kill modifier are excluded). The total potential shares in orders that were available at the NBBO midpoint from midpoint peg orders on exchanges and ATSs was calculated each stock day by adding shares when midpoint peg orders were received by an exchange or ATS and subtracting shares in these orders that were canceled or traded. Shares were also subtracted from the total when a wholesaler internalized an individual investor marketable order at a price worse than the NBBO midpoint and shares were available at the midpoint on exchanges and ATSs that the order could have hypothetically executed against. This ensures that that analysis is not overestimating the available midpoint liquidity (*i.e.,* it ensures that we do not estimate two individual investor 100 share orders could have executed against the same resting 100 share midpoint order). The analysis also kept track of the total amount of dollars of additional price improvement that individual investors would have received if their orders had hypothetically executed against the liquidity available at the NBBO midpoint instead of being internalized by the wholesaler. Note that this analysis might underestimate the total non-displayed liquidity available at the NBBO midpoint because it only looks at orders that pegged to the midpoint and not other orders, such as limit orders with a limit price equal to the NBBO midpoint.

[539] As discussed in Table 20, percentages were computed at a stock-week level and then averaged across stock-weeks by weighting by the total dollar volume the wholesaler internalized during that stock-week.

executed at a better price against the non-displayed liquidity resting at the NBBO midpoint on exchanges and NMS Stock ATSs. Under the current market structure, this liquidity is not displayed, so wholesalers may not have been aware of this liquidity and able to execute the individual investor marketable orders against it. Currently, if wholesalers wanted to detect this hidden liquidity, they would have had to ping each individual exchange or NMS Stock ATS to see if midpoint liquidity was available on that venue.[540]

These results shed additional light on the availability of liquidity at the NBBO midpoint for a large share of individual investor orders that currently receive executions at less favorable prices than the NBBO midpoint and therefore could potentially execute at a price equal to the NBBO midpoint under qualified auctions. Under the Proposal, individual investor marketable orders submitted to qualified auctions might execute at the NBBO against this hidden liquidity, assuming the added transparency does not reduce the supply of midpoint liquidity. The qualified auction message would act as a coordination mechanism and would make the broker-dealers that handle the orders resting at the NBBO midpoint on exchanges and NMS Stock ATSs aware there was a segmented order they could trade against. These broker-dealers could cancel their midpoint orders resting on exchanges and NMS Stock ATSs and instead submit them as an auction response priced at the midpoint in the qualified auction.[541]

Table 20 also estimates the additional dollar price improvement that these individual investor marketable orders would have received if they had executed against the available midpoint liquidity instead of being internalized. The total amount of additional price improvement that all of these individual investor orders would have received was about 51% of the total dollar price improvement provided by wholesalers to all of the individual investor marketable orders that they internalized (*i.e.* the marketable orders internalized at prices better or equal to the midpoint plus marketable orders internalized at prices worse than the midpoint).

In addition, the results in Table 20 also indicate the availability of NBBO midpoint liquidity is only slightly lower for less liquid (non-S&P 500 stocks) as liquid (S&P500) stocks. That is, while about 57% of the shares in individual investor marketable orders in non-S&P500 stocks internalized by wholesalers received executions at less favorable prices than the NBBO midpoint, there was nevertheless hidden liquidity available at the NBBO midpoint for about 68% of these non-S&P500 shares. Thus, the potential for NBBO midpoint execution for shares in non-S&P500 stocks from qualified auctions is similar to the overall market. Moreover, the potential additional price improvement that could have been gained if these individual investor orders had executed against this NBBO midpoint liquidity is almost 55% of the total price improvement provided by wholesalers in these stocks. In general, the potential for qualified auctions under the Proposal to act as a coordination mechanism and potentially create more opportunities for hidden liquidity resting at the NBBO midpoint to interact with segmented orders exists for both liquid and non-liquid stocks.

[540] Pinging for midpoint liquidity at multiple venues could increase the risk of information leakage or that prices may move, possibly resulting in some market participants canceling midpoint orders they posted.

[541] If the midpoint liquidity is resting on the LOB of the open competition center running the qualified auction then it would be included in the qualified auction without the submitter having to cancel the order.

TABLE 20—AVAILABLE MIDPOINT LIQUIDITY WHEN WHOLESALER INTERNALIZES A RETAIL TRADE

Stock type	Price group	Liquidity bucket	Wholesaler pct exec shares worse than midpoint	Pct shares MP price improvement	Additional dollar price improvement Pct
All	All		51.05	74.60	51.05
SP500	All		48.41	72.32	41.43
SP500	(1) <$30		64.36	60.08	50.00
SP500	(2) $30-$100		47.82	60.36	29.29
SP500	(3) $100+		47.69	75.69	43.27
NonSP500	All		57.45	68.10	54.51
NonSP500	(1) <30	Low	73.30	49.52	67.63
NonSP500	(1) <$30	Medium	71.30	60.25	82.85
NonSP500	(1) <$30	High	66.77	52.18	59.74
NonSP500	(2) $30-$100	Low	63.60	80.69	68.88
NonSP500	(2) $30-$100	Medium	57.71	85.24	61.80
NonSP500	(2) $30-$100	High	50.24	71.79	44.58
NonSP500	(3) $100+	Low	61.62	84.32	61.49
NonSP500	(3) $100+	Medium	55.40	93.29	55.96
NonSP500	(3) $100+	High	47.15	90.99	45.57
ETF	All		49.93	86.06	58.28
ETF	(1) <$30	Low	66.58	39.75	31.61
ETF	(1) >$30	Medium	57.95	54.91	38.35
ETF	(1) <$30	High	62.24	78.47	88.70
ETF	(2) $30-$100	Low	61.01	62.00	41.78
ETF	(2) $30-$100	Medium	53.94	77.54	46.85
ETF	(2) $30-$100	High	49.87	84.09	49.56
ETF	(3) $100+	Low	52.45	72.28	40.13
ETF	(3) $100+	Medium	47.51	87.20	45.35
ETF	(3) $100+	High	46.93	90.28	48.33

This table summarizes midpoint liquidity available on exchanges and ATSs during March 2022 when a wholesaler internalizes an individual investor marketable order less than $200,000 in an NMS common stock or ETF on a principal basis at a price less favorable than the NBBO midpoint (at the time of the wholesaler receives the order) from one of the 58 retail broker MPIDs in the CAT retail analysis. Stocks are broken out into buckets based on their security type, price, and liquidity. Stock type is based on whether a security is an ETF, or a common stock in the S&P 500 or Non-S&P 500. Price buckets are based on a stock's weekly average VWAP price as estimated from TAQ. Stocks within each security type-price bucket, except S&P 500 stocks, are sorted into three equal liquidity buckets based on the stock's total share trading volume during the week estimated using TAQ data (*see supra* Table 9 for additional details on the bucket definitions). *See supra* Table 7 for additional details on the sample and CAT analysis of wholesaler executions of the orders of individual investors.

Wholesaler Pct Exec Shares Worse Than Midpoint is the average percentage of individual investor shares that wholesalers executed on a principal basis at a price less favorable than the NBBO midpoint (measured at the time the wholesaler receives the order). Pct Shares MP Price Improvement is the average percentage of shares that the wholesaler executed at a price less favorable than the NBBO midpoint that could have executed at a better price against resting liquidity available at the NBBO midpoint on exchanges and NMS Stock ATSs at the time the wholesaler executed the order. Additional Dollar Price Improvement Pct is ratio of the total additional dollars of price improvement of the sample period that individual investors whose orders were executed at a price less favorable than midpoint would have received if their orders would have executed against available midpoint liquidity, divided by the total dollars in price improvement (measured relative the NBB or NBO at the time of order receipt) that wholesalers provided over the sample period when they internalized individual investor orders (*i.e.* the total price improvement for orders wholesalers internalized at prices less favorable than the midpoint plus the total price improvement for orders wholesalers internalized at prices more favorable than the midpoint).

Midpoint liquidity is measured based on resting midpoint peg orders on exchanges and NMS Stock ATSs during normal market hours identified from CAT data. Midpoint peg orders with an Immediate or Cancel or Fill or Kill modifier are excluded. The total potential shares in orders that were available at midpoint on exchanges and ATSs at a point in time were calculated keeping a running total each stock day by adding shares when midpoint peg orders were received by an exchange or NMS Stock ATS and subtracting shares when shares in these midpoint peg orders were canceled or traded. When a wholesaler executes an order at a price less favorable than the NBBO midpoint (at the time the wholesaler receives the order), then the executed shares are compared to the available resting liquidity at the NBBO midpoint. If the NBBO midpoint at the time the order is executed would provide price improvement over the price the wholesaler would have executed the order at, then the shares executed by the wholesaler are subtracted from the total resting shares available at the NBBO midpoint, up to the lesser of the number of shares executed by the wholesaler or the total resting shares available (*i.e.* the total resting shares will not drop below zero). These are counted as the total shares that would have received additional price improvement at the midpoint. This methodology ensures that that analysis is not overestimating the available midpoint liquidity (*i.e.* it ensures that we do not estimate two individual investor 100 share orders could have executed against the same resting 100 share midpoint order). NBBO midpoints for both time of order receipt and time of execution are estimated from the consolidated market data feed.

The additional dollars of price improvement individual investors whose orders were executed at a price less favorable than the midpoint would have received if their orders would have executed against available midpoint liquidity was calculated as the difference between the price the wholesaler executed the order at and the NBBO midpoint at the time the wholesaler executed the order (*i.e.,* executed price—NBBO midpoint at the time of execution for a marketable buy order and midpoint—executed price for a marketable sell order) times the number of shares that would have received the additional price improvement.

Weighted averages are calculated for the variables Wholesaler Pct Exec Shares Worse Than Midpoint and Pct Shares MP Price Improvement using the following methodology. Percentages based on share volume are calculate for each stock-week (*e.g.,* total shares executed at a price worse than the midpoint during a stock-week divided by the total shares of individual investor marketable orders executed by a wholesaler in a principal capacity during the stock-week). Weighted averages are then calculated for each stock-type-price-liquidity bucket by averaging these stock-week percentages over the month by weighting each stock-week by the total dollar trade volume internalized by the wholesaler during the stock-week (*i.e.,* using the stock's total dollar trading volume internalized by the wholesaler as the weight when averaging the stock-week percentage values).

The Additional Dollar Price Improvement Pct is not weighted and is calculated as the ratio of the month's total additional dollar price improvement orders executed at a price less favorable than the NBBO would have received if their orders would have executed against available midpoint liquidity, divided by the month's total dollars in price improvement (measured relative the NBBO at the time of order receipt) that wholesalers provided when they executed individual investor orders (*i.e.* the total price improvement for orders wholesalers internalized at prices less favorable than the midpoint plus the total price improvement for orders wholesalers internalized at prices more favorable than the midpoint).

c. Improvements to Other Market Participants' Execution Quality

In addition to benefiting individual investors, the Proposal would improve order execution quality for other key market participants that compete to supply liquidity to individual investor orders, including institutional investors. For example, individual investor order flow that is currently accessed indirectly by institutional investors through wholesaler SDPs could be accessed directly at better prices relative to the prices charged by SDPs.[542] As stated above, in Q1 2022, SDPs associated with the two highest-volume wholesalers accounted for around 3% of the consolidated NMS stocks volume, while the volume of shares handled by these two wholesalers accounted for 15.9% of consolidated share volume in NMS stocks as of Q1 2022.[543] If institutional and individual investors could directly interact via qualified

[542] *See supra* section VII.B.3 for further discussions regarding how institutional investors indirectly interact with individual investor orders through wholesaler SDPs.

[543] *See supra* note 416 and corresponding discussion.

auctions, then these orders could potentially receive better execution quality.[544]

d. Improvements in Pre-Trade Transparency and Price Efficiency

In addition to increasing price improvement and interaction among market participants, the Proposal would improve pre-trade transparency and price efficiency. Currently, because most individual investor orders are internalized by wholesalers, pre-trade transparency related to these orders is limited, and has very likely declined over time as a result of the increasing share of trading volume that is executed off-exchange.[545] Moreover, the fact that some of the same market-makers have a large presence both on and off exchange implies a skewed information advantage, accruing to a subset of market makers. This subjects on-exchange liquidity providers, which may include individual investors, to greater adverse selection, which may have manifested in spreads wider than they would be otherwise, as well as lower depth.[546]

As a result of the Proposal, price efficiency would be improved as a result of the dissemination of qualified auction messages, which would increase transparency regarding the trading interest of individual investors. Because qualified auction messages would be included in consolidated market data,[547] they would not only promote competition by soliciting potential auction responses from a wide spectrum of market participants, but would also enhance the pre-trade transparency of marketable orders of individual investors, which may lead to improvements in liquidity and price efficiency.[548] As market participants would be better able to observe the trading interest of individual investors using consolidated market data, this would also allow them to better able to observe institutional trades.[549] The overall increase in market participants' ability to observe information in trades reported in consolidated market data would lessen the highly skewed information advantage of large market makers on and off-exchange, reducing adverse selection and potentially improving market quality.[550] These improvements would also occur should order flow be routed directly to the limit order book rather than going to an auction. They would be reduced to the extent that orders would be internalized at midpoint or better by wholesalers rather than routed to an exchange.

Additionally, the execution of more individual investor orders on exchanges would increase post-trade transparency because it would be easier to identify which transactions belonged to individual investors and on which venue they were executed.[551] The effects of post-trade transparency would be similar in direction to that of pre-trade transparency, though perhaps smaller, as the incremental difference in the transparency is less. Overall, the proposal will likely lead to increased trading on national market exchanges and on alternative trading systems satisfying the specified conditions. Evidence suggests that an increase in trading on lit venues could potentially increase information efficiency.[552]

2. Costs

The Commission recognizes that the Proposal would result in initial and ongoing compliance costs, as well as other costs to market participants. The Commission quantifies these costs where possible and provides qualitative discussion when quantifying costs is not feasible.

a. Compliance Costs

Market participants would incur various initial and ongoing costs in order to comply with Proposed Rule 615. The Commission estimates in Table 21 that total initial PRA compliance costs would be approximately $48.28 million while ongoing annual PRA compliance costs would be approximately $1.99 million.[553] Compliance costs would vary across market participants, including broker-dealers, SROs (including national securities exchanges and FINRA), and NMS Stock ATSs.

TABLE 21—SUMMARY OF PRA COMPLIANCE COSTS

Element	Participants	Implementation costs per entity	Ongoing costs per entity	Total implementation costs	Total ongoing costs
Administer & regulate auctions – Rule 615 (c)(1)	10	$79,000	$119,000	$790,000	$1,190,000
P&P—Identification of segmented orders – Rule 615 (e)(1), (e)(2)	157	34,000	4,500	$5,301,000	$703,000
Marking segmented orders: In-house – Rule 615 (e)(2)	52	95,500		$4,970,000	
Marking segmented orders: 3rd party – Rule 615 (e)(2)	105	53,000		$5,600,000	

[544] The direct interaction between individual and institutional investors in qualified auctions would allow for price improvement for both groups of investors, the sum of which is currently received by the wholesaler serving as the intermediary via its SDP. Thus, the gains to individual and institutional investors would be an economic transfer from the wholesaler. The impact of the Proposal on the costs to wholesalers is discussed in *infra* section VII.C.2.c.

[545] *See supra* notes 374 and 375 and accompanying text. Additionally, market participants have stated that liquidity displayed at or near the NBBO on exchanges has declined over time. *See supra* note 376 and accompanying text.

[546] *See supra* section VII.B.1 for further discussion of the increase in off-exchange trading volume.

[547] The MDI Rules required auction messages to be included in consolidated market data. *See supra* section III.B.1. NMS Stock ATSs operating qualified auctions would need to disseminate qualified auction messages via FINRA's ADF.

[548] Evidence shows that increasing pre-trade transparency can improve liquidity and price efficiency. *See, e.g.,* Ekkehart Boehmer, Gideon Saar & Lei Yu, *Lifting the Veil: An Analysis of Pre-Trade Transparency at the NYSE,* 60 J. Fin. 783 (2005). However, some evidence suggests that extreme changes, beyond what is proposed here, can have detrimental effects on market quality. *See* Ananth Madhavan, David Porter & Daniel Weaver, *Should Securities Markets Be Transparent?, 8* J. Fin. Mkt. 265 (2005).

[549] For example, in the most extreme case, if virtually all individual investor orders are routed to and executed in qualified auctions, market participants would be able to identify nearly all other off-exchange transactions as institutional trades. This may result in additional costs to institutional investors related to information leakage; *see infra* section VII.C.2.f for a detailed discussion.

[550] The advantage would be lessened though not completely eliminated, provided that retail brokers route initially through wholesalers rather than directly to exchanges.

[551] Qualified auction messages (which would be disseminated in consolidated market data) could be matched with trade execution reports in order to identify which trades belonged to retail orders. Currently, SIP trade reports for trades executed on exchanges identify the venue on which the trade occurred. Trade reports for trades executed off-exchange do not.

[552] *See, e.g.,* Carole Comerton-Forde & Tālis J.Putniņš, *Dark trading and price discovery,* 118 J. Fin. Econ. 70 (2015), who find that high levels of dark trading can impede price discovery.

[553] Aggregate PRA compliance costs are calculated by summing up PRA compliance costs of various components of Proposed Rule 615, which are detailed below and also discussed in detail above in *supra* section VI.D.

TABLE 21—SUMMARY OF PRA COMPLIANCE COSTS—Continued

Element	Participants	Implementation costs per entity	Ongoing costs per entity	Total implementation costs	Total ongoing costs
One-time technology project costs to add ''segmented order'' and certification marks to existing marking systems –.	182	170,000		30,940,000	
Rule 615 (e)(2), (f)(1)					
Certification that BD identity will not be disclosed –	20	33,800	4,500	$675,000	$90,000
Rule 615(c)(1)(iii), (e)(3)					
ATS's excluding subscribers –	3	3,100	2,700	$9,300	$8,000
Rule 615 (d)(1)					
Total	176			$48.29 million	$1.99 million

These estimated compliance costs can be disaggregated into several components. First, as part of the requirement to provide qualified auction messages, specified in Proposed Rule 615(c)(1), national securities exchanges, FINRA and NMS Stock ATSs would have to utilize various personnel (legal, compliance, information technology, and business operations) to prepare and implement a system to collect and provide the information necessary to generate auction messages for dissemination in consolidated market data. In addition to the 6 national securities exchanges and 3 NMS stock ATSs that the Commission believes would participate in qualified auctions,[554] FINRA would also disseminate qualified auction data and would therefore incur these compliance costs. Thus, each of these 10 entities (6 exchanges, 3 ATSs, and FINRA), would each face an estimated initial compliance costs of $79,000, with total cost calculated at $790,000.[555] Furthermore, each of these entities would have to collect and provide auction messages on an ongoing basis, which the Commission estimates would be $119,000 per entity annually, totaling $1.19 million (*see* Table 21 above.)[556]

Originating broker-dealers would face various compliance costs, including identifying and marking segmented orders, as specified in paragraphs (e)(1) and (e)(2) of Proposed Rule 615. This would involve utilizing in-house and outside counsel to update and review existing policies and procedures, as well as an in-house General Counsel and a Chief Compliance Officer to review and approve updated policies and procedures. An outside programmer would also be needed to modify existing technology and coordinate with the broker-dealer's compliance manager. The Commission estimates that the initial costs to the 157 originating broker-dealers would be approximately $34,000 per broker and $5.3 million for the industry.[557] In addition, these originating brokers would need to provide ongoing annual reviews and update existing policies, which Commission estimates would cost about $4,500 per broker-dealer and an aggregate cost of $703,000.[558]

The 157 originating brokers would also incur the cost of adding a ''segmented order'' and certification mark to their existing marking systems, as specified in Rule 615(e)(2). The Commission predicts that approximately one third of the 157 originating brokers (*i.e.,* 52 firms) would choose to perform the necessary systems modifications to identify and mark segmented orders with in-house staff, which would cost an estimated $95,500 per firm and $4.97 million for all 52 firms. Commission estimates that two-thirds of the originating brokers (*i.e.,* 105 firms) would hire third-party service providers to assist with these system modifications, which is predicted to cost $53,000 per broker and $5.6 million for all 105 firms.[559]

The Commission also estimates that there would be an initial one-time technology project costs for originating brokers to add the ''segmented order'' and certification marks to the existing marking systems of all 157 originating brokers as well as 25 routing brokers (for a total of 182 brokers-dealers), in order to comply with paragraph (e)(2) of Proposed Rule 615, and the initial one-time cost for routing broker-dealers to mark segmented orders to comply with paragraph (f)(1) of Proposed Rule 615 and also mark orders to communicate certifications when applicable. These costs are estimated to be $170,000 per broker-dealer, for an aggregate total cost of $30.94 million.[560]

The ongoing task of marking segmented orders would not require new resources, but instead would utilize broker-dealers' existing marking systems. Therefore, the ongoing task of marking segmented orders would not cause broker-dealers to incur new monetary costs related to updating their systems to market orders (and is therefore not reported in Table 21 above).[561]

The Commission estimates that 20 originating broker-dealers would certify and not make the mandatory identity disclosure, as specified in paragraph (c)(1) of Proposed Rule 615.[562] Obtaining this certification would involve utilizing in-house and outside counsel to update and review existing policies and procedures, as well as an in-house General Counsel and a Chief Compliance Office to review and approve updated policies and procedures. Outside counsel would also be needed to review the updated policies and procedures. These initial compliance costs are estimated at $33,800 per broker, totaling $675,000 for all 20 firms.[563]

These 20 broker-dealers would also incur ongoing costs to review and update existing policies and procedures, estimated at $4,500 per broker-dealer and $90,000 for all 20 firms.[564] The various compliance costs involved in

[554] *See supra* section IV.B.2 and section VII.C.1.a for further discussion on the incentives for exchanges and ATSs to offer qualified auctions.

[555] *See supra* notes 290 and 296 for a detailed description of these estimated costs.

[556] *See supra* notes 291–292; 295; 297 for a detailed description of these estimated costs.

[557] *See supra* notes 301–303 for a detailed description of these estimated costs.

[558] *See supra* notes 304–305 for a detailed description of these estimated costs.

[559] *See supra* notes 312–313 for a detailed description of these estimated costs.

[560] *See supra* notes 314–315 for a detailed description of these estimated costs.

[561] The Commission estimates that around 2.1 billion orders would need to be marked annually, and calculates that this would require between approximately 24,000 and 290,000 total hours, based on its estimates of the duration of time used to mark each order. *See supra* notes 316–320 and corresponding discussion.

[562] *See supra* note 288 and corresponding discussion.

[563] *See supra* notes 322–326 for a detailed description of these estimated costs.

[564] *See supra* notes 327–329 for a detailed description of these estimated costs.

obtaining and maintaining originating broker certification (that it has established, maintained, and enforced written policies and procedures designed to assure that its identity will not be disclosed), as specified in paragraphs (c)(1)(iii) and (e)(3) of Proposed Rule 615, are summarized above in Table 21. It is uncertain how many broker-dealers would choose to exercise this option. If fewer or greater than (the Commission's estimate of) 20 firms seek certification to withhold their identity as the originating broker during a qualified auction, aggregate compliance costs would be different from those found in Table 21.

NMS Stock ATSs that participate in qualified auctions would incur costs in order to comply with the requirements regarding ATS policies and procedures for excluding subscribers, as specified in proposed Rule 615(d)(1). Compliance costs would initially involve reviewing existing policies and procedures for consistency with the proposed rule, making modifications as appropriate, and putting the policies and procedures in writing. These initial costs, which the Commission expects would apply to 3 NMS Stock ATSs, are predicted to cost $3,100 per firm, and $9,300 for all 3 firms.[565] In addition, these ATSs would face the ongoing cost of reviewing and updating the relevant existing policies and procedures, estimated at $2,700 per firm and $8,000 for all 3 firms (*see* Table 21 above). Note that these estimated compliance costs are based on the Commission's assumption that at least some ATSs would operate qualified auctions. As discussed above, ATSs would have to make significant adjustments to their business models (especially with regards to segmenting customer orders and displaying quotes) in order to meet the requirements to operate a qualified auction.[566]

It should be emphasized that the estimated compliance costs described above and summarized in Table 21 are the Commission's best estimate for the required technological, operational, and legal services resources that would be utilized in the initiation and ongoing operation of qualified auctions.

b. Costs to Individual Investors

i. Greater Variation in Execution Quality

The Commission is cognizant of concerns regarding the possibility of a decline in execution quality due to the implementation of qualified auctions. This includes the possibility that a qualified auction host could decide not to host an auction for a particular stock.[567] However, if an order fails to execute in one auction, it could be directed quickly to other auctions,[568] and/or the wholesaler would have the option to internalize the order at the same or better price at which it was exposed in the first auction. Although it is also possible that the quotes may move against the order during this time and the wholesaler would have to route it to an exchange LOB or expose the order in another qualified auction before it could execute. Also, wholesalers would have the option to internalize the trade without exposing it in an auction if the wholesaler were willing to execute the order at midpoint or better. More generally, however, the Commission believes that at least one open competition trading center would be incentivized to operate qualified auctions and serve as the qualified auction host for every segmented order in order to increase its volume/market share relative to other trading venues, as well as to potentially earn revenue from any net capture between the fees and rebates the qualified auction might charge.[569]

An additional concern is that there could be a general lack of interest from liquidity suppliers to participate in a qualified auction. However, in cases where there was insufficient competition from liquidity providers, then the majority of individual investor orders could simply be internalized by wholesalers, similar to the current market, though perhaps at inferior prices compared to what they might have received under the current market structure. Moreover, while this occurrence might occur for any individual order, it would be extremely unlikely at the market level, because marketable order flow of individual investors has lower adverse selection risk than order flow routed to exchanges and most liquidity suppliers would profit by trading with it if the predicted realized spread was large enough.[570]

A related concern regarding the functioning of qualified auctions is the possibility of slippage costs. More specifically, there is the potential that the NBBO could change while the qualified auction was in process. Since Proposed Rule 615 would require an auction message to be disseminated once an individual investor order is brought to a qualified auction, the concern is that these messages would trigger a response in quoted prices.

The Commission performed an empirical analysis to estimate this risk by observing the likelihood that that the NBBO spread moves (*i.e.,* the ''fading probability'') as the time lag increases (in milliseconds) from the internalization of an individual investor order in comparison to the fade probability after NBBO quote movements.[571] Results from this analysis [572] indicate that the probability of the NBBO quotes adversely moving after the execution of an individual investor order range from 1.8% at 25 milliseconds after an internalized trade, to 2.8% at 100 milliseconds—an increase of 1 percentage point. Extending the duration to 300 milliseconds, the maximum time of the auction as proposed, increases the likelihood of adverse fading to 4.6%.[573]

[565] *See supra* notes 334–335 for a detailed description of these estimated costs.

[566] *See* discussion in *supra* section VII.C.1.a.

[567] Qualified auction hosts would have the discretion to determine for which stocks they would run auctions.

[568] An additional risk is that there could be price slippage when the order is routed to a different qualified auction.

[569] *See supra* notes 503–507 and accompanying discussions for estimates of net capture rates for fees and rebates related to qualified auctions.

[570] The Commission is uncertain how liquidity would be impacted by increased volatility within the context of qualified auctions. The risk that individual investors may receive worse prices compared to the current market structure may not be significantly elevated because wholesalers could still internalize the trades if they cleared the auctions or route them to the LOB for execution.

[571] The Commission's ''fade analysis'' estimates the possibility of adverse price movements to individual investors. It's also possible to consider the likelihood of adverse price movements (and the resulting increase in trading costs) from the perspective of the bid winner. However, bidders would be much less exposed to risk of fade because their connectivity capacities would allow them to cancel bids should they expect adverse price movements. Individual investors, however, would have no control over where their orders are executed: auction vs. internally. Therefore, the Commission's focus is on the risk of adverse price movements from the perspective of individual investors.

[572] The Commission's ''fade analysis'' uses an algorithm from Boehmer et al. (2021) to identify retail trades. A recent paper by Barber et al. (2022) finds that the algorithm correctly identifies only 35% of trades as retail. However, plausibly a significant fraction of the retail trades unidentified by the algorithm reflects orders executed on a risk-less principal basis, *i.e.,* executions that would not be relevant to the order flow targeted by the Proposal. In addition, the internalized retail trades missed by the algorithm are likely idiosyncratic across buy and sell orders. Therefore, aggregation of the data, which was performed as part of the Commission fade analysis, would likely have minimized any directional bias that these errors would have otherwise caused. Therefore, empirical results regarding the estimated risk of adverse pricing movements are likely to still be consistent despite limitations in identifying retail trades. *See* Ekkehart Boehmer et al., *Tracking Retail Activity,* 76 J. Fin. 2249 (2021), and Brad M. Barber et al., *A (Sub)penny For Your Thoughts: Tracking Retail Investor Activity in TAQ* (last revised Sept. 30, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=4202874* (retrieved from Elsevier database).

[573] Moreover, the substantially lower fade probability of less than 5% following internalized investor trades relative to the cross-stock fade probability of more than 16% following a given

Auction announcements would differ from SIP trade messages for trades executed off-exchange, which could potentially result in different quote movements compared to those observed in the analysis. Auction announcements would represent announcements of pre-trade interest as opposed to SIP trade messages being announcements of post-trade interest, which could lead to different responses by the liquidity suppliers setting the NBBO.[574] Additionally, auction announcements would disclose more information than SIP messages for off-exchange trades, including, among other things, the direction of the segmented order, the venue it was on, and, potentially, the identity of the originating broker.[575] Disclosure of this information in qualified auctions, including the originating broker as mandated by the Proposal (absent a certification from the originating broker that its identity not be disclosed), would provide potential bidders with more information about an order than is currently provided by the SIP trade message, which in turn could lead to increased variation in the adverse fade that could follow auction announcements. That is, adverse fade could be reduced when bidders learn that an order stems from an originating broker with relatively low adverse selection risk, while announcements of orders from retail brokers with higher adverse selection risk could trigger greater adverse fade relative to a SIP trade announcement of an identical order. However, despite the likely increase in the variation of adverse fade, the average risk of adverse fade under qualified auctions may be similar to SIP trade announcements used to generate the estimates reported above. Overall, the results of the Commission's fade analysis suggest that auction messages would result in minimal adverse movements in best quotes due to the low adverse selection risk of individual investors, but, for the reasons discussed above, there may be greater variability in the risk of adverse quote movements. Because auction messages would differ from SIP messages, there is uncertainty regarding their overall effects on the risk of adverse quote movements.

Fade analysis only estimates the possibility that adverse price slippage will occur, not the magnitude of the adverse fade. Thus, it is not possible to directly compare the potential loss to individual investors due to adverse fading with the gains that could stem from qualified auctions, which the Commission estimates would range from 0.86 bps to 1.31 bps, or in dollar terms, 0.15 to 0.47 cents per share.[576] However, one way to possibly quantify the potential cost of fading is to consider the price impact of an auction that did not result in a bid, which might increase the *probability* that the NBBO would be worse after a 300 millisecond auction by (the fade analysis's estimate of) 4.6%. If we assume the quote moved 1 cent, which the Commission believes is the most frequent movement over a short time span, then the (expected value of the) potential average higher transaction cost to the order would face could be 1 cent × 4.6% = 0.046 cents—significantly smaller than the estimated 0.15–0.47 cent per share gain stemming from qualified auctions.

A similar analysis could be used to estimate that the adverse fade that would occur during the course of a successful auction, which would be a minimum of 100 milliseconds, with the current duration of wholesaler internalized executions, which have a median duration of 3.54 milliseconds. In other words, even successful qualified auctions that result in execution after the minimal duration of time will be (100 milliseconds—3.54 milliseconds) = 96.56 milliseconds slower than the median wholesaler execution. If we use the fade probability of 2.8% for 100 milliseconds, then the (expected value of the) adverse fade cost of a successful auction relative to internalization, assuming 1 cent slippage, would be 1 cent × 2.8% = 0.028 cents. This estimated cost is significantly below the estimated 0.15–0.47 cent per share gain stemming from qualified auctions. However, this calculation relies on the assumption of the minimum length of a qualified auction (100 milliseconds) and the median duration of a wholesaler internalized order (3.54 milliseconds). This calculation would generate different results if we assumed longer auction lengths, which would increase the fade cost of the auction, and longer (or shorter) internalization execution times. Given that a number of auctions in the options market have a duration of 100 milliseconds,[577] the Commission preliminarily believes that a majority of open competition trading centers may elect to choose an auction duration of 100 millisecond for their qualified auctions. Therefore, a significant share of auctions may be successfully concluded within the 100 millisecond minimum auction duration, although some orders could take longer to conclude, while other orders would likely fail to have a successful outcome. Overall, the Commission believes the Proposal would result in price improvement for individual investors, although it is possible that *variation* in price improvement and overall execution quality might increase.

Besides potentially greater volatility stemming from a failed auction, an additional cost for some orders may arise to the extent that lower execution quality for some orders currently subsidizes better execution quality for others. Table 10 shows that wholesalers execute 13.82% of orders at prices superior to midpoint for the investor.[578] On average, unless the orders have systematically negative price impact, the wholesaler may not be earning a positive marginal profit on these executions.[579] This could imply they currently subsidize the additional price improvement on these trades with marginal profits earned on other executions. To the extent this occurs, if wholesalers' marginal profits decline under the Proposal, then customers could receive less price improvement and experience higher transaction costs on trades that are currently subsidized. However, on average, the Commission expects that execution quality for individual investor orders would likely improve under the Proposal.[580]

The Commission recognizes that wholesalers may provide consistency with regard to the execution quality that they deliver to individual investor orders.[581] There is the concern that the Proposal would undermine the wholesaler business model, which in turn could hinder the ability of

quote update is consistent with low adverse selection costs of currently internalized individual investor orders.

[574] Although this difference may be limited given the lower adverse selection risk of segmented orders.

[575] The SIP trade message would not reveal what venue the trade took place on, its direction (although it may be able to be estimated based on the transaction price), or whether the trade belonged to an individual investor vs another market participant (although, similar to this analysis, this information may be inferred based on if the trade executed at a sub-penny price).

[576] *See supra* section VII.C.1.b.

[577] *See supra* note 243 for further discussions of the duration of auctions in the options market.

[578] Table 10 indicates that wholesalers executed 46.05% of shares at midpoint or better and 32.23% of shares at midpoint.

[579] For these statistics, the NBBO midpoint is measured at the time the wholesaler receives the order, so it is possible that quotes may have changed by the time the wholesaler executes the order. Therefore, it is possible that wholesalers execute some of these trades at prices worse than the NBBO midpoint at the time of execution, in which case the wholesaler could still earn a positive realized spread on these trades even if price impact measured against the NBBO midpoint at the time of execution was positive.

[580] *See supra* section VII.C.1.b.

[581] *See* discussion in *supra* section VII.B.2.b.

wholesalers to continue to provide consistency in their execution services. The Commission believes, however, that while bidders in qualified auctions may not provide as much consistency as wholesalers, some orders could receive improved execution quality while others would receive reduced execution quality (relative to wholesalers). Based on the competitive shortfall analysis presented in section VII.C.1.b above, the net result would likely be improved execution quality, but the standard deviation of this execution quality would likely increase.

ii. Resumption of Commissions on NMS Stock Orders

An additional concern is that if the Proposal results in a significant or complete loss of PFOF, then retail brokers would be forced to start charging commissions again for online NMS stock and ETF trades.[582] There are several reasons that retail brokers would be unlikely to resume charging commissions for these orders. First, the majority of retail brokers receive relatively little or no PFOF, and yet they have nevertheless successfully managed to support commission-free trading through their other revenue-generating lines of business.[583] In fact, several retail brokers, including some that do not accept PFOF, earned record revenues and profits after zero-commission trading was initiated.[584] While most brokers had already reduced commissions to under $10, there was still considerable concern that the zero commissions would lower profits. Despite these concerns, industry profit grew in 2020.[585]

Moreover, the average PFOF payment that brokers receive on a 100 share order is 10–20 cents.[586] The PFOF for a 1000 share order is less than the commission fees previously charged by broker-dealers, which had generally been $5 or more.[587] Thus, just as the loss of commission fees was not offset by the receipt of PFOF, the loss of PFOF might not necessitate the return of commission fees.[588]

Additionally, to the extent that rebates paid for the routing of segmented orders to qualified auctions are passed through to retail brokers, it could reduce the likelihood that they resume charging commissions. The 5 mil cap on rebates that qualified auctions could pay for the submission of segmented orders under the Proposal is approximately 40% of the average combined PFOF rate paid by wholesalers for marketable orders as estimated in Table 2.[589] If rebates paid by qualified auction hosts for the submission of segmented orders to the qualified auction are passed through to retail brokers (assuming the retail broker does not route the segmented order to the qualified auction directly), then it could supplement the revenue they may lose from a reduction in PFOF.[590] This could reduce the likelihood that retail brokers resume charging commissions.

iii. Other Possible Costs to Investors

The Commission is aware of other possible increases in trading costs stemming from the Proposal that might be experienced by some individual investors. For example, some individual investor orders that are currently eligible for RLP programs might not meet the proposed definition of segmented orders and might be excluded from the qualified auctions, which could reduce the price improvement that they currently receive via wholesalers or RPLs.[591]

Furthermore, since the Proposal would require that the identity of the originating retail broker be disclosed (unless the originating broker certifies that the identity of the originating broker will not be disclosed to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order[592]), orders from retail brokers that do not offer this certification and that are perceived to have higher adverse selection costs could end up receiving worse execution quality (*i.e.,* less price improvement) than they currently experience, but only if wholesalers today do not already price in such risk when interacting with each retail broker. Customers of retail brokers that certify they will not disclose their identity could potentially receive worse execution quality if non-disclosure signals to market participants that the adverse selection risk of the order flow are high relative to orders from other

[582] Almost all retail brokers continue to charge a commission fee for human broker-assisted orders.

[583] CAT analysis shows that PFOF brokers originated about 80% of the share volume and about 74% of dollar volume of individual investor marketable orders that were routed to wholesalers and executed (*see* Table 14). The Commission notes that trading revenue for many discount brokers rose to record levels in 2020, shortly after these discount brokers dropped commissions to zero. It's unclear how much of this increase was due to individual investors being incentivized by zero commissions and new trading options such as fractional share trading, and how much was due to COVID-related factors that made online trading more appealing, including a shift towards remote work and a rise in discretionary funds from government stimulus. *See* Maggie Fitzgerald & Kate Rooney, *E-brokers Defy Odds by Recording Record Trading Revenue While Dropping Commissions to Zero,* CNBC (Aug. 20, 2020), *available at https://www.cnbc.com/2020/08/20/e-brokers-defy-odds-by-recording-record-trading-revenue-while-dropping-commissions-to-zero.html.* It's also important to note that even brokers that do not accept PFOF experienced increased revenue and profits, despite adopting zero commissions. *See* Kenneth Corbin, *Fidelity Posts 6th Straight Record Profit,* Barrons (Mar. 9, 2022), *available at https://www.barrons.com/advisor/articles/fidelity-earnings-2021-51646853970.* However, the recent increase in individual investor trading volume did not result in the loss of order-by-order competition. Isolation of individual investor orders by wholesalers preceded the recent rise in trade volume and a subsequent decline in trade volume would not remove the rationale for the Proposal because individual investor orders will continue to comprise a substantial share of overall trade volume with the potential for improved execution quality if order-by-order competition is incorporated into this market.

[584] *Id.*

[585] Pre-tax income of FINRA-registered broker-dealers rose from $43,943 million (2019) to $77,212 million (2020), an increase of 75.7%. This was substantially larger than the 2.7% increase in profits from 2018 to 2019 ($42,780 million to $43,943 million). *See* FINRA, *2021 FINRA Industry Snapshot* (2021), *available at https://www.finra.org/sites/default/files/2022-02/21_0078.1_Industry_Snapshot_v10.pdf.* However, it is possible that this increase in industry profits was transitory because of the spike in individual investor trading volume related to COVID.

[586] *See* analysis in *supra* Table 17.

[587] The average retail order size has declined since the shift to zero commission trading. *See* Pankaj K. Jain et al., *Trading Volume Shares and Market Quality: Pre- and Post-Zero Commissions* (last revised Sept. 16, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=3741470 (retrieved from Elsevier database).* Assuming a PFOF rate of 20 cents per 100 shares, orders over 2500 shares would have lower per share revenue for the retail broker under a $5 fixed commission model than a PFOF model, while orders under 2500 shares would have higher per share revenue.

[588] Commission fees were reduced to zero for online NMS stock trades, but not broker-assisted stock trades. Therefore, commission revenues have continued to exceed PFOF revenues for most PFOF firms, excluding the two PFOF firms that are online brokers and collect no commission revenue.

[589] The 5 mil rebate would not be earned unless the order was routed to a qualified auction. If the wholesaler chose instead to internalize the order at midpoint (and thereby be exempted from the auction), it would not earn the 5 mil rebate.

[590] Similarly, if a wholesaler routes a segmented order to a qualified auction and receives the rebate for the submission of a segmented order, the wholesaler may indirectly pass the rebate from the qualified auction through to the retail broker by using the rebate to subsidize PFOF payments it makes to the retail broker. *See infra* section VII.C.2.d.ii for further discussions on retail broker loss of PFOF revenue.

[591] These orders could also be internalized by the wholesaler or executed on an ATS.

[592] Proposed Rule 615 would require the identity of the originating broker to be disclosed unless it received certification that it has established, maintained, and enforced written policies and procedures designed to assure that its identity will not be disclosed, as specified in proposed Rule 615(e)(3). *See supra* section IV.B.4. The impact of this certification is uncertain. Non-disclosure would likely signal increased adverse selection risk of the order to market participants. However, results from *supra* section VII.B.5.b indicate that broker-dealers with higher adverse selection risk receive worse execution quality from wholesalers, so it is unclear whether orders stemming from certified broker-dealers will receive inferior execution quality relative to wholesaler internalization under the current market structure.

broker-dealers. However, results from *supra* section VII.B.5.b indicate that broker-dealers with higher adverse selection risk receive worse execution quality from wholesalers, so it is unclear whether orders stemming from certifying broker-dealers would receive inferior execution quality relative to wholesaler internalization under the current market structure.

Currently, wholesalers may choose not to internalize individual investor orders with high adverse selection risk but instead pass them on to other market makers, where they might be pooled with other individual investor orders. This pooling might cause these orders to receive greater price improvement from RLP programs or other hidden liquidity on exchanges or ATSs than they would otherwise receive if liquidity suppliers knew the identity of the originating broker. It is therefore possible that the Proposal's requirement to disclose the identity of the originating broker (absent a certification from the originating broker that its identity not be disclosed) might result in such orders receiving reduced execution quality relative to what they currently receive to the extent they are pooled with orders from retail brokers with lower adverse selection risk. However, to the extent individual investor orders with high adverse selection risk orders are currently rerouted to exchange limit order books, where they may be effectively pooled with orders from other market participants with potentially higher adverse selection risk, then it is also possible that such orders could receive increased price improvement through execution in qualified auctions relative to what they receive in the current market structure. In sum, the more wholesalers already price in the adverse selection risk from each retail broker, the less impactful is the proposed requirement that retail brokers' identities be disclosed in the auction.

c. Cost to Wholesalers

The Commission recognizes that the Proposal would significantly impact the wholesaler market/business model. Wholesalers would have to compete directly with other liquidity providers on an order-by-order basis to provide price improvement to segmented orders in order to execute against such individual investor orders in qualified auctions.[593] This would likely result in wholesalers filling fewer individual investor orders than they do currently and would likely pressure wholesalers to provide greater price improvement in order to remain competitive in providing liquidity to segmented orders.[594]

The Commission recognizes that a wholesaler who exposes an order in a qualified auction would still be able to internalize the order if it submits the winning bid in the auction. However, because the order would be subject to competition from other liquidity suppliers, wholesalers would most likely not submit the winning bids in all of these auctions and thus would ultimately internalize a smaller share of order flow than they do now. Additionally, if a wholesaler decided to internalize an individual investor order at the midpoint or better, the order would not be required to be brought to a qualified auction. However, the E/Q ratios presented in Table 9 indicate that, on average, the execution prices of internalized individual investor orders are between 30% to 80% worse than the midpoint at the time of order receipt by the wholesaler. As such, the Commission believes that it would be unlikely for wholesalers to internalize all segmented order flow priced at the NBBO midpoint or better, although a fraction of segmented orders are expected to be internalized at the NBBO midpoint, as they are today.

Wholesalers could still end up trading with the majority of marketable orders of individual investors, although more of these orders might be executed on exchanges. Moreover, qualified auctions would provide wholesalers with an opportunity to access individual investor orders initially sent by retail brokers to other wholesalers. That is, individual investor orders brought by a given wholesaler to a qualified auction could be filled by another wholesaler that ends up submitting the winning bid to the qualified auction. More generally, wholesalers could have competitive advantages in supplying liquidity in these auctions due to their economies of scale and market making expertise. Therefore, while institutional investors would likely take advantage of the opportunity to directly access low-cost order flow provided by qualified auctions, it is nevertheless possible that wholesalers would still end up frequently winning qualified auctions and trading against a significant share of segmented orders. However, individual investor order flow might end up being more spread out across wholesalers rather than concentrated among two leading firms.[595]

The Commission recognizes that retail brokers might consider routing their orders directly to a qualified auction instead of through wholesalers, especially if wholesalers discontinue offering PFOF.[596] Furthermore, retail brokers could also route orders directly to a national securities exchange, which could result in access fees but also exchange rebate revenue.[597] While the Commission is unable to quantify the net effect of these factors on the overall routing decisions of retail brokers, it is likely that the overall share of individual investor order flow initially routed to wholesalers would decrease, while the share initially routed to exchanges and ATSs operating qualified auctions would increase.

The predicted decline in wholesaler profit margins from internalization might force wholesalers to reduce or cease paying PFOF, which in turn, would remove a key incentive for some broker-dealers to route to wholesalers. PFOF brokers route 97–98% of their market orders to wholesalers, while non-PFOF brokers route around 71–72% of their market orders to wholesalers.[598] PFOF brokers could reduce their dependence on wholesalers to usage rates similar to non-PFOF brokers if PFOF ceased.

Furthermore, the decline in wholesaler revenue and profit could cause wholesalers to start charging retail brokers for the order handling services that they provide. This could increase competition in the market for exchange execution services and cause wholesalers to lose market share against other providers of routing and execution services. Alternatively, wholesalers might try to preserve their share in order-handling services by continuing to not charge for their routing and execution services to retail brokers (and thereby earn lower profit margins),

[593] A wholesaler would not have to compete on an order-by-order basis for an individual investor order if it internalized the individual investor order at a price equal to the midpoint or better, pursuant to Proposed Rule 615(b)(3).

[594] As specified in section VII.B, the economic baseline against which we measure the economic effects of this proposal, including its potential effects on efficiency, competition, and capital formation, includes the changes to the current arrangements for consolidated market data in the MDI Rules; but those amendments have not been implemented.

[595] *See supra* section VII.B.1.

[596] The Proposal would allow retail brokers to route customer orders directly to a qualified auction with a specified limit price (such that they would not be bidding on the order). *See supra* section IV.A.

[597] Broker-dealers would always have the option to direct their orders to open competition trading centers or national securities exchanges instead of qualified auctions under the Proposal. Unlike qualified auctions, which would have auction fee and rebate caps of 5 mils (for orders valued at $1.00 or greater per share), national securities exchanges would continue to be able to charge tiered fees and rebate revenue, consistent with the requirements of Section 19(b) and Rule 19b–4.

[598] *See* analysis in *supra* Table 4.

especially if handling marketable order flow provides additional benefits, either in the qualified auctions or internalized individual investor orders at the midpoint.[599] The Commission is unable to quantify the likelihood that wholesalers would continue to not directly charge retail brokers to route and execute their orders, but believes that it is possible that the majority of wholesalers would still not charge retail brokers for order-handling services.

The Commission also recognizes that a decline in wholesaler market share would not only reduce wholesaler profits but might have spillover effects on wholesaler costs. For example, a reduction in the volume of individual investor order flow internalized by wholesalers could increase wholesaler inventory risk, which in turn could cause wholesalers to reduce the liquidity they supply as exchange market makers or to institutional investors via SDPs.

d. Costs to Retail Brokers

i. Potential Initiation of Order Handling Fees by Wholesalers

Currently, wholesalers do not charge retail brokers for routing and execution services, and pay some retail brokers PFOF for the right to provide these services. If the implementation of qualified auctions results in a significant loss of wholesaler profits, wholesalers might have to begin charging for routing and execution services. If wholesalers begin charging a fee for routing services, retail brokers would have to absorb this cost and earn lower profits and/or pass on a share of this cost to their customers. Retail brokers could also respond to the initiation of wholesalers routing fees by paying the compliance costs necessary to serve as an originating broker, or instead pay fees to brokers that are able to route directly to qualified auctions.

Retail brokers that certify that their identity would not be subject to the proposed disclosure requirement would not only face explicit costs for this certification (as discussed in *supra* section VI.B.3) but also would either have to route the order to the qualified auction themselves or use a routing service that wouldn't trade with the orders, as mandated by the Proposal. If instead the broker-dealer used a wholesaler to route its order, the wholesaler would have to agree not to trade with the order (as mandated by the Proposal). In response to this restriction, the wholesaler may offer less PFOF (if it was currently receiving PFOF from the wholesaler) or potentially even charge a fee for handling the order.

ii. Loss of PFOF Revenue

The Commission recognizes that the implementation of qualified auctions, as mandated by the Proposal, could lead to a significant decline or perhaps disappearance of PFOF in the markets for NMS stocks. PFOF amounted to $235 million in Q1 2022 but was received almost entirely (93.8%) by four firms.[600] One concern is that the loss of PFOF would cause PFOF brokers, and potentially other discount brokers, to resume charging commissions for online NMS stock trades.[601] Just as PFOF brokers led discount brokers into zero-commission trading in 2019, it is possible they too could lead discount brokers back to charging commissions if they stopped receiving PFOF.

The Commission is unable to quantify the risk that some discount brokers would resume charging commissions on NMS stock and ETF trades, but there are a number of factors that might make this risk low. First, the majority of PFOF received by retail brokers comes from transactions in the options market.[602] The Proposal would not have a significant effect on the PFOF brokers receive from options transactions because it applies only to transactions in NMS stocks.[603] Additionally, wholesalers may also continue paying retail brokers for segmented non-marketable limit orders in NMS stocks, which may not need to be exposed in qualified auctions under the Proposal if their limit price is at the midpoint or a more favorable price. Therefore, to the extent that retail brokers do rely on PFOF, they might be able to retain the majority of the PFOF revenue they currently receive.

Second, retail brokers might be able to expand existing revenue lines or develop other lines of business to compensate for the loss of PFOF revenue from NMS stock transactions. This includes the possibility of increasing revenue from margin interest and securities lending, which PFOF brokers currently utilize more heavily than the average broker-dealer.[604] Moreover, the retail broker industry did not experience a drop in profits following the end of commissions.[605] This includes non-PFOF brokers, who did not choose to make up for lost commission revenue by charging wholesalers PFOF. The ability to maintain or increase profits stemmed in part from the sudden increase in customer accounts, due to, among other factors, increasingly accessible online trading platforms and the initiation of fractional share trading.[606] Fractional share trading began with a single broker-dealer in late 2019, but has grown dramatically since that time, with an increasing number of broker-dealers offering this functionality.[607] Thus, just

[599] Even if wholesalers do not internalize individual investor orders, there might still be informational value from handling individual investor order flow. Wholesalers could be incentivized to offer free order routing to retail brokers in order to continue receiving this information, which would include the identity of the originating broker, the stock being traded and its order size, direction of the trade, and any handling instructions that may have been relayed to the broker, as well as the limit price if it's a limit order. All of this information could help the wholesaler assess the direction of the market. In addition, the wholesaler could choose to internalize the order at midpoint (an allowable exception to qualified auctions), which would provide additional information on the direction of order flow that other market participants would not have since there would be no auction message in this case. Besides receiving a possible informational advantage of having first look at individual investor orders, wholesalers could also receive rebate revenue for submitting the order to a qualified auction as well as SIP revenue, although the Commission expects the rebate to be under 5 mils in order to be less than the 5 mil auction fee cap. *See supra* section IV.C.4 for a discussion of fees and rebates. Finally, wholesalers could choose to internalize the order if it was exposed in a qualified auction but did not execute.

[600] *See* analysis in *supra* Table 16 and corresponding discussion.

[601] *See supra* section VII.C.2.b.ii for a discussion.

[602] *See supra* note 586.

[603] There are key differences between the options market and the market for NMS stocks; *see supra* note 235 for further discussion. Proposed Rule 615 is designed to achieve policy objectives that are particular to mandatory auctions in NMS stocks.

[604] *See* discussion in *supra* section VII.B.6.b.

[605] *See supra* note 505 and corresponding discussion.

[606] After falling during the 2016–2019 period from $229.2 billion to $197.8 billion, the average daily value of executions rose in 2020 to $312 billion. *See* 'Order Audit Trail System (OATS) Activity—Daily Average OATS Events, 2016–2020', *available at https://www.finra.org/sites/default/files/2022-02/21_0078.1_Industry_Snapshot_v10.pdf*. Fractional share trading allows individual investors to trade and enter orders for fractional shares of a security, *e.g.,* an individual investor could submit an order to buy 0.2 shares of a stock. Fractional share orders often arise from retail brokers allowing individual investors to submit orders for a fixed dollar value. It is the Commission's understanding that retail or clearing brokers generally trade in a principal capacity against their customers' fractional share orders and in turn send out principal round lot sized orders for execution to manage their inventory risk.

[607] Evidence suggests that this growth is in great part due to the rise in direct individual investor participation in equity markets. *See, e.g.,* Zhi Da, Vivian W. Fang & Wenwei Lin, *Fractional Trading* (last revised May 6, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=3949697* (retrieved from Elsevier database). *See also* Rick Steves, *Fractional Shares Experts Weigh In Amid Exploding Retail Trading Volumes,* FinanceFeeds (June 7, 2021) *available at https://financefeeds.com/fractional-shares-experts-weigh-in-amid-exploding-retail-trading-volumes/*, which shows that trading volume increased substantially (in one case, more than 1,400%) for brokers after they introduced the use of fractional shares. Furthermore, an analysis using CAT data

as retail brokers adjusted to the loss of commission revenue, they could also adjust to the loss of PFOF revenue.

Third, to the extent that rebates paid on segmented orders routed to qualified auctions are passed through to retail brokers, it could supplement the revenue they may lose from a reduction in PFOF.[608] The 5 mil cap on rebates that qualified auctions could pay for the submission of segmented orders under the Proposal is approximately 40% of the average combined PFOF rate paid by wholesalers for marketable orders as estimated in Table 2.

Furthermore, there is reason to believe that adjustment to the loss of PFOF would be much more manageable for the retail broker industry than the loss of commissions from online NMS stock and ETF orders. The average PFOF payment that brokers receive on a 100 share order is 10 to 20 cents,[609] far less than the commission fees previously charged by broker-dealers, which had generally been $5 or more.

While PFOF payments per order are relatively small, the small group of retail brokers (10 firms) that earn at least 2% of their revenue from PFOF on NMS stocks [610] could be pressured to develop or increase other revenue lines and/or attract additional customers to make up for the loss of PFOF. However, the dependence on PFOF for some of the top recipients of PFOF stemming from NMS stock orders has diminished in recent years due to mergers between PFOF-dependent firms and firms with less reliance on PFOF. This includes the single largest recipient of PFOF, which was purchased by a larger (*i.e.,* higher revenue) retail broker firm that had a much smaller share of its revenue stemming from PFOF.[611] Moreover, the purchasing firm in this merger had a much more diversified revenue portfolio, including a large collection of proprietary mutual funds and ETFs under management and a banking unit. In addition, the third largest recipient of PFOF was purchased in 2020 by a larger, full service broker with no reliance on PFOF. These mergers should help insulate leading recipients of PFOF from the financial damage that would result from the loss of PFOF due to Proposed Rule 615.

e. Costs to Exchanges

The Commission is mindful that the increase in competition to attract and execute orders of individual investors due to the Proposal could significantly impact costs for some exchanges and ATSs.[612] These costs would be in addition to the compliance costs estimated in section VII.D.2.a., and include the potential loss of market share for some exchanges and ATSs. The Commission believes that most marketable orders of individual investors would end up being exposed and executed in qualified auctions hosted by exchanges, which would increase the overall percentage of individual investor orders executed on exchanges, and decrease the percentage internalized by wholesalers. The market share of ATSs is expected to be stable because they do not handle significant fractions of marketable individual investor orders and thus are not affected by the proposed introduction of qualified auctions. The Commission believes that few ATSs would operate qualified auctions, either because it would be difficult for new ATSs to meet the requirements to run qualified auctions or because the requirements of operating a qualified auction would be incompatible with the business models of most currently operating ATSs.[613]

An NMS Stock ATS that wanted to run qualified auctions would face numerous requirements, including the need to: permit any registered broker-dealer to become a subscriber; provide equal access among all subscribers of the NMS Stock ATS and the registered broker-dealer of the NMS Stock ATS to all services that are related to a qualified auction operated by the NMS Stock ATS or to any continuous order book operated by the NMS Stock ATS;[614] display quotes in the ADF (and thus in the consolidated market data feed); and reveal the identity of the trading venue for trades executed on the ATS and report those trades to the TRF (which would report the trades and identity of the trading venue to the consolidated market data feed); operate as an automated trading center pursuant to Regulation NMS Rule 603(b) and have an average daily share volume of 1.0 percent or more of the aggregate average daily share volume for NMS stocks.[615] ATSs would have to make significant adjustments to their business models (especially with regards to segmenting customer orders and displaying quotes) in order to meet these requirements.[616] Additionally, new ATSs that could meet the other requirements might find it difficult to achieve 1% market share of trading volume in four out of six months without being able to concurrently operate a qualified auction.

The Commission acknowledges that Proposed Rule 615 might improve the competitive position of higher volume exchanges that offer qualified auctions and harm the competitive position of lower volume exchanges that do not. Higher volume exchanges that executed 1% or more of the average aggregate daily share volume for NMS stocks during 4 of the last 6 months would be eligible to run qualified auctions for segmented orders.[617] Exchanges that offered qualified auctions would have a competitive advantage in attracting marketable individual investor order flow because they would be able to segment the individual investor order flow and allow liquidity suppliers to trade against this order flow in smaller pricing increments in their qualified auctions.[618] Lower volume exchanges that do not meet the volume thresholds to run qualified auctions would not be able to segment individual investor order flow, unless they did so under one of the exceptions, such as offering

reveals that more than 46 million fractional share orders were executed in Mar. 2022, originating from more than 5 million unique accounts. Over 31 million of these orders were for less than 1 share, and they originated from more than 3.3 million accounts. The overwhelming majority (92%) of fractional share orders were attributed to natural persons, *i.e.,* individual investors. While fractional shares orders represented only a small fraction (2.1%) of total executed orders, they represent a much higher fraction (15.3%) of executions received by individual investors.

[608] Similarly, if a wholesaler routes a segmented order to a qualified auction and receives the rebate for the submission of a segmented order, the wholesaler may indirectly pass the rebate from the qualified auction through to the retail broker by using the rebate to subsidize PFOF payments it makes to the retail broker.

[609] *See* analysis in *supra* Table 17.

[610] *See* analysis in *supra* Table 16.

[611] The largest dollar recipient of PFOF received $101.5 million in PFOF from NMS stocks in Q1 2022, equal to 5.7% of its total revenue. The purchasing firm in this merger received $28.9 million in PFOF in NMS stocks Q1 2022, equal to 1.5% of its total revenue.

[612] Retail brokers may also choose to directly route their orders to qualified auctions, and may therefore compete with wholesalers, ATSs, and exchanges in executing retail orders. However, the Commission believes that broker-dealers will play a much more minor role in this competition.

[613] Of the 32 NMS Stock ATSs, the Commission estimates that approximately 3 would operate qualified auctions. *See supra* section VI.C.4 for further discussions of the estimates of how many NMS Stock ATSs would operate qualified auction.

[614] This would prohibit the ATS from segmenting customer orders outside of qualified auctions (unless the orders were executed at midpoint) and require it to charge the same fee to all subscribers (*see supra* section IV.C.4), thereby prohibiting them from charging tiered auction fees or providing tiered rebates.

[615] *See supra* section IV.B.2.b.

[616] The Commission estimates that 3 NMS stock ATSs would participate in qualified auctions. *See supra* section VI.C.4.

[617] The Commission estimates that six national securities exchanges would meet the proposed threshold. These include one exchange each from the NYSE, NASDAQ, and CBOE groups, as well as MEMX, IEX, and MIAX PEARL.

[618] *See supra* section IV.G for discussions on restrictions on exchanges from operating any separate trading mechanism for segmented orders other than qualified auctions.

liquidity to individual investor orders only at the NBBO midpoint.[619] Additionally, exchanges not offering qualified auctions would be unable to execute segmented orders at the finer 0.1 pricing increments that would be available in the qualified auctions. These factors could all limit the competitiveness of smaller exchanges.

There is also the possibility that if a disproportionate share of order flow is routed to one or more exchanges offering qualified auctions, these exchanges might become the preferred trading location for any given stock. This, in turn, could cause a liquidity externality to develop, making these venues the preferred routing destination for all orders.[620] Under such circumstances, while the consolidation of liquidity on these exchanges might benefit market participants in the short run, it may also lead to barriers to entry in the market for trading services, as new entrants would have a harder time attracting sufficient liquidity away from established liquidity centers. Lower volume exchanges could also be adversely impacted by the fact that under the Proposal, exchanges would have to stop offering RLP programs unless the program resulted in trades only at the NBBO midpoint, consistent with a proposed exception. This could result in a reduction in the trading volume and revenues received by lower-volume exchanges that do not meet the threshold to offer qualified auctions.[621]

The Commission is unable to quantify the likelihood that one or more exchanges that would be unable to offer qualified auctions would cease operating. However, the Commission preliminarily believes that this risk of this is low because the majority of individual investor marketable orders are not currently routed to exchanges. Therefore, even if they are not eligible to run qualified auctions under the Proposal, the reduction in trading volume that these exchanges might experience is unlikely to be large enough to require them to exit the market. Even if such an exit were to occur, the Commission does not believe this would significantly impact competition in the market for trading services because the market is served by multiple competitors. Consequently, if one or more lower-volume exchanges were to exit the market, demand would likely to be swiftly met by existing competitors. The Commission recognizes that lower-volume exchanges might have unique business models that are not currently offered by competitors, but believes that a competitor could create similar business models if demand were adequate, and if they did not do so, it seems likely new entrants would do so if demand were sufficient.

f. Costs to Institutional Investors

The Commission recognizes that the Proposal could increase the risk of information leakage for institutional investors in at least two ways.

First, the risk of information leakage may increase for those institutional investors that choose to supply liquidity in qualified auctions. Specifically, market participants could use auction message information [622] to identify the trades in consolidated market data that correspond to executions of individual investors orders in qualified auctions, which could allow these market participants to back out information about the corresponding institutional bids.[623] For example, if a market participant observes that a large volume of individual investor buy orders are filled in qualified auctions, they could correctly discern that an institutional investor may be providing a large sell order. However, in response to this concern, institutional investors could decide to route their orders to ATSs and OTC market makers, where information about their orders may be better concealed.[624] To the extent that concerns over the risk of information leakage prevent institutional investors from seeking liquidity through qualified auctions, this could limit the benefits of the Proposal.

Second, as individual investors' marketable orders would be increasingly routed to and executed in qualified auctions under the Proposal, and as these orders would become more easily identifiable through the information contained in auction messages as described above, it may become increasingly possible to identify information about off-exchange institutional trades in TRF data.[625] In the most extreme case, if virtually all individual investor orders are routed to and executed in qualified auctions, market participants may be able to identify nearly all off-exchange institutional transactions reported in the TRF data as originating from institutional trades.[626] In this way, information leakage might increase even for institutional investors that choose not to participate in qualified auctions.

However, it is possible that information on institutional order flow

[619] *See supra* section IV.B.2.a for a discussion of lower-volume exchanges.

[620] A liquidity externality could emerge if orders tended to concentrate in one auction, such that it would become the preferred routing destination and attract more orders. Orders in more liquid venues would be more likely to execute at better prices, which in turn, would provide such venues with a competitive advantage over less liquid venues.

[621] The Commission believes that the mandated auction mechanism largely would remove the need for RLPs run by exchanges that would meet the criteria to run qualified auctions. However, exchanges that operate RLPs that do not serve as qualified auctions host would be negatively impacted by having their RLP services curtailed. Individual or institutional investors, however, should not be significantly adversely impacted by the loss of these RLP services. From the perspective of individual investors, it would be unnecessary to execute orders through RLPs because any non-directed retail order would have a chance to be exposed to open competition, either because the order would be filled on a riskless principal basis, or because the wholesaler who considers internalizing an order would first be required to bring it to a qualified auction. From the perspectives of other market participants, *e.g.,* institutional investors, qualified auctions would provide a superior means, relative to RLPs, for these participants to directly interact with retail orders. This is the case because (1) unlike RLPs, qualified auctions require that characteristics of the order are communicated to bidders, including its price, size, and the name of the underlying retail broker; and (2) qualified auctions would allow market participants to interact with a substantially larger and more persistent pool of segmented retail order flow, relative to that available through RLPs. However the Commission acknowledges that the loss of RLP services may adversely impact market participants that may currently supply liquidity through existing RLPs but would not be fast enough to submit an auction response to a qualified auction message.

[622] Proposed Rule 615(c)(1) specifies that an auction message announcing the initiation of a qualified auction for a segmented order must be provided for dissemination in consolidated market data, including the disclosure that the auction is for a segmented order, the identity of the open competition trading center, NMS stock symbol, side (buy or sell), size, limit price, and identity of the originating broker for the segmented order (unless they certified that no bidder in the qualified auction knew the identity of the originating broker). Note that institutional bids in qualified auctions would not be revealed unless they were the winning bid and resulted in an execution.

[623] *See, e.g.,* Liyan Yang & Haoxiang Zhu, *Back-Running: Seeking and Hiding Fundamental Information About Institutional Order Flows,* 33 Rev. Fin. Studies 1484, 1487 (2020) (''. . .information about retail order flows is equivalent to information about institutional order flows, by market clearing.'').

[624] Trades executed off-exchange, including those executed on ATSs and by OTC market makers, are reported to Trade Reporting Facilities (TRFs), which are facilities through which members report transactions in NMS stocks, as defined in SEC Rule 600(b)(47) of Regulation NMS. *See Trade Reporting Facility (TRF),* FINRA, *https://www.finra.org/filing-reporting/trade-reporting-facility-trf.* However, as a result of the Proposal, it may be easier to identify institutional trades using TRF data; *see infra* this section for further discussion. Furthermore, it may currently be possible to identify institutional trades in TRF data; *see infra* note 627 and corresponding discussion.

[625] *See, e.g.,* Yang & Zhu, *supra* note 623, for further discussions on the identifying institutional investor orders.

[626] For those individual investor orders that would have been internalized by wholesalers and reported as a trade to the TRF but are instead executed in qualified auctions, these trades would be reported as trades executed on the exchange or ATS operating the qualified auction, rather than reported to the TRF. This would reduce the number of individual investor trades reported to the TRF.

is already discernable through multiple means. First, there is evidence that institutional order flow can be inferred by first identifying individual investor order flow, which can be estimated using sub-penny trades in TRF data.[627] In addition, wholesalers already may have the ability to discern institutional order flow due to their knowledge of individual investor order flow. Thus, while there is concern over information leakage for institutional order flow, it may be the case that much of this information is already identifiable. To the extent that qualified auctions would result in further information leakage, the Proposal may result in additional costs for institutional investors.[628] However, this effect could be balanced by the increased price improvement that institutional traders would receive by being able to interact directly with individual investor order flow in qualified auctions.

The Proposal may also result in wholesalers reducing the liquidity they supply to institutional investors via SDPs.[629] With reduced wholesaler liquidity provision on SDPs, institutional investors might have to resort to other sources of liquidity, *e.g.,* exchanges and ATSs or supplying liquidity to qualified auctions. An appealing feature of SDPs from an institutional investor perspective is the possibility of disclosing intended order size without being detected by other market participants competing for the same liquidity. By switching to other sources of liquidity, institutions would no longer enjoy this benefit. Hence, these institutions might find it more costly to locate liquidity as they need to protect their intended trade sizes to minimize price impact of trades.[630]

g. Effects on Exchange Limit Order Books (LOBs) Liquidity

There is a possibility that Proposed Rule 615 could cause displayed LOB liquidity to decrease. The Commission believes that the Proposal might entice some liquidity provision to be redirected from exchange LOBs to qualified auctions,[631] which could have an adverse impact on quoted LOB depth and the NBBO. More specifically, if liquidity is diverted to qualified auctions, there is the risk that the NBBO could widen because some market participants might reduce the frequency or the size of the orders they submit to the LOB, including orders that set the NBBO prices.[632] However, there would be trade-offs regarding the execution risk and execution price that might limit the incentives to bid in an auction compared to supplying liquidity in the LOB.[633] Moreover, the majority of marketable orders of individual investors are already segmented from exchanges and thus are not currently reaching exchange LOBs.[634] Therefore, although LOB liquidity may decline under the Proposal, there is the potential that the direct effect of qualified auctions on LOB liquidity may not be significant.

An additional possibility is that if the Proposal results in the elimination of zero-commission trading, retail trading volume could decline and the overall pool of liquidity could shrink due to increased wholesaler inventory risk.[635] A lower overall liquidity level might also manifest itself in lower displayed liquidity in exchange LOBs. For example, the introduction of qualified auctions might induce some (more sophisticated) individual investors to switch from placing non-marketable limit orders priced at or outside the NBBO to placing (a) marketable orders or (b) non-marketable orders priced between the midpoint and the NBO (NBB) for buy (sell) orders, which may participate as segmented orders in qualified auctions.[636] In this sense, the pool of non-marketable resting orders that would be routed to exchanges might shrink, potentially reducing the depth at the NBBO.

3. Competition

a. The Market for Trading Services in NMS Stocks

As discussed in more detail below, the creation of qualified auctions under the Proposal would result in most marketable orders of individual investors being exposed in qualified auctions on exchanges and ATSs that are eligible to serve as open competition trading centers.[637] The Commission estimates that 6 exchanges and 3 ATSs could operate qualified auctions. Exchanges should have strong economic incentives to offer qualified auctions because the lower adverse selection risk of marketable order flow of individual investors makes it a valuable commodity that would attract trading interest from other market participants and increase the exchange's trading volume and the associated revenue it delivers.[638] For this reason, it is likely that there would always be at least one

[627] *See, e.g.,* Boehmer et al., *supra* note 572, who use this methodology to identify individual investor activity. Specifically, using TRF data, the authors identify transactions as retail buys if the transaction price is slightly below the round penny and as retail sells if the transaction price is slightly above the round penny. Some institutional trades receive sub-penny price improvement as a result of midpoint trade price ends in a half-penny. Thus, trades at or near a half-penny are likely to be from institutions and are not assigned to the retail category.

[628] For example, in a study of the Swedish equity market, one academic paper found that a one-standard-deviation increase in the extent to which HFTs trade in the same direction as large institutional orders is associated with a $4,480 higher order execution cost for institutional investors. This result led the authors to conclude that the detection of large institutional orders is costly for institutional investors. *See* Vincent Van Kervel & Albert J. Menkveld, *High-Frequency Trading Around Large Institutional Orders,* 74 J. Fin. 1091 (2019).

[629] *See supra* section VII.C.2.c.

[630] However, institutional investor costs could also fall when they are able to trade against individual investor orders in qualified auctions. *See supra* section VII.C.1.c.

[631] The Commission also is proposing to amend rules addressing minimum pricing increments. *See* Minimum Pricing Increments Proposal, *supra* note 98. The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposing release.

[632] The submission of smaller orders might also require aggregation of odd-lot orders across more price levels to reach a round lot size, which would cause the NBBO to widen.

[633] *See infra* section VII.C.3.a.iii for further discussion on the trade-offs involved in supplying liquidity to a qualified auction vs. submitting an order to an LOB.

[634] *See supra* section VII.B.2.a for a discussion of estimates that appear to indicate that over 90% of individual investor marketable orders are routed to wholesalers and *supra* section VII.B.2.b for estimates that wholesalers internalize 90% of executed dollar volume in individual investor marketable orders that were routed to them.

[635] A reduction in retail trading volume as a result of the Proposal may decrease a wholesaler's ability to manage their inventory risk associated with their other trading activities, such as exchange market making or supplying liquidity through their SDPs. This may cause wholesalers to reduce the liquidity they supply in their other activities.

[636] A segmented order in a qualified auction could have the benefit of an increased likelihood of execution compared to non-marketable limit orders submitted to a LOB because bidders may supply liquidity (and potentially earn part of the spread) to orders submitted to a qualified auction. Non-marketable limit orders submitted to a LOB would have to wait until an opposite side marketable order arrived to potentially execute, which could result in a greater risk of the order not executing. However this increased likelihood of execution would come at the cost of earning a spread by using a non-marketable limit order.

[637] Proposed Rule 615 covers only NMS stocks. Qualified auctions would be conducted for ''segmented orders,'' which would be defined in Proposed Rule 600(b)(91) as an order for an NMS stock for an account of a natural person, or an account held in legal form on behalf of a natural person or group of related family members, and that for such an account, the average daily number of trades executed in NMS stocks must be less than 40 in each of the preceding six calendar months. *See supra* note 194 and corresponding text for a discussion of a Commission analysis indicating that during the six-month period (Jan. 1, 2022, to June 30, 2022), slightly more than 99.9% of individual investor accounts averaged 40 or fewer orders per day that resulted in a trade. Moreover, during the same period, 99% of individual customer accounts averaged 1.86 or fewer orders per day that resulted in a trade; *see* analysis in *infra* Table 22.

[638] *See supra* section IV.B.2 for further discussion on the incentives for exchanges and ATSs to offer qualified auctions.

exchange or ATS operating a qualified auction.[639]

Exchanges and ATSs operating qualified auctions would significantly increase competition among liquidity suppliers to fill marketable orders of individual investors, since the majority of these orders are currently internalized by wholesalers without competition on the individual order basis.[640] This increase in competition would have a significant effect on the business model of wholesalers and might reduce the volume of order flow that they internalize. This would affect the competitive dynamics between exchanges, wholesalers and ATSs related to how they compete for both individual and institutional order flow and could result in more orders being routed to exchanges that run qualified auctions. Additionally, there would be competitive implications for how qualified auctions interact with exchange LOBs. Additional analysis is provided below regarding the expected impact of the Proposal on competition: (i) in the market to supply liquidity to individual investor orders, (ii) between exchanges, ATSs, and wholesalers, and, (iii) between exchange LOBs and qualified auctions.

i. Competition To Supply Liquidity to Individual Investor Orders

Qualified auctions would enhance competition to provide liquidity to individual investors at the individual order level by drawing additional liquidity from other market participants besides the wholesaler handling the individual investor order, including other wholesalers that could bid in the auctions. Currently, once a wholesaler receives order flow, another wholesaler is unable to interact with these orders unless they are rerouted to that other wholesaler. Routing these orders to qualified auctions would prevent these orders from being isolated and instead allow them to be exposed to other market participants, including other wholesalers, that could bid for the right to execute them.

The lower adverse selection risk of individual investor orders should incentivize other liquidity providers to participate in qualified auctions. It is the Commission's understanding that market participants quote significant liquidity at prices superior to the NBBO.[641] This liquidity primarily includes inside-the-NBBO odd-lot liquidity quoted on exchanges and non-displayed liquidity quoted on exchanges and ATSs, originating from various market participants, including institutional investors, market makers, and individual investors. In addition, some market participants that currently use marketable orders to demand liquidity from intermediaries might benefit from participating in qualified auctions, *i.e.,* quote liquidity at prices better than the NBBO, to satisfy their liquidity needs. Proposed Rule 615 would provide an opportunity for these participants to potentially trade with individual orders with lower adverse selection by redirecting their liquidity provision to open qualified auctions or to switching from demanding to supplying liquidity through qualified auctions.

It would also give institutional investors a chance to directly interact with individual investor orders with a minimal degree of intermediation. For example, institutional investors with pressing liquidity demand typically rely on optimal trade execution algorithms that split their trades into child orders, which may demand liquidity, including on SDPs, where they may potentially end up paying the full spread.[642] The availability of marketable individual investor order flow at qualified auctions would likely draw institutional trade execution algorithms to supply liquidity in qualified auctions, where they might trade at the quote midpoint or at least inside the NBBO. By doing so, institutional orders would be filled without paying the full spread. This would not only increase the competition in liquidity provision against individual investor orders, but would also reduce institutional trading costs.

Some auction features would also enhance competition to supply liquidity to individual investor orders. The Proposal would facilitate finer price improvements for inside-NBBO orders by allowing a 0.1-cent quoting increment for shares priced at $1.00 or more per share. This would enhance competition by improving the ability of market participants to be able to compete on price in their auction responses, since they could quote in finer increments than they could on exchange or ATS LOBs.[643] An additional source of increased competition to supply liquidity would stem from the implementation of a 5 mil auction fee and rebate cap for shares priced at $1.00 and above and 0.05% for share prices under $1.00. Mandating low, flat fees and rebates in qualified auctions should promote a level playing field among all potential market participants that may wish to trade with segmented orders and therefore serve to increase competition among liquidity suppliers.[644]

The Commission is uncertain what effect the proposed requirement to give customer orders priority if auction responses are at the same price would have overall on the competition to supply liquidity to individual investor orders. On the one hand, giving priority to customer orders may encourage more customers, including institutional investors, to participate in qualified auctions, potentially increasing competition to supply liquidity to segmented orders. On the other hand, it could discourage liquidity provision by broker-dealers in qualified auctions, potentially decreasing competition to supply liquidity to segmented orders. However, qualified auctions overall would still enhance competition among broker-dealers to supply liquidity to individual investor marketable orders, because a significant portion of these would be exposed to multiple broker-dealers in a qualified auction instead of being execution in isolated at a wholesaler.

The Commission acknowledges that there could be some limitations on the increases in competition to supply liquidity to individual investor orders. The Commission recognizes that there are some institutional investors that may currently source liquidity from SDPs in order to avoid triggering reactions by market participants who would observe institutional trades might avoid qualified auctions and instead continue to access liquidity via other

[639] In cases where no open competition trading center chose to operate a qualified auction for a security, the broker-dealer or wholesaler handling the order would have the option to internalize the order. *See supra* section IV.A for further discussion of options for segmented orders that did not receive an execution in a qualified auction. However, it's very likely that at least one exchange or ATS would operate a qualified auction for an order. Because of the low adverse selection risk associated with segmented orders, if a single exchange or ATS operated a qualified auction, the trading facility would likely attract additional order flow to supply liquidity to segmented orders, which would increase its trading volume. This could potentially increase the exchange or ATS's revenue because a portion of SIP revenue is allocated among facilities based on trading volume (FINRA also rebates SIP revenue it receives for the TRF back to its members based on their trading volume).

[640] *See supra* section VII.B.2.b for a discussion of wholesaler internalization.

[641] *See supra* Table 20 and accompanying discussion in *supra* section VII.C.1.b for estimates of liquidity available at the NBBO midpoint on exchanges and NMS Stock ATSs when a wholesaler internalizes a trade.

[642] *See supra* section VII.B.3 for further discussions on how institutional investors may indirectly interact with individual investor orders via trading on SDPs.

[643] *See supra* section VII.C.1.a for further discussions on how the auction pricing increment could improve competition among liquidity suppliers.

[644] *See id.* and *supra* section IV.C.4 for additional discussions on the auction fee and rebate caps.

methods. Additionally, due to the sub-second duration of the auctions mandated by the Proposal, participation would require access to algorithmic trading technology, which could prevent some potential providers of liquidity from participating in qualified auctions.[645] In sum, however, the net effect of qualified auctions would be an increase in competition to supply liquidity to the orders of individual investors.

ii. Competition Among Exchanges, ATSs, and OTC Market Makers

Proposed Rule 615 would increase competition among wholesalers, ATSs, and exchanges in attracting and executing order flow of individual investors.[646] It is likely that the share of order flow currently internalized by wholesalers or executed on ATSs that do not serve as auction hosts would decline. Wholesalers receiving order flow from retail brokers could still end up internalizing a substantial portion of orders that they route to qualified auctions. However, because the orders would be subject to competition from other liquidity suppliers, wholesalers would likely win a smaller share of auctions compared to the share of orders that they currently internalize, for which they do not face competition at the individual order level.

The Proposal might improve the competitive position of higher volume exchanges that offer qualified auctions and harm the competitive position of lower volume exchanges that do not. Higher volume exchanges that execute 1% or more of the average daily share volume for NMS stocks during 4 of the last 6 months would be eligible to run qualified auctions for segmented orders.[647] Exchanges that offered qualified auctions would have a competitive advantage in attracting marketable individual investor order flow because they would be able to segment this order flow and allow liquidity suppliers to trade against it in smaller pricing increments ($0.001) in the qualified auctions that they host compared to the minimum price increment on national exchanges ($0.01).[648] The Commission is unable to quantify the likelihood that one or more exchanges that would be unable to offer qualified auctions would cease operating. Even if such an exit were to occur, the Commission does not believe this would significantly impact competition in the market for trading services because the market is served by multiple competitors.[649]

The Proposal would also likely increase competition between exchanges, ATSs, and OTC market makers to attract institutional order flow. The requirement to expose segmented orders in qualified auctions could improve the competitive position of exchanges and ATSs that run qualified auctions relative to most ATSs [650] and all OTC market makers, including SDPs, which would not be allowed to host auctions. The resulting increase in marketable orders of individual investors routed to exchanges and ATSs that operate qualified auctions, relative to other venues, would entice institutional investors to seek to supply liquidity to marketable individual investor orders through these auctions.

The Proposal would likely have an adverse impact on the competitive positions of wholesaler-affiliated SDPs to attract institutional order flow by reducing the liquidity available therein to institutional investors.[651] Specifically, the Proposal might lead retail brokers to directly route more of their customer orders to exchanges and ATSs operating qualified auctions instead of directing their orders to wholesalers.[652] In addition, wholesalers receiving orders from retail brokers that they then route to qualified auctions could lose a significant share of these auctions to other bidders. These effects would hamper the ability of wholesaler-operated SDPs and other OTC market makers to manage their inventory risk by internalizing incoming individual investor order flow. This might reduce the ability of these wholesalers and other market makers to provide liquidity to institutional investors, who might instead rely on other trading venues, including qualified auctions, to meet their liquidity needs. The Commission is unable to quantify the extent to which institutional order flow would migrate to exchanges or ATSs that run qualified auctions.

The risk of information leakage from institutional investors' orders participating in qualified auctions could also impact competition between exchanges, ATSs and OTC market makers. The Commission recognizes that concerns over the risk of information leakage could prevent institutional investors from seeking to provide liquidity in qualified auctions.[653] One possible way that leakage could occur is if a large volume of individual investor buy orders are filled consecutively at the midpoint, then market participants might correctly discern that an institutional investor is working a large sell order. Because the side and venue of an institutional order executed off-exchange would continue not to be revealed in a TRF trade print under Proposed Rule 615, ATSs and OTC market makers would remain competitive in terms of their ability to conceal intended institutional trades.[654] Institutional investors would likely weigh the trade-off between potentially lower trade costs provided by qualified auctions and the greater concealment of their trading intentions provided by off-exchange executions. In cases where the latter objective was paramount, institutional investors could decide to avoid routing some of their orders to qualified auctions. As such, ATSs and OTC market makers might remain attractive trading venues for such institutional orders.

Overall, however, the increase in marketable order flow on exchanges and

[645] *See supra* section VII.C.1.a for further discussion on the effect of not having access to algorithmic technology on qualified auction participation.

[646] Retail brokers might also choose to directly route their orders to qualified auctions, and might therefore compete with wholesalers, ATSs, and exchanges in executing individual investor orders. However, the Commission believes that broker-dealers would play a much more minor role in this competition.

[647] The Commission estimates that six national securities exchanges would meet the proposed threshold. These include one exchange each from the NYSE, NASDAQ, and CBOE groups, as well as MEMX, IEX and MIAX PEARL.

[648] Qualified auctions would have a price increment of $0.001 for shares priced at $1.00 or greater and 0.1% for shares under $1.00, in contrast to national exchanges, which have a minimum price increment of $0.01.

[649] *See supra* VII.B.1 for a discussion of the market for trading services in NMS stocks. *See also supra* section VII.C.2.e for additional discussion on the effects of the Proposal on small and large exchanges.

[650] As discussed in *supra* section VI.C.4, the Commission believes that 3 ATSs would operate a qualified auction.

[651] Institutional investors (or the brokers that represent them) would be able to bid in qualified auctions in order to directly interact with individual investor orders. This could give the execution of institutional orders better terms because institutional investors would not need to compensate the wholesaler for the intermediation services provided by their SDPs. As such, some of the institutional interest would migrate from its SDPs to qualified auctions due to more competitive pricing in the qualified auctions. Therefore, the loss of access to liquidity for institutional investors provided by SDPs would be mitigated by the ability of institutional traders to supply liquidity to marketable orders of individual investors in qualified auctions. *See supra* section VII.B.3 for further discussions on institutional investors interactions with SDPs.

[652] *See supra* section VII.C.1.a.

[653] *See supra* section VII.C.2.f for additional discussions on how the Proposal could affect information leakage of institutional investor orders.

[654] Institutional bids in qualified auctions would also have some ability to be concealed, because they would not be revealed unless they were the winning bid. If they do have the winning bid, the side, venue, and price of the institutional bid would be revealed, which may provide more information leakage than some trades on ATSs.

ATSs that operate qualified auctions, relative to other venues, would entice institutional investors to supply liquidity to marketable individual investor orders through these auctions. Due to the enhanced competition provided by qualified auctions, it is likely that execution costs of institutional investors' parent orders would be reduced, which in turn, should further the likelihood that institutional order flow would be attracted to exchanges and ATSs that operate auctions. The execution priorities of Proposed Rule 615 would reinforce this effect. Under paragraph (c)(5)(ii) of the proposed rule, if an institutional investor and a wholesaler (broker-dealer) were bidding the same price in a qualified auction, the investor would have execution priority. As such, all else constant, institutional investors would win qualified auctions when competing with wholesalers. This would reduce execution uncertainty from the perspectives of institutional investors who would consider bidding in qualified auctions on exchanges, as well as reduce their trading costs as a result of direct interactions with individual investor order flow. These collective effects would result in less institutional orders being routed to ATSs and OTC market makers, including SDPs.

The Proposal would also generate competition between qualified auctions that are offered on different exchanges and ATSs.[655] Open competition trading centers running qualified auctions might compete with each other by trying to offer the most price improvement in their auctions.[656] They might also compete with each other through innovations in their auctions protocols in order to differentiate themselves and attract more segmented orders and liquidity suppliers. Open competition trading centers might also try to compete with each other on the basis of fees or rebates they charge in their qualified auctions. However, the Commission believes that this form of competition might be limited because of the flat 5 mil auction fee and rebate cap on executed auction responses and the flat 5 mil rebate cap on segmented orders submitted to auctions.[657] More specifically, while providers of qualified auctions could compete by charging a fee *under* the 5 mil cap, this discount would provide far less latitude for attracting orders compared to the 30 mil fee cap on the LOB.[658] Furthermore, volume-based rebate and fees, which are utilized by many exchanges in their transaction based fee schedules, would not be permitted within qualified auctions (but would remain permitted on exchange LOBs). Therefore, the Commission believes that competition based on auction fees and rebates would be minimal.

iii. Competition Between Qualified Auctions and Exchange LOBs

The Commission believes that the Proposal might entice some liquidity provision from exchanges' LOB to qualified auctions. A core function of the mandated qualified auction mechanism under Proposed Rule 615 would be to segment order flow of individual investors, leading to a concentration of this order flow in qualified auctions. As a result, some market participants might consider redirecting liquidity provision from the LOB to qualified auctions. In doing so, market participants would need to consider the following under the Proposal: (1) Displayed orders on the LOB would have priority over auction responses if they were listed at the same price, and a winning auction response would have priority over hidden orders on the LOB; (2) for shares priced $1 or greater, LOB quoting is subject to a 1-cent price increment,[659] while qualified auctions would accept bids using a 0.1-cent price increment, allowing auction responses to jump in front of LOB quotes by quoting at sub-penny prices; and (3) broker-dealers with knowledge of where a segmented order is to be routed would not be allowed to submit LOB orders that could have priority to trade with the segmented order.[660] To the extent that market participants quoting visible or hidden liquidity on the LOB prefer to trade against the individual investor segment of the order flow through qualified auctions, they might provide liquidity to auctions rather than quote liquidity on the LOB.

The Commission is unable to quantify the magnitude of this potentially redirected liquidity from the LOB to qualified auctions. However, the Commission recognizes that there would be a trade-off between adverse selection risk (which would be higher on an exchange LOB compared to qualified auctions, where individual investor orders would be segmented) and execution risk (*i.e.,* the risk of non-execution, which would be higher for auctions). In general, qualified auctions should provide greater price improvement due to their lower adverse selection risk. However, redirecting displayed liquidity to qualified auctions might increase the execution risk and trading costs associated with the order. There might be less certainty regarding whether a bid in a qualified auction would execute because it would be competing against other bids that would not be displayed.[661] Additionally, bids in qualified auctions would lead to execution only if the market participant is willing to trade at worse prices that could lead to winning the auction, which may lower the spread that they would earn relative to executing their non-marketable limit order on a LOB.[662] Thus, the execution risk of submitting a bid in a qualified auction could be greater than posting an order at or inside the NBBO on a LOB. However, these risks associated with auctions would be somewhat offset by the lower adverse selection risk of trading against a segmented order in a qualified auction. Overall, the Commission believes that redirection of liquidity from the LOB to qualified auctions would be limited and would not significantly reduce execution quality on the LOB.

In addition, the name-give-up requirement could potentially reduce wholesaler liquidity on the LOB if a wholesaler handled a segmented order where the originating broker made the certification under proposed Rule 615(c)(1)(iii) that the identity of the originating broker will not be disclosed, directly or indirectly, to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order. Some retail brokers may seek certification to not disclose their identity, which would impose explicit costs on these broker-dealers (as discussed above in section VI.C.3). In addition, it could curtail wholesaler activity if a wholesaler had an order resting on the limit order book and routed a segmented order originating from a broker that made the certification under proposed Rule 615(c)(1)(iii) to a qualified auction on the same exchange. In this case, the wholesaler would likely have to cancel its resting limit order if it wanted to trade against the segmented order in the auction, since the limit order book is included in the auctions. Thus,

[655] The Commission includes ATSs to the degree that they would offer qualified auctions. *See supra* section VII.C.1.a.

[656] *See supra* section VII.C.1.a.

[657] *See supra* section VII.C.1.a for further discussions on the effects of auction fees and rebates.

[658] *See* 17 CFR 242.610(c).

[659] *See supra* note 146.

[660] *See* Proposed Rule 615(f)(2).

[661] Bids in qualified auctions would not be displayed.

[662] Additionally, a non-marketable limit order may earn a greater rebate from supplying liquidity on a maker-taker exchange LOB compared to in a qualified auction, which would have rebate cap of 5 mils on executed auction responses.

certification could impact wholesaler quoting on exchanges.[663]

b. Market Access

Retail brokers choose how to access the market for trading services in NMS stocks in order to fill their customers' orders. Currently, retail brokers primarily access this market via wholesaler internalization, although broker-dealers with exchange memberships or ATS subscriptions can access the market directly.[664] Retail brokers without these memberships or subscriptions must route their order to wholesalers or to other brokers that either have direct access to exchanges and ATSs, or have the routing resources to deliver orders to market centers. The introduction of qualified auctions would likely reduce the profit that wholesalers earn on internalizing marketable order flow, which in turn could result in the decision by wholesalers to start charging a fee for routing services. This would improve the competitive position of broker-dealers with routing access to qualified auctions.[665] Retail brokers might further choose not to route to wholesalers if they want to avoid the requisite identity disclosure requirement. It is likely that other routing brokers with access to qualified auctions would compete to receive order flow from retail brokers without this access. The Commission is uncertain of the extent to which routing services would shift away from wholesalers towards other routing brokers. However, the implementation of qualified auctions could generally be expected to reduce the benefit of wholesaler vertical integration and the potential profits they get from internalizing individual investor orders.[666]

c. The Market for Retail Broker Services

Wholesalers have been able to secure larger profits by accessing and internalizing the majority of marketable order flow of individual traders, which carries less adverse selection risk. The Proposal would require wholesalers to route this order flow to qualified auctions,[667] opening these orders to competition with other market participants. This competition could result in the wholesaler not winning the auction. In the event that the wholesaler actually wins the auction, it is likely that the increased competition would cause the realized spread (*i.e.,* the wholesaler's profit margin) it receives from internalizing these orders to fall. Declining profit margins could reduce the financial latitude that wholesalers needed to pay PFOF to retail brokers.[668] The Commission also recognizes that the decline or disappearance of PFOF would impact retail brokers, although this impact would vary widely across brokers, since only some broker-dealers receive PFOF, and the amount of PFOF differs across retail brokers that do receive it. In particular, as discussed in Section VII.B.6.a,[669] four retail brokers received 94% of all PFOF in 2021, and PFOF represented only a fraction of these four retail brokers' total revenues.

The Commission acknowledges that the implementation of qualified auctions and the likely subsequent reduction in PFOF could pose a competitive threat to retail brokers that are dependent on PFOF and lack alternate revenue sources to compensate for this loss of revenue. If wholesalers reduce PFOF or begin charging a fee for routing services, PFOF retail brokers would have to absorb this cost and earn lower profits and/or pass on a share of this cost to their customers. This would, in particular, depend upon the competition they face. For instance, if PFOF retail brokers earn economic rents, then they could absorb some of these costs, which would come out of their profit. If PFOF retail brokers primarily face competition from other PFOF retail brokers, then these brokers could pass on the costs to their consumers. That said, to the extent that PFOF brokers face competition from non-PFOF brokers, then their ability to pass on costs to their customers, such as in the form of higher commissions on stock and ETF trades, could be constrained. More specifically, non-PFOF brokers (which would not be harmed by the disappearance of PFOF) would be unlikely to resume charging commissions, which would put competitive pressure on commission rates that other retail brokers could charge and still retain customers. In this context, if the ability of smaller retail brokers to charge commissions is constrained by competition, it could increase the competitive advantage of larger retail brokers, which could raise the barriers to entry for new brokers and cause some smaller retail brokers to exit the market. The Commission is unable to quantify the likelihood one or more retail brokers would cease operating.

Another feature of Proposed Rule 615 that could impact competition in the market for retail brokers is the option that allows an originating broker to avoid disclosure of its identity by certifying that its identity will not be disclosed, directly or indirectly, to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order, as specified in Proposed Rule 615(c)(1)(iii) and (e)(3).[670] Broker-dealers carrying the greatest adverse selection risk could determine that their execution risk is improved by remaining anonymous, despite the possibility that their anonymity could signal that they carry above average adverse selection risk.[671] However, the Commission estimates that this effect on the market would be relatively minor due to the modest number of retail brokers (20 firms)[672] that would be expected to choose to use this certification.

4. Efficiency

The Commission believes the Proposal might have both positive and negative effects on efficiency. The Proposal might have negative effects on the efficiency of wholesaler operations and the efficiency with which marketable individual investor orders are executed, but the Commission believes both these effects might be minimal. On the other hand, price efficiency might improve due to an increase in pre-trade and post trade transparency for the segmented orders

[663] Wholesalers could indirectly pass their costs for this back to the originating brokers if wholesalers charged them a fee for handling segmented orders where the originating brokers made the certification under proposed Rule 615(c)(1)(iii).

[664] *See supra* section VII.B.2.a for further discussion of broker-dealer routing and market access.

[665] The Commission estimates that 182 retail brokers (157 originating brokers and 25 routing brokers) would be able to route orders to qualified auctions. *See supra* note 286 and accompanying text.

[666] *See supra* section VII.C.3.a.ii for a discussion of how Proposed Rule 615 would increase competition among wholesalers, ATSs, and exchanges in attracting and executing order flow of individual investors.

[667] This would be the case unless the wholesaler internalized the order under one of exceptions, such as executing it at the midpoint. If the wholesaler chose to internalize individual investor orders at midpoint, the marginal profit earned from supplying liquidity, represented by the wholesaler's realized spread, would be reduced. Currently, wholesalers have an average realized spread of 0.72 (*see* Table 6). Midpoint execution, by definition, generates, at best, a zero realized spread, assuming no adverse price impact. While the broker-dealer may have other incentives to execute a trade with a negative realized spread, such as reducing inventory risk or as part of a hedging strategy, all else equal, a positive realized spread would always be preferable.

[668] *See supra* section VII.B.5.c.

[669] *See supra* Table 16 and corresponding discussion for an analysis of the rate of PFOF across retail brokers.

[670] *See supra* note 477.

[671] *See* discussion in *supra* section VI.C.3. The Commission's estimate is based on the number of broker-dealers that are believed to have sufficiently large number of informed traders.

[672] *See supra* section VI.D.3.

that are exposed in a qualified auction.[673]

The Proposal might decrease the overall efficiency of wholesaler operations, although this effect is likely to be minimal. The success of wholesalers typically relies in part on significant investment spending on high frequency trading technology. It also relies on firm-specific expertise that has been cultivated over time on how to most effectively utilize this technology. However, if increased competition due to a mandated qualified auction system reduces the volume and/or profit margins of wholesalers, it is conceivable that one or more wholesalers might exit the business of handling and internalizing individual investor orders.[674]

Assuming that the market power of the industry's most active wholesalers is at least partially (if not primarily) due to the particular efficiencies that these firms provide, the possibility of exit by one of these firms perhaps poses a risk of overall diminished efficiency. However, remaining wholesalers (or, alternatively, other executing brokers or OTC market makers) should be able to provide the routing and execution services to the customers of the exiting wholesaler. In fact, Rule 606 reports reveal that broker-dealers currently route to multiple wholesalers and do not restrict their routing to a single wholesaler. Moreover, the Commission's view is that all current wholesalers would likely remain operating, albeit possibly with reduced profit margins. Net profit margins among wholesalers are fairly high, averaging 39.9% in Q1 2022, compared to 19.9% for the broker-dealer industry as a whole.[675] Finally, the Commission believes that retail brokers would be able to shift their orders towards other wholesalers without much difficulty in the event that any wholesalers chose to exit the business. In fact, retail brokers regularly re-assess whether their current allocation of trading interest to liquidity providers, including wholesalers, exchanges, and ATSs, is optimal. As a result, the Commission does not expect the Proposal to have a significant adverse effect on the overall efficiency of wholesaler operations.

Additionally, the Proposal might reduce the efficiency with which marketable individual investor orders are executed, but these effects would likely be minimal. The proposed requirement that wholesalers expose marketable orders of individual investors to qualified auctions might reduce the efficiency with which these orders are filled because the trade execution would become less streamlined as a new layer of intermediation would be added to the lifecycle of each trade. Even in cases where originating brokers would route customer orders directly to qualified auctions, this process could be more complex or time-consuming for retail brokers than routing order flow to wholesalers that manage routing, market access and execution services.[676] Any additional complexity or reduction in the speed of execution would tend to reduce the efficiency of order executions. However, the duration of the qualified auction would be less than or equal to 300 milliseconds,[677] and the process would be automated, both of which would serve to limit the complexity and duration of the qualified auction. Therefore, the Commission believes that the overall efficiency with which marketable orders of individual investors are executed would not be significantly affected by the Proposal.

5. Capital Formation

The Commission believes that the improvements in execution quality for individual investors and other market participants[678] as well as improvements in price efficiency[679] that might result from the Proposal would potentially promote capital formation.

As investors would benefit from improved execution quality as a result of the proposed amendments, these investors would also likely benefit from lower transaction costs. Higher transaction costs may hinder customers' trading activity that would support efficient adjustment of prices and, as a result, may limit prices' ability to reflect fundamental values. Less efficient prices may result in some firms experiencing a cost of capital that is higher than if their prices fully reflected underlying values, and in other firms experiencing a cost of capital that is lower than if their prices accurately reflected their underlying value, as a result of the market's incomplete information about the value of the issuer. This, in turn, may limit efficient allocation of capital and capital formation. By improving order execution quality and reducing transaction costs, the proposed amendments would reduce financial frictions and promote investor's ability to trade. Furthermore, improvements in price efficiency as a result of the Proposal would cause firms' prices to more accurately reflect their underlying values, which may also improve capital allocation and promote capital formation.

D. Reasonable Alternatives

A central aim of Proposed Rule 615 is to retain the benefits of segmenting individual investor orders. A second concern that this proposal addresses involves the nature of the information transmitted to the market by the originating broker. The first type of reasonable alternatives discussed below varies by who can segment, the degree of segmentation, and whether prescriptive changes to routing practices are required. The discussion addresses these questions with options that vary along degrees of prescriptive rules, versus relying on market incentives alone. The Commission also considered additional types of alternatives, namely: (1) alternative definitions of segmented orders, (2) alternative auction designs, including the degree to which auction design is set by rules or determined by open competition centers, (3) alternative exceptions to the order competition requirement, and (4) variation in the definition of open competition center. Finally, the Commission also considered alternatives such as mandating information barriers within wholesaler business functions, allowing exchanges to display quotes in retail liquidity programs, and a separate retail NBBO as well as a disclosure-only alternative. These alternatives could be used together or in combination with each other and could also be paired with other elements of the Proposal. Where applicable the Commission has

[673] *See supra* section VII.C.1.d for further discussion of how the Proposal would increase pre-trade transparency and price efficiency.

[674] Wholesalers also have other business lines. While a wholesaler might stop handling and internalizing individual investor orders, it is possible that the wholesaler may continue to supply liquidity to individual orders through qualified auctions if one of its other business lines, such as an exchange market maker or proprietary trading desk, bids in qualified auctions.

[675] Profit margin data are calculated using FOCUS data, and calculated as [(total revenue − total expenses)/(total revenue)] × 100. *See supra* Table 16 for the share of revenue stemming from PFOF for NMS stock orders across PFOF brokers. The two largest wholesalers in terms of volume earned 44% and 41% profit margins, respectively.

[676] This is assuming that the wholesalers internalize the routed orders. For those individual investor orders that are re-routed by wholesalers, it is possible that directly routing orders to qualified auctions may reduce complexity and time-to-execution for retail brokers.

[677] More specifically, once the proposed qualified auction receives the order and sends out the auction message, the duration of the auction is 100 to 300 milliseconds.

[678] *See supra* section VII.C.1.b for a discussion of how the Proposal would improve execution quality for individual investors and *supra* section VII.C.1.c for how the Proposal would improve execution quality for other market participants, including institutional investors.

[679] *See supra* section VII.C.1.d for further discussion of how the Proposal would increase pre-trade transparency and price efficiency.

specified which alternatives would likely be paired together when considering the economic impact of the alternative.

1. Variation in Provisions Regarding Segmentation and Routing

a. Trade-at Requirement

The first alternative to the Proposal is that the Commission could introduce a trade-at prohibition as part of Regulation NMS. A trade-at prohibition would: (1) prevent a trading center that was not quoting from price-matching protected quotations and (2) permit a trading center that was quoting at a protected quotation to execute orders at that level, but only up to the amount of its displayed size. Orders would not be able to be executed at a trading center not displaying a quote unless the orders were executed with at least a minimum amount of price improvement as established by the Commission. There could be exceptions for trades at the NBBO midpoint or trades based on a reference price, such as VWAP trades. This would mean that any trading center not displaying a quote, including ATSs and wholesalers, could not execute a trade unless it offered at least the minimum amount of price improvement over the NBBO. Exchanges would still be able to offer separate RLP programs in order to segment the marketable orders of individual investors. However, because quotes in RLPs would not be displayed, quotes in RLPs would also be restricted from executing orders unless they offered the minimum amount of price improvement over the NBBO.[680]

The Commission could establish a low value for the minimum amount of price improvement of 0.1 cent. It could alternatively establish higher values for a minimum amount of price improvement ranging up to a full tick size (*i.e.,* 1 cent), with exceptions for midpoint executions.[681] If the Commission chose a higher value for the minimum amount of price improvement, then the economic effects of this alternative would be larger (*i.e.,* a greater increase in displayed liquidity, a greater share of orders being routed to exchanges, etc.).

A number of markets have examined the effects of a trade-at rule. Studies have examined the introduction of a trade-at prohibition in Canada and Australia. In Canada, results indicate that dark trading declined and trading on lit venues increased when the trade-at prohibition was imposed.[682] There were not significant changes in overall spreads or volatility. Displayed depth increased, but total market depth, *i.e.,* hidden plus displayed depth, did not change.[683] Some measures showed a decline in price efficiency.[684] Empirical research has also looked at differences in trader-types and found that the trade-at prohibition eliminated intermediation of individual investor orders in dark venues and shifted individual investor orders onto the lit market with the lowest trading fee.[685] Findings indicate that this resulted in individual investors receiving less price improvement, retail brokers paying higher trading fees to exchanges, and high-frequency traders earning higher revenues from trading fees.[686] Using Australian market data, researchers found that a trade-at prohibition decreased off-exchange trading and internalization, with more off-exchange trades executing at the midpoint.[687] They also found that the trade-at prohibition increased quoted spreads.[688] However, because these countries had different market structures than the U.S. market in NMS stocks (*e.g.,* less fragmentation and less trading occurring off-exchange) the effects observed from the trade-at-prohibitions in these studies may not be similar if a trade-at-prohibition were applied to NMS stocks in the US.

The U.S. Tick Size Pilot in NMS stocks imposed a trade-at requirement for one of the test groups (Test Group 3), although there were a number of exceptions, including for individual investor orders.[689] One academic paper that examined the effects of the Tick Size Pilot, including the effects of the trade-at prohibition,[690] found that the effects of the trade-at prohibition varied based on whether the stock was tick-constrained or unconstrained.[691] The authors generally found that in tick-constrained stocks the trade-at prohibition decreased quoted and effective spreads, increased displayed depth at the NBBO, and increased trading volume. In contrast, unconstrained stocks did not experience significant changes in spreads or displayed depth and experienced a decrease in trading volume. Both tick-constrained and unconstrained stocks experienced an increase in quote volatility and a decrease in average trade size. Other empirical research indicates that the trade-at prohibition reduced the volume of trading off-exchange, with more trading occurring

[680] If this alternative were combined with the alternative to allow exchanges to display quotes in RLPs, then displayed quotes in RLPs would be able to execute at NBBO without offering price improvement.

[681] The Commission also is proposing to amend Rule 612 regarding the tick size. *See* Minimum Pricing Increments Proposal, *supra* note 98. The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposing release.

[682] *See* Baiju Devani, Lisa Anderson & Yifan Zhang, Inv. Indus. Regulatory Org. Can., *Impact of the Dark Rule Amendments* (May 7, 2015), *available at https://paperzz.com/doc/8507782/impact-of-the-dark-rule-amendments.*

[683] *Id.*

[684] *Id.*

[685] *See* Carole Comerton-Forde, Katya Malinova & Andreas Park, *Regulating Dark Trading: Order Flow Segmentation and Market Quality,* 130 J. Fin. Econ. 347 (2018).

[686] *Id.*

[687] *See* CFA Inst., *Trade Rules in Australia and Canada: A Mixed Bag for Investors* (Nov. 2014), *available at https://www.cfainstitute.org/-/media/documents/issue-brief/policy-brief-trade-at-rules.ashx.*

[688] *Id.*

[689] The Tick Size Pilot Program was an NMS plan designed to allow the Commission, market participants, and the public to study and assess the impact of wider minimum quoting and trading increments—or tick sizes—on the liquidity and trading of the common stocks of certain small-capitalization companies. The Tick Size Pilot began in Oct. 2016 and ended in Sept. 2018. The Tick Size Pilot included NMS common stocks that had a market capitalization of $3.0 billion or less, a closing price of at least $2.00, and a consolidated average daily volume of one million shares or less (''Pilot Securities''). The Pilot Securities were divided into one control group and three test groups. Each test group contained approximately 400 Pilot Securities and the remaining Pilot Securities were in the control group. The Pilot Securities assigned to Test Group One (''TG1'') were quoted in $0.05 per share increments but continued to trade at the current price increments, subject to limited exceptions. The Pilot Securities assigned to Test Group Two (''TG2'') were quoted in $0.05 per share increments like those in TG1, but were traded in $0.05 per share increments, subject to certain exceptions, including exceptions that permit executions that were the (1) midpoint between the national or protected best bid and the national or best protected offer, (2) retail investor orders with price improvement of at least $0.005 per share, and (3) negotiated trades. The Pilot Securities assigned to Test Group Three (''TG3'') were quoted in $0.05 per share increments and traded in $0.05 per share increments consistent with TG2. TG3 Pilot Securities were also subject to a Trade-at Prohibition, which generally prevented price matching by a trading center that was not displaying the best price unless an exception applied. The Trade-at Prohibition had exceptions that were similar to those provided in Rule 611 of Regulation NMS. Pilot Securities in the control group continued to quote and trade at the current tick size increment of $0.01 per share. *See* Order Approving the National Market System Plan to Implement a Tick Size Pilot Program, Securities Exchange Act Release No. 74892 (May 6, 2013), 80 FR 27541.

[690] *See* Barbara Rindi & Ingrid M. Werner, *U.S. Tick Size Pilot* (Fisher Coll. Bus. Working Paper No. 2017–03–018, Charles A. Dice Ctr. Working Paper No. 2017–18, last revised Mar. 17, 2019), *available at https://ssrn.com/abstract=3041644* (retrieved from Elsevier database) (hereinafter ''Rindi and Werner (2019)'').

[691] Rindi and Werner (2019) defined tick-constrained as a stock having an average quoted spread of five cents or less during the time period before the Tick Size Pilot was implemented. They define an unconstrained stock as one having an average quoted spread of 10 cents or greater during the time period before the Tick Size Pilot was implemented.

on inverted exchanges (*i.e.,* those exchanges that pay a rebate for demanding liquidity and charge a fee for supplying liquidity).[692] However, the results observed from the trade-at-prohibition in the Tick Size Pilot may not be similar if a trade-at-prohibition were applied to all stocks, because the Tick Size Pilot was limited to stocks with smaller market capitalizations and also involved a simultaneous increase in the tick size to five cents.[693]

Overall, the Commission believes that a trade-at prohibition would result in more orders being routed from ATSs to exchanges and an increase in displayed depth on the LOB compared to the Proposal.[694] However, it is uncertain to what degree total depth would increase because the increase in displayed depth could mostly come from market participants choosing to display orders they currently hide on LOBs. If most of the increase in displayed depth came from market participants choosing to display orders they currently hide, then total depth in the LOB (*i.e.,* hidden plus displayed depth) under this alternative may be similar to total depth in the LOB under the Proposal. However, LOB depth may increase if OTC market makers that currently internalize trades off-exchange increased their liquidity supplied to the LOB in order to be able to trade without offering the minimum amount of price improvement.[695] There is also uncertainty about what would happen to spreads under this alternative. Based on the evidence from implementing a trade-at rule in other countries, spreads (both quoted and effective) may not significantly change compared to the Proposal. However, it is also possible that quoted and effective spreads could decline on exchanges if more orders from individual investors are routed for execution to exchange LOBs.[696] More trading volume (including more orders from institutional investors) may also shift from ATSs to exchanges because the trade-at rule may prevent ATSs not displaying quotes from executing a trade unless they provide a minimum amount of price improvement to the NBBO.[697] This shift in order flow from ATSs to exchanges could increase transparency and may further lower spreads, increase liquidity, and improve price efficiency relative to the Proposal.

Under this alternative, wholesalers would likely internalize more individual investor marketable orders compared to the Proposal. However, the threshold the Commission selects for the minimum amount of price improvement would affect to what degree wholesalers internalize the marketable orders of individual investors.[698] If the Commission selected a smaller threshold, *e.g.,* a threshold of 0.1 cents or 0.2 cents, then this would result in more marketable orders of individual investors being internalized by wholesalers.[699] Because these orders would not be exposed to order-by-order competition when they are internalized by wholesalers, the average price improvement individual investors receive on their marketable orders would likely be reduced, and the transaction costs of these orders would be higher, relative to the Proposal.

Under this alternative, broker-dealers and trading centers would not have the costs associated with identifying and handling segmented orders, but they would have additional costs associated with developing policies and procedures and adjusting their systems to implement the trade-at requirements.

b. Permit Exchanges To Offer Auctions in Smaller Pricing Increments

As an alternative to mandating segmented orders be routed to qualified auctions, the Commission could allow exchanges to run auctions with 0.1 cent pricing increments that the orders of all market participants would be eligible to trade in.[700] Exchanges would be able to run separate auctions for their RLPs and for orders that were not eligible to be submitted to their RLPs, which would allow exchanges to maintain some degree of segmentation (alternatively, the Commission could permit a greater degree of segmentation as in the alternative below). This less prescriptive alternative would allow exchanges to offer sub-penny price improvement to a wider set of market participants outside of their RLP programs. As in the trade-at alternative considered above, it would maintain the current separation between how market entities are allowed to segment orders, and the relative anonymity of orders on exchange. By not contributing to further segmentation of orders, relative to the Proposal, this alternative might lower the cost for trading for investors currently identified as having order flow with greater price impact. Because broker-dealers and trading centers would not have to establish policies and procedures for identifying and handling segmented orders, this alternative would have significantly lower costs than the Proposal. However, it offers no clear mechanism for creating significantly greater competition for segmented orders, nor in improving execution quality for segmented orders as defined in the Proposal.

c. Trade-at Requirement for Segmented Orders Only

As a variation on the Trade-at Requirement alternative discussed above, the Commission could only establish a trade-at requirement for segmented orders, as defined by the Proposal or in combination with an alternative definition of segmented

[692] *See* Carol Comerton-Forde, Vincent Grégoire & Zhuo Zhong, *Inverted Fee Structures, Tick Size, and Market Quality,* 134 J. Fin. Econ.141 (2019).

[693] Additionally, a number of exceptions applied to the Tick Size Pilot trade-at prohibition, including an exception for retail orders.

[694] This may help reverse a decline in pre-trade transparency. Market participants have stated that liquidity displayed at or near the NBBO on exchanges has declined over time. An analysis by an exchange separately finds off-exchange trading has also increased over a similar time period. *See supra* notes 375 and 376 and accompanying text.

[695] If the minimum pricing increment were larger, then OTC market makers may submit more liquidity to a LOB.

[696] Because individual investor orders exhibit lower adverse selection risk, the average adverse selection risk faced by liquidity suppliers on exchanges could decrease, which may cause them to quote at more aggressive prices, resulting in a reduction in quoted and effective spreads. *See* Glosten and Milgrom (1985) for a discussion of how adverse selection risk affects quoted spreads. However it is also possible that this effect may be limited if tighter quoted spreads also cause market participants that pose greater adverse selection risk to increase their liquidity demanding orders, which could potentially increase the adverse selection risk faced by liquidity suppliers on exchange LOBs.

[697] The shift in volume from ATSs to exchanges would be greater if the Commission set a larger threshold for the minimum amount of price improvement needed to execute the order.

[698] This effect would also vary based on the quoted spread of the stock. For stocks with quoted spreads above two cents, even if the minimum threshold price improvement threshold was set at a full tick, wholesalers would likely internalize more order flow compared to the Proposal because they would have had to offer more than 1 cent of price improvement in order to internalize individual investor orders at the midpoint without having to expose them in qualified auctions. If the Commission selected a minimum price improvement threshold of a full tick, then stocks with quoted spreads less than two cents may have wholesalers internalize less individual investor orders under this alternative compared to the Proposal. These effects would vary if the minimum tick size for a stock was different. The Commission also is proposing to amend Rule 612 regarding the minimum tick size. *See* Minimum Pricing Increments Proposal, *supra* note 98. The Commission encourages commenters to review that proposal to determine whether it might affect their comments on this proposing release.

[699] The proportion of individual investor order flow internalized by wholesalers would decline as the threshold for the minimum amount of price improvement increases, because wholesalers would have to offer more price improvement to internalize these orders.

[700] Currently, exchanges are able to offer smaller pricing increments in their RLPs, but Rule 612 still applies to other auctions that they run (*e.g.,* open and closing auctions and auctions following a trading halt). This alternative would allow exchanges to offer smaller pricing increments for these other auctions.

orders as discussed below. This alternative would limit both the potential positive and negative effects of the Trade-at alternative because it would apply to a smaller set of orders. Relative to the two alternatives above, it would maintain the definition of segmented orders, thereby still contributing to the complexity that these two alternatives seek to avoid. However, like the Proposal, it would potentially expose segmented orders to order-by-order competition. The degree of this competition would depend on the minimum price improvement threshold selected because a higher threshold would result in less internalization and more routing of orders to exchanges, where they would be exposed to order-by-order competition. It would also depend on whether these orders were revealed to be segmented orders—given a flag, or sent to an existing RLP program—and whether they also identify the originating broker. The less information, the lower the degree of segmentation, which may help liquidity in general and segmented orders presenting more adverse selection risk, but might limit the ability for segmented orders presenting less adverse selection risk to gain price improvement. Unlike the Trade-at Requirement alternative discussed above, this alternative is explicitly compatible with the provision in the Proposal to prevent a routing broker to post a quote in a way that has priority, thereby potentially lessening the information asymmetry and increasing competition if it works as intended.

d. Create a Segmented Order Definition but Not Require Segmented Orders To Be Exposed in Qualified Auctions

As an alternative, the Commission could introduce the proposed definition of a segmented order and permit exchanges to offer separate auction mechanisms for segmented orders with finer trading increments, but not introduce a requirement for segmented orders to be exposed in these auctions. There would be no minimum trading volume requirement in order for exchanges to be able to run these segmented auctions and exchanges would have greater flexibility in designing these auctions, similar to the alternative discussed in section VII.D.3.a below. Similar to the Proposal, this alternative would introduce the definition of segmented orders and with it the additional complexity. Relative to the Proposal, it contains no prescriptive requirements for auctions, and thus may have lower costs for implementing them, similar to the alternative in section VII.D.1.b. Because more exchanges would be able to offer segmented auctions, there may be greater competition among market centers that are able to offer segmented auctions compared to the Proposal.

e. Continue To Permit National Securities Exchanges To Offer Separate Trading Mechanisms for Segmented Orders in Addition to Qualified Auctions

As an alternative, the Commission could allow national securities exchanges to offer separate trading mechanisms for segmented orders in addition to qualified auctions, such as allowing exchanges to continue to operate RLPs. In addition to being able to submit a segmented order to an exchange LOB or a qualified auction, broker-dealers could also submit a segmented order to execute in other exchange trading mechanisms designed for segmented orders.[701] Separate trading mechanisms for segmented orders could also be priced in 0.1 cents increments, but, similar to current market practices, quotes in exchange RLP programs would not be displayed in exchange proprietary feeds or consolidated market data.[702]

Compared to the Proposal, this alternative might improve competition among exchanges, and improve the competitive position of lower-volume exchanges, because they would be allowed to offer trading mechanisms for segmented orders even if they fell below the 1% average daily volume requirement necessary to run a qualified auction. This might result in less trading volume in segmented orders concentrating on larger exchanges, which could reduce the risk that one or more small exchanges might exit the market. It would also improve the ability of market participants that might not possess the speed necessary to respond to qualified auction messages, *e.g.,* individual investors or professional traders that do not utilize algorithmic trading technology, to compete to supply liquidity to segmented orders. There may be more methods available for them to supply liquidity to segmented orders that do not require the speed necessary to respond to qualified auction messages, such as posting quotes in exchange RLP programs.[703]

However, compared to the Proposal, this alternative may increase the ability of wholesalers or other broker-dealers handling segmented orders to indirectly internalize an order by executing it against a quote they are posting in another trading mechanism for segmented orders, such as an RLP program. In these other trading mechanisms, the broker-dealer may maintain a larger information advantage than it would have with qualified auctions, because these other trading mechanisms may not require identity disclosure of the originating retail-broker. However, since qualified auctions would still be available and there may be additional competition from liquidity on smaller exchanges, the average price improvement and trading costs for marketable orders of individual investors may not be significantly different under this alternative compared to the Proposal.

This alternative could also allow quotes in RLPs to be displayed in proprietary feeds and in consolidated market data. This would potentially increase the transparency of liquidity available to segmented orders and may further improve their order routing and execution quality compared to not displaying RLP quotes under this alternative. Displaying quotes in RLP programs may also further enhance the competitive position of smaller exchanges and new exchanges that enter the market that do not meet the criteria for an open competition trading center but may operate an RLP. Displaying exchange RLP quotes would provide more transparency into the liquidity available to the orders of individual investors on these exchanges, which might result in more individual investor orders being routed to these exchanges when the prices of displayed quotes are equal to or better than the expected execution prices individual investor orders may expect to receive in qualified auctions (*e.g.,* if the RLP is posting a quote at the NBBO midpoint).

[701] Exchanges could either adjust the definitions of orders they accepted to their RLPs to conform with the definition of segmented orders or they could allow a broader set of individual investor orders of which segmented orders would be a subset.

[702] A flag would still be disseminated next to an exchange quote in consolidated market data indicating that there was liquidity present in an exchange's RLP program at a price better than the NBBO.

[703] If an exchange operated both a qualified auction and an RLP program, liquidity supplying orders submitted to the exchange's RLP program could be incorporated into qualified auctions. Because they could submit resting orders to RLP programs, liquidity suppliers that were not fast enough to submit bids in qualified auctions would still be able to submit an order in 0.1 cent pricing increments that would only supply liquidity to a segmented order. However, they may not be able to factor in information on the originating broker submitting the segmented order into the liquidity supplying orders they submit to qualified auctions.

2. Alternate Definitions of Segmented Orders

a. Current Market Practice as a Definition of Segmented Order

The Commission understands that current market practices concerning definitions of retail orders often relies on brokers representing retail flow as coming from natural persons.[704] In addition, a number of SRO rules prohibit the use of trading algorithms or computerized technology for the eligibility of retail orders for their RLP programs.[705] As an alternative to the proposed definition of segmented order, the Commission could adopt a definition of segmented order that consisted of these two elements, *i.e.,* the order must be submitted by a natural person and does not originate from a trading algorithm or any other computerized methodology,[706] but without any thresholds based on the number of trades executed or orders submitted by the account.

Compared to the Proposal, this could result in fewer orders meeting the definition of a segmented order. Although a small number of additional individual investor accounts would now meet the definition of segmented order because there would be no minimum trade threshold,[707] a number of orders that previously would have been included under the Proposal could be excluded because they originate from a trading algorithm or any other computerized methodology.[708] The Commission does not have data on how many retail orders originate from trading algorithms or any other computerized methodology, but the Commission understands that a number of retail brokers allow individual investors to trade through APIs and that a number of retail brokers may use trading algorithms to generate orders for individual accounts.[709] To the extent that orders originating from a trading algorithm or computerized methodology have larger adverse selection risk than other orders originating from individual investors that met the definition of a segmented order, then the adverse selection risk of segmented orders in qualified auctions may decrease and liquidity suppliers might offer slightly greater price improvement to segmented orders in qualified auctions under this alternative compared to the Proposal. The costs to originating brokers for identifying segmented orders under this alternative may be similar to the Proposal.[710]

b. Use a Quantitative Threshold Other Than Trades To Identify Segmented Orders

Rather than using average number of trades, the Commission could rely on an alternative metric, such as average number of orders submitted by an individual investor's account to identify the threshold for the definition of segmented orders. The Commission understands that some exchanges in the options market have designed definitions of retail orders that rely on a criteria based on the average number of orders an account originates per day, as opposed to the average number of trades.[711]

The economic effects of using an average order threshold would largely depend on the threshold selected. If the Commission selected an average order threshold that corresponded to a similar percentage of accounts being excluded as the proposed trade threshold, *i.e.,* if the Commission selected an average orders per day cutoff so that 99.9% of individual investor accounts were below the threshold, then the economic effects of this alternative would likely be similar to those described in the Proposal. If the Commission varied the threshold, then the economic effects would likely be similar to the effects of varying the average trade threshold discussed below in section VII.D.2.c. Similar to the Proposal, originating brokers would have to develop systems to identify individual investor accounts that meet definition of a segmented order. However, these costs may be higher if it is more difficult for an originating broker to develop systems that track the average number of orders that originate from a customer's account compared to the number of trades.

c. Vary the Daily Trade Threshold of Individual Investors Covered by the Proposal

The Commission could adopt alternative definitions of a segmented order by varying the threshold for the average daily number of trades in NMS stocks that a natural person or group of related family members would need to be under in order for their orders to qualify as segmented orders, including not having a maximum number of trades per day threshold.[712]

Table 22 estimates the distribution of the average daily number of orders that an individual investor's account originates and results in a trade (conditional on the individual investor submitting an order during the observation period). The analysis shows that 99.9% of individual investor accounts average 14.3 or fewer orders that result in a trade each day and that 99% of individual investor accounts average 1.86 or fewer orders that result in a trade each day.

[704] *See supra* notes 188, 189, and 190 and related discussions (discussing natural person in context of definitions of retail orders).

[705] *See supra* note 193 (discussing restrictions on retail orders originating from a trading algorithm).

[706] Similar to the proposed definition 600(b)(91)(i), the order could originate from a natural person or an account held in legal form on behalf of a natural person or group of related family members.

[707] *See* analysis and discussion of the distribution of individual investors' average daily number of orders resulting in a trade in *infra* Table 22.

[708] It is also possible that the orders from individual investor accounts that average 40 or more trades a day could also be excluded under this alternative if the orders originate from a trading algorithm or any other computerized methodology.

[709] For example, if a retail broker has automated methods for rebalancing an individual investor's account, it may generate orders using a trading algorithm.

[710] Although originating brokers may not need to keep track of the average number of trades each individual investor account executes under this alternative, they would need to have systems to track if an order submitted by an account originated from a trading algorithm or computerized methodology.

[711] *See supra* note 197 for a discussion of how the average number of orders submitted per day from a customer's account is included in the definition of a ''Professional'' order.

[712] If there were no trade threshold, then the segmented order definition would be similar to the criteria that some exchanges use to determine which investor orders are eligible to execute in their RLP programs. Although some exchanges also have criteria using the average number of orders submitted by the natural person as a threshold for determining which orders are eligible to be submitted to their RLP programs. *See supra* note 188 and accompanying text for discussions of the orders that are eligible to be submitted to RLPs.

TABLE 22—DISTRIBUTION OF INDIVIDUAL INVESTORS' AVERAGE DAILY NUMBER OF ORDERS RESULTING IN A TRADE

Mean	Std	Min	25%	50%	75%	99%	99.9%	99.99%	99.999%	Max
0.20	118.74	0.00	0.01	0.02	0.06	1.86	14.30	83.92	318.83	667,289.34

This table uses CAT data to estimate the distribution of the average daily number of orders that an individual investor's account originates and are associated with a trade. This is estimated from CAT identified Individual Customer accounts that originated an order during the six month period from Jan. 1, 2022, through June 30, 2022. Because this analysis only includes Individual Customer Accounts that originated an order during this time period, it may overestimate the value at a given percentile because accounts originating zero orders are not included in the distribution. *See supra* note 194 for additional details on the analysis.

If the average trade threshold were lowered, fewer individual investors would meet the definition of a segmented order and be eligible to have their orders be routed to qualified auctions. Individual investors that no longer met the definition of segmented orders would experience lower execution quality than under the Proposal because their orders would not be eligible to be segmented and participate in qualified auctions. Instead, these orders would likely either be internalized by wholesalers without being subject to order by order competition if they have lower adverse selection risk or routed and executed on an exchange LOB or ATS if wholesalers don't want to internalize them. If these orders have larger adverse selection risk than the average orders of individual investors that fall below the average trade threshold, then the average adverse selection risk of segmented orders in qualified auctions may decrease and liquidity suppliers might offer slightly greater price improvement to segmented orders in qualified auctions under this alternative compared to the Proposal. However, as long as the average trade threshold remained above 15 trades per day, then the effects of this alternative may not be that significant, because it would affect less than 0.1% of individual investors.

If the average trade threshold were increased or eliminated, then orders of more individual investors would be included in qualified auctions. However, the proportion of individual investors that meet the definition of segmented orders under this alternative, but do not under the Proposal would be small because more than 99.9% of individual customer accounts average less than 40 trades per day. The marketable orders of individual investors that average more than 40 trades per day and meet the definition of segmented order under this alternative may receive more price improvement and lower transaction costs compared to the Proposal because their orders would now be eligible to be included in qualified auctions. However, the orders of these individual investors that trade more frequently may have greater adverse selection risk compared to orders from individual investors that trade less frequently. Compared to the Proposal, this may result in the average adverse selection risk increasing in qualified auctions and liquidity suppliers bidding in auctions may offer less price improvement on average. This would result in the orders of individual investors that average less than 40 trades per day receiving less price improvement on their marketable orders and paying higher transactions costs than they would under the Proposal. This would effectively result in a transfer from individual investors that average less than 40 trades per day to the ones that average more than 40 trades per day. Institutional investors may also see increased transactions costs compared to the Proposal because they may be more likely to supply liquidity to individual investors with higher adverse selection risk. However, if individual investors with more than 40 trades per day are limited to a few broker-dealers, then the potential disclosure of the originating broker in qualified auctions may limit the effect to these broker-dealers.

3. Variation in Auction Design

a. Allow Open Competition Trading Centers More Flexibility in Designing Qualified Auctions

As one alternative, the Commission could allow open competition trading centers more flexibility in designing qualified auctions. This would include allowing open competition trading centers more flexibility in setting matching protocols, priority structure, auction duration, disclosure of the identity of the originating broker, and auction fees and rebates. However, the Commission could still specify a minimum auction duration (open competition centers could choose greater times). The Commission could also still specify that execution priority shall not be based on time of receipt of the auction response (otherwise, it is not clear how an auction might differ significantly from the limit order book).

Compared to the Proposal, this alternative could lead to greater innovation in the design of qualified auctions and foster greater competition among open competition trading centers that run qualified auctions. However, it could also lead to the design of qualified auctions with mechanisms that could provide a greater advantage to certain liquidity suppliers, which could result in less competition among liquidity suppliers, and reduced benefits that come from it, including less improvement in individual investor and institutional investor execution quality compared to the Proposal.

Allowing more flexibility in the design of qualified auctions could enhance innovation compared to the Proposal by allowing open competition trading centers to incorporate auction features that better fit the needs of different market participants, which in turn could improve order execution quality for some market participants compared to the Proposal. More flexibility in the design of qualified auctions could also promote further competition among open competition trading centers and lead to greater differentiation among qualified auction mechanisms in order to attract segmented orders and liquidity suppliers. It could also lead to more open market trading centers operating qualified auctions, since an exchange group might be more likely to operate multiple qualified auctions if it has the flexibility to implement different designs at different exchanges. This, however, could result in greater fragmentation of individual investor order flow and liquidity supply across qualified auctions compared to the Proposal and result in decreased competition among liquidity suppliers to individual qualified auctions and less price improvement for individual investors relative to the Proposal.

Compared to the Proposal, allowing greater flexibility in qualified auction designs could result in some open competition trading centers designing auction mechanisms that provide a greater competitive advantage to some types of bidders over others. For example, an open competition trading center could design an auction that includes an auto-match pricing feature (where the order automatically adjusts

to match the price of the best auction bid), and an allocation guarantee to the participant that initially brought the order to the auction if it provided the best bid. This would provide a competitive advantage to whichever market participant brought the order to the auction and increase the likelihood that it would trade with the individual investor order. This could result in market participants directing individual orders to qualified auctions that offered them a greater competitive advantage, which would result in less competition among market participants to supply liquidity to individual investor orders and worse execution quality for individual investor orders compared to the Proposal.

Additionally, because this alternative would not require qualified auctions to ensure customer priority if multiple bids are at the same price, it could reduce the likelihood of other investors trading directly with individual investor orders compared to the Proposal (*e.g.,* it could increase the chance of broker-dealers bidding in qualified auctions getting priority over institutional orders at the same price compared to the Proposal). This could result in less improvement in the execution quality for the orders of institutional investors compared to the Proposal.[713]

[713] *See supra* section VII.C.1.c discussing improvements in execution quality for institutional investors.

b. Variation in the Duration of Qualified Auctions

As an alternative, the Commission could vary the minimum and maximum durations for the qualified auction, making both larger or smaller. Variations in the duration of qualified auctions results in a trade-off between NBBO slippage and the exposure of the auctioned order flow to potential bidders. Because the NBBO may vary over short time horizons, auctioned orders may become stale or priced outside the NBBO as best quotes move. This effect calls for shorter auction durations. However, longer auction durations provide a longer opportunity, after observing the auction message through the SIP, for other participants to interact with the auctioned order flow, potentially raising the number of bidders in qualified auctions.

The Commission performed analysis to estimate the risk of quote slippage for different auction lengths by observing the likelihood that that the NBBO spread moves (*i.e.,* the ''fading probability'') as the time lag increases (in milliseconds) after internalization of an individual investor order.[714] Research indicates there is a few-millisecond gap between an off-exchange trade and the reporting of that trade to the SIP.[715] Assuming this lag applies to internalized individual investor orders as well, NBBO movements were measured during the initial moments following internalization of an individual investor order. This analysis is performed on 600 randomly selected stocks that are divided into three groups: high, medium, and low activity stocks.[716] The probability of fading is calculated at the stock level as the overall likelihood that the NBO (NBB) will be higher (lower) than the current NBO (NBB) for increasing durations of time after internalization. These probabilities are then averaged across stocks in each of the three groups of stocks. Figure 1 below indicates slippage probabilities for different periods of delay after internalization: [717]

[714] From Daily TAQ's NBBO and Quote files, NBBO updates are constructed based on nanoseconds time-stamps. Each quote update is matched up with the NBBO that is in effect for different durations of time (in milliseconds) after internalization. These durations include 25, 50, 75, 100, 200, 300, and 500 milliseconds.

[715] *See* Thomas Ernst & Chester S. Spratt, *Payment for Order Flow and Asset Choice* (last revised May 16, 2022) (unpublished manuscript), *available at https://ssrn.com/abstract=4056512* (retrieved from Elsevier database).

[716] Six hundred stocks were randomly selected from the population of all NMS common shares and ETFs in Mar. 2022. Three buckets were formed from the population of stocks based on trading volume: top-500 (high activity), 501–1,000 (medium activity), and 1,001–3,000 (low activity). Then 200 stocks were randomly selected from each bucket in a stratified manner, such that the final sample included stocks from all levels of quoted spread.

[717] Filters were used to identify off-exchange transactions (sub-penny trades) that are attributable to individual investors. An algorithm from Boehmer et al., *supra* note 572, was then used to identify buyer vs. seller initiated such trades. *See supra* note 572 for further discussions of this algorithm.

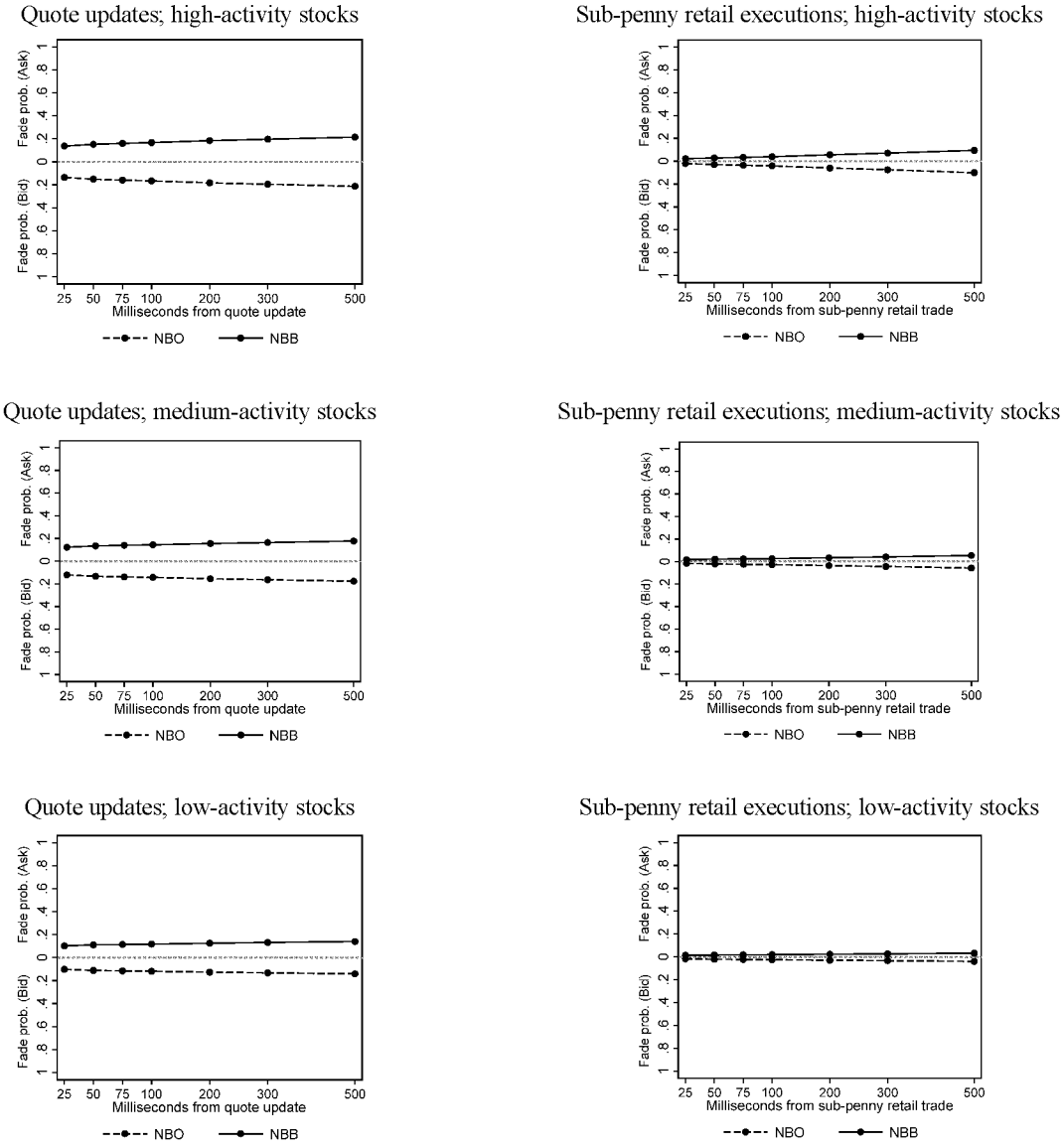

Figure 1: Probability of NBBO Quote Fade following Quote Updates and Sub-Penny Off-Exchange Executions

Probabilities are estimated from NYSE TAQ data in Mar. 2022 for a sample of 600 stocks that were randomly selected from the population of all NMS common shares and ETFs.

Results indicate that the fade probability goes from a cross-stock average of 12% at 25 milliseconds after a quote update, to 14% at 100 milliseconds—an increase of only 2 percentage points. Focusing on individual investor orders, the fade probability goes from an average of 1.7% at 25 milliseconds after an internalized individual investor order, to 2.9% at 100 milliseconds—an increase of only 1.2 percentage points.

These findings suggest that changing qualified auction lengths relative to the proposed 100 milliseconds length would not significantly change the chance of ''adverse'' price movements when an auction message is disseminated. The Commission believes, based on this analysis, that the chance of the quotes moving against the individual investor order does not significantly increase over horizons from 20 milliseconds to 500 milliseconds long. However, the Commission observes that the likelihood of slippage may be greater in volatile markets.

In addition to the low risk of slippage within the Proposal's auction durations, the Commission does not believe that changing the qualified auction length would materially substantially impact the number of potential bidders. Trading algorithms used by most market participants may be fast enough to respond to an auction message in the SIP in 10 milliseconds, so reducing or increasing the auction length from the proposed 100 to 300 millisecond range may not have a significant effect on the number of bidders. The Commission

also observes that, even at 1 second most traders using screens would not be fast enough to participate, limiting the additional market participants that could potentially join the auctions as bidders. However, auctions below 10 milliseconds may prevent some participants that utilize algorithms from responding timely to SIP auction messages. These limitations likely reflect geographical delay in the SIP, which is estimated to be up to one millisecond between trading centers in New York and New Jersey and up four milliseconds from Chicago to New York/New Jersey.[718]

c. Vary the Minimum Pricing Increment in Qualified Auctions

The Proposal sets the minimum pricing increment at 0.10 cents in a qualified auction. As an alternative, the Commission could lower the minimum pricing increment requirement to 0.01 cents in the qualified auctions. Concern about a minimum pricing increment tends to occur around pennying on a limit order book, which economically acts as an erosion of time priority. However, auctions as required do not have time priority, and so this is less of a concern. Lowering the minimum pricing increments would allow bidding at more competitive prices. It could, however, increase the possibility of de minimis price improvement relative to the limit order book. This would drain liquidity from the limit order book with little benefit to investors. Varying the minimum pricing increment could affect the competitiveness among liquidity suppliers in qualified auctions and also the potential price improvement that segmented orders may receive.

d. Qualified Auctions With Liquidity Provider Backstop

As another alternative, the Commission could require qualified auction operators to have a designated liquidity provider (DLP) for each security to serve as a backstop and guarantee execution of a portion of the segmented order at the NBBO if an auction does not produce any bids. For each symbol, the number of shares a DLP would be obligated to guarantee execution for in an order could be set at the minimum of some percentage of the average quoted size at the NBBO or some percentage of the average daily executed share volume, whichever is smaller.[719] In return for the DLP backstopping the qualified auction, if the DLP were tied with other bidders at the best price, the DLP would be given an allocation guarantee of some percentage of the size of the segmented order or the size of their bid, whichever is smaller.[720] If there were multiple bidders besides the DLP at the best price, each liquidity supplying order at the same price level would be assigned a random priority and, after the DLP received its allocation guarantee, any remaining shares would be filled based on the random priority ranking. However, qualified auction features that gave the DLP additional advantages, such as allowing it to automatically match the best price, would not be allowed.

Compared to the Proposal, this alternative would provide more certainty regarding individual investor orders executing in qualified auctions, particularly in less liquid securities where there may be a higher chance that no liquidity suppliers bid in the auctions. This execution certainty would be greater if the DLP's percentage execution guarantee were higher. However, the DLP would also be taking on greater risk, because they might have a larger inventory position, which would put them at greater risk if prices moved against them.

Giving allocation guarantees to DLPs may reduce the incentive for other market participants to compete to supply liquidity to segmented orders compared to the Proposal, because they would be less likely to execute against the segmented order if they submitted an order at the same price as the DLP.[721] The incentives of other market participants to compete to supply liquidity may be reduced more if the percentage of the segmented order the DLP is guaranteed priority to execute (*i.e.,* the DLPs allocation guarantee) is greater.

e. Two-Sided Auctions

Under this alternative, qualified auction messages would not include information on the direction of the segmented order (*i.e.,* whether it was a buy or sell order). Bidders would be able to submit a one sided bid (*i.e.,* a directional bid to either buy or sell) or a two sided bid (*i.e.,* a bid indicating the bidder was willing to both buy and sell).[722]

On the one hand, not disclosing the direction of the segmented order may reduce bidding from some market participants,[723] potentially resulting in less competition to supply liquidity to the segmented order, which may result in segmented orders receiving less price improvement compared to the Proposal. On the other hand, not disclosing the direction of the segmented order may also reduce the risk of information leakage if an institutional investor was bidding in the auction compared to the Proposal, because it would be more difficult to discern the direction of the trade.[724] This could incentivize more bids from institutional investors, which could increase the competition to supply liquidity to segmented orders and potentially provide more improvement in institutional investor execution quality compared to the Proposal.

Not disclosing the direction of the segmented order may also reduce the risk of the NBBO slippage during the qualified auction, *i.e.,* the risk of the NBBO quotes moving against the individual investor order (*e.g.,* the probability of an increase in the NBO for a segmented buy order or a decrease in the NBB for a segmented sell order).[725] Because market participants setting the NBBO quotes would not know the direction of the segmented order, to the extent they would have adjusted their quotes in response to an auction announcement under the Proposal, they may be less likely to adjust their quotes under this alternative.

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[718] *See* MDI Adopting Release, *supra* note 81, note 1692 and accompanying text.

[719] For example, the Commission could require the DLP to guarantee execution of a number of shares that would be equal to 25% of the average quoted size at the NBBO in a security or 0.1% of the average daily executed share volume in a security, whichever is smaller.

[720] For example, the Commission could guarantee that a DLP would have priority to execute 25% of the shares in the segmented order if it were tied with other bidders at the same price.

[721] The reduction in incentives to compete to supply liquidity to segmented orders compared to the Proposal may be larger for customer orders, including the orders of institutional investors, because, in addition to the DLP allocation guarantee, the random priority structure would further reduce their chance of executing against an order when their order is tied with others at the same price compared to the Proposal (in which customer orders had priority in the event of a tie).

[722] A two sided bid could be submitted as providing some sort of price improvement over the NBBO. For example, a market participant supplying liquidity in the qualified auction could submit a two-sided response specifying that they were willing to execute the segmented order (*i.e.,* they were willing to both buy and sell to the individual investor) at 0.2 cents better than the NBBO.

[723] For example, not knowing the direction of the segmented order may reduce the willingness of some market participants to cancel a resting order with queue position on another venue and submit it as a bid in the qualified auction because it is more difficult to know if their order was going to execute.

[724] *See supra* section VII.C.2.f for a discussion on the risk of information leakage from institutional investors supplying liquidity in qualified auctions.

[725] *See supra* section VII.C.2.b for a further discussion on individual investor slippage costs in qualified auctions.

f. Alternative Maximum Fee for Auctions

The Proposal imposes a 5 mil access fee cap on executed auction responses and does not allow a fee to be charged for submitting auction responses or the submission or execution of segmented orders. The alternative discussed in section VII.D.3.a allows more flexibility in designing auctions, which could include more flexibility for exchanges to charge greater fees (and offer greater rebates), both from those routing orders to an exchange and from those bidding in an exchange. As exchanges compete to offer auctions, it is possible that access fees would be competed down to levels that make a cap unnecessary. However, because the auctions are required for certain segmented orders prior to internalization, there remains the possibility that this requirement could lead to access fees being set above those that would occur in the absence of such a requirement. Due to this market failure, setting a maximum fee may be necessary. Alternatively the Commission could raise the 5 mil qualified auction access fee cap to, for example, 10 mils, and could allow a capped fee on auction respondents and on those routing segmented orders to qualified auctions. This could raise the access fees charged to auction responses and lower the price improvement received by segmented orders, but it would raise the incentives for exchanges to offer auctions.

g. No Requirement for Customer Priority in Case of Auction Responses at Same Price

The Proposal currently requires qualified auctions to give priority to auction responses for the account of a customer over auction responses for the account of a broker or dealer at the same price. Under this alternative, the Commission could not specify priority rules requiring giving priority to customer auction responses. The Commission could still maintain priority restrictions prohibiting time priority and prohibiting priority rules favoring the broker-dealer that routed the segmented order to the auction, the originating broker for the segmented order, the open competition trading center operating the auction, or any affiliate of the foregoing persons.[726] Additionally, the Commission could also still maintain the proposed priority rules regarding how qualified auctions would interact with the continuous limit order book.[727]

While one of the goals of the Proposal is to promote the NMS objective set forth in section 11A(a)(1)(C)(v) of the Exchange Act and maximize the potential for customer orders to interact with other customer orders,[728] giving priority to customer orders may discourage liquidity provision by broker-dealers in qualified auctions. Compared to the Proposal, this alternative could encourage greater participation by traditional liquidity providers, such as exchange market makers and other OTC dealers, in qualified auctions. However, it might discourage other customers, including institutional investors, from participating in qualified auctions, which may be contrary to one of the goals of the proposal.

h. Do Not Reveal Identity of Originating Broker in Qualified Auction Message

As an alternative, the Commission could not permit the identity of the originating broker to be disclosed in qualified auction messages. If the identity of the originating broker were not revealed to bidders in qualified auctions, then they would need to price their auction responses based on the average adverse selection risk of the segmented orders in the qualified auctions. Relative to the proposal, this has the potential to improve pricing and liquidity for the individual investor orders from retail brokers presenting greater adverse selection risk, thereby increasing incentives for information production and potentially improving price efficiency. However, it may also potentially reduce the price improvement and increase transaction costs for individual investor orders of retail brokers presenting lower adverse selection risk, since their orders could not be distinguished from the orders of customers of retail brokers that imposed greater adverse selection risk. Additionally, if wholesalers continue to route segmented orders and bid in qualified auctions, then they would have a larger information advantage relative to other participants in qualified auctions because they would be aware of the identity of the originating broker of a segmented order they submit to the qualified auction. This could reduce the incentives of other market participants to supply liquidity in qualified auctions, because they may be more likely to suffer from winner's curse, *i.e.,* they would be more likely to only win qualified auction in which the wholesaler submitting the segmented order to the auction didn't want to bid aggressively because the individual investor order posed greater adverse selection risk. This could reduce competition among liquidity suppliers in qualified auctions and result in less price improvement and higher transactions costs for segmented orders compared to the Proposal.

4. Variation in Exceptions to the Order Competition Requirement

a. Vary the Market Value of the Segmented Order Exception for Executing a Segmented Order at a Restricted Competition Trading Center

As an alternative, the Commission could consider varying the proposed $200,000 threshold of the order dollar value exception for having to expose a segmented order in a qualified auction by either increasing or decreasing the threshold. Table 23 estimates the distribution of the dollar value of executed orders submitted by individual investors. Approximately 98.9% of individual investor orders have a dollar value less than $200,000 and more than 95% of individual investor orders have a dollar value less than $55,000. Therefore, unless the proposed order dollar value exception threshold is reduced significantly, the vast majority of individual investor orders would remain below the threshold level. Similarly, increasing the threshold level would not significantly increase the percentage of orders that would be required to be exposed in qualified auctions.

[726] *See supra* section IV.C.5 for further discussions on these priority restrictions.

[727] *See id.* (discussing proposed Rule 615(c)(5)(v)).

[728] *See id.* (discussing proposed Rule 615(c)(5)(ii)).

TABLE 23—DISTRIBUTION OF DOLLAR VALUE OF ORDERS SUBMITTED BY INDIVIDUAL INVESTOR

10 Pct	25 Pct	50 Pct	75 Pct	90 Pct	95 Pct	99 Pct
$21.21	$136.13	$1,019.01	$6,232.51	$25,243.63	$54,728.69	$209,281.75

This table presents analysis of CAT data showing the distribution of the original dollar value of orders that resulted in trades and originated from CAT Individual Customer accounts at one of the 58 MPIDs in the CAT retail analysis identified in Table 7 during March 2022. The distribution is calculated from all market and limit orders that originated from CAT Individual Customer accounts and resulted in a trade. Dollar values for limit orders were calculated based on the limit price of the order (limit price times shares in the order). Dollar values of market orders were calculated based on the far side NBBO quote at the time of order entry and then multiplying that by the number of shares in the order. The execution price was used in the rare instances when the NBBO wasn't available. *See supra* Table 7 for details on how the broker-dealers were identified.

A smaller threshold value would result in more segmented orders potentially being excepted from qualified auctions. Orders above this value and below $200,000 would be more likely to not be exposed in a qualified auction and would instead be more likely to be internalized by a wholesaler without the wholesaler being subject to competition at the individual order level. This may decrease price improvement offered to these orders compared to the Proposal. It would also reduce the chance that other market participants could interact with these individual investor orders, potentially increasing their transaction costs compared to the Proposal. However, it may also result in less of a reduction in wholesaler revenue compared to the Proposal, which may result in wholesalers not reducing PFOF as much. It may also increase the likelihood of wholesalers continuing to not charge retail brokers for their routing services. Both of these changes may also reduce the chance retail brokers would resume charging commissions compared to the Proposal.

A larger threshold value would result in more individual investor orders potentially being included in qualified auctions. This could result in more individual investors orders over $200,000 receiving greater price improvement compared to the Proposal, because they would be more likely to be exposed in qualified auctions. However, this benefit may be limited, because the auctions may be less likely to attract sufficient liquidity to fill the entire order.

b. Exception of Beyond-the-Midpoint Non-Marketable Limit Orders

As another alternative, the Commission could create an additional exception to Proposed Rule 615 that would apply to all segmented orders that were classified as non-marketable limit orders at the time of order receipt. Proposed Rule 615 includes beyond-the-midpoint non-marketable limit orders but exempts non-marketable limit orders with limit prices at and below the midpoint. Under this alternative, beyond-the-midpoint non-marketable limit orders that met the other criteria to be considered a segmented order would also be exempted from Proposed Rule 615.

Table 24 below provides a breakdown of the share of different order types for individual investors during Q1 2022. The data indicates that beyond-the-midpoint non-marketable orders only accounted for 1.9% of the executed dollar volume of orders individual investors routed to wholesalers.[729] Furthermore, only 17.7% of the dollar volume in these orders were executed in a principle capacity, equaling 0.3% of total executed dollar volume.[730] Thus, the share of non-marketable limit orders that is currently isolated at the order-by-order level is an extremely small share of overall individual investor order flow.

TABLE 24—DISTRIBUTION OF INDIVIDUAL INVESTOR ORDER TYPES, Q1 2022

Order type	Share of dollar trading volume (%)
Marketable Order (% of total)	80.6
Marketable Orders—Principle Execution (% of total)	73.5
Principle Share % of Marketable Orders	91.1
Marketable Limit Orders (% of total)	14.7
Marketable Limit Orders—Principle Execution (% of total)	12.7
Principle Share % of Marketable Limit Orders	86.4
Beyond-the-Midpoint Non-Marketable Limit Orders (% of total)	1.9
Beyond-the-Midpoint Non-Marketable Limit Orders—Principle Execution (% of total)	0.3
Principle Share % of Beyond-the-Midpoint Non-Marketable Limit Orders	17.7
Midpoint or below Non-Marketable Limit Orders (mp and farside) (% of total)	2.8
Midpoint or below Non-Marketable Limit Orders (mp and farside)—Principle Execution (% of total)	0.3
Principle Share of Midpoint or below Non-Marketable Orders (mp and farside)	10.5

This table looks at the percentage of dollar trading volume in NMS stocks and ETFs of different market and limit (as measured by marketability) order types that were routed to wholesalers from the 58 broker-dealer MPIDs in the CAT retail analysis in Q1 2022. *See supra* Table 7 for additional information on the sample.

The analysis shows the order type's percentage of dollar trading volume, *i.e.* the dollar trading volume belonging to a particular order type (out of the total dollar trading volume across all order types). The Principle Execution for an order type is the percentage of dollar trading volume executed in a principal capacity by a wholesaler belonging to a particular order type (out of the total dollar trading volume executed in a principal capacity by a wholesaler across all order types). The Principle Share % for a particular order type is the percentage of dollar trading volume that was executed by a wholesaler in a principal capacity (out of the total dollar trading volume in that order type).

[729] Over 95% of the executed dollar volume individual investors routed to wholesalers came from marketable orders.

[730] The majority of the executed dollar volume in beyond-the-midpoint non-marketable orders was executed in a riskless principal capacity or was rerouted and executed on an agency basis.

Marketability of a limit order was determined using the NBBO from the consolidated market data feed at the time the wholesaler received the order. Marketable limit orders are limit orders where the limit price is greater than or equal to the opposite side quote (NBB for sell orders and NBO for buy orders). Beyond-the-midpoint Non-marketable limit orders are limit orders with limit prices between the midpoint and the opposite side quote (NBB for sell orders and NBO for buy orders). Midpoint or below non-marketable limit orders are limit orders with limit prices between the midpoint and the same side quote.

Given the small volume of beyond-the-midpoint non-marketable limit orders, the costs and benefits of this alternative could be similar to the Proposal. However, fewer beyond-the-midpoint non-marketable limit orders would be submitted to qualified auctions. Instead, more of them may be internalized or executed on a riskless principal basis, which may reduce the price improvement they receive relative to the Proposal.[731]

5. Variation in the Definition of Open Competition Trading Centers

a. Vary Threshold To Become an Open Competition Trading Center

In addition to other requirements, the Proposal requires a trading center to have an average daily share volume of 1.0 percent or more of the aggregate average daily share volume for NMS stocks during at least four of the preceding 6 calendar months in order to qualify as an open competition trading center. As an alternative, the Commission could choose to require a higher or a lower percentage, including zero percent, of the average daily share volume in NMS stocks as the threshold to qualify as an open competition trading center.

If the threshold were higher, then fewer exchanges and ATSs would meet the definition of an open competition and be eligible to run qualified auctions. It could result in reduced competition between venues running qualified auctions. This may reduce innovation and, to the extent it occurs within the 5 mil fee and rebate caps, result in reduced competition between qualified auctions on the basis of access fees and rebates, which could increase the net capture rate open competition centers earn from their qualified auctions. However, the reduced number of qualified auctions could result in more liquidity suppliers competing in individual qualified auctions (*i.e.,* there would be less fragmentation of liquidity suppliers across qualified auctions), which may provide more price improvement to segmented orders submitted to these auctions.

If the threshold were lower, more exchanges and ATSs would be able to meet the definition of an open market trading center and be able to operate qualified auctions. More exchanges and ATSs might operate qualified auctions, which could enhance competition between venues running qualified auctions. This could encourage more innovation in qualified auctions. For example, exchange groups may be more likely to run multiple qualified auctions on different exchanges with different structures, priority rules, or fees. It would also reduce the competitive disadvantage of exchanges and ATSs that would be too small to run qualified auctions under the Proposal but would be under this alternative. However, it may result in greater fragmentation of liquidity suppliers across different qualified auctions, which may reduce competition between liquidity suppliers in individual qualified auctions and reduce price improvement to segmented orders submitted to these auctions. Additionally, greater fragmentation in qualified auctions could increase the risk that a broker-dealer could route a segmented order to a qualified auction with less competition from other liquidity suppliers so that the routing broker-dealer may have a greater chance to trade with the segmented order.

b. Only National Securities Exchanges as Open Competition Trading Centers

As an alternative, the Commission could limit the definition of an open competition trading center to only include national securities exchanges. This alternative could be in combination with the 1% average daily share volume in NMS stocks that the Proposal specifies, or some other threshold (including no threshold) as discussed in section VII.D.5.a. This would mean that NMS Stock ATSs would not be able to operate qualified auctions.

Compared to the Proposal, this alternative would put NMS Stock ATSs at a competitive disadvantage to exchanges. NMS Stock ATSs that would have met the criteria to be considered open competition trading centers under the Proposal would be considered restricted trading centers under this alternative and would not be able to execute segmented orders, unless it is via one of the exceptions.[732] More segmented orders would be routed to qualified auctions on exchanges, which could lead to these exchanges attracting additional order flow and result in a greater share of orders being executed on exchanges. This could raise the barriers to entry for new NMS Stock ATSs and increase the chance that a smaller NMS Stock ATS exits the market.

However, relative to the Proposal, this alternative could result in increased investor protection. Because qualified auctions would be limited to being operated by national securities exchanges, proposed rule changes to all qualified auctions would be subject to notice, comment and Commission approval. This would give the Commission greater ability to review and disapprove qualified auctions designs to ensure they met standards of the Proposal, which may increase investor protection.

c. Eliminate the Requirements for NMS Stock ATSs To Be Open Competition Trading Centers

As an alternative, the Commission could choose to allow NMS Stock ATSs to qualify as open competition trading centers and be eligible to run qualified auctions without imposing the requirements of proposed Rule 600(b)(64)(ii). However, any average daily NMS stock volume threshold that would apply to exchanges for being able to run qualified auctions would also apply to NMS Stock ATSs.[733] This would mean that the NMS Stock ATS would not be required to display quotes that are disseminated in consolidated market data, although it would still need to subscribe to the ADF so that its qualified auction messages are included in consolidated data. Additionally, if the NMS Stock ATS was not subject to the fair access requirements of Rule 301(b)(5), then it would be allowed to limit subscriber access to its ATS and to its qualified auction mechanisms. However, the NMS Stock ATS's

[731] Both the Proposal and this alternative would allow beyond-the-midpoint non-marketable limit orders to be routed to an exchange LOB instead of being submitted to qualified auctions. Therefore, this alternative may result in a similar portion of individual investor beyond-the-midpoint non-marketable limit orders being routed to exchange LOBs as under the Proposal.

[732] Under the Proposal, NMS stock ATSs operating qualified auctions may have had a competitive advantage over exchanges in the sense that they would have more flexibility in making changes to their qualified auctions, because their changes would not be subject to notice, comment, and Commission approval, like exchanges would.

[733] Either the proposed 1% average daily volume threshold or a higher or lower threshold (including zero percent) as discussed in *supra* section VII.D.5.a.

qualified auction would still be limited by any of the qualified auction requirements, either proposed Rule 615(c) or one of the alternatives discussed in section VII.D.3.

This alternative would make it easier for an NMS Stock ATS to operate a qualified auction and result in more NMS Stock ATSs operating qualified auctions compared to the Proposal. On the one hand, this could enhance competition between venues running qualified auctions and encourage more innovation in qualified auctions. However, NMS Stock ATSs operating qualified auctions would have a greater competitive advantage over exchanges. Compared to exchanges, they could limit access to their platform and the market participants that would be eligible to participate in qualified auctions.[734] Although they would have to charge the same fees and rebates to all bidders in the qualified auctions, they would have more flexibility in bundling other aspects of their ATS or services to give an advantage to some subscribers over others, which may allow these subscribers an indirect advantage in bidding in qualified auctions. This may limit competition among liquidity suppliers in these qualified auctions. NMS Stock ATSs that operate qualified auctions may also be a more attractive destination for some broker-dealers to route segmented orders because they may give the broker-dealer routing the order an increased chance of being able to trade with the segmented order compared to qualified auctions operated by exchanges. These competitive advantages of NMS Stock ATSs operating qualified auctions may limit the incentives for exchanges to operate qualified auctions, which could reduce competition between venues running qualified auctions.

6. Wholesaler Information Barriers

As an alternative, the Commission could establish a new information barrier rule specifying new policies and procedures for wholesalers that must be part of the policies and procedures for protecting material, non-public information that Exchange Act Section 15(g) requires of all broker-dealers. The new rule would require wholesalers to not share information on customer order flow, either on individual orders or in aggregate, outside of the wholesaler business functions that were responsible for the handling and execution of the customer orders. This would prevent wholesalers from sharing this information with other business units and affiliates that may engage in proprietary trading or other business functions not related to the handling or execution of the customer order. The rule particularly would focus on assuring that customer order information is not used in a way that would detract from the interests of customers in obtaining best execution of their orders.

A wholesaler information barrier rule would result in greater protection of customer order information at wholesalers, which would improve investor protection. It may also improve customer order execution quality by reducing the chance that another trader will be able to use customer order information to trade ahead of or adjust liquidity to disadvantage the customer order. This rule may reduce the profits of other wholesaler lines of business or affiliates that may have benefited from customer order information. This may reduce the incentives for wholesalers to handle individual investor orders, which may reduce the amount of price improvement they offer to individual investor orders or the PFOF they pay to retail brokers. To the extent that the use of this information by other wholesaler business lines increases information asymmetries and adverse selection risk for other market participants, the rule may reduce adverse selection risk faced by other liquidity providers, which could improve market quality.

7. Display Quotes in Retail Liquidity Programs

As an alternative the Commission could allow national securities exchanges to display the price and size of quotes in their RLP programs on their proprietary feeds and in the consolidated market data feed. Under this alternative, exchanges would not execute as large a share of marketable individual investor orders as under the Proposal. Instead, the majority of marketable individual investor orders would still be internalized by wholesalers. This would occur because liquidity providers quoting in exchange RLP programs would not know the identity of the retail broker of the marketable individual investor orders they are trading against. Therefore, they would usually need to set their quotes in the RLP programs wider to account for the risk of trading with individual investor order flow that imposed greater adverse selection risk. However, wholesalers would know the identity of the retail broker of the order they were handling. This means wholesalers could avoid internalizing individual investor order flow that posed greater adverse selection risk and give greater price improvement to individual investor orders with less adverse selection risk.

On average, marketable individual investor orders would receive less price improvement under this alternative than the Proposal because wholesalers would not need to compete on an order by order basis when they internalize an individual investor order. Institutional investor transaction costs would also be higher than under the Proposal because they would not be able to trade with marketable individual investor orders as frequently. A lack of order-by-order competition would also allow wholesalers to pay more PFOF to retail brokers than under the proposal, since wholesalers would be able to internalize order flow at more profitable spreads relative to those that would emerge under qualified auctions. From this increased profitability, wholesalers would be able to pay more PFOF. Increased PFOF revenue would reduce the incentive for broker-dealers to generate new revenue lines or expand existing revenue lines. Therefore, under this alternative there would not be as significant a change in retail broker business models.

Compared to the baseline, there would be greater transparency in the liquidity available to the marketable orders of individual investors. This could increase competition between exchange RLPs and wholesalers for the execution of individual investor marketable orders and result in more individual investor orders being executed in exchange RLPs (although the majority of individual investor orders would still likely be internalized by wholesalers). Because broker-dealers would be able to see the displayed quotes in RLPs, when marketable orders of individual investors are routed to execute in RLPs, it may be because the quoted prices in the RLP were better than the prices the wholesaler would have been willing to internalize the individual investor order at. Additionally, the increase in competition may result in wholesalers offering more price improvement to the marketable orders of individual investors to attract order flow from retail brokers. Both of these effects may result in lower trading costs for marketable orders of individual investors compared to the baseline. However, if wholesalers earn lower marginal profits from internalizing the orders of individual investors, they may reduce the amount of PFOF they pay to retail brokers that accept PFOF, which could indirectly get passed through to the retail brokers'

[734] Additionally, NMS stock ATSs would have more flexibility in making changes to their qualified auctions, because their changes would not be subject to notice, comment, and Commission approval, like exchanges would.

customers in the form of reduced services or an increased risk of the retail broker charging commissions.

8. Creation of a Retail Best Bid and Offer

As an alternative, in addition to displaying quotes in RLPs, the Commission could introduce a new, smaller-sized benchmark from the NBBO for segmented orders. The new benchmark would be called the Retail Best Bid and Offer (''RBBO''). It would be constructed similar to the NBBO, but the threshold for determining when an exchange's quotes qualified for the RBBO would be based on a $500 notional value. It would also incorporate information from smaller odd lot quotations and quotes from exchange RLPs, which would be aggregated up across multiple price levels by individual exchanges until they exceeded a value of $500 or greater. The least aggressive price level from this aggregation would be sent to the SIP for the purposes of determining the RBBO. The RBBO would be a protected quote for the purposes of executing segmented orders and would also be added as a benchmark in Rule 605 reports for calculating price improvements statistics for segmented orders.

Compared to the Proposal, this alternative would result in wholesalers internalizing a larger share of marketable orders of individual investors and fewer such orders being executed on exchanges. Although quotes in RLPs and smaller odd-lot quotes would be protected with respect to segmented orders, liquidity providers quoting in exchange RLPs would usually need to set their quotes in the RLPs wider than the prices at which wholesalers might internalize individual investor orders to account for the risk of trading with individual investor order flow that imposed greater adverse selection risk.[735]

On average, marketable orders of individual investors would receive less price improvement under this alternative than the Proposal because wholesalers would not need to compete on an order by order basis when they internalize an individual investor order. Institutional investor trading costs would also be higher than under the Proposal because they would not be able to trade with marketable orders of individual investors as frequently. A lack of order by order competition would also allow wholesalers to pay more PFOF to retail brokers than under the Proposal. Therefore, there would not be as significant improvements in retail broker business models.

However, compared to the baseline, there would be more price improvement and lower trading costs for marketable orders of individual investors. This would occur because wholesalers would need to offer price improvement against a tighter benchmark in order to internalize a segmented order. The disclosure of price improvement against the NBBO in Rule 605 reports might also enhance competition among wholesalers to offer greater price improvement in order to attract more order flow from retail brokers.

9. Disclosure of Execution Quality of Individual Investor Orders

Instead of requiring that segmented orders be routed to qualified auctions, the Commission could require that execution quality information concerning an individual investor's order be disclosed on their transaction confirmations. Specifically, under this alternative retail brokers would be required to disclose information on the number of shares executed, the price improvement relative to the NBBO, the effective-to-quoted spread ratio, and time to execution. This information would be provided along with the confirmation of each trade to the customer who had placed the order, enhancing transparency on each individual investor's own execution quality.

The Commission believes that this disclosure would not significantly increase transparency regarding how execution quality varies across retail brokers for two reasons. First, reflecting their small scale of trading activity, most individual investors rely on a single retail broker that executes orders on their behalf. As such, most customers would never have a chance to compare the execution quality of their trades via a given retail broker to similar executions at another retail broker. Second, even if a customer used services of more than one retail broker contemporaneously, the small sample of that individual investor's execution quality metrics as well as differences between the orders of the customer that were handled by different retail brokers may lead to misleading inferences about execution quality differences across brokers.

The Commission also believes that the benefits of this alternative are limited relative to the Proposal because marketable individual investor orders would remain mostly isolated, *i.e.,* mostly executed by the wholesaler handling these orders. A lack of interaction with trading interest from other market participants would prevent the execution quality improvements that would otherwise obtain under the Proposal. As such, there would be less of an increase in price improvement (and reduction in transaction costs) for individual investors compared to the Proposal. Additionally, compared to the Proposal, this alternative would not provide other market participants, including institutional investors, as great a chance to directly interact with order flow from individual investors, which may result in institutional investors receiving worse order execution quality compared to the Proposal.

E. Request for Comments

The Commission requests comment on all aspects of this initial economic analysis, including whether the analysis has: (1) identified all benefits and costs, including all effects on efficiency, competition, and capital formation; (2) given due consideration to each benefit and cost, including each effect on efficiency, competition, and capital formation; and (3) identified and considered reasonable alternatives to the proposed new rules and rule amendments. The Commission requests and encourages any interested person to submit comments regarding the proposed rules, the Commission's analysis of the potential effects of the proposed rules and proposed amendments, and other matters that may have an effect on the proposed rules. The Commission requests that commenters identify sources of data and information as well as provide data and information to assist us in analyzing the economic consequences of the proposed rules and proposed amendments. The Commission also is interested in comments on the qualitative benefits and costs identified and any benefits and costs that may have been overlooked. In addition to our general request for comments on the economic analysis associated with the proposed rules and proposed amendments, the Commission requests specific comment on certain aspects of the proposal:

38. Do commenters believe the Commission has adequately described the market failures due to the existing structure of U.S. stock markets? Why or why not?

39. Do commenters agree with the Commission's qualitative and quantitative baseline descriptions of the structure of trading for NMS stocks, including trading service, broker services, and access to market centers? Why or why not?

[735] Wholesalers would still know the identity of the retail broker whose orders they internalize. Compared to liquidity suppliers in exchange RLP programs, they would likely be able to further sub-segment individual investor order flow when considering how much price improvement to offer.

40. Do commenters agree with the Commission's qualitative and quantitative baseline descriptions of order routing behavior of retail brokers? Why, or why not?

41. Do commenters agree with the Commission's assessment of execution quality and fill rates of individual investor orders in NMS stocks? Why, or why not?

42. Do commenters agree with the Commission's assessment of brokers' handling of fractional individual investor orders? Why or why not?

43. Do commenters agree with the Commission's characterization of individual investor order flow segmentation by wholesalers? Why, or why not?

44. Do commenters agree with the Commission's characterization of the interaction between wholesalers and institutional investors? Please explain why, or why not?

45. Do commenters agree with the Commission's description of market making expenses of wholesalers? What other types of such market making costs should be considered? Please provide conceptual and quantitative context.

46. Do commenters agree with the Commission's description of the trade-off between PFOF and execution quality of individual investor orders faced by PFOF receiving retail brokers, driven by the business models of these brokers and the wholesalers who offer PFOF? Why, or why not?

47. Do commenters agree with the Commission's descriptions of different aspects of retail brokers' business models? Why, or why not?

48. Do commenters agree the Commission's assessment of conflict of interests on the parts of wholesalers and PFOF receiving brokers? Please explain your reasoning.

49. Do commenters agree with the Commission's assessment of the impacts of such conflicts of interest on the execution quality of individual investor orders? Why or why not?

50. Do commenters agree with the Commission that a lack of order-by-order competition is a key missing component in the individual investor order execution process? Please explain why or why not.

51. Do commenters agree with Commission's assessment that retail brokers' use of past execution quality metrics to determine the allocation of current individual investor order flow across wholesalers may lead to poor execution quality for some individual investor orders? Why or why not?

52. Do commenters agree with the Commission that the existing execution practices for individual investor orders makes the portion of individual investor order flow with the least adverse selection risk inaccessible to other market participants, including institutional investors? Please explain why or why not.

53. Do commenters agree with the Commission's assessment that the ability of wholesalers to choose which orders to internalize and which ones to allow to interact with trading interest with other market participants places wholesalers at a competitive advantage? Why or why not?

54. Do commenters agree that the proposed Rule would improve competition, including in the market for trading service and the market for broker-dealer services? Why or why not?

55. Do you agree with the Commission that the proposed Rule would lower trading costs to individual and institutional investors, enhance individual investor order execution quality and price discovery, and improve efficiency in the operations of retail brokers? Please explain why or why not?

56. Does the Economic Analysis in this release account for all compliance costs? If not, what other compliance cost would market participants or exchanges incur? Please provide estimates of the additional compliance costs that you believe should be considered.

57. Does the Economic Analysis in this release account for all relevant costs? If not, which other costs should the economic analysis consider? Please provide estimates of additional costs, other than compliance costs, that you believe should be considered.

58. Do commenters agree with the Commission's assessment of how the Proposed Rule would impact efficiency and capital formation? Why, or why not? Please explain.

59. Do commenters agree with the Commission's analysis of the benefits and costs of the reasonable alternatives to the Proposed Rule? Why, or why not? Please explain.

60. Are there any additional reasonable alternatives the Commission should consider? If so, please describe that alternative and provide the benefits and costs of that alternative relative to the baseline and to the proposed Rule.

61. Should the Commission specify a minimum set of auction standards as part of the reasonable alternative to allow open competition trading centers more flexibility in designing qualified auctions? If so, what minimum set of auction standards should the Commission specify and why? Please explain. What would be the costs and benefits or other economic effects of specifying this minimum set of auctions standards? Should the Commission specify a minimum auction duration as part of this alternative? Why or why not? If so, what minimum auction duration should the Commission specify? Please explain and provide as much analysis and discussion as possible. Should the Commission specify that execution priority shall not be based on time of receipt of the auction response as part of this alternative? Why or why not? Please explain.

62. Instead of requiring the consolidated tapes to amend their plans to include qualified auction messages, should the Commission accelerate the inclusion of all auction information in NMS data from the MDI Rules? What would be the costs and benefits or other economic effects of accelerating the inclusion of all auction information in NMS data? How would such an acceleration impact eventual competition among competing consolidators or the realization of the anticipated costs and benefits of the MDI Rules? Please explain.

VIII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'')[736] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act,[737] as amended by the RFA, generally requires the Commission to undertake an initial regulatory flexibility analysis of the impact of the proposed rule amendments on ''small entities.''[738] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant impact on a substantial number of small entities.[739]

Certification for Proposed Rule 615 and the Related Amendments

Proposed Rule 615 and the proposed related amendments are discussed in detail in section IV (Description of Proposed Rule 615) above. The economic impact, including the estimated compliance costs and burdens, of Proposed Rule 615 are

[736] 5 U.S.C. 601 *et seq.*

[737] 5 U.S.C. 603(a).

[738] Although section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term ''small entity'' for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10 under the Exchange Act, 17 CFR 240.0–10.

[739] 5 U.S.C. 605(b).

discussed in section VI (Paperwork Reduction Act Analysis) and section VII (Economic Analysis). As discussed above in those sections, Proposed Rule 615 and the proposed related amendments would have an impact on certain broker-dealers, NMS Stock ATSs, national securities exchanges, and national securities associations.

Impact on Broker-Dealers

Although section 601(b) of the RFA defines the term ''small business,'' as stated above, the statute permits agencies to formulate their own definitions, and for purposes of Commission rulemaking in connection with the RFA, a small business includes a broker or dealer that: (1) had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[740] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[741] Applying this test and based on a review of data relating to broker-dealers,[742] the Commission estimates, as discussed below, that of the 3,498 broker-dealers, there are only 4 that would be ''small entities'' and also in the scope of Proposed Rule 615.

Proposed Rule 615(a) would apply to any restricted competition center that executes internally segmented orders in NMS stocks. Restricted competition trading centers would include NMS Stock ATSs that do not meet the definition of open competition trading center, and, with the exception of national securities exchanges, any other trading center that executes segmented orders, which would include certain broker-dealers. The Commission has identified no broker-dealers that likely execute internally orders for customer accounts that would be ''small entities.''

Proposed Rule 615 and the related amendments would also apply to any broker or dealer that could potentially handle segmented orders. As discussed in section VI, this would include the 157 broker-dealers that the Commission has identified that carry customer accounts, and would be in the scope of Proposed Rule 615. Of these, the Commission has identified 1 that may be a ''small entity.'' Also as discussed in section VI, the Commission has identified 25 broker-dealers that may fall within the scope of Proposed Rule 615 because, although they report that do not carry customer accounts, they report that they do effect public customer transactions in equity securities on a national securities exchange or OTC and likely are acting as ''executing brokers.'' Of these, the Commission has identified 3 that may potentially be engaged in lines of business that would make them within the scope of Proposed Rule 615 and that may also be ''small entities.'' Finally, as discussed in section VI, the Commission has identified 1,267 broker-dealers that would likely be ''originating brokers'' with responsibility for monitoring customer accounts that could potentially fall within the scope of Proposed Rule 615. Of these, however, the Commission concludes that none of the approximately 20 broker-dealers that the Commission estimates would fall within the scope of Proposed Rule 615, because they may make the certification referred to in paragraph (c)(1) of Proposed Rule 615,[743] would be ''small entities.''

Impact on National Securities Exchanges, National Securities Associations, and NMS Stock ATSs

Also as discussed above in sections IV, VI and VII, Proposed Rule 615 and the proposed related amendments would impose requirements on national securities exchanges, national securities associations, and NMS Stock ATSs. With respect to national securities exchanges, the Commission's definition of a small entity is an exchange that has been exempt from the reporting requirements of Rule 601 of Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[744] Applying this test, no national securities exchange is a small entity. The only national securities association, is also not a ''small entity.'' [745]

With respect to NMS Stock ATSs, all ATSs, including NMS Stock ATSs, are required to register as broker-dealers.[746] The Commission examined recent FOCUS data for the broker-dealers that operate the 32 NMS Stock ATSs and applying the test for broker-dealers described above [747] believes that none of the NMS Stock ATSs currently trading were operated by a broker-dealer that is a ''small entity.''

For the above reasons, the Commission certifies that Proposed Rule 615 and the proposed related amendments would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

The Commission requests written comments regarding this certification. The Commission invites commenters to address whether the proposed rules would have a significant impact on a substantial number of small entities, and requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

IX. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of

[740] 17 CFR 240.17a–5(d).

[741] *See* 17 CFR 240.0–10(c); *see also* 17 CFR 240.0–10(i) (providing that a broker or dealer is affiliated with another person if: such broker or dealer controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25% or more of the voting securities of such other person or is entitled to receive 25% or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person; or such broker or dealer introduces transactions in securities, other than registered investment company securities or interests or participations in insurance company separate accounts, to such other person, or introduces accounts of customers or other brokers or dealers, other than accounts that hold only registered investment company securities or interests or participations in insurance company separate accounts, to such other person that carries accounts on a fully disclosed basis).

[742] The Commission considered FOCUS data and information about broker-dealers made publicly available by FINRA through reports *available at https://brokercheck.finra.org/*.

[743] *Supra* section VI.C.3 (discussing which broker-dealers would likely certify that they established, maintained, and enforced policies and procedures reasonably designed to assure that the identity of the originating broker will not be disclosed, directly or indirectly, to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order).

[744] *See* 17 CFR 240.0–10(e) (providing that when used with reference to an exchange, means any exchange that: (1) has been exempted from the reporting requirements of Rule 601; and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization); *see also* 17 CFR 240.0–10(i) (providing that a person is affiliated with another person if that person controls, is controlled by, or is under common control with such other person; and a person shall be deemed to control another person if that person has the right to vote 25% or more of the voting securities of such other person or is entitled to receive 25% or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person).

[745] *See* 13 CFR 121.201.

[746] Rule 301(b)(1) of Regulation ATS. Also, while a national securities exchanges can operate an ATS, subject to certain conditions, such an ATS would have to be registered as a broker-dealer. *See* Regulation ATS Adopting Release, *supra* note 27, at 70891. Currently, no national securities exchange operates an ATS that trades NMS stocks.

[747] *Supra* note 741 and accompanying text.

1996, or ''SBREFA,'' [748] the Commission must advise OMB whether a proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effects on competition, investment, or innovation. The Commission requests comment on the potential effect of the proposed amendments on the U.S. economy on an annual basis; any potential increase in costs or prices for consumers or individual industries; and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

Statutory Authority

Pursuant to the Exchange Act (15 U.S.C. 78a *et seq.*), and particularly sections 3(b), 5, 6, 11A, 15, 15C, 17(a), 17(b), 19, 23(a), and 36 thereof (15 U.S.C. 78c(b), 78e, 78f, 78k–1, 78o, 78o–5, 78q(a), 78q(b), 78s, 78w(a), and 78mm), the Commission proposes to amend parts 240 and 242 of chapter II of title 17 of the Code of Federal Regulations as follows:

List of Subjects in 17 CFR Parts 240 and 242

Brokers, Reporting and recordkeeping requirements, Securities.

Text of the Proposed Rule and Amendments

For the reasons stated in the preamble, the Commission is proposing to amend title 17, chapter II of the Code of Federal Regulations:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT of 1934

■ 1. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

[748] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

§ 240.3a51–1 [Amended]

■ 2. Amend § 240.3a51–1 by, in paragraph (a), removing the text ''§ 242.600(b)(55)'' and adding in its place ''§ 242.600(b)(58)''.

§ 240.13h–1 [Amended]

■ 3. Amend § 240.13h–1 by, in paragraph (a)(5), removing the text ''§ 242.600(b)(54)'' and adding in its place ''§ 242.600(b)(57)''.

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 4. The authority for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l,* 78m, 78n, 78*o*(b), 78*o*(c), 78*o*(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

§ 242.105 [Amended]

■ 5. Amend § 242.105 by:
■ a. In paragraph (b)(1)(i)(C), removing the text ''§ 242.600(b)(30)'' and adding in its place ''§ 242.600(b)(33)''.
■ b. In paragraph (b)(1)(ii), removing the text ''§ 242.600(b)(77)'' and adding in its place ''§ 242.600(b)(84)''.

§ 242.201 [Amended]

■ 6. Amend § 242.201 by:
■ a. In paragraph (a)(1), removing the text ''§ 242.600(b)(55)'' and adding in its place ''§ 242.600(b)(58)''.
■ b. In paragraph (a)(2), removing the text ''§ 242.600(b)(30)'' and adding in its place ''§ 242.600(b)(33)''.
■ c. In paragraph (a)(3), removing the text ''§ 242.600(b)(68)'' and adding in its place ''§ 242.600(b)(74)''.
■ d. In paragraph (a)(4), removing the text ''§ 242.600(b)(50)'' and adding in its place ''§ 242.600(b)(53)''.
■ e. In paragraph (a)(5), removing the text ''§ 242.600(b)(58)'' and adding in its place ''§ 242.600(b)(62)''.
■ f. In paragraph (a)(6), removing the text ''§ 242.600(b)(67)'' and adding in its place ''§ 242.600(b)(73)''.
■ g. In paragraph (a)(7), removing the text ''§ 242.600(b)(77)'' and adding in its place ''§ 242.600(b)(84)''.
■ h. In paragraph (a)(9), removing the text ''§ 242.600(b)(95)'' and adding in its place ''§ 242.600(b)(105)''.

§ 242.204 [Amended]

■ 7. Amend § 242.204 by:
■ a. In paragraph (g)(2), removing the text ''§ 242.600(b)(77) (Rule 600(b)(77) of Regulation NMS)'' and adding in its place ''§ 242.600(b)(84) (Rule 600(b)(84) of Regulation NMS)''.
■ 8. Amend § 242.600 by:
■ a. In paragraph (b) introductory text, removing the text ''(§§ 242.600 through 242.612)'' and adding in its place ''(§§ 242.600 through 242.615)'';
■ b. Redesignating paragraphs (b)(3) through (100) as follows:

Old paragraph	New paragraph
(b)(3)	(b)(4)
(b)(4)	(b)(5)
(b)(5)	(b)(6)
(b)(6)	(b)(7)
(b)(7)	(b)(8)
(b)(8)	(b)(9)
(b)(9)	(b)(10)
(b)(10)	(b)(11)
(b)(11)	(b)(12)
(b)(12)	(b)(13)
(b)(13)	(b)(14)
(b)(14)	(b)(15)
(b)(15)	(b)(16)
(b)(16)	(b)(17)
(b)(17)	(b)(18)
(b)(18)	(b)(19)
(b)(19)	(b)(20)
(b)(20)	(b)(21)
(b)(21)	(b)(24)
(b)(22)	(b)(25)
(b)(23)	(b)(26)
(b)(24)	(b)(27)
(b)(25)	(b)(28)
(b)(26)	(b)(29)
(b)(27)	(b)(30)
(b)(28)	(b)(31)
(b)(29)	(b)(32)
(b)(30)	(b)(33)
(b)(31)	(b)(34)
(b)(32)	(b)(35)
(b)(33)	(b)(36)
(b)(34)	(b)(37)
(b)(35)	(b)(38)
(b)(36)	(b)(39)
(b)(37)	(b)(40)
(b)(38)	(b)(41)
(b)(39)	(b)(42)
(b)(40)	(b)(43)
(b)(41)	(b)(44)
(b)(42)	(b)(45)
(b)(43)	(b)(46)
(b)(44)	(b)(47)
(b)(45)	(b)(48)
(b)(46)	(b)(49)
(b)(47)	(b)(50)
(b)(48)	(b)(51)
(b)(49)	(b)(52)
(b)(50)	(b)(53)
(b)(51)	(b)(54)
(b)(52)	(b)(55)
(b)(53)	(b)(56)
(b)(54)	(b)(57)
(b)(55)	(b)(58)
(b)(56)	(b)(60)
(b)(57)	(b)(61)
(b)(58)	(b)(62)
(b)(59)	(b)(63)
(b)(60)	(b)(65)
(b)(61)	(b)(66)
(b)(62)	(b)(67)
(b)(63)	(b)(68)
(b)(64)	(b)(70)
(b)(65)	(b)(71)
(b)(66)	(b)(72)
(b)(67)	(b)(73)
(b)(68)	(b)(74)
(b)(69)	(b)(75)
(b)(70)	(b)(76)
(b)(71)	(b)(77)

Old paragraph	New paragraph
(b)(72)	(b)(78)
(b)(73)	(b)(79)
(b)(74)	(b)(80)
(b)(75)	(b)(82)
(b)(76)	(b)(83)
(b)(77)	(b)(84)
(b)(78)	(b)(85)
(b)(79)	(b)(86)
(b)(80)	(b)(88)
(b)(81)	(b)(89)
(b)(82)	(b)(90)
(b)(83)	(b)(92)
(b)(84)	(b)(93)
(b)(85)	(b)(94)
(b)(86)	(b)(95)
(b)(87)	(b)(96)
(b)(88)	(b)(97)
(b)(89)	(b)(98)
(b)(90)	(b)(99)
(b)(91)	(b)(101)
(b)(92)	(b)(102)
(b)(93)	(b)(103)
(b)(94)	(b)(104)
(b)(95)	(b)(105)
(b)(96)	(b)(106)
(b)(97)	(b)(107)
(b)(98)	(b)(108)
(b)(99)	(b)(109)
(b)(100)	(b)(110)

■ c. Adding new paragraphs (b)(3), (b)(22), (b)(23), (b)(59), (b)(64), (b)(69), (b)(81), (b)(87), (b)(91), and (b)(100).

The additions read as follows:

§ 242.600 NMS security designation and definitions.

* * * * *

(b) * * *

(3) *Affiliate* means, with respect to a specified person, any person that, directly or indirectly, controls, is under common control with, or is controlled by, the specified person.

* * * * *

(22) *Continuous order book* means a system that allows orders for NMS stocks to be accepted and executed on a continuous basis.

(23) *Control* means the power, directly or indirectly, to direct the management or policies of a broker, dealer, or open competition trading center, whether through ownership of securities, by contract, or otherwise. A person is presumed to control a broker, dealer, or open competition trading center if that person:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions);

(ii) Directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the broker, dealer, or open competition trading center; or

(iii) In the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the broker, dealer, or open competition trading center.

* * * * *

(59) *NMS Stock ATS* has the meaning provided in § 242.300(k).

* * * * *

(64) *Open competition trading center* means either:

(i) A national securities exchange that:

(A) Operates an SRO trading facility that is an automated trading center and displays automated quotations that are disseminated in consolidated market data pursuant to § 242.603(b);

(B) Provides transaction reports identifying the national securities exchange as the venue of execution that are disseminated in consolidated market data pursuant to § 242.603(b);

(C) During at least four of the preceding 6 calendar months, had an average daily share volume of 1.0 percent or more of the aggregate average daily share volume for NMS stocks as reported by an effective transaction reporting plan; and

(D) Operates pursuant to its own rules providing that the national securities exchange will comply with the requirements of § 242.615(c) for a qualified auction; or

(ii) An NMS Stock ATS that:

(A) Displays quotations through an SRO display-only facility in compliance with § 242.610(b);

(B) Operates as an automated trading center and displays automated quotations that are disseminated in consolidated market data pursuant to § 242.603(b);

(C) Provides transaction reports identifying the NMS Stock ATS as the venue of execution that are disseminated in consolidated market data pursuant to § 242.603(b);

(D) Permits any registered broker or dealer to become a subscriber of the NMS Stock ATS; provided, however, the NMS Stock ATS:

(*1*) Shall not permit any registered broker or dealer subject to a statutory disqualification to be or become a subscriber; and

(*2*) May, pursuant to written policies and procedures, prohibit any registered broker or dealer from being or becoming a subscriber, or impose conditions upon such a subscriber, that does not meet the standards of financial responsibility or operational capability as are prescribed by such written policies and procedures;

(E) Provides equal access among all subscribers of the NMS Stock ATS and the registered broker-dealer of the NMS Stock ATS to all services that are related to:

(*1*) A qualified auction operated by the NMS Stock ATS under § 242.615(c); and

(*2*) Any continuous order book operated by the NMS Stock ATS;

(F) During at least four of the preceding six calendar months, had an average daily share volume of 1.0 percent or more of the aggregate average daily share volume for NMS stocks as reported by an effective transaction reporting plan; and

(G) Operates pursuant to an effective Form ATS–N under § 242.304, and such Form ATS–N evidences compliance by the NMS Stock ATS with the requirements of § 242.615(c) for a qualified auction and with the provisions of paragraphs (b)(64)(ii)(A) through (b)(64)(ii)(F) of this section.

* * * * *

(69) *Originating broker* means any broker with responsibility for handling a customer account, including, but not limited to, opening and monitoring the customer account and accepting and transmitting orders for the customer account.

* * * * *

(81) *Qualified auction* means an auction that is operated by an open competition trading center pursuant to § 242.615(c).

* * * * *

(87) *Restricted competition trading center* means any trading center that is not an open competition trading center and is not a national securities exchange.

* * * * *

(91) *Segmented order* means an order for an NMS stock that is for an account:

(i) Of a natural person or an account held in legal form on behalf of a natural person or group of related family members; and

(ii) In which the average daily number of trades executed in NMS stocks was less than 40 in each of the six preceding calendar months.

(iii) For purposes of this paragraph (b)(91), group of related family members means a group of natural persons with any of the following relationships: child, stepchild, grandchild, great grandchild, parent, stepparent, grandparent, great grandparent, domestic partner, spouse, sibling, stepbrother, stepsister, niece, nephew, aunt, uncle, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, including adoptive and foster relationships; and any other natural person (other than a tenant or employee)

sharing a household with any of the foregoing natural persons.

* * * * *

(100) *Subscriber* has the meaning provided in § 242.300(b).

* * * * *

§ 242.602 [Amended]

■ 9. Amend § 242.602 by, in paragraphs (a)(5)(i) and (ii), removing the text ''§ 242.600(b)(90)'' and adding in its place ''§ 242.600(b)(99)''.

§ 242.611 [Amended]

■ 10. Amend § 242.611 by, in paragraph (c), removing the text ''§ 242.600(b)(38)'' and adding in its place ''§ 242.600(b)(41)''.

§ 242.614 [Amended]

■ 11. Amend § 242.614 by, in paragraphs (d)(1), (2), and (3), removing the text ''§ 242.600(b)(20)'' and adding in its place ''§ 242.600(b)(21)''.

■ 12. Add § 242.615 to read as follows:

§ 242.615 Order competition rule.

(a) *Order competition requirement.* A restricted competition trading center shall not execute internally a segmented order for an NMS stock until after a broker or dealer has exposed such order to competition at a specified limit price in a qualified auction that meets the requirements of paragraph (c) of this section and is operated by an open competition trading center. If the segmented order is not executed in the qualified auction, a restricted competition trading center may, as soon as reasonably possible, execute the segmented order internally at a price that is equal to or more favorable for the segmented order than the specified limit price in the qualified auction.

(b) *Exceptions.* The order competition requirement of paragraph (a) of this section shall not apply if:

(1) The segmented order is received and executed by the restricted competition trading center during a time period when no open competition trading center is operating a qualified auction for the segmented order;

(2) The market value of the segmented order is at least $200,000 calculated with reference to the midpoint of the national best bid and national best offer when the segmented order is received by the restricted competition trading center;

(3) The segmented order is executed by the restricted competition trading center at a price that is equal to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the restricted competition trading center;

(4) The segmented order is a limit order with a limit price selected by the customer that is equal to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the restricted competition trading center; or

(5) The segmented order is received and executed by the restricted competition trading center during a time period when no open competition trading center is operating a qualified auction for the segmented order that accepts orders that are not entirely in whole shares, and the customer selected a size for a segmented order that is not entirely in whole shares of an NMS stock, in which case any portion of such segmented order that is less than one whole share of the NMS stock, and only such portion, shall not be subject to the order competition requirement of paragraph (a) of this section.

(c) *Qualified auction requirements.* An open competition trading center shall comply with the following requirements for operation of a qualified auction for segmented orders.

(1) *Auction message.* (i) An auction message announcing the initiation of a qualified auction for a segmented order shall be provided for dissemination in consolidated market data pursuant to § 242.603(b). Each such auction message shall invite priced auction responses to trade with a segmented order and shall include the identity of the open competition trading center and the symbol, side, size, limit price, and identity of the originating broker for the segmented order.

(ii) If more than one broker is an originating broker for a segmented order, the originating broker identified pursuant to paragraph (c)(1)(i) of this section shall be the broker responsible for approving the opening of accounts with customers.

(iii) Notwithstanding the provisions of paragraph (c)(1)(i) of this section, the identity of the originating broker shall not be disclosed in the auction message if such originating broker certifies that it has established, maintained, and enforced written policies and procedures reasonably designed to assure that the identity of the originating broker will not be disclosed, directly or indirectly, to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order, and the originating broker's certification is communicated to the open competition trading center conducting the qualified auction.

(2) *Auction responses.* An open competition trading center shall accept auction responses for a period of at least 100 milliseconds after an auction message is provided for dissemination in consolidated market data and shall end the auction not more than 300 milliseconds after an auction message is provided for dissemination in consolidated market data. Auction responses shall remain undisplayed during the auction period and not disseminated at any time thereafter.

(3) *Pricing increments.* Segmented orders and auction responses shall be priced in an increment of no less than $0.001 for segmented orders and auction responses with prices of $1.00 or more per share, in an increment of no less than $0.0001 for segmented orders and auction responses with prices of less than $1.00 per share, or at the midpoint of the national best bid and national best offer.

(4) *Fees and rebates.* No fee shall be charged for submission or execution of a segmented order. No fee shall be charged for submission of an auction response. The fee for execution of an auction response shall not exceed $0.0005 per share for auction responses priced at $1.00 per share or more, shall not exceed 0.05% of the auction response price per share for auction responses priced at less than $1.00 per share, and otherwise shall be the same rate for executed auction responses in all auctions. Any rebate for the submission or execution of a segmented order or for the submission or execution of an auction response shall not exceed $0.0005 per share for segmented orders or auction responses priced at $1.00 per share or more, shall not exceed 0.05% of the segmented order or auction response price per share for segmented orders or auction responses priced at less than $1.00 per share, and otherwise shall be the same rate for segmented orders in all auctions and shall be the same rate for auction responses in all auctions.

(5) *Execution priority of auction responses and resting orders.* (i) The highest priced auction responses to buy and the lowest priced auction responses to sell shall have priority of execution.

(ii) Auction responses for the account of a customer shall have priority over auction responses for the account of a broker or dealer at the same price.

(iii) As long as an auction response is received within the prescribed time period, execution priority shall not be based on time of receipt of the auction response.

(iv) The terms of execution priority shall not favor the broker or dealer that routed the segmented order to the auction, the originating broker for the segmented order, the open competition

trading center operating the auction, or any affiliate of the foregoing persons.

(v) Orders resting on a continuous order book of the open competition trading center operating the qualified auction at the conclusion of an auction period shall have priority over auction responses at a less favorable price for the segmented order. Displayed orders resting on a continuous order book of the open competition trading center operating the qualified auction shall have priority over auction responses at the same price. Auction responses shall have priority over undisplayed orders resting on a continuous order book of the open competition trading center operating the qualified auction at the same price.

(d) *Open competition trading centers.* (1) A national securities exchange or NMS Stock ATS shall not operate a qualified auction for segmented orders unless it complies with the provisions of this section and meets the definition of open competition trading center in § 242.600(b)(64).

(2) An open competition trading center shall not operate a system, other than a qualified auction, that is limited, in whole or in part, to the execution of segmented orders unless any segmented order executed through such system:

(i) Is received and executed by the open competition trading center during a time period when no open competition trading center is operating a qualified auction for the segmented order;

(ii) Has a market value of at least $200,000 calculated with reference to the midpoint of the national best bid and national best offer when the segmented order is received by the open competition trading center; or

(iii) Is executed by the open competition trading center at a price that is equal to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the open competition trading center.

(iv) Is a limit order with a limit price selected by the customer that is equal to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the open competition trading center; or

(v) Is received and executed by the open competition trading center during a time period when no open competition trading center is operating a qualified auction for the segmented order that accepts orders that are not entirely in whole shares, and is a size, selected by the customer, that is not entirely in whole shares of an NMS stock, in which case any portion of such segmented order that is less than one whole share of the NMS stock, and only such portion, may be executed through such system.

(e) *Originating brokers.* (1) An originating broker shall establish, maintain, and enforce written policies and procedures reasonably designed to identify the orders of customers as segmented orders as defined in § 242.600(b)(91).

(2) An originating broker shall not route a customer order identified as a segmented order without also identifying such order as a segmented order to the routing destination.

(3) An originating broker that makes a certification referred to in paragraph (c)(1)(iii) of this section shall establish, maintain, and enforce written policies and procedures reasonably designed to assure that the identity of the originating broker will not be disclosed, directly or indirectly, to any person that potentially could participate in the qualified auction or otherwise trade with the segmented order.

(4) Where there are multiple originating brokers for a segmented order, an originating broker shall not be deemed to be in violation of the provisions of paragraphs (e)(1) through (3) of this section arising solely from a failure to meet a responsibility that was specifically allocated by prior written agreement to another originating broker.

(f) *Brokers or dealers.* (1) No broker or dealer that receives an order identified as a segmented order shall route such order without identifying such order as a segmented order to the routing destination.

(2) No broker or dealer with knowledge of where a segmented order is to be routed for execution shall submit an order, or enable an order to be submitted by any other person, to the continuous order book of an open competition trading center or of a national securities exchange that could have priority to trade with the segmented order at such open competition trading center or national securities exchange.

(g) *National securities exchanges.* A national securities exchange shall not operate a system, other than a qualified auction, that is limited, in whole or in part, to the execution of segmented orders unless any segmented order executed through such system:

(1) Is received and executed by the national securities exchange during a time period when no open competition trading center is operating a qualified auction for the segmented order;

(2) Has a market value of at least $200,000 calculated with reference to the midpoint of the national best bid and national best offer when the segmented order is received by the national securities exchange;

(3) Is executed by the national securities exchange at a price that is equal to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the national securities exchange.

(4) Is a limit order with a limit price selected by the customer that is equal to or more favorable for the segmented order than the midpoint of the national best bid and national best offer when the segmented order is received by the national securities exchange; or

(5) Is received and executed by the national securities exchange during a time period when no open competition trading center is operating a qualified auction for the segmented order that accepts orders that are not entirely in whole shares, and is a size, selected by the customer, that is not entirely in whole shares of an NMS stock, in which case any portion of such segmented order that is less than one whole share of the NMS stock, and only such portion, may be executed through such system.

§ 242.1000 [Amended]

■ 13. Amend § 242.1000, in the definition *Plan processor,* by removing the text ''§ 242.600(b)(67)'' and adding in its place ''§ 242.600(b)(73)''.

By the Commission.

Dated: December 14, 2022.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–27617 Filed 12–30–22; 8:45 am]

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Part III

Federal Trade Commission

16 CFR Part 456
Ophthalmic Practice Rules (Eyeglass Rule); Proposed Rule

FEDERAL TRADE COMMISSION

16 CFR Part 456

RIN 3084–AB37

Ophthalmic Practice Rules (Eyeglass Rule)

AGENCY: Federal Trade Commission.

ACTION: Notice of proposed rulemaking; request for public comment.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') proposes to amend the Ophthalmic Practice Rules (''Eyeglass Rule '' or ''Rule'') to require that prescribers obtain a signed confirmation after releasing an eyeglass prescription to a patient, and maintain each such confirmation for a period of not less than three years. The Commission also proposes to permit prescribers to comply with automatic prescription release via electronic delivery in certain circumstances. The Commission further proposes a clarification that the presentation of proof of insurance coverage shall be deemed to be a payment for the purpose of determining when a prescription must be provided. Finally, the Commission proposes to amend the term ''eye examination'' to ''refractive eye examination'' throughout the Rule. The Commission seeks comment on these proposals.

DATES: Written comments must be received on or before March 6, 2023.

ADDRESSES: Interested parties may file a comment online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Eyeglass Rule, Project No. R511996'' on your comment, and file your comment through *https://www.regulations.gov.* If you prefer to file your comment on paper, write ''Eyeglass Rule, Project No. R511996'' on your comment and on the envelope and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex C), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Alysa Bernstein, Attorney, (202) 326–3289, Paul Spelman, Attorney, (202) 326–2487, or Sarah Botha, Attorney, (202) 326–2036, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The Commission finds that using the procedures set forth in this notice of proposed rulemaking will serve the public interest by supporting the Commission's goals of clarifying and updating existing regulations without undue expenditure of resources, while ensuring that the public has an opportunity to submit data, views, and arguments on whether the Commission should amend the Rule. The Commission, therefore, has determined, pursuant to 16 CFR 1.20, to use the following procedures: (1) publishing this notice of proposed rulemaking; (2) soliciting written comments on the Commission's proposals to amend the Rule; (3) holding a workshop; and (4) announcing final Commission action in a document to be published in the **Federal Register**.

The Commission will host a workshop to gather additional public input regarding the proposed changes. After publishing this notice of proposed rulemaking (''NPRM''), the Commission will publish a document in the **Federal Register** announcing the workshop and providing instructions on how interested persons may request an opportunity to participate.

The Commission, in its discretion, has not chosen to schedule an informal hearing and has not made any initial designations of disputed issues of material fact necessary to be resolved at an informal hearing. The Commission believes that a workshop will provide sufficient opportunity for obtaining additional public input on its proposal. Interested persons who wish to make an oral submission at an informal hearing must file a comment in response to this NPRM and submit a statement identifying their interests in the proceeding and describing any proposals regarding the designation of disputed issues of material fact to be resolved at the informal hearing, on or before March 6, 2023. 16 CFR 1.11. Such requests, and any other motions or petitions in connection with this proceeding must be filed with the Secretary of the Commission.

Table of Contents

I. Background

A. Overview of the Eyeglass Rule

The Eyeglass Rule declares it an unfair practice for an optometrist or ophthalmologist to fail to provide a patient with a copy of the patient's eyeglass prescription immediately after an eye examination is completed.[1] The prescriber may not charge the patient any fee in addition to the prescriber's examination fee as a condition to releasing the prescription to the patient.[2] The Rule defines a prescription as the written specifications for lenses for eyeglasses which are derived from an eye examination, including all of the information specified by state law, if any, necessary to obtain lenses for eyeglasses.[3]

The Rule prohibits an optometrist or ophthalmologist from conditioning the availability of an eye examination on a requirement that the patient agree to purchase ophthalmic goods from the ophthalmologist or optometrist.[4] The Rule also deems it an unfair act or practice for the prescriber to place on the prescription, or require the patient to sign, or deliver to the patient, a waiver or disclaimer of prescriber liability or responsibility for the accuracy of the exam or the ophthalmic goods and services dispensed by another seller.[5]

B. History of the Rule

The FTC has decades of regulatory and research experience with the optical goods industry, which continues to inform the basis and purpose of the Rule and this NPRM. The Commission's engagement in the industry predates formal adoption of the Eyeglass Rule. In 1962, the Commission first took steps to protect consumers and foster competition in the sale of eyeglasses by adopting the ''Guides for the Optical Products Industry,'' which included a provision declaring it an unfair trade practice to ''tie in or condition'' refraction services to the dispensing of eyeglasses when such a practice has a ''reasonable probability'' of harming competition.[6] Among the conduct considered unfair were charging a higher or additional fee if the patient wanted to take the prescription elsewhere to buy eyeglasses, and refusing to perform examinations if the patient wanted to take the prescription elsewhere.[7] The Guides were not binding, however, and the FTC never undertook litigation to enforce them,[8] even though prescribers routinely violated the directives.[9]

1. Eyeglass I Report and Rule

On September 16, 1975, the Commission directed its staff to examine the retail ophthalmic market, including whether prescribers were tying eyeglass dispensing to examination, and whether such practices harmed consumers.[10] Staff surveyed state laws and regulations, and solicited comment from a variety of interested parties, including ophthalmic licensing boards, professional associations, and consumer groups.[11] The Commission then sought comment on a proposed rule to eliminate certain advertising restraints on ophthalmic goods and services, and indicated that if evidence showed that consumers were being prevented from price shopping—due to the unavailability of prescriptions—the Commission might require prescribers to give patients copies.[12]

FTC staff subsequently released its Eyeglass I Report detailing practices that prescribers used to discourage consumers from taking prescriptions to be filled elsewhere, including (1) outright refusal to release prescriptions or refusal to conduct examinations unless the patient agreed to purchase eyeglasses; (2) charging an additional fee as a condition to releasing the prescription; and (3) conditioning the release of the prescription on the patient signing a release or waiver of liability.[13] Staff explained that significant evidence—including testimony from optometrists, patients, and consumer groups, as well as prescriber surveys and published statements from boards of optometry and opticians—established that such practices were a serious and pervasive problem.[14] The Report concluded that refusal to release prescriptions, or placing conditions on their release, constituted an unfair act or practice, and recommended that the Commission promulgate a rule ''insuring consumers unconditional access to their ophthalmic prescriptions.'' [15]

On June 2, 1978, the Commission issued the Advertising of Ophthalmic Goods and Services Rule (the ''Eyeglass I Rule''), which, among other things, contained a provision titled ''Separation of Examination and Dispensing'' requiring prescribers to automatically release prescriptions to their patients—regardless of whether or not the patients requested them—to ensure consumers unconditional access to their prescriptions so they could comparison-shop for eyeglasses.[16] In the Rule's Statement of Basis and Purpose, the Commission explained that evidence conclusively established that consumers suffered substantial economic loss through the imposition of surcharges for obtaining their prescriptions, and through lost opportunity costs arising from an inability to comparison-shop for eyeglasses.[17] Furthermore, the Commission found that prescribers' use of waiver notices and disclaimers deceived consumers as to the capabilities of other optical dispensaries, and further restricted purchase options.[18] Such practices offended public policy in that they denied consumers the ability to effectively use available information,

[1] 16 CFR 456.2(a). A prescriber may withhold a patient's prescription until the patient has paid for the eye examination, but only if the prescriber would have required immediate payment if the examination had revealed that no ophthalmic goods were needed. *Id.*

[2] 16 CFR 456.2(c).

[3] 16 CFR 456.1(g).

[4] 16 CFR 456.2(b). The Rule thereby also prohibits conditioning the release of the prescription on the requirement that the patient purchase ophthalmic goods from the ophthalmologist or optometrist.

[5] 16 CFR 456.2(d).

[6] 16 CFR 192 (rescinded); *see also* ''Staff Report on Advertising of Ophthalmic Goods and Services and Proposed Trade Regulation Rule,'' 235–36 (1977), *https://www.ftc.gov/reports/staff-report-advertising-ophthalmic-goods-services-proposed-trade-regulation-rule-16-cfr-part-456?msclkid=957f749bc63711ecaefb4944debc75db* [hereinafter Eyeglass I Report].

[7] Eyeglass I Report, *supra* note 6, at 235–36.

[8] *Id.*

[9] *See id.* at 240–48 (detailing myriad accounts of prescribers refusing to release eyeglass prescriptions to their patients); *see also* Final Trade Regulation Rule, Advertising of Ophthalmic Goods and Services, 43 FR 23992, 23998 (June 2, 1978) [hereinafter Eyeglass I Rule] (finding that in nearly every survey of practicing optometrists considered in the rulemaking record, more than 50 percent imposed a restriction on the availability of eyeglass prescriptions to patients).

[10] Eyeglass I Report, *supra* note 6, at 1.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 241. With respect to liability waivers and releases, the Eyeglass I Report concluded that there could be ''little doubt'' that their primary intent was to discourage or dissuade consumers from taking their eyeglass prescriptions elsewhere to be filled. *Id.* at 277.

[14] *Id.* at 241–45, 252–54.

[15] *Id.* at 259, 263–65.

[16] Eyeglass I Rule, 43 FR 23992, 23998, 24007–08.

[17] *Id.* at 24003.

[18] *Id.*

and inhibited competition in retail eyeglasses markets.[19]

The Commission added that while it considered only requiring prescription release upon consumer request, it opted instead for so-called ''automatic release'' due to consumers' lack of awareness that they could purchase eyeglasses elsewhere, and because absent automatic release, there might be ''evidentiary squabbles'' over whether consumers did or did not request their prescription.[20] In addition, the Commission noted there was no evidence to suggest automatic release would impose a significant burden on prescribers.[21]

After issuance of the Eyeglass I Rule, the American Optometric Association (''AOA''), representing most of the country's optometrists, challenged it, and in 1980 the D.C. Circuit overturned Rule provisions pertaining to advertising restrictions.[22] The court, however, upheld the automatic prescription release requirement, finding there was ample evidence that withholding prescriptions harmed consumers by making comparison-shopping harder, removing incentives for ophthalmic goods sellers to advertise, and reducing opticians' ability to compete.[23] The court also noted there was considerable evidence that prescribers had used waivers and liability disclaimers ''to discourage comparison shopping, to mislead consumers . . .., and to frighten consumers into purchasing ophthalmic goods and services'' from the prescriber.[24]

2. Eyeglass II Report and Rule

Following the court's remand of the Eyeglass I Rule, FTC staff conducted further investigation, and in 1980 issued a staff report entitled ''State Restrictions on Vision Care Providers: The Effects on Consumers (''1980 Staff Report'').[25] The 1980 Staff Report did not make recommendations regarding the automatic prescription release provision, but instead suggested the Commission seek comment on whether to change it to release upon request, or to sunset the release requirement altogether.[26]

Following the 1980 Staff Report, the Commission sponsored a survey to determine to what extent prescribers were complying with the Rule. The survey, commonly known as the ''Market Facts Study,'' found that only about one-third of prescribers automatically provided patients with prescriptions.[27] Thus, the majority of prescribers were not in compliance. The survey also found that only 38 percent of consumers knew they were entitled to receive their prescription automatically.[28] The survey found, however, that when consumers requested their prescriptions, by and large prescribers no longer refused to release them,[29] and that a majority of consumers had become ''generally knowledgeable'' about the availability of eyeglass prescriptions, appearing to know they could request one.[30]

Five years later, the Commission again reviewed the Rule and sought comment on whether consumers were aware of their right to obtain their prescription,[31] and whether the automatic release provision ought to be terminated, changed to release upon request, or changed to require that prescribers simply ''offer'' patients their prescriptions rather than automatically provide them.[32] After public hearings, the hearing officer issued a report to the Commission (''Presiding Officer's Report'') [33] finding that, although most prescribers would release prescriptions upon request, many were still not releasing them automatically. Accordingly, the presiding officer recommended that the automatic release requirement not be modified or terminated.[34]

In contrast, FTC staff issued its own report (''Eyeglass II Report''), which proposed changing the release provision from automatic release to release upon request.[35] Staff based its proposal on what it perceived to be altered market conditions and increased consumer awareness, as well as the difficulty staff had encountered enforcing the automatic release provision.[36] According to staff, the automatic release requirement had not succeeded at ''avoiding evidentiary squabbles,'' [37] but rather had increased them, since whether a prescriber had released a prescription could not, in most cases, be ascertained by documentary evidence.[38]

Despite staff's recommendation, the Commission, in its final rule—referred to as the ''Eyeglass II Rule''—sided with the Presiding Officer and opted to retain the automatic release component.[39] As the basis for its decision, the Commission cited the comments and testimony about continued prescriber non-compliance,[40] as well as the Market Facts Study and findings of the Presiding Officer, which established that many prescribers were not automatically providing prescriptions as required.[41] The Commission also cited an additional survey submitted by the American Association of Retired Persons (''AARP''), which found significant non-compliance and lack of consumer awareness, particularly among older consumers.[42]

The Eyeglass II Rule was again challenged by the optometric industry and, in 1990, much of the Rule was

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[19] *Id.*

[20] *Id.* at 23998.

[21] *Id.*

[22] *Am. Optometric Ass'n* v. *FTC,* 626 F.2d 896, 910–11 (D.C. Cir. 1980).

[23] *Am. Optometric Ass'n,* 626 F.2d at 915.

[24] *Id.* at 916.

[25] ''State Restrictions on Vision Care Providers: The Effects on Consumers'' (1980), *https://www.ftc.gov/reports/state-restrictions-vision-care-providers-effects-consumers-eyeglasses-ii*

[26] *Id.* at 248–49. The 1980 Staff Report, however, did propose extending the automatic release requirement to cover eyeglass dispensers, so that opticians—as well as optometrists and other eyeglass dispensers—would be required to return prescriptions to patients after fabricating the eyeglasses. *Id.* at 133, 260–61. The aim of staff's proposal was to guarantee patients access to their prescriptions even after they had been filled, and to ensure that consumers retained a copy so they could obtain duplicate glasses later without having to return to their original prescriber or eyeglass dispenser. *Id.* at 134, 261–64. Staff later reversed course on this proposal, however, after determining that there was insufficient evidence that dispensers were refusing to return prescriptions to patients. The Commission chose not to adopt the proposal. *See* ''Ophthalmic Practice Rules: State Restrictions on Commercial Practice,'' 250, 300–02 (1986), *https://www.ftc.gov/reports/ophthalmic-practice-rules-state-restrictions-commercial-practice-eyeglasses-ii-report-staff* [hereinafter Eyeglass II Report]; Final Trade Regulation Rule, Ophthalmic Practice Rules, 54 FR 10285, 10303 (Mar. 13, 1989) [hereinafter Eyeglass II Rule].

[27] Eyeglass II Report, *supra* note 26, at 256.

[28] *Id.* at 258. Forty-six percent wrongly believed they were entitled to the prescription only upon request, and 18 percent wrongly believed that prescribers were permitted to charge extra if the patient asked for the prescription. *Id.*

[29] *Id.* at 253–62.

[30] *Id.*

[31] Ophthalmic Practice Rules, Notice of Proposed Rulemaking, 50 FR 598, 602 (Jan. 4, 1985).

[32] The Commission received significant comment and evidence on whether to maintain automatic prescription release, repeal it, or change it to release upon request, but very little comment or evidence regarding the option of offering patients prescriptions. Eyeglass II Rule, 54 FR 10285, 10303 & n.182.

[33] Report of the Presiding Officer on Proposed Regulation Rule: Ophthalmic Practice Rules, Public Record No. 215–63 (May 1, 1986), *https://www.ftc.gov/reports/report-presiding-officer-proposed-trade-regulation-rule-ophthalmic-practice-rules-eyeglass-rule-16?msclkid=c8131b8ac63911ecb89f5b16ef81c791.*

[34] *Id.*

[35] Eyeglass II Report, *supra* note 26, at 249.

[36] *Id.* at 249, 274–276.

[37] Eyeglass I Rule, 43 FR 23992, 23998.

[38] Eyeglass II Report, *supra* note 26, at 275–76.

[39] Eyeglass II Rule, 54 FR 10285, 10286–87.

[40] *Id.* at 10303.

[41] *Id.* at 10313 & nn.180 & 181; *see also* Eyeglass II Report, *supra* note 26, at 255–58 (reporting the Market Facts Study results).

[42] Eyeglass II Rule, 54 FR 10285, 10303 nn.180 & 181; *see also* Eyeglass II Report, *supra* note 26, at 263 (reporting that the AARP survey of older Americans found that 47 percent did not receive a copy of their prescription, and 32 percent of those did not know to ask for one).

vacated, but not the prescription release requirements, which remained in effect.[43]

3. The 1997 to 2004 Eyeglass Rule Review

In 1997, as part of its systematic review of its rules and regulations, the Commission again requested comment on whether the Rule's prescription release requirement should be retained, modified, or eliminated.[44] The Commission received comments from numerous parties but withheld taking action while it considered whether contact lenses should be covered by the Rule. Ultimately, after Congress passed the Fairness to Contact Lens Consumers Act (''FCLCA''),[45] the Commission issued a separate Contact Lens Rule (''CLR'') with prescription release requirements similar, in most respects, to those required by the Eyeglass Rule.[46] When the Commission turned again to the Eyeglass Rule and its prescription release requirement, it held that evidence in the rulemaking record suggested that prescribers continued to refuse to release eyeglass prescriptions, even though such conduct had been unlawful for nearly 25 years.[47] The Commission opined that were it to eliminate the prescription release requirement, even more prescribers might refuse to release prescriptions and thereby benefit from inducing patients to purchase eyeglasses from them.[48] Due to this possibility, and because it found the release of prescriptions enhances consumer choice at minimal compliance cost to prescribers, the Commission opted to retain the prescription release requirement.[49]

Furthermore, after reviewing the record and finding that some consumers still were not aware of their right to obtain their prescription, the Commission decided not to modify the Rule to require release upon request. The Commission stated that absent automatic release, consumers unaware of their right would not know to request their prescription, or their prescriber might discourage them from doing so.[50] In light of these considerations, the Commission determined to retain the Rule in its existing form.[51] In so doing, the Commission also ensured that prescription release requirements for eyeglasses would align with those for contact lenses under the Contact Lens Rule.[52]

4. The 2015 to 2020 Contact Lens Rule Review

As part of its periodic review of rules and guides, the Commission, on September 3, 2015, initiated a review of the Contact Lens Rule, including its prescription release requirement.[53] While the Contact Lens Rule differs from the Eyeglass Rule in some respects, many of the issues and concerns regarding prescription release and portability are the same, and therefore some of the comments and data submitted during the CLR review are pertinent to the Commission's review of the Eyeglass Rule.

During its review of the CLR, the Commission considered more than 8,000 public comments as it put forth a notice of proposed rulemaking [54] and supplemental notice of proposed rulemaking [55] before issuing an amended final rule on August 17, 2020.[56] In its CLR final rule, the Commission determined that the evidentiary record, as well as the Commission's enforcement and oversight experience, supports the view that prescriber compliance with the automatic prescription release requirement is sub-optimal, and, as a result, that millions of consumers are still not receiving their contact lens prescriptions as required by law.[57] The Commission further found that many consumers remain unaware that they even have a right to receive their prescriptions.[58] To remedy this, the Commission implemented a Confirmation of Prescription Release provision, requiring that prescribers request that a patient confirm receipt of their contact lens prescription.[59] According to the Commission, the patient confirmation requirement should result in, among other things, an increase in the number of patients in possession of their contact lens prescription and improved flexibility and choice for consumers, ultimately fostering improved competition in the market, more efficient contact lens sales, and lower prices for consumers.[60] The Commission also noted that the requirement would increase the Commission's ability to enforce and assess the CLR.[61]

C. The Evolving Eyeglass Marketplace

The retail vision care industry in the United States consists of several different kinds of participants, namely ophthalmologists, optometrists, opticians, and eyewear retailers. The services provided by these different participants often overlap, and the different participants often have business affiliations with each other.

Ophthalmologists are medical doctors who specialize in treating diseases of the eye. They are the only eye care professionals who can treat all eye and vision system diseases, perform eye surgery, prescribe nearly all manner of drugs, and use any treatment available to licensed physicians. Ophthalmologists can prescribe and sell eyeglasses and contact lenses, and their offices may be attached to an associated optical dispensary. Ophthalmologists have typically completed four years of medical school, a year of general internship, and an additional three years of specialized hospital residency training in ophthalmology. It is estimated that there are approximately 19,000 active ophthalmologists in the United States.[62] Many ophthalmologists, especially those who further specialize,[63] do not sell eyewear, although some do.

[43] *See Cal. State Bd. of Optometry* v. *FTC,* 910 F.2d 976 (D.C. Cir. 1990). The decision focused on a determination that the FTC lacked statutory authority to declare state laws of optometry to be unfair acts or practices without more explicit authority from Congress. Following the court decision, the Commission, in 1992, reissued the Eyeglass Rule, but without the portions declared invalid, and with renumbered designations pertaining to prescription release. *See* Final Trade Regulation Rule, Ophthalmic Practice Rules, 57 FR 18822 (May 1, 1992).

[44] Ophthalmic Practice Rules, Request for Comments, 62 FR 15865, 15867 (Apr. 3, 1997).

[45] 15 U.S.C. 7601–7610 (Pub. L. 108–164).

[46] Contact Lens Rule, 16 CFR part 315.

[47] Ophthalmic Practice Rules, Final Rule, 69 FR 5451, 5453 (Feb. 4, 2004).

[48] *Id.*

[49] *Id.*

[50] *Id.* The Commission also made findings that: release of prescriptions enhances consumer choice; no evidence had been submitted that the Rule's restrictions on disclaimers and waivers were no longer needed; the automatic release provision imposed only a minimal burden on prescribers; and retaining automatic release would keep the Eyeglass Rule consistent with the automatic release provision of the Contact Lens Rule, promulgated in 2004 pursuant to the Fairness to Contact Lens Consumers Act of 2003. *Id.; see also* Contact Lens Rule, 16 CFR part 315; Fairness to Contact Lens Consumers Act, 15 U.S.C. 7601–7610.

[51] Ophthalmic Practice Rules, 69 FR 5451, 5453.

[52] *Id. See also* Contact Lens Rule, 69 FR 40482 (July 2, 2004) (codified at 16 CFR part 315).

[53] Contact Lens Rule, Request for Comment, 80 FR 53272 (Sept. 3, 2015) [hereinafter CLR RFC].

[54] Contact Lens Rule, Notice of Proposed Rulemaking, 81 FR 88526 (Dec. 7, 2016) [hereinafter CLR NPRM].

[55] Contact Lens Rule, Supplemental Notice of Proposed Rulemaking, 84 FR 24664 (May 28, 2019) [hereinafter CLR SNPRM].

[56] Contact Lens Rule, Final Rule, 85 FR 50668 (Aug. 17, 2020) [hereinafter CLR Final Rule].

[57] *Id.* at 50687.

[58] *Id.*

[59] 16 CFR 315.3(c).

[60] CLR Final Rule, 85 FR 50668, 50687.

[61] *Id.*

[62] American Academy of Ophthalmology (''AAO''), ''Eye Health Statistics,'' *https://www.aao.org/newsroom/eye-health-statistics.*

[63] According to the AAO, ''[s]ubspecialists have intensive training in a particular area of the eye. To become subspecialists, ophthalmologists add a fellowship to their years of medical training. A fellowship prepares an ophthalmologist to treat

Continued

Optometrists are doctors of optometry. They have not completed medical school, but have instead completed four years of training in optometry school, following three or more years of college. They are trained and licensed to examine eyes, diagnose refractive problems, prescribe and dispense eyeglasses and contact lenses, and detect eye disease.[64] As with ophthalmologists, optometrists can prescribe and sell eyeglasses and contact lenses, and their offices are often attached to, or part of, an associated optical dispensary. A government estimate indicates that in 2020 there were approximately 43,000 active optometrists in the United States.[65] While professional services, such as eye health and refraction examinations, generate significant revenue for optometrists, most optometrists still derive a larger percentage of their income from product sales, including the sale of eyeglasses and contact lenses.[66] According to some estimates, product sales typically account for 55 to 65 percent of optometrist revenue.[67]

Opticians, also known as dispensing opticians or ophthalmic dispensers, act primarily as retail providers of eyeglasses and contact lenses. Opticians fabricate, fit, adjust, and repair eyeglasses, primarily on the basis of prescriptions issued by optometrists and ophthalmologists. Opticians typically are not authorized to examine eyes to determine prescriptions, but may conduct pupillary distance examinations in order to fit a pair of eyeglasses to an individual. Twenty-one states currently require opticians to obtain licenses,[68] usually through a state-approved course of study and completion of an exam. The remaining states have no formal requirements for practice, but many opticians in these states complete some form of apprenticeship or training. A 2020 government estimate indicates that there are approximately 70,000 active opticians in the United States.[69]

Eyewear retailers are companies and independent merchants that sell eyeglasses. They often are owned by, employ, or associate themselves with, ophthalmologists, optometrists, and opticians. Some are considered independent optical retailers (defined as a retailer with three or fewer locations that has either an ophthalmologist, optometrist, optician, or optical retailer on site [70]), while others may be optical chain stores, such as LensCrafters and America's Best, mass merchandisers, such as Costco and Sam's Club, department stores, such as Macy's, or online entities, such as Warby Parker and Zenni Optical.

The overall retail eyeglass market continues to experience growth in both the number of eyeglass wearers as well as the number of eyeglasses purchased. As of December 2019, approximately 165 million American adults were regularly wearing prescription eyeglasses, representing nearly two-thirds of the country's adult populace.[71] In addition, some 30 percent of eyeglass wearers used two or more pairs interchangeably on a regular basis.[72]

Overall, in 2019, consumers purchased approximately 79 million pairs of eyeglass frames, and 88 million pairs of lenses [73] for a total sales volume of roughly $10 billion in frames and $14.3 billion in lenses.[74] Of total sales, the largest portion—at least in terms of dollars spent—occurred at independent optical retailers, who accounted for approximately 50 percent of U.S. eyeglass frame and lens sales in 2019.[75] Conventional optical chain stores accounted for approximately 27.5 percent of eyeglass frame and lens sales (in dollars), and mass merchandisers accounted for approximately 10 percent of eyeglass frame and lens sales (in dollars).[76]

Online sales of eyeglasses remain a small portion of the optical market. According to one industry publication, as of June 2019 just five percent of sales (in dollars) of eyeglass frames derived from online sales during the previous year.[77] Consumers purchased approximately seven and a half million pairs of frames online, representing about 9.4 percent of all pairs of frames sold, in the 12 months ending June 2019.[78] But although online sales are still relatively small, they continue to increase steadily. Total online sales (in dollars) for all vision care products rose 7.7 percent between mid-2018 and 2019,[79] while online sales (in dollars) of frames grew 8.1 percent and of prescription lenses grew 10.8 percent in 2019.[80] A primary driver for the increase in online sales may be lower pricing. According to an industry source, as of 2015 online sellers were typically 50 to 60 percent less expensive than brick and mortar eyeglass retailers.[81] More recently, the COVID–19 pandemic may have spurred a greater

more specific or complex conditions in certain parts of the eye or in certain types of patients.'' AAO, ''Ophthalmology Subspecialists'' (June 6, 2016), *https://www.aao.org/eye-health/tips-prevention/ophthalmology-subspecialists.*

[64] In some states, optometrists can prescribe medicine and perform certain surgeries. AOA, ''What's a doctor of optometry?'' *https://www.aoa.org/healthy-eyes/whats-a-doctor-of-optometry?sso=y.*

[65] Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, Optometrists, *https://www.bls.gov/ooh/healthcare/optometrists.htm* (visited Apr. 27, 2022).

[66] ECP University, ''Key Metrics: Assessing Optometric Practice Performance & Best Practices of Spectacle Lens Management Report,'' 25 (March 22, 2018), *https://ecpu.com/media//wysiwyg/docs/ECPU_MBA_KeyMetricsReport_2018.pdf* (''Independent optometric practices derive 35% of revenue from professional fees and 65% from product sales, including 37% from [eyeglasses] and 17% from contact lens sales''); Rev. Optm. Bus., ''Challenges and Opportunities in the Future of Independent Optometry,'' 3 (April/May 2013), *https://www.reviewob.com/wp-content/uploads/2016/11/paa_visionsource__0413.pdf* (stating that device sales remain the dominant revenue producer in most practices, typically accounting for 55 to 65 percent of revenue).

[67] *Id. See also* Margery Weinstein, ''Key Practice Metrics: Numbers to Track & Grow to Help Speed Practice Recovery,'' Rev. Optm. Bus., *https://www.reviewob.com/key-practice-metrics-numbers-to-track-grow-to-speed-practice-recovery/* (citing Care Credit, Independent Optometry Key Performance Metrics: 2019 Trend Report at 5, 9, and noting that product sales in 2019 continued to account for the majority of gross revenue (54%), but that eyeglass sales dropped from 42% of gross revenue in 2018 to 37% in 2019).

[68] OpticianEDU.org, ''Optician Certification,'' *https://www.opticianedu.org/optician-certification/.*

[69] Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, Opticians, *https://www.bls.gov/ooh/healthcare/opticians-dispensing.htm* (visited Apr. 27, 2022).

[70] Vision Council, ''VisionWatch—The Vision Council Market Analysis Report,'' Dec. 2019 [hereinafter VisionWatch Report], at 17.

[71] VisionWatch Report, *supra* note 70, at 24; *see generally* Vision Council, ''U.S. Optical Overview and Outlook,'' Dec. 2015, at 4–5 (discussing the growth of eyeglass usage from 2006 to 2015).

[72] VisionWatch Report, *supra* note 70, at 43.

[73] In 2019, about 89 percent of prescription lenses were purchased as a complete pair of eyeglasses (frames and lenses), representing about 78.3 million pairs of prescription eyeglasses. VisionWatch Report, *supra* note 70, at 11, 12, 60. By comparison, in 1975, American consumers purchased approximately 53 million pairs of prescription eyeglasses. Eyeglass I Report, *supra* note 6, at 11–12.

[74] Vision Council, ''Consumer Barometer,'' Dec. 2019, at 2, 18–19.

[75] *Id.* at 18–19.

[76] *Id.* Optical centers in department stores accounted for approximately two percent of frame and lens sales (in dollars). *Id.*

[77] Vision Council, ''U.S. Optical Market Optical Overview,'' Sept. 2019, at 12. The industry report does not specify whether the frames were purchased with prescription lenses or by themselves. Other data from the Vision Council, however, indicate that distribution percentages for sales of refractive lenses are nearly identical to that of frames, suggesting that the overall percentage of complete eyeglasses (frames and lenses) purchased online is about 5 percent of total sales (in dollars). Vision Council, ''Consumer Barometer,'' Dec. 2019, at 18–19. By comparison, approximately 15 percent of sales (in dollars) of contact lenses now derive from online sales. Vision Council, ''U.S. Optical Market Optical Overview,'' Sept. 2019, at 3, 6.

[78] Vision Council, ''U.S. Optical Market Optical Overview,'' Sept. 2019, at 7.

[79] *See id.* at 6.

[80] Vision Council, ''Consumer Barometer,'' Dec. 2019, at 18–19.

[81] Vision Council, ''U.S. Optical Overview and Outlook,'' *supra* note 71, at 65 n.3.

number of consumers to shop for eyeglasses online, or to delay eyewear purchases altogether, but the long-term impact of the pandemic on consumer purchasing decisions is unknown. A study commissioned by The Vision Council showed that, in March 2020, when the World Health Organization declared COVID–19 a pandemic, over 25% of consumers stated an intention to buy eyewear online to limit human interaction and physical contact, more than double the number who planned to shop online before COVID–19.[82]

D. State Regulation of the Sale of Eyeglasses

As detailed above, the purpose of the Eyeglass Rule is to facilitate consumer choice and foster competition by separating the functions of the eye examination and the dispensing of prescribed eyeglasses. The Rule accomplishes this separation by requiring that prescribers provide consumers with a copy of their eyeglass prescription at the conclusion of the eye examination, and by prohibiting certain restrictions on the release of the prescription. The Eyeglass Rule, however, regulates only the release of the eyeglass prescription, and does not regulate other aspects of the practice of ophthalmology, optometry, or opticianry.[83]

State laws and regulations govern most aspects of professional practice and eyewear sales. Typically, individual state licensing boards are responsible for the licensing and oversight of ophthalmologists, optometrists, and opticians and, often, the dispensing of prescribed eyeglasses. These state regulatory frameworks vary widely. Some states have comprehensive regulatory frameworks that govern every aspect of dispensing prescribed eyeglasses: such regulations set forth the required components of an eyeglass prescription, the length and expiration date of an eyeglass prescription, and the allowable modes to transmit eyeglass prescriptions, as well as recordkeeping requirements.[84] Other states regulate less comprehensively. For example, some states require opticians to dispense eyeglasses only upon the written prescription of a prescriber,[85] while other states allow more flexibility.[86] Further, some states that require a prescription for the sale of eyeglasses do not explicitly set forth specific components of an eyeglass prescription.[87] State regulatory frameworks also differ on expiration dates for eyeglass prescriptions: some states require that eyeglass prescriptions expire within a certain period; [88] some states mandate that prescriptions be valid for at least a certain amount of time; [89] other states leave that determination to the prescriber; [90] while still other states are silent on the issue.[91]

II. Eyeglass Rule Review

A. Evidentiary Standard

The Commission promulgated the Eyeglass Rule under section 18 of the FTC Act, which grants the Commission the authority to adopt rules defining unfair or deceptive acts or practices in or affecting commerce.[92] When amending or repealing the Rule, the Commission must follow the same section 18 procedures governing the adoption of rules,[93] and in doing so, engages in a multi-step inquiry. To make a determination that a practice is unfair, the Commission evaluates the following questions: (1) Does the act or practice cause or is it likely to cause substantial injury to consumers? (2) Is the injury to consumers outweighed by countervailing benefits that flow from the act or practice at issue? and (3) Can consumers reasonably avoid the injury? [94]

If an act or practice is deemed unfair, the Commission may issue a notice of proposed rulemaking under section 18 only where it has ''reason to believe'' that the unfair act or practice at issue is ''prevalent.'' [95] The Commission can find prevalence where information available to it indicates a widespread pattern of unfair or deceptive acts or practices.[96] Once the Commission finds that an unfair act or practice is prevalent, it has wide latitude in fashioning a remedy and need only show a ''reasonable relationship'' between the unfair act or practice and the remedy.[97]

In making this proposal, the Commission has relied on a record that includes public comments received in response to the Commission's 2015 advance notice of proposed rulemaking (''ANPR'') that initiated this rule review,[98] and incorporates the rulemaking record for the 2020 amendments to the CLR to the extent that record provides information pertinent to the prescription release provision of the Eyeglass Rule.[99] The

[82] Vision Council, ''Researching Recovery: Exploring Evolving Consumer Behavior and Industry Response During COVID–19,'' May 21, 2020, at 38 (reporting results of VisionWatch Insights study), *available at https://thevisioncouncil.org/sites/default/files/assets/media/TVC-COVID-19-VisionWatch-Consumer-Industry-Research_Member-Insights-Webinar-5-21-2020_w-Notes.pdf.*

[83] For example, although the Eyeglass Rule contains a definition of ''prescription,'' the purpose of the definition is to effectuate the separation of the exam and the sale of eyeglasses. The Rule's definition is not intended to preempt state regulations. *See* 16 CFR 456.1(g).

[84] *See* Alaska Stat. Ann. §§ 48.310, 48.920; La. Admin. Code tit. 46, § LI–505.

[85] *See* Ky. Rev. Stat. Ann. § 320.300; N.Y. Comp. Codes R. & Regs. tit. 18, § 505.6.

[86] Mass. Gen. Laws Ann. ch. 112, § 73C (permitting duplications, replacements, reproductions or repetitions at retail without a prescription); N.C. Gen. Stat. Ann. § 90–235 (same).

[87] N.C. Gen. Stat. Ann. § 90–236.1; Del. Code Ann. tit. 24, § 2122.

[88] DC Mun. Regs. tit. 17, § 6416.1 (expiration of 1 year after the issue date unless there is a medical reason that warrants a prescription for less than 1 year.); Fla. Stat. Ann. § 463.012 (eyeglass prescriptions shall be considered valid for a period of 5 years).

[89] Cal. Bus. & Prof. Code § 2541.1 (''The expiration date of a spectacle lens prescription shall not be less than two to four years from the date of issuance unless medical reason for earlier reexamination''); Mich. Comp. Laws Ann. § 333.5557 (setting expiration date of no less than 1 year from the date of the examination unless medical reason for shorter time).

[90] 852 Ind. Admin. Code 1–5.1–1 (stating it is the optometrist's responsibility to determine the expiration of the prescription.); Kan. Admin. Regs. § 65–8–4 (requiring prescriber to include on the prescription the ''expiration date, if appropriate'').

[91] Ark. Code Ann. § 17–90–108 (A)(3) (providing expiration term for contact lens prescriptions, but not for eyeglass prescriptions); Wis. Admin. Code Opt § 5.02 (providing that a contact lens prescription must contain the date of expiration, but making no mention of the expiration of eyeglass prescriptions).

[92] 15 U.S.C. 57a(a)(1)(B).

[93] 15 U.S.C. 57a(d)(2)(B) which states a substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under that subsection.

[94] 15 U.S.C. 45(n); *see also* Eyeglass II Rule, 54 FR 10285, 10287; Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), *Appended to International Harvester Co.,* 104 F.T.C. 949, 1070, 1073 (1984).

[95] 15 U.S.C. 57a(b)(3).

[96] 15 U.S.C. 57a(b)(3)(B).

[97] *Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 988 (D.C. Cir. 1985) (quoting *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 612–13 (1946)).

[98] Ophthalmic Practice Rules (Eyeglass Rule), Advance Notice of Proposed Rulemaking; Request for Comment, 80 FR 53274 (Sept. 3, 2015) [hereinafter Eyeglass Rule ANPR].

[99] The 2020 Contact Lens Rulemaking record includes comments to the CLR RFC; the CLR NPRM; the Public Workshop Examining Contact Lens Marketplace and Analyzing Proposed Changes to the Contact Lens Rule; Public Workshop and Request for Public Comment, 82 FR 57889 (Dec. 8, 2017) [hereinafter CLR WS]; and the CLR SNPRM. Public comments received in response to these notices are available on *Regulations.gov*.

https://www.regulations.gov/document/FTC-2015-0093-0001 (CLR RFC Comments); *https://www.regulations.gov/document/FTC-2016-0098-0001* (CLR NPRM Comments); *https://www.regulations.gov/document/FTC-2017-0099-0001* (CLR WS Comments); and *https://www.regulations.gov/document/FTC-2019-0041-0001* (CLR SNPRM Comments). *Regulations.gov* has assigned each comment an identification number appearing after the name of the commenter. This

Continued

Commission has also examined the state of the marketplace and the content of consumer complaints about prescriber practices. Further, the Commission remains cognizant of the lengthy history and record that supported the enactment of the Eyeglass Rule and the CLR. Based on the entire record for the Rule, the Commission has reason to believe that prescribers' failure to automatically provide consumers with prescriptions at the completion of an eye exam—held to be an unfair act or practice when the Eyeglass Rule was enacted—remains prevalent, and millions of Americans every year are not receiving their eyeglass prescriptions as required by law. The Commission also believes that a risk of significant harm to consumers continues to exist and that, without the Rule's requirements, consumers could not reasonably avoid the injury resulting from the unfair acts and practices prohibited by the Rule. Further, the Commission believes that documentation of prescription release is necessary to better effectuate compliance with, as well as enforcement of, the Rule. Consequently, the Commission proposes amending the Rule to implement a Confirmation of Prescription Release requirement similar to that now required by the CLR.[100] Pursuant to these amendments, prescribers would be required to do one of the following:

(i) Request that the patient acknowledge receipt of the prescription by signing a separate statement confirming receipt of the prescription;

(ii) Request that the patient sign a prescriber-retained copy of a prescription that contains a statement confirming receipt of the prescription;

(iii) Request that the patient sign a prescriber-retained copy of the sales receipt for the examination that contains a statement confirming receipt of the prescription; or

(iv) If a digital copy of the prescription was provided to the patient (via methods including an online portal, electronic mail, or text message), retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable. The Commission's proposal provides sample language for confirmation options (i), (ii), and (iii), but also allows prescribers to craft their own wording of the signed confirmation for these options if they so desire. As with the CLR's Confirmation requirement, the proposed Confirmation of Prescription Release requirement for eyeglass prescriptions would apply only to prescribers with a direct or indirect financial interest in the sale of eyeglasses.

The Commission believes that the proposed amendment will prevent consumer harm, and that the proposed amendment is necessary to remedy demonstrated failures of some providers to automatically release prescriptions at the completion of an eye examination, and to ensure a competitive marketplace for eyeglasses. The Commission notes that providers who comply with the automatic release provision of the Rule may face a competitive disadvantage because of the widespread non-compliance of other providers. This creates an unlevel playing field and undermines competition. The Commission is sensitive to any additional burden or cost that this rule change imposes on business. However, it believes that this proposal maximizes the benefits of comparison-shopping with a relatively small burden or cost on business. The potential benefit of increasing the number of patients in possession of their eyeglass prescriptions is substantial: namely, increased flexibility and choice for consumers; a reduced likelihood of errors associated with incorrect, invalid, and expired prescriptions, and consequently, improved patient safety; and an improved ability for the Commission to enforce and monitor prescriber compliance with the Rule's prescription release requirements.

The proposal would also align the prescription release related provisions of the Rule with the CLR, thereby reducing confusion and complexity that might arise for consumers and prescribers from having different prescription release requirements for eyeglass and contact lens prescriptions. In addition, because the CLR already obligates ophthalmologists and optometrists to release contact lens prescriptions, to obtain a confirmation, and to maintain records, the marginal cost of the proposed amendment to the Eyeglass Rule would be extremely low. Prescribers likely have forms and systems in place already, which may need only minor adjustments to accommodate confirmations for eyeglasses prescriptions.

The Commission also proposes permitting prescribers to comply with automatic prescription release via electronic delivery in certain circumstances.[101] The Commission does not propose, at this time, to implement other recommendations about which it requested comment in the ANPR, including requiring prescribers to provide duplicate copies of prescriptions to patients; to provide a copy of a prescription to, or verify a prescription with, third-party sellers; or to add pupillary distance to prescriptions.

B. Overview of Comments in Response to ANPR

In September 2015, as part of its routine review of Commission rules and guides, the Commission published the ANPR seeking public comment on, among other things: the continuing need for the Rule; the Rule's economic impact and benefits; possible conflict between the Rule and state, local, or other federal laws or regulations; and the effect on the Rule of any technological, economic, or other industry changes. The Commission also sought comment on the following specific questions: should the definition of ''prescription'' be modified to include pupillary distance; should the Rule be extended to require that prescribers provide their patients with a duplicate copy of a prescription; and should the Rule be extended to require that a prescriber provide a copy to or verify a prescription with third parties authorized by the patient? [102]

This notice of proposed rulemaking summarizes the comments received in response to the ANPR and explains why the Commission continues to believe that the Eyeglass Rule is necessary. It also explains why the Commission is proposing certain amendments and why it declines to propose others. Additionally, it seeks additional comment on certain questions. Finally, the NPRM sets forth the Commission's regulatory analyses under the Regulatory Flexibility and Paperwork Reduction Acts, as well as the text of the proposed amendments.

The Commission received 868 comments in response to the ANPR from a variety of individuals and entities, including ophthalmologists, optometrists, opticians, trade associations, consumers (and representatives of consumers), and eyeglass sellers.[103] Virtually all of the

notice cites comments using the last name of the individual submitter, or the name of the organization and the individual within the organization who submitted the comment, along with the comment identification number assigned by *Regulations.gov*.

[100] 16 CFR 315.3.

[101] *See* Section IV.B.2.a, *infra*. The Commission also clarifies that the presentation of proof of insurance coverage shall be deemed to be a payment for the purpose of determining when a prescription must be provided under 16 CFR 456.2(a), a clarifying, technical rule amendment. *See* Section IV.B.3, *infra*. The Commission further clarifies that the term ''eye examination'' used in the Rule refers to a refractive eye examination. *See* Section V.C, *infra*.

[102] Eyeglass Rule ANPR, 80 FR 53274, 53276.

[103] The comments are posted at *https://www.regulations.gov/document/FTC-2015-0095-0001*. This document cites comments from the

comments supported retaining the Rule. Some commenters, including trade associations that represent opticians and retailers that employ optometrists and opticians, stated that the Rule is needed because some prescribers still are not automatically releasing prescriptions and some consumers face resistance when they try to obtain their prescriptions.[104] The AOA, which represents approximately 33,000 doctors of optometry, questioned the continued need for the Rule based on its understanding that doctors of optometry widely comply with the Rule's requirements, but stated that the Rule—as currently drafted—is not necessarily harmful.[105]

Warby Parker, a large online eyeglasses retailer,[106] and a few consumers indicated their belief that ordering eyeglasses online is a good option as it provides consumers with an affordable and convenient choice.[107] Some indicated their support for Rule changes that would permit online sales to occur with greater ease. Specifically, some commenters supported requirements for prescribers to provide copies of prescriptions to authorized third-party sellers upon a seller's request and to provide duplicate copies of prescriptions to patients upon request.[108] Some commenters also suggested the Rule should require prescribers to post a ''bill of rights'' or conspicuous signage of consumers' rights to a copy of their prescription.[109] Some commenters also expressed support for adding a requirement that prescriptions include pupillary distance—a measurement needed for consumers to order eyeglasses online—and for the Rule to prohibit eyeglass prescriptions from including any expiration dates, or at least unnecessarily short-term expiration dates.[110]

On the other hand, many prescribers felt the Commission should limit, ban, or regulate the online sale of eyeglasses on grounds that such sales are less safe because eyeglasses sold online do not always adhere to prescription specifications and glass impact-resistance requirements.[111] Some prescribers commented that their offices are burdened by the problematic practices of internet-based eyewear companies, since the patient ultimately goes to their prescriber for a remedy if they have an issue with their online eyeglass purchase.[112]

The AOA stated that the Rule should not require prescribers to provide additional copies of prescriptions to consumers because prescribers must be allowed to use their clinical judgment to determine whether it is appropriate to provide additional copies after the eye exam was performed.[113] The organization also questioned the FTC's authority to add a requirement to the Rule mandating that prescribers respond to authorized third-party requests.[114] The American Academy of Ophthalmology (''AAO''), the largest national member association of ophthalmologists, stated that it was unaware of any significant issues with consumers receiving duplicate copies of their prescriptions from ophthalmologists, noting that its members put significant time and resources into ensuring patients receive prescriptions in a timely manner and traditionally provide duplicates without charge.[115]

Further, the AOA, the AAO, and individual prescribers commented that the Rule should not require that a prescription include pupillary distance, because, among other reasons, they believe this measurement is part of the dispensing of eyeglasses, and not part of a refractive examination.[116] Prescribers also generally did not support having an expiration date of more than one year for eyeglasses, or requested that the FTC defer to state law and the medical judgment of prescribers to determine if and when a prescription should expire.[117]

A number of optician groups commented that the Rule should require that eyeglass dispensers only sell eyeglasses after obtaining a copy of a prescription, or verifying a prescription with the prescriber, to ensure the safety of their patients.[118] They also largely did not want the Rule to require that

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Eyeglass Rule ANPR using the comment number assigned by *Regulations.gov* without the preceding identification ''FTC–2015–0095.'' The citations also include: for comments submitted by individuals, the last name of the commenter; and for comments submitted on behalf of organizations, the name of the organization and the last name of the individual submitting on behalf of the organization. For instance, the full comment number assigned by *Regulations.gov* to the comment submitted by an individual named Publi is FTC–2015–0095–0040. In this document, that comment is cited as ''Public (Comment #0040)''.

[104] *See, e.g.,* Opticians Association of Virginia (Comment #0647 submitted by Nelms) (stating that patients are led into the dispensary before paying for their exam and requesting the Rule be amended to include language that the prescription be given to the patient without additional sales pressure or intimidation); Burchell (Comment #0866); NAOO (Comment #0748 submitted by Cutler); Professional Opticians of Florida (Comment #0803 submitted by Couch). Other commenters more generally stated their support for the Rule. *See* Publi (Comment #0040); Santini (Comment #0047); Costa (Comment #0068); Ellis (Comment #0189); Hildebrand (Comment #0220); Prevent Blindness (Comment #0385 submitted by Parry); DiBlasio (Comment #0441); Pulido (Comment #0019); Stuart (Comment #0841).

[105] Comment #0849 submitted by Peele; *see also* Barnes (Comment #0043) (stating she complies with the Rule although it is unnecessary since any ethical doctor will release a non-expired prescription to a patient); Kanevsky (Comment #0364) (optometrist states she and the prescribers she knows comply with the Rule).

[106] Warby Parker, which began as an online-only entity but now has over 100 brick and mortar locations in the U.S., began operations in 2010 and appears to be the largest online eyeglass seller. VisionMonday, ''Top 50 U.S. Optical Retailers 2020,'' *available at https://www.visionmonday.com/vm-reports/article/key-optical-players-ranked-by-us-sales-in-2019/.*

[107] Thompson (Comment #0333); Berge (Comment #0352); Warby Parker (Comment #0817 submitted by Kumar); *see also* Senate Majority Leader Charles Schumer (Comment #0865).

[108] *See, e.g.,* DeMuth, Jr. (Comment #0055); Jozwik (Comment #0002); Schwartz (Comment #0514); Opticians Association of Virginia (Comment #0647 submitted by Nelms); Pulido (Comment #0019); Warby Parker (Comment #0817 submitted by Kumar); *see also* NAOO (Comment #0748 submitted by Cutler); Professional Opticians of Florida (Comment #0803 submitted by Couch); Opternative (now Visibly) (Comment #0853 submitted by Dallek).

[109] Tedesco (Comment #0042) (signage); Warby Parker (Comment #0817 submitted by Kumar) (bill of rights and signage).

[110] *See, e.g.,* Hildenbrand (Comment #0049) (expiration); Fainzilberg (Comment #0051) (pupillary distance); Wintermute (Comment #0067) (pupillary distance); Cordivari (Comment #0069) (expiration); Dickens (Comment #0176) (pupillary distance); O'Dea (Comment #0188) (pupillary distance); Nystrom (Comment #0254) (expiration); Meszaros (Comment #0303) (expiration); Buntain (Comment #0529) (expiration); Morel (Comment #0712) (expiration); Warby Parker (Comment #0817 submitted by Kumar) (expiration and pupillary distance).

[111] *See, e.g.,* Pentecost (Comment #0626); Bolenbaker (Comment #0633); McWilliams (Comment #0635); Cervantes (Comment #0671); Harrison (Comment #0718); Nellis (Comment #0725); Ambler (Comment #0025).

[112] AOA (Comment #0849 submitted by Peele); Pentecost (Comment #0626); McWilliams (Comment #0635); Nellis (Comment #0725); Diener (Comment #0017). The AOA also stated its concern that some online retailers may be using foreign manufacturers with questionable labor standards. Comment #0849.

[113] Comment #0849 submitted by Peele. The AOA also stated that it is already common practice for prescribers to provide duplicate copies of prescriptions upon request. *Id.*

[114] *Id.*

[115] Comment #0864 submitted by Haber.

[116] *See, e.g.,* AAO (Comment #0864 submitted by Haber); AOA (Comment #0849 submitted by Peele); Johnson (Comment #0654); Nichols (Comment #0461); Patterson (Comment #0469); Chung (Comment #0474); Wareham (Comment #0498); Yuhas (Comment #0505); Mangano (Comment #0525); Hopkins (Comment #0776); Alvarez (Comment #0838).

[117] *See, e.g.,* AAO (Comment #0864 submitted by Haber); AOA (Comment #0849 submitted by Peele).

[118] *See, e.g.,* Opticians Association of America (Comment #0638 submitted by Allen); Opticians Association of Kentucky (Comment #0640 submitted by Castle); Opticians Association of Vermont (Comment #0641 submitted by Williams); Opticians Alliance of New York (Comment #0642 submitted by Cullen); Opticians Association of Ohio (Comment #0683 submitted by Glasper); Opticians Association of Iowa (Comment #0646 submitted by Dalton); South Carolina Association of Opticians (Comment #0822 submitted by Harbert).

prescriptions include pupillary distance because they prefer to take this measurement and not be required to follow a measurement taken by the prescriber.[119] In addition, although many opticians stated a preference for a one-year expiration date, they did not object to a two-year expiration period unless a medical reason exists for requiring a shorter period of time.[120]

III. Requirements for Eyeglass Sellers

Although the Eyeglass Rule imposes certain requirements and limitations on prescribers—namely that they automatically release eyeglass prescriptions and do not charge fees or demand liability waivers for doing so—the Rule does not otherwise regulate the sale of eyeglasses. In this respect, the Eyeglass Rule diverges from the Contact Lens Rule. For example, among other things, the CLR provides that a dispenser may only sell contact lenses in accordance with a valid prescription that is either presented to the seller or verified by the prescriber.[121] The CLR is based on the language Congress set forth in the FCLCA, 15 U.S.C. 7603, whereas the Eyeglass Rule is more narrowly tailored and does not regulate the terms of sale for eyeglasses. The Commission's September 3, 2015 ANPR did not specifically request comment on this issue. However, in response to the Commission's request for feedback on general issues, including its request for modifications to the Rule that may increase benefits to consumers, some commenters offered their views on this topic, with many opining that the FTC should more closely regulate eyeglass sales.

In particular, the Opticians Association of America, a national organization of opticians with over 10,000 members, commented that to ensure patient safety, the Commission should mandate that all sellers only sell eyeglasses after obtaining a copy of the prescription, or after verifying the prescription information with a prescriber.[122]

Some commenters also stated that eyeglasses sold online are inferior in quality, or may come with an incorrect prescription.[123] The Opticians Association of Alaska, Inc., for example, commented that much of the eyewear sold online ''does not meet national tolerance standards,'' and asserted that consumers often rely on brick and mortar dispensaries to remedy problems stemming from poorly manufactured eyeglass products purchased online.[124]

The Opticians Association of America and others commented that consumers' eye health may be negatively affected by unrestricted sales practices, and called the lack of required verification for sellers a ''loophole'' in the Rule.[125] Other commenters proposed that, regardless of whether a prescription is presented or verified, the online sale of eyeglasses should be limited or even banned altogether.[126]

However, commenters submitted very little empirical evidence of consumer harm that would support restrictions on sales practices. The only data referenced or submitted in support of additional Commission regulation of eyeglass sales was a 2010 study focusing solely on the online sale of eyeglasses. That study, conducted by Dr. Karl Citek[127] and others, found that many eyeglasses sold by online retailers did not pass ANSI (American National Standards Institute) standards for prescription accuracy or safety.[128] In the study, ten individuals (consisting of the researchers and their colleagues and associates) ordered two pairs of eyeglasses apiece from ten online sellers.[129] The published report does not identify the sellers used, stating only that they were online eyeglass sellers with the ten highest page rankings (most visited) at the time.[130] According to the report, the eyeglasses purchased, and subsequently received in the mail, were then tested by an individual—described in the study as a researcher[131]—for prescription accuracy, and tested by an independent laboratory for impact-resistance.[132] The study found that of the eyeglasses purchased online, 28.6 percent contained at least one lens that failed at least one parameter of optical analysis,[133] and 22.1 percent had at least one lens that failed impact testing at the lab.[134]

The Commission has reviewed the Citek study and has significant reservations about the study's conclusion that eyeglasses purchased online might not be ''of equal performance, value, or safety'' as those dispensed in person.[135] Significant weaknesses in the study's design and reporting limit its usefulness. For example, the study does not name the individual online retailers from whom lenses were purchased, nor provide results for each retailer in the study. Hence, even for the ten retailers in question, it is not possible to determine whether the 28.6 percent and 22.1 percent average failure rates reported are typical failure rates or are skewed due to significantly higher failures among a small number of relatively poorly performing actors. In addition, the study does not report how click-rates correspond to sales in the online market. Hence, it is unclear whether those online retailers were also the ten leading online retailers in terms of sales

[119] *Id.*

[120] *Id.*

[121] *See* 16 CFR 315.5(a).

[122] Comment #0638 submitted by Allen; *see also* Opticians Association of Kentucky (Comment #0640 submitted by Castle); Opticians Association of Vermont (Comment #0641 submitted by Williams); Opticians Alliance of New York (Comment #0642 submitted by Cullen); Duff (Comment #0653); Opticians Association of Ohio (Comment #0683 submitted by Glasper); Parent (Comment #0693); Groenke (Comment #0697); Kline (Comment #0710); Schrup (Comment #0765); Kuhl (Comment #0766); Gorsuch (Comment #0773); Frein (Comment #0774); Hopkins (Comment #0776); Feldman (Comment #0780); Anderson (Comment #0781); Lyden (Comment #0792); Jackson (Comment #0707); Meinke (Comment #0795); Lorenczi (Comment #0796); Keas (Comment #0798); Burkhart (Comment #0805); Albee (Comment #0806); Rivera (Comment #0809); Warden (Comment #0820); Anderson (Comment #0714); South Carolina Association of Opticians (Comment #0822 submitted by Harbert); Sansbury (Comment #0825); Williamson (Comment #0827); Ardis (Comment #0830); Folline Vision Centers (Comment #0837); Rump (Comment #0843); Murtha (Comment #0844); Heaton (Comment #0845); Gage-Halman (Comment #0846); Malonjao (Comment #0856); Jozwik (Comment #0002) (commenting that verification minimizes mistakes since the information is straight from the prescriber).

[123] *See, e.g.,* Strahl (Comment #372); Senate Majority Leader Charles Schumer (Comment #0865); Pentecost (Comment #0626); Harrison (Comment #0718); Nellis (Comment #0725).

[124] Comment #0852 submitted by Brand.

[125] Opticians Association of America (Comment #0638 submitted by Allen); Opticians Association of Kentucky (Comment #0640 submitted by Castle); Opticians Association of Vermont (Comment #0641 submitted by Williams); Opticians Alliance of New York (Comment #0642 submitted by Cullen); Opticians Association of Ohio (Comment #0683 submitted by Glasper); South Carolina Association of Opticians (Comment #0822 submitted by Harbert).

[126] *See, e.g.,* Opticians Association of Alaska, Inc. (Comment #0852 submitted by Brand); Kline (Comment #0710).

[127] Dr. Citek is an optometrist and university professor. *See https://www.pacificu.edu/about/directory/people/karl-citek-ms-od-Ph.D.-faao.*

[128] Karl Citek *et al.,* ''Safety and compliance of prescription spectacles ordered by the public via the internet,'' Optometry, 82 (2011) 549–55.

[129] *Id.* at 550.

[130] *Id.*

[131] *Id.* The study does not identify the researcher except by the initials ''DLT,'' which correspond to one of the article's authors, Daniel L. Torgersen. At the time, Torgersen was Vice President of Management Information Systems and Special Projects for the Walman Optical Company, an ophthalmic products provider, and technical director of the Optical Laboratories Association. *Id.* at 549; *see also,* VisionMonday, *OLA Announces 2009 Directors' Choice Recipient and Awards of Excellence Final Nominees* (Oct. 2009), *available at https://www.visionmonday.com/latest-news/article/ola-announces-2009-directors-choice-recipient-and-awards-of-excellence-final-nominees-16057/?msclkid=740f9983c64b11ec8e35481006e0819a a.*

[132] Citek, *supra* note 128, at 550. The independent laboratory is not identified.

[133] The parameters analyzed included sphere power, cylinder power, cylinder axis, and horizontal prism imbalance. *Id.* at 552.

[134] *Id.* at 554.

[135] *Id.* at 555.

(either in dollars or pairs of eyeglasses), whether they accounted for any particular percentage of online eyeglass sales overall, or whether they were, by some measure, representative of online sellers generally.

It is also unclear whether the Citek study's reported failure rate for online sellers is any different from that for eyeglasses purchased from traditional optical dispensaries. The study did not include eyeglasses purchased directly from prescribers or brick and mortar dispensaries.[136] The study does note, however, that, according to a previous study published in 1978, approximately 25 percent of eyewear manufactured for traditional dispensaries fail at least one parameter of optical analysis, a rate comparable to the online failure rate cited in the Citek study.[137]

In addition, the Citek study is a decade old, and was conducted when the online sale of eyeglasses was in its relative infancy. The eyeglass market has changed considerably since 2010, and it is probable that online sales have changed in various ways: new sellers have entered the market, seller market shares have probably shifted (as well as relative page visits and click-through rates), and online vendors from 2010 who are still operating may have modified their business practices. Because of these and other concerns about the study, the Commission cannot accord it significant weight.

Even if the Citek study were more compelling, however, it is unlikely it would provide, by itself, sufficient justification for adding new regulatory requirements to the Rule. The evidentiary record as a whole does not contain sufficient empirical evidence establishing that current eyeglass sales practices, whether by online vendors or competing brick and mortar establishments, are harmful to consumers and, therefore, should be banned or otherwise restricted. If the Commission had evidence of significant harm associated with one distribution channel in particular, it would need to assess whether new regulatory restrictions would ameliorate those harms in a way that would provide a net benefit to consumers. Furthermore, the Commission notes that certain states expressly permit sellers to duplicate eyeglasses, or do not require written prescriptions to make eyeglasses,[138] and a Commission regulation requiring presentation of a prescription or verification of a prescription would have to preempt these state laws. The Commission declines to take such action without more compelling empirical evidence of consumer harm or benefits.

IV. Section 456.2—Separation of Examination and Dispensing

A. Automatic Prescription Release

Section 456.2(a) of the Eyeglass Rule provides that it is an unfair act or practice for a prescriber to fail to provide to the patient one copy of the patient's prescription immediately after the eye examination is completed. This provision provides, however, that a prescriber may refuse to give the patient a copy of the patient's prescription until the patient has paid for the eye examination, but only if that prescriber would have required immediate payment from that patient had the eye examination revealed that no ophthalmic goods were required.[139] Sections 456.2(b) and 456.2(c) prohibit prescribers from imposing conditions for patients to receive eye examinations and prescriptions. Section 456.2(b) provides that it is an unfair act or practice for a prescriber to condition the availability of an eye examination on a requirement that the patient agree to purchase any ophthalmic goods from the prescriber. Section 456.2(c) provides that it is an unfair act or practice for a prescriber to charge any fee in addition to the examination fee as a condition for releasing the prescription to the patient.

These provisions, typically referred to as the automatic prescription release requirement (also sometimes referred to historically as the required''separation of examination and dispensing''),[140] were intended to ensure that consumers have ''unconditional access'' to their ophthalmic prescriptions so they are able to ''price shop'' for eyeglasses.[141] As noted in the Eyeglass I Report, without the ability to unconditionally obtain their prescriptions, consumers lack available information to choose the mixture of quality and price that best satisfies their needs.[142]

5. Comments on Whether To Retain Automatic Prescription Release

In response to a request for comments on the continuing need for the automatic prescription release provision,[143] many commenters—including opticians, optometrists, ophthalmologists, eyeglass sellers, and consumers—expressed strong support.

[136] While none of the commenters submitted or referenced any additional studies evaluating eyeglass sales practices, the Commission is aware of a 2016 study from the United Kingdom analyzing the acceptability, quality, and accuracy of glasses purchased online and from optometry practices. Alison J. Alderson *et al.,* ''A Comparison of Spectacles Purchased Online and in UK Optometry Practice,'' Optometry and Vision Science, 93 (2016) 1196–1202. The study involved 33 eyeglass wearers who purchased 154 pairs of eyeglasses online and 155 pairs in person from optometry practices in the United Kingdom. Eyeglasses were evaluated based on participant-reported preference, acceptability, and safety; an assessment of lens, frame and fit quality; and the accuracy of prescriptions to an international standard. Compared to the practice eyeglasses, participants rated more of the online eyeglasses unacceptable or unsafe due to poor fit, poor cosmetic appearance, or inaccurate optical centration distance. While participants preferred eyeglasses purchased from optometry practices to those purchased online, lens quality and prescription accuracy were similar between the two groups. Frame quality differed based on price, and the authors noted that the online frames were significantly less expensive and thus lower quality. The study authors noted areas for potential improvement in sales practices both for online sellers and optometry practices.

This study is informative of the types of problems eyeglass wearers can encounter in an online or in person purchase and the preferences that may motivate consumers when choosing where to purchases eyeglasses, but the Commission does not believe it provides an adequate basis for imposing further regulatory requirements on eyeglass sellers. The study took place in the United Kingdom, rather than the United States, and online retailers were limited to those with a base in the United Kingdom, so the results are not necessarily applicable to the US market. The study had design limitations similar to the Citek study, such as not identifying the online retailers (or, in this case, the optometry practices), or providing the results for each retailer. Study authors selected online retailers based on search engine results, rather than sales volume, while study participants selected their own optometry practices within a limited set of restrictions. In addition, 97% of study participants had previously purchased their eyeglasses from optometry practices (and may have chosen to purchase from those same practices as part of the study), which might have led to confirmation bias in the self-reported assessments. Moreover, the study findings did not support a meaningful difference in the quality or accuracy of glasses purchased online as compared to those purchased in person.

[137] *See* Citek, *supra* note 128, at 554 (citing G.A. Chase & B.E. Lynch, ''An Examination of Ophthalmic Prescription Spectacle Quality Relative to the American National Standard Z80.1–1972,'' Optical Index 1978; 53: 17–52). According to Citek, a subsequent unpublished study found that most of these failures are caught during secondary inspections before the eyeglasses leave the lab for the dispensary. *Id.* at 554. Because the testing in each of the three studies discussed herein was performed by different researchers in different settings in different decades, it is impossible to know if they were performing the same exact tests in the same exact manner, so comparisons between the Citek study and the other two studies are likely of questionable value.

[138] *See, e.g.,* Mass. Gen. Laws ch. 112, § 73C (duplication, replacements, reproductions, or repetitions may be done at retail without prescription); S.C. Code Ann. § 40–38–280 (duplications, replacements, reproductions, or repetitions may be provided without prescription).

[139] 16 CFR 456.2(a).

[140] 16 CFR 456.2; *see also* Presiding Officer's Report, *supra* note 33, at 17–24, 206.

[141] Eyeglass I Rule, 43 FR 23992, 23992.

[142] Eyeglass I Report, *supra* note 6, at 265 (citing hearing testimony from the then-Commissioner of the New York City Department of Consumer Affairs).

[143] Eyeglass Rule ANPR, 80 FR 53274, 53275.

Several stated that the provision benefits consumers by fostering comparison-shopping and competition.[144] As one consumer commented, ''[o]btaining a prescription for my eyeglasses has been crucial, improving my ability to purchase glasses at fair prices.'' [145] Another declared that the Rule ''has provided consumers the benefit of choosing where they'd prefer to buy their eyeglasses, saving them money on that expense.'' [146]

Other commenters stressed a continuing need for this provision in the Rule, with some contending that the need is as great or greater now as when the Rule was first implemented. According to one comment (submitted on behalf of three individuals), the advent of online optical dispensaries can put more pressure on prescriber profits, making it even more vital to mandate automatic release in order to ensure that prescribers do not try to recoup lost profits by coercing patients to buy eyewear in-house.[147] According to this comment, the automatic release provision compels prescribers to remain competitive, leading to lower prices and higher quality eyeglasses.[148] Another commenter, the Professional Opticians of Florida, stated that since the Rule was first implemented, there has been a ''dramatic increase'' in prescribers' offices with attached optical dispensaries, increasing the potential for such prescribers to steer patients into purchasing eyeglasses in-house.[149]

Opticians, in particular, expressed strong support for the automatic prescription release requirement, with the National Association of Optometrists and Opticians (''NAOO''), a trade association representing co-located optical dispensaries, characterizing the Rule as a ''triumph of narrowly tailored government action that directly addresses [a] specific consumer problem with minimal cost and remarkable benefits.'' [150] According to NAOO, any costs to prescribers from prescription release has been ''trivial,'' while benefits to consumers have been significant, allowing them to comparison-shop and choose the optical dispenser of their choice.[151] This, in turn, according to the commenter, has helped foster exponential growth in the ophthalmic goods market.[152] NAOO added that it was critical to maintain the automatic release requirement due to the continuing ''imbalance of power between patient and prescriber,'' and powerful financial incentives for prescribers—who sell the products that they prescribe—to keep sales in-house.[153]

On the other hand, the AOA commented that, ''[i]t is our understanding that doctors of optometry widely comply with the Rule,'' and did not believe that compliance with the prescription release provision remains an issue.[154] The AOA also stated that patients are well informed of their ability to obtain their eyeglass prescriptions and have a greater expectation to receive their health information from their doctors as a result of the Health Insurance Portability and Accountability Act of 1996 (''HIPAA'').[155] Accordingly, the AOA posited that ''[g]iven that the requirements outlined in the Rule are now standard practice, it is questionable as to whether the Rule serves a continued benefit to patients.'' [156] Nonetheless, the AOA did not expressly suggest modifying or terminating the prescription release provision, stating that the Rule, as currently drafted, is not necessarily harmful.[157] In addition, a few individual optometrists concurred that patients should be given their prescriptions after a refraction examination.[158]

None of the commenters expressly proposed eliminating the prescription release requirement. Some prescribers, however, commented that requiring automatic release is unnecessarily burdensome and wasteful, since not all patients want paper copies of their prescription.[159] As one prescriber explained, ''A lot of patients don't want the copy and we end up throwing the paper away. I sometimes worry that if a patient chose not to take it, we would later be accused of not offering it to them.'' [160] Some commenters suggested that instead of automatically providing a copy, the Rule should require that prescriptions be made accessible electronically, or only upon request.[161]

6. Compliance With the Automatic Prescription Release Requirement

Commenters disagreed over whether most prescribers comply with the automatic prescription release requirement. As stated above, the AOA expressed its belief that doctors of optometry typically comply with the Rule.[162] In addition, several individual prescribers asserted that they always give patients a paper copy of their prescription.[163] Other individual prescribers commented that all the prescribers they know do the same.[164] It

[144] *See, e.g.,* Publi (Comment #0040); Ellis (Comment #0189); Prevent Blindness (Comment #0385 submitted by Parry); DiBlasio (Comment #0441); Kelley (Comment #0804); Opternative (now Visibly) (Comment #0853 submitted by Dallek).

[145] Varazo (Comment #0250).

[146] Pulido (Comment #0019); *see also* Shuval (Comment #0564) (''The [E]yeglass [R]ule is a beautiful and wonderful thing. Giving patients a copy of their prescription is essential.'').

[147] Burchell (Comment #0866). The FTC recognizes that the increase in online optical dispensaries may theoretically lead to reduced prescriber profits, but notes that the evidentiary record does not currently contain empirical evidence demonstrating this effect.

[148] *Id.*

[149] Comment #0803 submitted by Couch.

[150] Comment #0748 submitted by Cutler; *see also, e.g.,* Ahrens (Comment #0022) (other opticians expressing support for automatic prescription release); Opticians Association of Alaska, Inc. (Comment #0852 submitted by Brand); Hoffman (Comment #0026).

[151] Comment #0748 submitted by Cutler. The NAOO noted that based on member experience and observation, thousands of optometrists affiliated in co-location with their members comply with the Rule with ''little or no added costs or other burden on the eye care practice.'' *Id.*

[152] *Id.*

[153] *Id.* NAOO noted that optometry and ophthalmology are among the very few health care professions in which prescribers also sell, and often derive a significant portion of their income from, the products they prescribe. *Id.; see also* note 66, *supra* (product sales typically account for 55 to 65 percent of optometrist revenue). In commenting on the CLR, however, the AOA pointed out that health care professionals in other areas—such as ambulatory surgery centers, orthopedic centers, and dental service providers, among others, also sell what they prescribe or recommend for treatment. AOA (CLR SNPRM Comment FTC–2019–0041–0096). The Commission acknowledged this fact. CLR Final Rule, 85 FR 50668, 50679–80 (stating that the Commission did not base its CLR amendments solely on a belief that contact lens prescribers' role and market is necessarily unique, but rather considered the structure of the market as a contributing factor in an overall evaluation of the need for improved compliance and enforcement).

[154] Comment #0849 Submitted by Peele.

[155] Public Law 104–191 (Aug. 21, 1996); Comment #0849 submitted by Peele.

[156] Comment #0849 submitted by Peele.

[157] *Id.*

[158] *See, e.g.,* Kim (Comment #0667); Heuer (Comment #0670).

[159] Barnes (Comment #0043); Lunsford (Comment #0346).

[160] Barnes (Comment #0043).

[161] Lunsford (Comment #0346); B.C. (Comment #0749).

[162] Comment #0849 submitted by Peele.

[163] Johnson (Comment #0654); Michel (Comment #0472); Cook (Comment #0541); Kaulfuss (Comment #0570); McWilliams (Comment #0635); Brosman (Comment #0637). Numerous prescribers who commented on the Contact Lens Rule proposals also wrote that they consistently release prescriptions to patients after each eye examination—including examinations for eyeglass prescriptions—and attested that their colleagues do the same. *E.g.,* Carlson (CLR WS Comment FTC–2017–0099–0727) (''Each and every patient of mine gets their glasses and contact lens prescription at the end of their exam. It is not only the law but ethical.''); Chakuroff (CLR WS FTC–2017–0099–0763) (''Every patient I see is provided a copy of their glasses and contact lens prescriptions.'').

[164] Kanevsky (Comment #0364); Smith (Comment #0365); Hartenstein (CLR WS FTC–2017–0099–0766) (''The overwhelming majority of eye doctors already provide patients with copies of prescriptions for both glasses and contact lenses per your previous mandates.''); *see also* CLR SNPRM, 84 FR 24664, 24673.

should be noted, however, that prescribers may be aware in a general way of their obligation to release prescriptions and yet be ignorant of the precise requirements of the prescription release provision. For example, in some instances, prescribers may violate the Rule by waiting for a patient to ask for the prescription, or asking a patient, ''Do you want a copy of your prescription?'' In both circumstances, the prescriber has violated the Rule since the prescription is not automatically provided. Indeed, a number of prescribers admitted to doing exactly that when commenting on the CLR, with many misstating the prescription release requirements and asserting that they always ''offer'' prescriptions to their patients or provide them ''when requested,'' rather than automatically providing prescriptions ''whether or not requested by the patient,'' as required under both the Contact Lens Rule and Eyeglass Rule.[165] Many prescribers may thus believe they are complying with the Rule even though they are not, and might also be incorrect in assessing, and reporting on, their own compliance and that of their colleagues.

A number of commenters, meanwhile, asserted that, even though the Rule has required, for more than four decades, that prescribers automatically release eyeglass prescriptions to their patients, prescribers still routinely fail to comply, either by failing to provide a prescription unless requested, requiring a waiver in exchange for a prescription, or failing to provide a prescription at all. According to eyeglass seller and manufacturer Warby Parker, ''[i]t is well known in the industry that many [prescribers] refuse to give patients prescriptions unless they specifically request it, and some [prescribers] place intimidating and unnecessary warnings or waivers of responsibility on the prescriptions they do release.'' [166]

One commenter, an optician, opined that the practice of prescribers failing to automatically release prescriptions is ''flagrant,'' [167] while another commented that ''[i]t has been my observance that the Eyeglass Rule is not being complied with at all.'' [168] These two commenters asserted that prescribers often do not provide patients with prescriptions until after patients are led into the prescriber's in-house optical dispensary,[169] a practice that would violate the Rule because the examination has concluded, and the patient should have already been provided with the prescription. And the NAOO commented that while it did not possess empirical evidence, ''experiential and anecdotal evidence and observation of industry leaders indicates that while many consumers are getting a copy of their eyeglass prescription upon completion of the eye exam, some are not, and some are faced with resistance when they attempt to obtain their prescriptions.'' [170]

The Commission did not receive many comments from consumers specifically addressing the issue of prescription release in response to the ANPR. However, a number of consumers who commented during the CLR review stated that their prescribers failed to provide them with their prescriptions for contact lenses *and* for eyeglasses.[171] And separate from these rule review processes, the Commission continues to receive consumer complaints about noncompliance with the automatic release provisions of both the Eyeglass Rule and Contact Lens Rule. In December 2020, the Commission sent warning letters to 28 prescribers after consumers complained to the FTC that the prescribers had violated the Eyeglass Rule.[172] And in April 2016, the Commission sent warning letters to 45 contact lens prescribers after receiving complaints alleging the prescribers had violated the CLR by failing to release prescriptions.[173]

Two commenters also submitted consumer survey evidence about prescriber compliance. Warby Parker submitted results from an October 2015 survey, conducted on the company's behalf by the polling firm SurveyMonkey, which reported that, of consumers who had purchased eyeglasses within the last three years, 47 percent of those who saw optometrists and 31 percent of those who visited ophthalmologists were not automatically provided with a physical copy of their eyeglass prescription.[174]

[165] *See* CLR SNPRM, 84 FR 24664, 24673–74. Staff is aware of similar prescriber comments in the context of eyeglass prescriptions. The Eyeglass Rule specifically mandates that patients be handed a copy of their prescriptions automatically without their asking for them. And while seemingly minor, the act of waiting for a patient to ask, or offering a prescription rather than automatically providing it, can put patients in an awkward position, since they may feel they are showing disloyalty to their prescriber if they want to shop for eyeglasses elsewhere. *See* Eyeglass II Report, *supra* note 26, at 271 (noting that according to commenters, consumers are not always comfortable requesting their prescription, and may be unwilling to risk offending their doctors). Such an act may therefore undermine the Rule's intent to boost comparison-shopping and foster a vibrant marketplace.

[166] Comment #0817 submitted by Kumar.

[167] Santini (Comment #0047) (''In my area, it is common for eye care providers who exam [sic] AND Sell glasses to not be forthcoming with providing the spectacle Rx, particularly when consumers demand it'').

[168] Tedesco (Comment #0042).

[169] *Id.;* Santini (Comment #0047); *see also* Opticians Association of Virginia (Comment #0647 submitted by Nelms).

[170] Comment #0748 submitted by Cutler.

[171] *See, e.g.,* Nichols (CLR WS Comment FTC–2017–0099–0209) (said she was charged for her eyeglass prescription); Tennison (CLR WS Comment FTC–2017–0099–0453) (does not receive written prescriptions for lenses or eye glasses after exams); Bogner (CLR NPRM Comment FTC–2016–0098–1398); Rasczyk (CLR NPRM Comment FTC 2016–0098–1415); Strobel (CLR NPRM Comment FTC–2016–0098–1446); Austin (CLR NPRM Comment FTC–2016–0098–1514); Martinez (CLR NPRM Comment FTC–2016–0098–2090). A few other CLR consumer commenters, however, stated that although they do not receive their prescriptions after a contact lens fitting, they typically do receive them after a refraction exam for eyeglasses. *See, e.g.,* Hall (CLR WS Comment FTC–2017–0099–0227); Krainman (CLR NPRM Comment FTC–2016–0098–1373); Zeledon (CLR NPRM Comment FTC–2016–0098–1377).

[172] Press Release, Fed. Tr. Comm'n, FTC Sends 28 Warning Letters Regarding Agency's Eyeglass Rule (December 8, 2020), *https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sends-28-warning-letters-regarding-agencys-eyeglass-rule.* Similarly, in May 2016, the Commission sent warning letters to 38 prescribers after receiving consumer complaints alleging violations of the Eyeglass Rule. Press Release, Fed. Tr. Comm'n, FTC Issues Warning Letters Regarding Agency's Eyeglass Rule (May 13, 2016), *https://www.ftc.gov/news-events/press-releases/2016/05/ftc-issues-warning-letters-regarding-agencys-eyeglasses-rule.*

[173] Press Release, Fed. Tr. Comm'n, FTC Issues Warning Letters Regarding the Agency's Contact Lens Rule (Apr. 7, 2016), *https://www.ftc.gov/news-events/press-releases/2016/04/ftc-issues-warning-letters-regarding-agencys-contact-lens-rule.* During the Commission's CLR review, the AOA and several optometrists pointed out that based on a percentage of the total number of eye patients in the United States, the number of complaints to the FTC about prescribers' failure to release prescriptions is quite small. *See* CLR Final Rule, 85 FR 50668, 50676; CLR SNPRM, 84 FR 24664, 24674. This is correct, but does not mean that the number of prescribers who fail to release prescriptions is correspondingly small. As discussed in some detail in the CLR SNPRM and CLR Final Rule, a lack of formal consumer complaints about failure to release prescriptions does not equate with prescriber compliance. Based on the Commission's experience, the vast majority of injured or impacted consumers do not typically register complaints with the government, and even fewer are likely to file a formal complaint about a prescriber's failure to release their prescription. *See* CLR Final Rule, 85 FR 50668, 50676; CLR SNPRM, 84 FR 24664, 24674–75.

[174] Comment #0817 submitted by Kumar. The SurveyMonkey survey comprised 1,329 respondents recruited from a sample that was U.S. Census-balanced and representative of the national distribution of major demographic factors, including age, gender, geography, and income. Respondents were not informed of the identity of the survey sponsor. Survey respondents who had purchased eyeglasses within the last three years (65% of the total respondents) answered questions about prescription information, purchase behavior, and prescriber experience. Within the set of respondents who had purchased within the last three years, 54% had purchased within the last 12 months. There were no significant differences in responses regarding automatic prescription release between those who had purchased within the last year and those who had purchased between one

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Another commenter, contact lens seller 1–800 CONTACTS, cited a survey—conducted on its behalf by the firm Survey Sampling International (''SSI'') and submitted previously with a comment on the Commission's Contact Lens Rule review—which found that only 34 percent of eyeglass wearers automatically received their prescriptions on the day of their office visit, with another 19 percent receiving it during their visit, but only after asking for it.[175] According to the SSI survey, some consumers were able to obtain their prescription at a later point by returning to their prescriber's office, but 39 percent of consumers never received their prescription at all.[176]

The Commission has also reviewed five consumer surveys—submitted and considered during the CLR review—which found that between 21 and 34 percent of contact lens users did not receive their prescriptions after their exam and fitting.[177] These surveys asked only about receipt of contact lens prescriptions, not eyeglass prescriptions, and there are some differences in the examination and prescription processes.[178] But the mandatory prescription release requirements are similar, and there is little evidence in the record to indicate that prescribers provide eyeglass prescriptions in significantly greater numbers than they do contact lens prescriptions.[179]

It is important to acknowledge that no survey is perfect, and all surveys are subject to methodological limitations, as well as limits commonly associated with survey evidence. The Commission has also recognized, however, that multiple surveys conducted by different sources at different times with similar results can bolster the credibility of each individual survey.[180] Furthermore, the Commission notes, as it did in the CLR Final Rule, that despite multiple opportunities and requests for comment since 2015, the Commission has yet to find or receive any reliable consumer-survey data rebutting or contradicting the submitted findings for either contact lens users or eyeglass wearers, or establishing (other than anecdotally) that consumers consistently receive their prescriptions from prescribers.[181]

Consumer behavior and third-party seller experience may also reveal the level of prescriber compliance with the automatic prescription release requirement. For example, comments submitted pursuant to the rulemaking process, and staff communications with industry, indicate that many consumers who attempt to purchase eyeglasses from third parties do not present their prescriptions.[182] These consumers must either request a copy of their prescriptions from their prescribers or request that the sellers do so.[183] This suggests that these consumers were not provided with a copy of their prescriptions as required by the Rule.[184]

In terms of the scope of this issue, Warby Parker commented that it is required to expend substantial resources ''persuad[ing prescribers] to provide the information required to fill a consumer order,'' and that it informs between 50 and 100 consumers per day that it is unable to complete their eyeglass orders.[185] In addition, more than 20 consumers commented in this rule review that, when they tried to purchase eyeglasses, they asked their eyeglass sellers to obtain or verify the prescription with the prescribers, often without success.[186] Although this type

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and three years prior to the survey. The significant difference in automatic release compliance between optometrists and ophthalmologists may be due to the fact that fewer ophthalmologists sell eyeglasses, and might thus have less incentive to withhold a consumer's prescription, but the survey did not directly explore this issue.

[175] Comment #0834 submitted by Williams. According to 1–800 CONTACTS, the data derive from an October 2015 SSI online survey of 303 prescription eyeglass wearers. *See* ''FCLCA Study, Focus on Prescription (Rx),'' attached as Exhibit B to 1–800 CONTACTS (CLR RFC Comment FTC–2015–0093–0555 submitted by Williams). Respondents were not informed of the identity of the survey sponsor. The Commission has some concerns about the methodology utilized for this survey, particularly about the lack of an ''I don't know'' response option for some questions, but believes the information may still be suggestive, particularly when viewed in conjunction with information from other sources and the absence of contradictory data.

[176] *Id.*

[177] The results from the individual consumer surveys are as follows: (1) June 2019 survey by Dynata on behalf of 1–800 CONTACTS of 1,011 contact lens users found that 21% said they never received their prescriptions (1–800 CONTACTS (CLR SNPRM Comment FTC–2019–0041–0135)); (2) January 2017 survey by Caravan ORC International on behalf of Consumer Action of 2,018 adults found that 31% of contact lens users said that at their last eye exam, their doctor did not provide them with a paper copy of their prescription (Consumer Action (CLR NPRM Comment FTC–2016–0098–2954)); (3) December 2016 survey of 1,000 contact lens users by SSI on behalf of 1–800 CONTACTS found that 24% of consumer respondents said they did not receive their prescription (1–800 CONTACTS (CLR NPRM Comment FTC–2016–0098–2738)); (4) May 2015 SSI survey of 2,000 contact lens wearers found that 34% said they did not receive their prescription (1–800 CONTACTS (CLR RFC Comment FTC–2015–0093–0555 submitted by Williams, Ex. C)); and (5) November 2014 SSI survey of 2,000 contact lens wearers found that 34% said they did not receive their prescription (1–800 CONTACTS (CLR RFC Comment FTC–2015–0093–0555 submitted by Williams, Ex. C)). As noted in the CLR SNPRM, the manner in which a few of the questions were phrased in the 2014 and 2015 surveys raised some Commission concerns, since some questions were leading, lacked an ''I don't know'' response option, and used a term—''hard copy''—which not all consumers may understand. The more recent surveys represented an improvement because they included an option for respondents to acknowledge that they do not recall whether they received their prescriptions, and used the term ''paper copy'' rather than ''hard copy.'' CLR SNPRM, 84 FR 24664, 24672.

[178] A primary difference is that contact lens exams involve a lens ''fitting,'' in which consumers try on the lenses, and prescriptions are only to be provided after the fitting is complete. Fittings can entail sending consumers home with a set of lenses to try out for a few days, and thus sometimes the prescriber will not provide the prescription until after this process. This sometimes leads consumers to think they should have been provided their prescriptions when, in fact, the fitting was not yet complete. There is no such fitting for eyeglass prescriptions. In theory, this should mean that fewer eyeglass patients are confused as to whether they did or did not receive their prescriptions when they were supposed to. The fact that the percentage of eyeglass users surveyed who said they did not receive their prescriptions is roughly the same as, or even higher than, that of contact lens wearers surveyed adds considerable credence to both types of surveys, and provides further support for the conclusion that a substantial number of consumers are not automatically receiving their prescriptions from prescribers as the Rule requires.

[179] As noted, *supra* note 171, a small number of consumer commenters to the CLR stated that although their prescribers fail to give them their contact lens prescriptions, they typically do provide them with their eyeglass prescription after each eye exam. *See, e.g.,* Hall (CLR WS Comment FTC–2017–0099–0227); Krainman (CLR NPRM Comment FTC–2016–0098–1373); Zeledon (CLR NPRM Comment FTC–2016–0098–1377). The Commission has not seen empirical data that supports this (and, in fact, it appears to be contradicted by the consumer survey data).

[180] *See* CLR Final Rule, 85 FR 50668, 50675; CLR SNPRM 84 FR 24664, 24673.

[181] *See* CLR Final Rule, 85 FR 50668, 50675.

[182] *See* Warby Parker (Comment #0817 submitted by Kumar).

[183] According to Warby Parker (Comment #0817 submitted by Kumar), before it processes an order it verifies every prescription by viewing a copy of the prescription or speaking with the customer's prescriber. In discussions with Warby Parker, the company has indicated that in 12 percent of all prescription eyewear orders (including both online and in-store orders), consumers utilize what is known as a ''call doctor'' request, whereby the customer requests that Warby Parker call the prescriber on behalf of the customer to obtain prescription information. However, the company noted that as of March 15, 2017, 15 percent of all ''call doctor'' requests Warby Parker made on behalf of its customers have been unanswered (*i.e.,* the prescriber has not provided the requested prescription information to Warby Parker). As a result, Warby Parker believes it may be more efficient for a customer to request the prescription information from the provider.

[184] It is reasonable to expect that if consumers possessed copies of their prescriptions, many would provide them to third-party sellers instead of asking the sellers to obtain their prescriptions from their prescribers. It is also possible, however, that some consumers could have received copies of their prescriptions but misplaced them, or simply thought it easier for the third-party seller to obtain copies of the prescription than to locate and provide the copies themselves in the format requested by the seller.

[185] Comment #0817 submitted by Kumar. Unlike with contact lenses, prescribers are not required by rule to verify eyeglass prescription requests from third-party sellers.

[186] *See, e.g.,* Debnam (Comment #0039); White (Comment #0053); Kidwell (Comment #0054);

of data does not allow the Commission to conclusively determine the level of prescriber compliance with automatic prescription release, or the number or percentage of consumers who might not have received a copy of their eyeglass prescription, it likely supports the finding that many patients are not automatically receiving a copy of their eyeglass prescriptions.

Lastly, it must be acknowledged that the same structural issue—an ''inherent conflict of interest'' in that prescribers sell the items they prescribe—that led the Commission to enact the Eyeglass Rule and CLR, and for Congress to enact the FCLCA,[187] and that the Commission cited as an ongoing factor in its decision to amend and strengthen the CLR,[188] still exists with respect to the eyeglass market and the Rule. According to some industry sources, eyeglass sales amount to approximately 37 to 44 percent of an optometric practice's gross revenue, with gross profit on eyeglass sales in the area of 62 percent.[189] While many prescribers have noted that they follow medical ethical codes that require they prioritize their patients' health,[190] it cannot be denied that it is contrary to prescribers' financial self-interest for their patients to take prescriptions elsewhere to buy eyeglasses.[191]

7. Evidence Regarding Consumers' Awareness of Their Right To Receive Their Prescription

As with the question of Rule compliance, there was little consensus among commenters as to whether consumers are fully aware of their right to their prescriptions.[192] In its comment, the AOA asserted that patients are now well-informed of their ability to obtain their eyeglass prescriptions.[193] Other commenters disagreed, with some eyeglass sellers asserting that many patients are still not aware of the Rule and their rights.[194]

In previous reviews of the Eyeglass Rule, the Commission received conflicting empirical evidence regarding the extent of consumer awareness, with some studies suggesting a relatively high degree of awareness,[195] and others indicating that consumers, particularly older patients, were unaware of their right to automatically receive a copy of their prescription.[196] For this review, none of the commenters submitted survey evidence specifically focused on consumer awareness of their right to their eyeglass prescription. One commenter, 1–800 CONTACTS, however, cited a survey submitted to the Commission during the Contact Lens Rule review which indicates that lack of awareness of a right to an eyeglass prescription is still an issue.[197] According to the survey, 49 percent of prescription eyeglass wearers are not aware that they have a right to receive a copy of their prescription, and 51 percent are not aware that their eye exam provider cannot charge for a copy of their prescription.[198]

Furthermore, multiple other consumer surveys examined during the Contact Lens Rule review indicate that a high percentage of consumers (46 to 60 percent, according to submitted data) do not realize they are entitled to receive their contact lens prescription,[199] and it is likely that many of these consumers are also

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Averett (Comment #0057); Silva-Sadder (Comment #0065); Tresham (Comment #0075); Ramiah (Comment #0139); Capurso (Comment #0149); Kulp (#0150); Lass (Comment #0197); Moran (Comment #0202); Wilbur (Comment #0215); Vieira (Comment #0237); Lavieri (Comment #0242); Donovan (Comment #0330); Panaccio (Comment #0340); Kingsley (Comment #0356); Gartland (Comment #0370); Gold (Comment #0340); Stout (Comment #0527); Crollini (Comment #0607). These commenters stated that their online orders were delayed, made more difficult, or defeated altogether, when their prescribers would not provide their prescription information.

[187] *See* H.R. Rep. No. 108–318, 108th Cong., 1st Sess. 4 (2003) at 4–5 (2003) (statements of Rep. W.J. Tauzin) (noting there is a ''classic conflict of interest that robs the consumers of the ability to shop competitively for the best price'').

[188] CLR Final Rule, 85 FR 50668, 50678–80 (''Moreover, the existing regulatory structure in the U.S., which bars a consumer from obtaining contact lenses without a prescription while permitting prescribers to sell what they prescribe, creates regulatory-based economic incentives for some prescribers to not release prescriptions, or to not release them unless requested by the consumer.'').

[189] ECP University, ''Key Metrics: Assessing Optometric Practice Performance & Best Practices of Spectacle Lens Management Report,'' 25, 40–41; *see also* note 66, *supra.*

[190] AOA (Comment #0849 submitted by Peele). *See also* Leeper (CLR NPRM Comment FTC–2016–0098–0798); MacDonald (CLR NPRM Comment FTC–2016–0098–1586); Aman (CLR NPRM Comment FTC–2016–0098–2523); Woo (CLR NPRM Comment FTC–2016–0098–2254); Talley (CLR RFC Comment FTC–2015–0093–0601).

[191] This, of course, was the basis for the Eyeglass Rule in the first place. The Commission determined that there was a long documented history of prescribers taking action to prevent or discourage patients from buying eyeglasses from third parties. *See* Eyeglass I Rule, 43 FR 23992, 24003. Even apart from any intentional actions prescribers may engage in to flout the Rule, this financial self-interest may result in prescriber bias to steer patients to purchasing glasses in-house. As the Supreme Court has observed, ''established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor.'' *N.C. State Bd. of Dental Exam'rs* v. *FTC,* 574 U.S. 494, 505 (2015). While some prescribers may sincerely believe that, from a health perspective, it is in their patients' best interest to obtain their eyeglasses from their prescriber, the Rule mandates that this decision belongs to the patient.

[192] The Rule's imposition of an obligation on a prescriber to automatically release an eyeglass prescription creates a corresponding right for consumers to receive it. *See* Eyeglass I Report, *supra* note 6, at 269 (''By requiring the release of the prescription in every case the public will have a clear, absolute right to their prescriptions.'').

[193] AOA (Comment #0849 submitted by Peele).

[194] Opticians Association of Virginia (Comment #0647 submitted by Nelms); NAOO (Comment #0748 submitted by Cutler); *see also* Warby Parker (Comment #0817 submitted by Kumar) (stating that many consumers are unaware of their rights and the Commission should try to increase awareness).

[195] *See* Eyeglass II Report, *supra* note 26, at 257–62 (citing Market Facts Study for the finding that a large majority of those surveyed knew they did not have to purchase eyeglasses from the examining doctor and could ask for an eyeglass prescription after an examination, although many mistakenly thought they had to ask for it, and some thought doctors were allowed to charge extra for providing it).

[196] *See* Presiding Officer's Report, *supra* note 33, at 22.

[197] *See* ''FCLCA Study, Focus on Prescription (Rx),'' attached as Exhibit B to 1–800 CONTACTS (CLR RFC Comment FTC–2015–0093–0555 submitted by Williams).

[198] *Id.* The manner in which the consumer awareness questions were phrased in the survey submitted by 1–800 CONTACTS did raise some concerns about the weight that should be accorded to the results. In particular, the questions were leading and used a term—''hard copy''—that some consumers might not understand. On the other hand, the question's phrasing may have led to under-reporting by consumers who in fact did not know their right, but did not want to admit that, because they did not want to acknowledge that they were unaware of their rights under federal law (this is known as social-desirability bias). *See* Diamond, *Reference Guide on Survey Research,* in Reference Manual on Scientific Evidence, 2nd. ed., 248–264 (Federal Judicial Center 2000), *available at https://wwws.law.northwestern.edu/faculty/fulltime/diamond/papers/referenceguidesurveyresearch.pdf;* Fowler, *How Unclear Terms Affect Survey Data,* The Public Opinion Quarterly (Summer 1992), *available at https://www.jstor.org/stable/2749171; see generally,* Carl A. Latkin, et al., *The relationship between social desirability bias and self-reports of health, substance use, and social network factors among urban substance users in Baltimore, Maryland,* 73 Addictive Behaviors 133–136 (2017) (social desirability bias is the tendency of survey respondents to answer questions in a manner that will be viewed favorably by others, and can skew survey results by over-reporting attitudes and behaviors that may be considered desirable attributes, while underreporting less desirable attributes). Social-desirability bias in this instance likely underestimates the number of patients unaware of their right to their prescription. In other words, the way the question was phrased could lead to results that make it appear that more patients are aware of their rights than is, in fact, the case. *See* ''FCLCA Study, Focus on Prescription (Rx),'' attached as Exhibit B to 1–800 CONTACTS (CLR RFC Comment FTC–2015–0093–0555 submitted by Williams) (One question was phrased, ''Are you aware that it is your right under federal law, as a patient to receive a hard copy of your contact lens/eye glasses prescription from your eye exam provider?'' and the other asked, ''Are you aware of the following. . .—Your eye exam provider cannot charge you for an actual hard copy of your prescription?'').

[199] CLR SNPRM, 84 FR 24664, 24675 (citing a Caravan ORC International survey submitted by Consumer Action (CLR NPRM Comment FTC–2016–0098–2954) and SSI survey submitted by 1–800 CONTACTS (CLR NPRM Comment FTC–2016–0098–2738)).

unaware they are entitled to their eyeglass prescription.

8. Analysis of Evidence Regarding Automatic Prescription Release Provision

Having considered the evidence compiled thus far—including the comments, empirical surveys, ongoing pattern of consumer complaints and anecdotal reports, and relevant evidence submitted during the CLR review (and the Commission's determinations in that regard), along with the industry's documented history of failing to provide eyeglass prescriptions automatically even when obligated by state and federal law—in conjunction with the intent, purpose, and history of the Eyeglass Rule, the Commission believes that there is still a significant need for the automatic prescription release provision. The Commission also concludes that improving compliance with, and consumer awareness of, the provision is necessary to further the goals of the Rule. Finally, the Commission sees a benefit—to both consumers and prescribers—in aligning the prescription release requirements and practices for both eyeglass and contact lens prescriptions.

At the time of the Rule's initial implementation, the Commission determined that failure to release prescriptions was pervasive and widespread, and that this constituted an unfair act or practice under section 5.[200] In subsequent Eyeglass Rule reviews, the Commission noted that despite the Rule, compliance remained a problem, and expressed concern that if the automatic release requirement were removed, more prescribers might return to the practice of refusing or failing to release prescriptions.[201] And while some commenters assert that automatic prescription release is now such standard practice that it would be adhered to even absent a rule, the weight of the evidence in this Rulemaking clearly favors retaining the automatic release requirement. Furthermore, the Commission notes that, when it relied on voluntary compliance in the past, compliance was poor.[202]

The Commission remains concerned that a lack of compliance with the Rule is still prevalent, and that removing the automatic prescription release requirement might further reduce the number of consumers who receive their prescriptions, whether automatically or on request. The Commission has not seen evidence suggesting that the structure of the market or financial incentives for prescribers have changed in such a way as to make the automatic prescription release requirement no longer necessary. Arguably, the incentive that prescribers have to steer patients to in-house optical dispensaries rather than giving patients their prescription remains the same, if not stronger,[203] than when the Rule was first implemented. Moreover, the evidentiary record indicates that a significant percentage of prescribers still do not automatically provide a prescription. The evidence also suggests that many consumers are still not fully aware of their right to receive or obtain their prescription. Furthermore, the population of eyeglass wearers is not static, and large numbers of consumers become first-time wearers each year. The Commission thus concludes that many consumers cannot reasonably avoid prescribers' failure to automatically release prescriptions as required by the Rule. It is important that this be remedied, and that consumers are aware of, and receive the benefits of, their right to comparison-shop for eyeglasses.

The Commission also has not seen evidence that the automatic release provision imposes an unreasonable burden on prescribers, or that there is a substantial countervailing benefit that would result from eliminating the automatic release requirement. Indeed, while a few prescribers asserted it was wasteful or unnecessary,[204] other commenters felt it was not a significant burden,[205] and the AOA stated that the automatic release provision was not ''harmful'' to prescribers.[206] The Commission previously concluded that the requirement enhances consumer choice among eyeglass sellers at a minimal compliance cost to eye care prescribers.[207] Moreover, since the automatic prescription release provision has been in existence since 1978, maintaining it as part of the Rule would not impose new costs on prescribers. By contrast, eliminating it for eyeglass prescriptions would create the potential for confusion amongst patients and prescribers alike, since the automatic prescription release requirement still applies to contact lens prescriptions.[208]

The Commission also concludes that the potential benefits of increasing the number of patients who receive their prescriptions automatically are substantial. These benefits include: increased patient flexibility and choice in comparison-shopping for eyeglasses; fewer disputes between consumers and prescribers; fewer requests from patients for a copy of their prescription, and arguably, fewer requests for a copy of, or a verification of, a prescription from third-party sellers of eyeglasses, which some prescribers find burdensome; [209] and a reduction in costs and voided sales by third-party sellers.[210] The cumulative effect of increased compliance and consumer awareness would likely increase competition, lower costs, and improve convenience and flexibility for patients, sellers, and prescribers.

9. Proposals for Improving Compliance and Consumer Awareness

Having reached a determination that the automatic release provision should be retained, and that it would be beneficial to increase compliance with, and awareness of, the provision, the Commission now evaluates proposals for how best to achieve this goal.

a. Proposal To Increase Enforcement

Of the commenters who discussed the automatic prescription release provision, very few offered suggestions for amending the Rule to increase compliance with, or consumer awareness of, this provision.[211] A few, however, suggested that the Commission should improve compliance by bringing more enforcement actions against prescribers

[200] Eyeglass I Rule, 43 FR 23992, 23998.

[201] Ophthalmic Practice Rules, 69 FR 5451, 5453 (noting that in a 1989 rule review, the Commission had found ''significant non-compliance,'' and finding that as of 2004, lack of compliance was still a problem).

[202] *See* note 9, *supra.*

[203] *See* Section I.C, *supra; see also* Burchell (Comment #0866) (positing that online dispensaries will put increasing pressure on prescribers' profit margins); NAOO (Comment #0748 submitted by Cutler) (noting that optometrists still earn the majority of their revenue from selling eyewear they prescribe); Professional Opticians of Florida (Comment #0803 submitted by Couch) (noting a dramatic increase in the number of prescribers' offices that sell eyewear).

[204] *See* Lunsford (Comment #0346) (waste of time and resources to provide each patient with a copy of his or her prescription); Barnes (Comment #0043) (a lot of patients don't want a copy and end up throwing it away).

[205] NAOO (Comment #0748 submitted by Cutler) (''Based on NAOO member experience, the thousands of optometrists affiliated in co-location with NAOO member companies regularly comply with the Eyeglass Rule and the Contact Lens Rule with little or no added cost or other burden on the eye care practice.'').

[206] Comment #0849 submitted by Peele.

[207] *See* Ophthalmic Practice Rules, 69 FR 5451, 5453.

[208] 16 CFR 315.

[209] Cerri (Comment #0509); Kiener (Comment #0593); Bolenbaker (Comment #0633).

[210] *See* Sections I.B.1, IV.A.2, *supra,* and Sections IV.A.5, IV.C.1, *infra.*

[211] One commenter, the Opticians Association of Virginia, suggested that prescribers should be ''reminded'' of their obligation to release prescriptions, although the comment did not specify how prescribers should be reminded. Comment #0647 submitted by Nelms.

who fail to automatically release prescriptions.[212] Warby Parker, in particular, noted that Commission enforcement actions have been ''virtually non-existent,'' [213] and asserted that more aggressive enforcement would quickly increase both prescriber compliance and consumer awareness.[214] To assist the Commission in its enforcement, Warby Parker also suggested creating a more ''user-friendly'' online complaint process for consumers.[215]

The Commission recognizes the need for increased enforcement of the automatic prescription release provision. Simply put, with the evidence in the Rulemaking showing significant noncompliance with this provision after 40 years, it is clear that more enforcement is necessary to improve industry adherence. In this regard, the absence of documentation often makes it difficult in an enforcement investigation to determine whether, in any particular case, a prescriber provided a patient with a prescription. The lack of documentation also makes it difficult to determine how many times, or how frequently, a particular noncompliant prescriber has violated the Rule. Instead, allegations and denials of non-compliance often become a matter of a patient's word against that of the prescriber, making violations difficult to prove. Commission staff first identified this issue in its Eyeglass II Report, where it explained that the automatic release requirement had not helped to avoid ''evidentiary squabbles''—as the Commission had hoped it would [216]—but instead had increased them, because whether or not a prescriber had released a prescription could not, in most cases, be ascertained by documentary evidence.[217] Accordingly, the Commission has brought only one enforcement action against an eyeglass prescriber for failure to comply with the automatic release provision.[218] The Commission believes that improvement in its ability to assess and verify compliance with the Rule's automatic prescription release requirements will increase its ability to monitor and enforce compliance.[219]

b. Proposal To Require an Eye Care Patients' Bill of Rights

Commenter Warby Parker proposed that the Rule be amended to require that prescribers provide patients with written notices informing them of their right to their prescription.[220] According to the proposal, such notices would take the form of a ''bill of rights'' for eyeglass patients, notifying them of their rights under the Eyeglass Rule, including their right to receive their prescription free of charge and to purchase glasses from a provider of their own choosing.[221] Such a proposal, if implemented and complied with, might increase consumer awareness and, presumably, increase the percentage of patients who receive prescriptions from their providers. Providing the document would also remind prescribers and their staffs of their obligation to provide patients with their prescriptions, and would remind patients to ask for their prescriptions in the event that prescribers failed to provide them without request, as the Rule requires.

A bill of rights would also impose a relatively small burden upon prescribers, since they would only need to provide a brief, standard, pre-drafted form for each patient, and would not have to perform additional recordkeeping. On the other hand, patients already receive forms and other paperwork when they visit a prescriber, increasing the possibility that patients might not read or attend to the information in a bill of rights.

Moreover, the Rule already requires that prescribers provide patients with copies of their prescriptions, and yet evidence indicates that prescribers do not always do so. Without some mechanism to ensure prescriber compliance with the new obligation to provide a bill of rights, the requirement might not provide material benefits. For example, under Warby Parker's proposal, patients would be given a copy of the bill of rights to take with them, but there would be no requirement that prescribers maintain records of their compliance. Therefore, the bill of rights proposal does not require the type of prescriber recordkeeping that would allow for better Rule monitoring and enforcement, and help resolve disputes between patients and prescribers over whether a prescription had been released. It is thus possible that adding a bill of rights requirement would impose an increased burden on prescribers without providing tangible, countervailing benefits to consumers or prescribers.

Many prescribers might also object to an eyeglass patient's bill of rights out of concern that it might impart the impression to consumers that prescribers are untrustworthy. Prescribers voiced numerous objections of this type during the CLR review when the Commission proposed including a sentence on a consumer acknowledgment of prescription stating, ''I understand I am free to purchase contact lenses from the seller of my choice.'' [222] According to prescribers, such a statement implies that they have done something wrong.[223] It seems likely prescribers would oppose an eyeglass patient's bill of rights for the same reason.

In fact, a similar bill of rights proposal was put forth by commenters to the Contact Lens Rule [224] and considered,

[212] Warby Parker (Comment #0817 submitted by Kumar); Professional Opticians of Florida (Comment #0803 submitted by Couch).

[213] Comment #0817 submitted by Kumar.

[214] *Id.*

[215] *Id.* This suggestion is discussed in Section VI, *infra.*

[216] Eyeglass I Rule, 43 FR 23992, 23998.

[217] Eyeglass II Report, *supra* note 26, at 275–76.

[218] *United States* v. *Doctors Eyecare Ctr., Inc.,* No. 3:96–cv–01224–D (N.D. Tex. June 24, 1996). The complaint alleged that the eye care center only released prescriptions when patients asked for them, and included waivers of liability on patients when doing so. The prescriber paid a $10,000 civil penalty and was enjoined from future violations of the Eyeglass Rule. *See* Press Release, Fed. Tr. Comm'n, Dallas Eyecare Center Agrees to Settle Charges That They Failed to Give Consumers Copies of Their Eyeglass Prescriptions (May 3, 1996), *https://www.ftc.gov/news-events/press-releases/1996/05/dallas-eyecare-center-agrees-settle-charges-they-failed-give.*

[219] Separately, the Commission does not believe it necessary to amend the Rule to explicitly state that violations of the Rule constitute a violation of the Federal Trade Commission Act, as some commenters have proposed. *See* Warby Parker (Comment #0817 submitted by Kumar); 1–800 CONTACTS (Comment #0834 submitted by Williams); *see also* Santini (Comment #0047) (''There should be clear penalties if consumers encounter resistance at any point [in] obtaining their spectacle Rx.''). The existing language in § 456.2 of the Rule, in conjunction with the Commission's authority to prescribe the Ophthalmic Practice Rules under section 18 of the FTC Act, make it sufficiently clear that violations of the Rule are unfair acts or practices under section 5 of the FTC Act, and can be enforced as such. *See* 16 CFR 456.2; 15 U.S.C. 57a; 15 U.S.C. 45.

[220] Warby Parker (Comment #0817 submitted by Kumar). Warby Parker proposed this written notice for the Contact Lens Rule as well ((CLR RFC Comment FTC–2015–0093–0578 submitted by Kumar), as did 1–800 CONTACTS (CLR RFC Comment FTC–2015–0093–0555 submitted by Williams) and Lens.com (CLR RFC Comment FTC–2015–0093–0666 submitted by Samourkachian).

[221] Warby Parker (Comment #0817 submitted by Kumar). The Commission has considered similar proposals in the past, including during the initial Eyeglass I rulemaking, when it was suggested that the prescription itself should include a notice declaring that it could be taken to any optical dispensary to have eyeglasses fabricated. At that time, the Commission and staff concluded that such a notice was unnecessary since advertising by opticians would likely make patients aware of their prescription's portability. *See* Eyeglass I Report, *supra* note 6, at 278; Eyeglass I Rule, 43 FR 23992, 23998.

[222] *See* CLR SNPRM, 84 FR 24664, 24678–79.

[223] *Id.*

[224] 1–800 CONTACTS (CLR RFC Comment FTC–2015–0093–0555 submitted by Williams); Lens.com (CLR RFC Comment FTC–2015–0093–0666

Continued

and the Commission ultimately decided against adopting it for many of the reasons cited herein.[225] In light of these considerations, the Commission does not propose amending the Rule to require that prescribers provide patients with a bill of rights.

c. Proposal To Require Signage

Some commenters proposed that one way to increase compliance with, and awareness of, the automatic release provision, would be to amend the Rule to require that prescribers post conspicuous signage in their offices informing patients of their right to their prescriptions.[226] Such signage is currently required by state law in California.[227]

If adopted, such a requirement could provide some of the same benefits as a bill of rights by educating consumers and, presumably, might also increase the percentage of patients who receive their prescription from their provider. A sign could also serve as a reminder to patients to ask for their prescription in the event a prescriber fails to provide it. Furthermore, a sign would impose relatively little burden on prescribers, since it would only have to be posted once. Lastly, enforcing such a provision could be relatively straightforward, since the Commission could simply perform spot checks on prescribers' offices.

On the other hand, the Commission lacks evidence about the effects of California's signage requirement on automatic prescription release. It is unclear how many patients would notice a sign at prescribers' offices, particularly since many prescribers' offices already have numerous ads or other postings about various patient rights, requirements, and obligations. It is possible that in the context of prescribers' offices, a signage requirement would not be as effective in increasing consumer awareness as a requirement that consumers be handed or shown a specific document. A sign would also not require a prescriber, or the prescriber's staff, to interact with each patient about their prescription, so it would serve as less of a reminder for them to provide patients with their prescriptions. And while the Commission might be able to verify compliance with a signage requirement by performing spot checks at prescribers' offices, such visits would not reveal whether the prescribers' office was complying with the Rule's automatic prescription release provision. Moreover, since signage would increase prescription release only if more consumers see a sign and ask for their prescription, relying on signage essentially shifts the burden of prescription release compliance and enforcement to the consumer, an approach the Commission has repeatedly rejected in the past.[228]

During its review of the CLR, the Commission gave extensive consideration to the possibility of using signage, particularly as an alternative to some form of written acknowledgment of prescription from the patient.[229] The Commission ultimately decided against a signage provision, after determining that the benefits were limited and that requiring signage would be significantly less effective at ensuring contact lens prescription release than requiring a written patient confirmation.[230] The Commission reaches the same conclusion with respect to proposed signage reminding consumers about their eyeglass prescriptions.[231]

d. Proposal To Require a Confirmation of Prescription Release

Having determined that some type of documentation is necessary to increase adherence and improve enforcement of the Rule, the Commission next turns to consider what type of documentation should be required.

In 2020, the Commission amended the Contact Lens Rule to add a requirement that prescribers retain documentation confirming that they released contact lens prescriptions to patients as required by the CLR.[232] The CLR's confirmation requirement was adopted subsequent to the publication of the ANPR, and while none of the commenters to the ANPR explicitly proposed a signed acknowledgment, commenters to the CLR review made such a suggestion, and the Commission ultimately determined there would be substantial benefits to such an approach. In promulgating the requirement, the Commission stated its belief that the confirmation requirement would increase compliance with prescription release requirements and awareness of the CLR's requirements among consumers by mandating that prescribers present a document for patients to sign confirming that they received their prescription at the end of their contact lens fitting.[233]

The Confirmation of Prescription Release provision added to the CLR in 2021 requires prescribers do one of the following:

(A) Request that the patient acknowledge receipt of the contact lens prescription by signing a separate statement confirming receipt of the contact lens prescription;

(B) Request that the patient sign a prescriber-retained copy of a contact lens prescription that contains a statement confirming receipt of the contact lens prescription;

(C) Request that the patient sign a prescriber-retained copy of the sales receipt for the examination that contains a statement confirming receipt of the contact lens prescription; or

(D) If a digital copy of the prescription was provided to the patient (via methods including an online portal, electronic mail, or text message), retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable.[234]

In order to relieve prescribers of the burden of crafting their own confirmation language, the CLR provides sample language for options (A), (B), and (C), but also allows prescribers to create their own wording for the signed confirmation if they so desire.[235] Prescribers are required to maintain records or evidence of consumer confirmation, or that a digital copy was provided to the patient, for at least three years.[236] Lastly, in order to limit the burden as much as possible, the CLR confirmation requirement only applies to prescribers with a financial interest in the sale of contact lenses.[237]

The Commission believes a similar requirement for eyeglass prescriptions would have many benefits. A signed patient confirmation of release for eyeglass prescriptions would notify and

submitted by Samourkachian); *see* CLR NPRM, 81 FR 88526, 88532–33.

[225] CLR NPRM, 81 FR 88526, 88532–33.

[226] Tedesco (Comment #0042); Warby Parker (Comment #0817 submitted by Kumar).

[227] Section 2554 of the California Business and Professions Code requires that each prescriber office post, in a conspicuous place, a notice informing patients that eye doctors are required to provide patients with a copy of their spectacle prescriptions upon completion of the exam, and that patients may take their prescription to any eye doctor or registered dispensing optician to be filled. Cal. Bus. & Prof. Code § 2554.

[228] *See* Eyeglass I Rule, 43 FR 23992, 23998; Eyeglass II Rule, 54 FR 10285, 10286–87, 10303, 10313 & nn.180 & 181; *see also* Eyeglass II Report, *supra* note 26, at 255–58 (reporting the Market Facts Study results).

[229] *See* CLR NPRM, 81 FR 88526, 88534; CLR SNPRM, 84 FR 24664, 24679; CLR Final Rule, 85 FR 50668, 50684–85.

[230] CLR Final Rule, 85 FR 50668, 50685.

[231] The Commission further notes that imposing a signage requirement for eyeglass prescriptions, where one does not exist for contact lens prescriptions, could result in confusion for both consumers and prescribers.

[232] *See* CLR Final Rule, 85 FR 50668, 50687–88; 16 CFR 315.3(c).

[233] *See* CLR Final Rule, 85 FR 50668, 50687–88.

[234] 16 CFR 315.3(c).

[235] *Id.* at 315.3(c)(1)(ii).

[236] *Id.* at 315.3(c)(2).

[237] *Id.* at 315.3(c)(3).

remind consumers of their prescription portability rights and, in all likelihood, increase the percentage who receive their prescription from the prescriber. Providing the confirmation document, and obtaining the patient's signature, would remind prescribers and their staffs to provide prescriptions, and remind patients who might have received a confirmation document (and are asked to sign) but did not receive their prescription to ask for it.

Since the document is given to the patient, and the patient asked to sign it, such a document is less likely to go unnoticed or unread by patients than a bill of rights or office signage reminding patients of their prescription rights. And requiring prescribers to retain a signed confirmation would improve the Commission's ability to verify whether prescribers had complied with the Rule's requirement to release prescriptions to their patients. It would reduce the number of instances where a filed complaint simply pits the patient's word against that of the prescriber. Prescribers would also have valuable documentation to present in their defense should a patient lose or dispose of his or her prescription copy and mistakenly believe the prescriber had not provided it, a scenario cited by at least one commenter.[238] In short, a confirmation of release would eliminate certain evidentiary problems related to Rule enforcement, one of the reasons the Commission adopted automatic prescription release when it promulgated the Eyeglass Rule in the first place.[239] Ultimately, adding a confirmation of release requirement should result in more consumers having a copy of their prescriptions, and thus improve consumer flexibility and choice, reduce the number of eyeglass sellers and consumers who call prescribers to obtain patient prescriptions, improve competition in the market for eyeglasses and frames, and lower prices for consumers.[240]

The primary drawback to requiring a signed confirmation is the increased recordkeeping burden imposed on prescribers, since they would have to provide the piece of paper and retain the signed form for a certain period of time.[241] This recordkeeping burden could be reduced to the extent that prescribers have adopted electronic medical record systems, especially those where patient signatures can be recorded electronically and inputted automatically into the electronic record. Furthermore, prescribers could scan signed paper copies of the confirmation and store those forms electronically to lower their compliance costs. Moreover, the added paperwork requirement may apply only to prescribers who use a separate form to get the patient's signed confirmation, since those who opt to add the confirmation to a copy of the patient's prescription or sales receipt would, presumably, be maintaining those records anyway. Prescribers also will likely have an established means of collecting patient confirmations and maintaining records for the purpose of complying with the CLR. The marginal cost of adopting such forms and systems to include eyeglasses prescriptions is likely to be very low. Accordingly, the Commission believes that any recordkeeping burden would be relatively minimal and outweighed by the benefits described above.

One concern is the possibility that requiring consumers to sign a confirmation that they received their prescription will sow doubts about prescriber integrity, and sully the doctor-patient relationship.[242] The Commission believes this to be unlikely. Consumers are accustomed to signing acknowledgments or receipts.[243] Many pharmacists require patients to acknowledge that they do not have questions upon receiving a prescription; physicians' offices require visitors to sign in; and patients are accustomed to signing HIPAA acknowledgment forms signifying they received a provider's Notice of Privacy Practices (''NPP'').[244] The Commission is not aware of evidence that such requirements sow distrust on the part of the person signing the receipt. The Commission believes this will hold true for a Confirmation of Prescription Release for eyeglass prescriptions, particularly since prescribers can devise their own language of confirmation, and since prescribers will already be obtaining patients' signatures from those who obtain contact lens prescriptions.

10. The Commission's Proposal To Require a Signed Confirmation of Prescription Release

After consideration of the evidence and proposals, the Commission proposes to amend the Rule to add a Confirmation of Prescription Release requirement. The Commission believes such a provision will increase the number of patients who receive their prescriptions, inform patients of the Rule and their right to their prescriptions, reduce the number of seller requests to prescribers for eyeglass prescriptions, improve the Commission's ability to monitor overall compliance and target enforcement actions, reduce evidentiary issues, complaints, and disputes between prescribers and consumers, and bring the Eyeglass Rule into congruence with the Confirmation of Prescription Release requirement of the Contact Lens Rule.[245] The addition of a patient confirmation requirement accomplishes the desired

[238] Barnes (Comment #0043) (''I sometimes worry that if a patient chose not to take [the prescription], we would later be accused of not offering it to them.''). Prescribers have also verbally informed Commission staff about such occurrences when responding to warning letters about failure to release prescriptions.

[239] Eyeglass I Rule, 43 FR 23992, 23998.

[240] In addition, adding a Confirmation of Prescription Release requirement to the Eyeglass Rule would apply similar requirements to both eyeglass and contact lens prescription release, and would thus avert consumer and prescriber confusion about when patients had to sign a confirmation of prescription release.

[241] Prescribers who choose to offer a digital copy of the prescription would avoid this aspect of recordkeeping for those patients who consent to receive a digital copy.

[242] The Commission considered this concern during its review of the CLR (CLR Final Rule, 85 FR 50668, 50680–81) and came to the conclusion that this concern is not significant enough to change the result.

[243] This fact was also considered in the CLR evaluation. *Id.*

[244] The U.S. Department of Health & Human Services (''HHS'') proposed eliminating the requirement to obtain an individual's written acknowledgment of receipt of the provider's NPP, but patients have had experience signing such acknowledgements for many years. *See* Proposed Modifications to the HIPAA Privacy Rule To Support, and Remove Barriers to, Coordinated Care and Individual Engagement, 86 FR 6446, 6485 (Jan. 1, 2021). As explained in the CLR, the impetus for the NPP signed acknowledgment and that for the CLR (and Eyeglass Rule) prescription release confirmation were very different, and—in contrast to eye prescriptions—there is little evidence that providers were not providing patients with their NPPs, and thus significantly less need for a patient acknowledgment of receipt. CLR Final Rule, 85 FR 50668, 50684–85 (noting that the primary intent of the HIPAA signed-acknowledgment was to provide patients an opportunity to review the provider's Notice of Privacy Practices, discuss concerns related to their private health information, and request additional confidentiality, not to remedy a lack of compliance, and that the HHS record does not contain empirical evidence showing that doctors are not fulfilling their obligations to provide Notices of Privacy Practices to patients); *see also* Request for Information on Modifying HIPAA Rules to Improve Coordinated Care, Office for Civil Rights, Department of Health and Human Services, 83 FR 64302, 64308 (Dec. 14, 2018) (discussing the intent of the HIPAA signed acknowledgment); *see also generally* Comments in Response to Request for Information on Modifying HIPAA Rules to Improve Coordinated Care, Office for Civil Rights, Department of Health and Human Services, *https://www.regulations.gov/document/HHS-OCR-2018-0028-0001.*

[245] Should a prescriber wish to create a single document confirming receipt of both an eyeglass and a contact lens prescription (in cases where both prescriptions are finalized at the same time), the Commission believes such a document could meet the requirements of both rules so long as there are separate statements and signature lines for the contact lens prescription and the eyeglass prescription. Such a practice could help prescribers reduce any burden associated with confirmations.

objectives of the Rule with little increased burden on prescribers.

The Commission therefore proposes to amend § 456.3 to add the requirement that upon completion of a refractive eye examination, and after providing a copy of the prescription, the prescriber shall do one of the following:

(i) Request that the patient acknowledge receipt of the prescription by signing a separate statement confirming receipt of the prescription;

(ii) Request that the patient sign a prescriber-retained copy of a prescription that contains a statement confirming receipt of the prescription;

(iii) Request that the patient sign a prescriber-retained copy of the sales receipt for the examination that contains a statement confirming receipt of the prescription; or

(iv) If a digital copy of the prescription was provided to the patient (via methods including an online portal, electronic mail, or text message), retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable.

If the prescriber elects to confirm prescription release via paragraphs (i), (ii), or (iii), the prescriber may, but is not required to, use the statement,'' My eye care professional provided me with a copy of my prescription at the completion of my examination'' to satisfy the requirement. In the event the patient declines to sign a confirmation requested under paragraphs (i), (ii), or (iii), the prescriber shall note the patient's refusal on the document and sign it. A prescriber shall maintain the records or evidence of confirmation for not less than three years. Such records or evidence shall be available for inspection by the Federal Trade Commission, its employees, and its representatives. The prescription confirmation requirements shall not apply to prescribers who do not have a direct or indirect financial interest in the sale of eye wear, including, but not limited to, through an association, affiliation, or co-location with an optical dispenser.

The full text of the proposed Rule amendment is located at the end of this document.

B. Other Issues Surrounding Patients' Access to Eyeglass Prescriptions

1. Prescriber Responsibilities To Provide Additional Copies of Prescriptions

The Eyeglass Rule requires an ophthalmologist or optometrist to provide ''one copy'' of the patient's prescription immediately after the completion of the eye exam.[246] In the ANPR, the Commission sought comment on whether it should amend the Rule to require prescribers to provide duplicate copies of prescriptions to patients who no longer have access to the original.[247] Patients may need an additional copy because they lost or misplaced their prescriptions, or because the prescription was not returned after they ordered eyeglasses.[248] The Commission believes that there is often a valid need for consumers to obtain additional copies of their prescriptions, and encourages prescribers to provide them when requested. However, in a previous Rule review, the Commission considered this issue and determined not to mandate a requirement to provide additional copies since it did not receive sufficient evidence indicating that the practice of refusing to release additional copies of eyeglass prescriptions was prevalent.[249] After reviewing the evidence in the instant rulemaking record, the Commission, for this same reason, declines to amend the Rule to require prescribers to provide patients with additional copies of eyeglass prescriptions upon request.

Optometrists, opticians, consumers, a consumer advocate, an online seller, and a telehealth prescriber commented in favor of amending the Rule to require that prescribers provide additional copies of prescriptions to patients that do not currently have access to their prescription.[250] The NAOO stated its belief that, although optometrists affiliated with its member companies provide additional copies upon request at no charge, the Rule should clarify that consumers always have a right to their eyeglass prescriptions as part of their medical records.[251] It pointed out that, although consumers already have a right to their prescriptions under HIPAA, the 30-day period allotted to prescribers (and other covered entities) for the production of medical records under HIPAA is overly long for consumers who may need replacement eyeglasses.[252] Warby Parker commented that providing an additional copy furthers the original goal of the Rule to foster comparison-shopping in that it ensures that patients have the freedom to choose where to purchase their eyeglasses.[253] Visibly, formerly known as Opternative, a telehealth prescriber, stated that such a requirement would be consistent with the Rule's intent and furthers its purpose.[254] Warby Parker also stated that some prescribers refuse to provide such copies and that others charge patients for them.[255] One commenter stated that there is no real impact on a prescriber's business to provide a duplicate copy, while it allows consumers access to their prescription without needing to undergo a new exam.[256] Some commenters stated the prescriber should have to release additional copies, but suggested that prescribers should be able to impose a small administrative fee.[257] One commenter who supported permitting the imposition of a small fee explained that such a fee is justified

[246] 16 CFR 456.2(a).

[247] Eyeglass Rule ANPR, 80 FR 53274, 53276.

[248] The Commission distinguishes a request for an additional copy of a prescription from a request for an initial copy of a prescription in instances when a consumer did not receive the prescription immediately after the completed eye examination. In the latter event, the prescriber must provide a copy of the prescription without a fee unless the prescriber did not release the prescription immediately following the examination because the patient failed to pay for the examination and the prescriber requires immediate payment from all patients, whether or not the exam reveals a need for ophthalmic goods. *See* 16 CFR 456.2(a).

[249] *See* Eyeglass II Rule, 54 FR 10285, 10303.

[250] DeMuth Jr. (Comment #0055); Ellis (Comment #0189); Prevent Blindness (Comment #0385 submitted by Parry); Schwartz (Comment #0514); Burchell (Comment #0866); Kiener (Comment #0593); Opticians Association of Virginia (Comment #0647 submitted by Nelms); NAOO (Comment #0748 submitted by Cutler); Pulido (Comment #0019); Professional Opticians of Florida (Comment #0803 submitted by Couch); Warby Parker (Comment #0817 submitted by Kumar); Stuart (Comment #0841); Opternative (now Visibly) (Comment #0853 submitted by Dallek).

[251] Comment #0748 submitted by Cutler; *see also* Prevent Blindness (Comment #0385 submitted by Parry) (calling the right to one's own prescription a ''basic consumer right''); Professional Opticians of Florida (Comment #0803 submitted by Couch) (stating it is a consumer's right to have access to his or her prescription).

[252] Comment #0748 submitted by Cutler. In 2021, HHS proposed modifying the HIPAA Privacy Rule ''to require that access [to protected health information] be provided 'as soon as practicable,' but in no case later than 15 calendar days after receipt of the request, with the possibility of one 15 calendar-day extension.'' Proposed Modifications to the HIPAA Privacy Rule To Support, and Remove Barriers to, Coordinated Care and Individual Engagement, 86 FR 6446, 6459. The Cures Act Final Rule, implementing the 21st Century Cures Act, also requires healthcare providers to make certain classes of data available to patients in their electronic health records. *See* Section IV.B.2.b, *infra.* This may result in consumers having greater access to their refraction measurements.

[253] Comment #0817 submitted by Kumar.

[254] Comment #0853 submitted by Dallek. Several consumers also wrote in support of adding this requirement to the Rule. DeMuth, Jr. (Comment #0055); Ellis (Comment #0189).

[255] Comment #0817 submitted by Kumar.

[256] Jozwik (Comment #0002).

[257] Kiener (Comment #0593); Pulido (Comment #0019); *see also* Burchell (Comment #0866) (stating administrative charge should reflect the cost of the paper, other office supplies, and office staff time; suggesting that current market supports a fee of $2–$10; and clarifying the fee should not be a profit-making mechanism). One commenter recommended that the Rule mandate prescribers provide one replacement copy at no charge, but permit a charge for subsequent copies. Stuart (Comment #0841).

because the prescriber faces a burden in providing the additional copy, and consumers should bear (or share) the responsibility for not having safeguarded the original copy they received following their examination.[258] The NAOO stated that additional copies should be provided without requiring that patients file formal HIPAA requests and at no charge because the cost to the prescriber is trivial.[259]

Other commenters, including the AOA and the AAO, opposed amending the Rule to require that prescribers provide additional copies upon request.[260] These commenters stated that most prescribers already provide additional copies at no charge and, therefore, there is no need to mandate it by rule.[261] Some commenters stated that consumers should be responsible for copying and maintaining their prescription,[262] and that prescribers should not have to shoulder the burden of consumers who are remiss at recordkeeping.[263] The AOA expressed concern with the possible health effects to consumers that could result from requiring prescribers to provide prescriptions long after an initial refraction, and stated that prescribers must be allowed to use their clinical judgment to determine whether it is medically appropriate to provide subsequent copies of a prescription that may not be recent.[264] The organization did not detail specific negative health effects, but stated that there are scenarios wherein an optometrist may not want to reissue an eyeglass prescription to a patient. For example, the optometrist may have performed a more recent comprehensive eye exam that renders the previous prescription no longer appropriate, or the prescriber may be aware of other health changes for the patient that could necessitate a change in the prescription.[265] The AOA also pointed out, as a comparison, that medical doctors are not required to give patients multiple copies of pharmaceutical prescriptions upon request and that some medical doctors may require payment for such additional copies.[266]

a. Analysis of Whether To Require Provision of Additional Copies of Prescriptions Upon Request

It is unnecessary to decide whether failure to provide an additional copy of a prescription upon request is an unfair act or practice because the Commission has not been presented with, and is unaware of, evidence that refusing to provide duplicate copies of prescriptions upon request is a prevalent problem. The NAOO, the AAO, and the AOA commented that prescribers do provide additional copies of prescriptions upon request.[267] The only commenter who asserted that prescribers are not releasing duplicate copies of prescriptions upon request was Warby Parker.[268] In support of its statement that some of its customers are being denied additional copies of prescriptions, Warby Parker cited to a survey that it said showed that 30 percent of consumers were not offered a copy of their prescription.[269] This fact, however, may relate to the failure to initially release prescriptions to consumers, not the provision of additional copies, and thus does not establish that prescribers are refusing to provide additional copies to consumers upon request. Since the rulemaking record does not support a showing of prevalence, which is necessary for any Eyeglass Rule amendment,[270] the Commission does not believe it has sufficient evidence to propose amending the Rule to require that prescribers provide additional copies of prescriptions upon request.[271]

b. Analysis of Whether To Permit Prescribers To Charge Fees for Provision of Additional Copies of Prescriptions

In addition to not requiring that prescribers provide additional copies of prescriptions, the Eyeglass Rule does not set forth whether or not prescribers are permitted to charge for providing such copies. Some of the commenters requested the Commission amend the Rule to either permit a prescriber to charge a fee,[272] or to prohibit a prescriber from charging a fee,[273] for providing additional copies. Since the Commission determined not to propose amending the Rule to require prescribers provide additional copies, it is unnecessary to address the issue of fees for mandated duplicate copies.[274]

In the current Rule review, as noted above, little evidence was placed on the record indicating that prescribers are not providing duplicate prescriptions upon request or that prescribers are charging more than nominal, administrative fees for providing additional copies of prescriptions. As a result, the Commission has not been presented with evidence that these practices are prevalent and does not believe an amendment prohibiting or limiting the imposition of fees for additional copies of prescriptions is necessary.

2. Electronic Delivery of Prescriptions as a Means for Automatic Prescription Release Under § 456.2(a)

As previously noted, § 456.2(a) of the Eyeglass Rule provides that it is an unfair act or practice for a prescriber to fail to provide to the patient one copy of the patient's prescription

[258] Burchell (Comment #0866).

[259] Comment #0748 submitted by Cutler. The HHS' proposed modifications to the HIPAA Privacy Rule would clarify that providers may not charge individuals a fee to inspect their protected health information in person (including when they photograph or record the information themselves) or to view and capture an electronic copy of their information via an internet-based method. Proposed Modifications to the HIPAA Privacy Rule To Support, and Remove Barriers to, Coordinated Care and Individual Engagement, 86 FR 6446, 6465–6466.

[260] *See, e.g.,* AAO (Comment #0864 submitted by Haber); AOA (Comment #0849 submitted by Peele); Publi (Comment #0040); Haas (Comment #0359); Sharma (Comment #0609); Berry (Comment #0673).

[261] AAO (Comment #0864 submitted by Haber); AOA (Comment #0849 submitted by Peele); Sharma (Comment #0609); Berry (Comment #0673). The AAO stated that if practices are inflexible with regard to providing duplicate copies, patients will go elsewhere for their eye care needs. Comment #0864 submitted by Haber. One commenter indicated that amending the Rule is not necessary because consumers should have access to their prescriptions through electronic health records or patient portals. Bolenbaker (Comment #0633).

[262] Publi (Comment #0040); Haas (Comment #0359).

[263] *See, e.g.,* Haas (Comment #0359).

[264] Comment #0849 submitted by Peele.

[265] *Id.*

[266] *Id.*

[267] NAOO (Comment #0748 submitted by Cutler); AAO (Comment #0864 submitted by Haber); AOA (Comment #0849 submitted by Peele); *see also* Sharma (Comment #0609) (stating duplicates already being provided on voluntary basis); Berry (Comment #0673) (same).

[268] Comment #0817 submitted by Kumar.

[269] *Id.*

[270] *See* 15 U.S.C. 57a(b)(3).

[271] The Commission recognizes that this result differs from the FCLCA and the CLR, which require prescribers to respond to requests for additional copies of prescriptions. 15 U.S.C. 7601(a)(2); 16 CFR 315.3(a)(2). *See also* CLR NPRM, 81 FR 88526, 88536 (explaining Act and Rule's requirements to provide a copy of an additional contact lens prescription upon request). However, as previously explained, the authority for the Eyeglass Rule is different than for the CLR, and requires a showing that the problem is prevalent.

[272] Kiener (Comment #0593) (proposing a small administrative fee); Burchell (Comment #0866) (stating administrative charge should reflect the cost of the paper, other office supplies, and office staff time; suggesting that current market supports a fee of $2–$10; and clarifying the fee should not be a profit-making mechanism); Pulido (Comment #0019) (proposing a small fee).

[273] NAOO (Comment #0748 submitted by Cutler); Warby Parker (Comment #0817 submitted by Kumar). One commenter recommended that the Rule mandate prescribers provide one replacement copy at no charge, but permit a charge for subsequent copies. Stuart (Comment #0841).

[274] As noted above, if the prescriber has failed to provide a copy of the prescription following the completed examination in violation of the Rule, the prescriber must provide a copy of the prescription when a patient later asks for it. Because the prescriber could not charge a fee had he or she provided it immediately following the examination, the prescriber may not do so in response to that patient's later request for an initial copy.

immediately after the eye examination is completed. The Rule does not expressly permit electronic delivery of prescriptions as a means for automatic prescription release. The Commission believes expressly permitting electronic delivery in certain circumstances could provide benefits to consumers.

In 2021, the CLR was amended to allow prescribers to satisfy the CLR's automatic release requirement by providing the patient with a digital copy of his or her contact lens prescription, such as by text message, electronic mail, or an online patient portal, in lieu of a paper copy, provided the prescriber first identified the specific method of delivery to be used and obtained the patient's verifiable affirmative consent to this method of delivery.[275] In the CLR SNPRM, the Commission noted that providing patients with an electronic copy of their prescription could enable patients to share prescriptions more easily with sellers when purchasing eyewear, and this in turn could potentially reduce the number of patient and seller requests for verification or additional copies of the prescription. To enhance portability, the Commission noted that electronic delivery methods should allow patients to download, save, and print the prescription.[276]

As discussed above, the Commission is proposing to amend the Rule to add a Confirmation of Prescription Release requirement.[277] The proposed text of the Rule would provide prescribers with four alternative means of complying with the Confirmation of Prescription Release requirement. The fourth option states, ''If a digital copy of the prescription was provided to the patient (via methods including an online portal, electronic mail, or text message), retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable.'' In order to allow prescribers to meet the Confirmation of Prescription Release requirement in this way, the Rule must describe the conditions under which electronic delivery of the prescription will satisfy the automatic prescription release requirements. The Commission therefore proposes to define the phrase, ''provide to the patient one copy,'' which appears in § 456.2(a) and creates the requirement to automatically release the prescription immediately after the eye examination is completed.[278] This new definition expressly permits electronic delivery in certain circumstances.

a. The Commission's Proposal To Add a Definition to § 456.1 To Permit Electronic Delivery of the Patient's Prescription

Accordingly, the Commission proposes to modify the Rule by adding a definition of the term ''provide to the patient one copy.'' The Commission proposes to require that prescribers provide patients with either a paper copy of their prescription or, with the patient's verifiable affirmative consent, a digital copy of the patient's prescription in lieu of a paper copy. Verifiable affirmative consent means that a patient must have provided his or her consent to the prescriber in a way that can be later confirmed, such as through a signed consent form or an audio recording. The consent must also identify the specific method or methods of electronic delivery to be used because it is possible that a patient may prefer one method of electronic communication, but not others, and the patient should be able to make an informed choice.

Prescribers would be required to keep a record or evidence of a patient's affirmative consent for a period of not less than three years, which would facilitate Commission enforcement efforts to monitor compliance with the Rule. As the Commission concluded in the CLR Final Rule, the burden of retaining a record of patient consent should be minimal, ''since prescribers who opt for electronic delivery of prescriptions will, in all likelihood, obtain and/or store such consent electronically.'' [279] At any rate, obtaining and storing a record of patient consent should not take longer than obtaining and storing a patient's Confirmation of Prescription Release under option (i), (ii), or (iii), and prescribers choosing to use the fourth option to confirm prescription release would not need to collect additional information from the patient beyond the consent to electronic delivery. Finally, offering a prescription in a digital format would be an option for prescribers, but is not mandatory, so prescribers can choose not to offer electronic delivery of prescriptions if they find the recordkeeping provision overly burdensome.

The amended Rule would also require that if the prescription is provided electronically, it must be in a digital format that can be accessed, downloaded, and printed by the patient. The Commission believes this could enable patients to have easier access to and use of a prescription, reduce requests for additional copies and calls from sellers to verify a prescription, and potentially lower costs while providing flexibility for prescribers and patients.

Therefore, the Commission proposes to amend § 456.1 to define the phrase ''provide to the patient one copy'' to mean giving a patient a copy of his or her prescription:

(1) On paper; or

(2) In a digital format that can be accessed, downloaded, and printed by the patient. For a copy provided in a digital format, the prescriber shall identify to the patient the specific method or methods of electronic delivery to be used, such as text message, electronic mail, or an online patient portal, and obtain the patient's verifiable affirmative consent to receive a digital copy through the identified method or methods; and maintain records or evidence of a patient's affirmative consent for a period of not less than three years. Such records or evidence shall be available for inspection by the Federal Trade Commission, its employees, and its representatives.

The full text of the proposed Rule amendment is located at the end of this document.

b. Technological Advances That May Improve Prescription Portability

Technological advances—including many spurred by federal and state health information technology initiatives [280]—have fostered the

[275] CLR Final Rule, 85 FR 50668, 50717.

[276] CLR SNPRM, 84 FR 24664, 24668.

[277] *See* Sections II.A, IV.A.6, *supra.*

[278] 16 CFR 456.2(a).

[279] CLR Final Rule, 85 FR 50668, 50683.

[280] Numerous federal and state programs have been designed to foster the development of health information technology and the electronic processing, storage, and transmission of patients' health information. For example, under the Health Information Technology for Economic and Clinical Health Act or HITECH Act of 2009—Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009—Congress directed the Medicare and Medicaid programs to make direct payments to eligible healthcare professionals, hospitals, and certain other healthcare providers specifically to incentivize the adoption and meaningful use of electronic health records systems (''EHRs''). American Recovery and Reinvestment Act of 2009, Public Law 111–5, Division B, Title IV, §§ 4101, 4102, and 4201 (2009) (Medicare incentives for eligible professionals, Medicare incentives for hospitals, and Medicaid provider payments, respectively). According to a 2016 report, more than $30 billion in such incentive payments were made between 2011 and 2015. U.S. Dep't Health & Human Servs., Office of the National Coordinator for Health Information Technology, Report to Congress, ''Update on the Adoption of Health Information Technology and Related Efforts to Facilitate the Electronic Use and Exchange of Health Information'' 17 (2016), *https://www.healthit.gov/sites/default/files/Attachment_1_-_2-26-16_RTC_Health_IT_Progress.pdf.* Regarding patient portals in particular, *see, e.g.,* U.S. Dep't Health & Human Servs., Office of the National Coordinator for Health

proliferation of patient portals, application programming interfaces, and other developing technologies, through which health care providers can securely share medical information, such as prescription information, directly with patients. The increasing number of prescribers who have adopted various health information technologies to support patient engagement,[281] such as patient portals, has made it possible for prescribers to provide online access to prescriptions. This, along with the patient's ability to email or otherwise upload prescription copies to sellers, increases prescription portability.

Available information suggests, however, that the number of patients accessing EHRs, such as patient portals, remains limited,[282] and that certain patients, including older patients, are less likely to use these tools.[283] Through the 21st Century Cures Act, Congress authorized HHS to take action to promote the interoperability of health IT, support the use, exchange, and access of electronic health information, and limit information blocking.[284] The Cures Act Final Rule, promulgated by the Office of the National Coordinator for Health Information Technology (''ONC''),[285] requires healthcare providers to enable patient access to enumerated classes of data in their electronic health record systems. These data classes include providers' clinical notes and information on medications,[286] and may result in consumers having greater access to their prescription information from their refractive exam.[287]

The use of patient portals for presentation of eyeglass prescriptions to sellers could provide many benefits to consumers—potentially at low marginal cost to those providers who already maintain EHRs and patient portals. When using a portal, the patient could have direct access to a current, exact copy of the eyeglass prescription, reducing the chance of errors caused by an inaccurate or expired prescription, and the need for follow-up corrections by prescribers.[288] The use of health information technologies, such as patient portals, could also reduce costs for prescribers, patients, and sellers by making it easier and more efficient for patients to obtain and share eyeglass prescriptions and by reducing the number of requests placed on prescribers to verify prescription information, or provide duplicate copies, of prescriptions. In addition, patient portals may not raise the same privacy concerns expressed by some prescribers about sharing patient prescription information with third parties because patient portals can enable the secure sharing of such information directly with the patients themselves, who may then provide the prescription to the third-party seller.[289]

Accordingly, the Commission believes that the use of health information technologies, such as patient portals, to provide patients with access to electronic copies of their eyeglass prescriptions can benefit prescribers, patients, and sellers. The Commission encourages prescribers to consider whether, in addition to providing patients with copies of their prescriptions immediately following the completion of the eye examination, they should make prescriptions available electronically and online via health information technologies, in accordance with federal and state law and HHS guidance. To facilitate the likelihood that patient portals will increase prescription portability, prescribers should consider whether to configure patient portals to allow the patient to download, save, and print the prescription.[290] In addition, prescribers should explore whether designing the portal to allow the patient to securely transmit the prescription directly to a seller will further foster prescription portability.

The proposed Rule amendment permitting electronic delivery of prescriptions to satisfy the automatic prescription release requirement expressly contemplates the use of patient portals to deliver prescriptions. Significantly, the proposed change to allow for a digital copy in lieu of a paper copy does not alter the timing of when a prescriber must provide the prescription to the patient. In both instances, whether a digital or paper copy is given, prescribers must provide the prescription immediately after completion of the refractive eye examination. The Commission believes increased future use and adoption of health information technologies, such as patient portals, in response to the 21st Century Cures Act and other developments, have the potential to facilitate prescribers' compliance with the automatic prescription release requirement of the Rule and believe it is appropriate to provide an option for prescribers to use electronic delivery of prescriptions, so long as patients have expressly consented in advance to the mode of delivery used.

Information Technology, ''Patient Engagement Playbook,'' *https://www.healthit.gov/playbook/pe/introduction/*.

[281] As of 2015, 78 percent of all physicians had adopted certified health information technology. U.S. Dep't Health & Human Servs., Office of the National Coordinator for Health Information Technology, 2018 Report to Congress, ''Annual Update on the Adoption of a Nationwide System for the Electronic Use and Exchange of Health Information'' 8 (2018), *https://www.healthit.gov/sites/default/files/page/2018-12/2018-HITECH-report-to-congress.pdf*.

[282] As noted in the CLR SNPRM, a survey submitted by 1–800 CONTACTS showed that approximately 30% of patients were offered access to a portal during their last eye exam and, of those who were given the option, 29% chose to use the portal. CLR SNPRM, 84 FR 24664, 24668 n.50.

[283] Heather Landi, ''Who Isn't Using Patient Portals? New Study Sheds Light on Portal Use,'' Population Health Management (Dec. 12, 2018), *https://www.hcinnovationgroup.com/population-health-management/news/13030963/who-isnt-using-patient-portals-new-study-sheds-light-on-portal-use*. *See also* GAO, Report to Congressional Requesters, ''Health Information Technology'' 17 (Mar. 2017), *https://www.gao.gov/assets/690/683388.pdf* (reporting that only 15 to 30% of patients participating in the Medicare EHR program in 2015 electronically accessed their health information when it was made available to them).

[284] 21st Century Cures Act, Public Law 114–255, Title IV (2016).''Information blocking'' refers to practices that are likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information. 42 U.S.C. 300jj–52.

[285] ONC, 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, Final Rule, 85 FR 25642 (May 1, 2020).

[286] See ONC, *HealthIT.gov*, ''United States Core Data for Interoperability (USCDI),'' *https://www.healthit.gov/isa/united-states-core-data-interoperability-uscdi*.

[287] ONC has received proposals to include refraction measurements as a data element in the USCDI. *See https://www.healthit.gov/isa/uscdi-data-class/ophthalmic-data*.

[288] Empirical studies of the integrity of electronic transmission of prescription information chiefly focus on systems for transmitting prescription drug information and not eyeglass prescriptions. Still, such studies suggest that the adoption of electronic prescribing greatly reduces the error rate associated with handwritten paper prescriptions. *See, e.g.,* Rainu Kaushal et al., ''Electronic Prescribing Improves Medication Safety in Community-Based Office Practices,'' 25 J. Gen. Intern. Med. 530, 530 (2010) (finding that, ''For e-prescribing adopters, error rates decreased nearly sevenfold, from 42.5 per 100 prescriptions (95% confidence interval (''CI''), 36.7–49.3) at baseline to 6.6 per 100 prescriptions (95% CI, 5.1–8.3) one year after adoption ($p < 0.001$). For non-adopters, error rates remained high at 37.3 per 100 prescriptions.'').

[289] *See, e.g.,* ONC, *HealthIT.gov*, ''Do I Need to Obtain Consent From My Patients to Implement a Patient Portal?,'' *https://www.healthit.gov/faq/do-i-need-obtain-consent-my-patients-implement-patient-portal* (noting that HIPAA permits the disclosure of health information to the patient without requiring the patient's express consent and that portals are ''an excellent way to afford patients access to their own information and to encourage them to be active partners in their health care.'').

[290] If a prescriber intends to use a patient portal to satisfy the automatic prescription release requirement of § 456.2(a), the proposed new definition of the phrase ''provide to the patient one copy'' would require that the prescription be provided in a digital format that can be accessed, downloaded, and printed by the patient.

c. HIPAA Concerns Regarding Emailed Prescriptions

In response to the ANPR, the Commission did not receive any comments that identified concerns with how the Eyeglass Rule interacts with HIPAA and the HIPAA Privacy and Security Rules (''HIPAA Rules'').[291] However, in other contexts, the Commission has received questions and complaints related to prescribers' HIPAA obligations under the Eyeglass Rule. For example, some prescribers have asked staff whether HIPAA precludes optometrists from emailing copies of a prescription to a patient without written authorization. Correspondingly, some consumers have complained that their eye care practitioners have cited HIPAA in refusing to email or fax eyeglass prescriptions to them.

As a preliminary matter, the HIPAA Rules do not require the prescriber to obtain a signed HIPAA authorization from a patient in order for the prescriber to release an eyeglass prescription to the patient.[292] The HIPAA Rules also do not prohibit covered prescribers from emailing eyeglass prescriptions to patients. According to guidance provided by HHS, the HIPAA Rules allow health care providers to communicate electronically with patients, provided they apply reasonable safeguards.[293] Although a covered provider must consider encryption to protect against unintentional disclosures, the provider may determine that it is not reasonable and appropriate, and may instead apply ordinary precautions when transmitting unencrypted email, such as checking the email address for accuracy before sending, sending an email alert to the intended recipient for address confirmation prior to sending the message, and limiting the amount and type of protected health information (''PHI'') transmitted through the email.[294]

Moreover, where a patient requests that the covered entity transmit PHI (such as a copy of an eyeglass prescription) by unencrypted email—as is their right under the HIPAA Privacy Rule right of access—a covered entity must do so,[295] even if the email is an unsecure mode of transmission.[296] Before sending unencrypted email containing PHI to a patient, the entity must advise the patient of the risk that the unencrypted PHI could be intercepted and accessed by unauthorized third parties.[297] If, after having been advised of the risks, the patient still opts to receive his or her PHI via unencrypted email, the patient has the right to receive the PHI in that manner, and the covered entity is not liable for unauthorized access to the PHI during electronic transmission, or for safeguarding the PHI once delivered to the patient.[298] Conversely, a covered prescriber must honor a patient's reasonable request that the prescriber *not* send communications via unencrypted email, by offering other means of delivery, such as encrypted email, secure patient portal, postal mail, or telephone.[299]

While permitting electronic delivery with a patient's verifiable consent, the proposed Rule amendment would not mandate that prescribers use electronic delivery, nor would it obligate patients to accept such delivery.[300] As with the recent CLR amendment,[301] patients who decline to consent to electronic delivery, for any reason, must be given a paper copy of their prescription. Likewise, because technology is still developing or may be costly to implement, prescribers who prefer to provide paper copies to their patients would not be required to offer an electronic option under the amended Rule.

3. Insurance Coverage as Payment Under § 456.2(a)

The Eyeglass Rule requires that prescribers provide consumers with a copy of their prescription, but also contains an exception to allow a prescriber to refuse to give the patient a copy of their prescription until the patient has paid for the eye examination, so long as the prescriber would have required immediate payment had the eye examination revealed that no ophthalmic goods were required.[302] The CLR contains the same provision, but also provides that for purposes of this exception, a patient's proof of insurance coverage shall be deemed to constitute a payment.[303] The Eyeglass Rule does not contain this insurance clarification, and staff has received questions from the public about this issue. The Commission believes that such a proviso, which was initially formulated by Congress in drafting the FCLCA,[304] should be added to the Eyeglass Rule, both because it is appropriate that a patient's proof of

[291] 45 CFR parts 160, 164.

[292] *See* 45 CFR 164.502(a)(1); U.S. Dep't of Health & Human Servs., Office for Civil Rights, ''Summary of the HIPAA Privacy Rule'' 4–5 (2003), *http://www.hhs.gov/sites/default/files/privacysummary.pdf* (''A covered entity is permitted . . . to use and disclose protected health information, without an individual's authorization, for the following purposes or situations: (1) To the Individual (unless required for access or accounting of disclosures) . . . . Covered entities may rely on professional ethics and best judgments in deciding which of these permissive uses and disclosures to make.'') (footnote omitted).

[293] U.S. Dep't Health & Human Servs., Health Information Privacy, FAQs, ''Does the HIPAA Privacy Rule permit health care providers to use email to discuss health issues and treatment with their patients?,'' *http://www.hhs.gov/hipaa/for-professionals/faq/570/does-hipaa-permit-health-care-providers-to-use-email-to-discuss-health-issues-with-patients/; see also* 45 CFR 164.530(c).

[294] Encryption of PHI must be implemented where a covered entity has determined that it is a reasonable and appropriate safeguard as part of its risk management. *See* U.S. Dep't Health & Human Servs., Health Information Privacy, FAQs, ''Is the use of encryption mandatory in the Security Rule?,'' *http://www.hhs.gov/hipaa/for-professionals/faq/2001/is-the-use-of-encryption-mandatory-in-the-security-rule/index.html.* A covered health care provider also must protect PHI in those emails while they are stored on servers, workstations, mobile devices, and other computer systems, through encryption and other safeguards, as appropriate. *See* 45 CFR 164.306(a).

[295] The HIPAA Privacy Rule right of access requires a covered prescriber to provide, upon patient request, a copy of a prescription to the patient or to another person or entity she designates. 45 CFR 164.524(c)(3); *see also* U.S. Dep't Health & Human Servs., Health Information Privacy, FAQs, ''Individuals' Right under HIPAA to Access their Health Information 45 CFR 164.524,'' *http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/.* HHS has proposed modifying the Privacy Rule to clarify that an individual's right of access to direct a provider to transmit PHI to a third party is limited to an electronic copy of PHI contained in an electronic health record. Proposed Modifications to the HIPAA Privacy Rule To Support, and Remove Barriers to, Coordinated Care and Individual Engagement, 86 FR 6446, 6462.

[296] U.S. Dep't Health & Human Servs., Health Information Privacy, FAQs, ''Do individuals have the right under HIPAA to have copies of their PHI transferred or transmitted to them in the manner they request, even if the requested mode of transfer or transmission is unsecure?,'' *https://www.hhs.gov/hipaa/for-professionals/faq/2060/do-individuals-have-the-right-under-hipaa-to-have/index.html* (''individuals generally have a right to receive copies of their PHI by mail or email, if they request. It is expected that all covered entities have the capability to transmit PHI by mail or email and transmitting PHI in such a manner does not present unacceptable security risks to the systems of covered entities, even though there may be security risks to the PHI once it has left the systems. Thus, a covered entity may not require that an individual travel to the covered entity's physical location to pick up a copy of her PHI if the individual requests the copy be mailed or emailed.'')

[297] Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules, 78 FR 5565, 5634 (Jan. 25, 2013).

[298] *Id.*

[299] 45 CFR 164.522(b).

[300] The proposed amendment would also not alter or pre-empt existing state and federal requirements pertaining to the electronic delivery of records and consumer consent, such as the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 (''E-Sign'').

[301] *See* CLR Final Rule, 85 FR 50668, 50682.

[302] 16 CFR 456.2(a).

[303] 16 CFR 315.4.

[304] 15 U.S.C. 7602.

insurance coverage equates to payment, and to bring the two rules into conformity, to eliminate unnecessary confusion. The Commission thereby proposes a technical amendment to the Rule to add a statement to the end of § 456.2(a) clarifying that the presentation of proof of insurance coverage shall be deemed to be a payment.

C. Requiring Prescribers To Respond to Authorized Third-Party Seller Requests for a Copy of Prescription or Verification of Prescription Information

In contrast to the CLR, the Eyeglass Rule does not require a prescriber to provide a copy to, or verify prescription information with, third-party sellers authorized by the patient.[305] The Commission requested comment on whether it should amend the Rule to obligate prescribers to respond to either or both of these requests from sellers.[306]

1. Comments on Requiring Prescriber Response to Third-Party Seller Requests

Some commenters recommended that the Commission align the Eyeglass Rule with the CLR, which requires that prescribers provide authorized third parties with a copy of, and verification of, a prescription.[307] Under the CLR, a seller may only sell contact lenses in accordance with a prescription that is presented to the seller by the patient or prescriber, or verified by the prescriber.[308] A prescription is verified only if the prescriber confirms the prescription is accurate, the prescriber informs the seller that the prescription is inaccurate and provides the accurate prescription, or the prescriber fails to respond to the seller within eight business hours after receiving a complete verification request (''passive verification'').[309] A prescriber is also required to respond to an authorized seller's request for a copy of a prescription.[310]

The verification requirements for contact lenses derive from the FCLCA, which created the framework for contact lens sales and directed the Commission to promulgate the CLR.[311] The FCLCA requires that sales of contact lenses occur only with a copy of a prescription, or after verifying a prescription with a prescriber, and sets forth the requirements for passive verification.[312]

Commenters in favor of amending the Eyeglass Rule to require that prescribers provide copies of prescriptions to sellers, or verify prescriptions with sellers, include the NAOO, several state optician groups and individual opticians, some prescribers (including a telehealth prescriber), eyewear seller Warby Parker and some of its employees, a United States Senator, and numerous individual consumers.[313] Warby Parker and a number of consumers stated that there is a need for such a requirement because, at present, when sellers request a copy or verification of prescription information, prescribers do not always respond [314] or respond in a timely fashion.[315] Warby Parker commented that it expends substantial resources ''persuad[ing prescribers] to provide the information required to fill a consumer order,'' and that it informs between 50 and 100 consumers per day that it is unable to complete their eyeglass orders.[316] As a result, some consumers complained that they waited a long time for their eyeglasses, or that they were ultimately unable to purchase glasses from a seller other than their prescriber.[317] Some of these commenters felt that prescribers have unfairly kept their medical information from them.[318]

In addition to those comments recommending that the Commission require sellers to obtain a copy of, or verify, a prescription before manufacturing eyeglasses,[319] one commenter opined that a verification provision would promote fair competition and better options and pricing for consumers; [320] and others supported rule improvements that would increase access to safe, affordable prescription eyewear.[321] U.S. Senator Charles Schumer commented that not having a verification requirement limits consumer choice and leads to higher prices.[322] In addition, state opticians

[305] The Eyeglass Rule contains the word ''verification,'' but the meaning associated with that word is quite different from what is being considered in this discussion. Section 452.6(c) states that a prescriber may not charge a patient any fee in addition to the examination fee as a condition of releasing the prescription, but provides a caveat that the prescriber ''may charge an additional fee for verifying ophthalmic goods dispensed by another seller when the additional fee is imposed at the time the verification is performed.'' Verification in the exception pertains to an ophthalmologist or optometrist examining the accuracy of the lenses dispensed by another seller, and not a prescriber verifying prescription information provided by a seller. *See* Eyeglass I Rule, 43 FR 23992, 23998.

[306] *See* Eyeglass Rule ANPR, 80 FR 53274, 53276.

[307] *See, e.g.,* NAOO (Comment #0748 submitted by Cutler); Warby Parker (Comment #0817 submitted by Kumar); Duplantier (Comment #0847); Opternative (now Visibly) (Comment #0853 submitted by Dallek).

[308] 16 CFR 315.5.

[309] *Id.*

[310] 16 CFR 315.3(a).

[311] 15 U.S.C. 7607; 16 CFR 315.1.

[312] 15 U.S.C. 7603.

[313] *See, e.g.,* Opticians Association of America (Comment #0638 submitted by Allen); Opticians Alliance of New York (Comment #0642 submitted by Cullen); Duff (Comment #0653); NAOO (Comment #0748 submitted by Cutler); South Carolina Association of Opticians (Comment #0822 submitted by Harbert); DeMuth Jr. (Comment #0055); Senate Majority Leader Charles Schumer (Comment #0865); Ramiah (Comment #0139); Capurso (Comment #0149); Mendelsohn (Comment #0429); Groenke (Comment #0697); Schrup (Comment #0765); Kuhl (Comment #0766); Gorsuch (Comment #0773); Frein (Comment #0774); Hopkins (Comment #0776); Feldman (Comment #0780); Anderson (Comment #0781); Lyden (Comment #0792); Jackson (Comment #0707); Meinke (Comment #0795); Lorenczi (Comment #0796); Keas (Comment #0798); Burkhart (Comment #0805); Albee (Comment #0806); Rivera (Comment #0809); Warby Parker (Comment #0817 submitted by Kumar); Warden (Comment #0820); Anderson (Comment #0714); Sansbury (Comment #0825); Williamson (Comment #0827); Ardis (Comment #0830); Folline Vision Centers (Comment #0837); Rump (Comment #0843); Murtha (Comment #0844); Heaton (Comment #0845); Gage-Halman (Comment #0846); Malonjao (Comment #0856). Some commenters used the term ''verify'' to mean that prescribers should be required to provide a copy of a prescription to an optical shop. *See, e.g.,* Debnam (Comment #0039) (consumer did not have a copy of the prescription so asked optical shop to call the doctor to verify the prescription); Panaccio (Comment #0340) (same). In other instances, it was unclear whether commenters were discussing requiring the prescriber to provide a copy of, or verify, prescriptions.

[314] *See, e.g.,* Debnam (Comment #0039); White (Comment #0053); Kidwell (Comment #0054); Averett (Comment #0057); Silva-Sadder (Comment #0065); Tresham (Comment #0737); Kulp (Comment #0150); Lass (Comment #0197); Moran (Comment #0202); Vieira (Comment #0237); Lavieri (Comment #0242); Panaccio (Comment #0340); Schermerhorn-Cousens (Comment #0350); Stout (Comment #0527); Warby Parker (Comment #0817 submitted by Kumar).

[315] *See, e.g.,* Peel (Comment #0281); Paluzzi (Comment #0412); Quinn (Comment #0427); Hollis (Comment #0430); Choi (Comment #0455); Cash (Comment #0482); Gold (Comment #0503); Poppy (Comment #0517); Schneider (Comment #0571); Crollini (Comment #0607); Pappas (Comment #0692); Peaton (Comment #0772); Benson (Comment #0777); Carter (Comment #0778); Ghaznavi (Comment #0779); Knittel (Comment #0782); Cornett (Comment #0784); Nakanishi (Comment #0789); Anderson (Comment #0797); Beeferman (Comment #0801); Taylor (Comment #0787); Todd (Comment #0802); Kelley (Comment #0804); Nguyen (Comment #0812); Necastro (Comment #0816); Warby Parker (Comment #0817 submitted by Kumar); Stauffer (Comment #0859).

[316] Comment #0817 submitted by Kumar.

[317] Debnam (Comment #0039); White (Comment #0053); Kidwell (Comment #0054); Averett (Comment #0057); Tresham (Comment #0075); Ramiah (Comment #0139); Boyle (Comment #0605).

[318] Debnam (Comment #0039); White (Comment #0053); Kidwell (Comment #0054); Averett (Comment #0057); Silva-Sadder (Comment #0065); Tresham (Comment #0075); Kulp (Comment #0150); Lass (Comment #0197); Moran (Comment #0202); Vieira (Comment #0237); Lavieri (Comment #0242); Panaccio (Comment #0340); Schermerhorn-Cousens (Comment #0350); Stout (Comment #0527); *see also* Magida (Comment #0597) (complaining that it felt like the prescriber held prescription ransom because consumer was looking elsewhere to purchase eyeglasses).

[319] *See* note 122, *supra.*

[320] Mendelsohn (Comment #0429).

[321] O'Dea (Comment #0188); Buntain (Comment #0531).

[322] Comment #0865. Warby Parker made similar arguments regarding consumers' need for easy access to affordable prescription glasses. Comment

Continued

groups, individual opticians, and at least one optometrist, stated that enabling sellers to verify prescriptions with a patient's optometrist or ophthalmologist would better ensure patient safety.[323]

The NAOO and Warby Parker specifically requested the Rule be amended to include ''passive verification,'' similar to that in the CLR, which would allow the sale of eyeglasses after a seller requests prescription verification and the prescriber fails to respond within a certain period of time.[324] In support, the NAOO stated that there is only a very small health or safety risk, if any, in improper fitting or inaccurate prescriptions for corrective eyewear, and such risk is substantially less for eyeglasses than contact lenses (since eyeglasses are not placed on the eye itself).[325]

On the other hand, several commenters, mostly prescribers, objected to amending the Rule to require prescribers to respond to sellers' requests for prescription information.[326] The AOA did not comment on whether prescribers should be required to provide a copy of a prescription to third-party sellers,[327] but ''strongly oppose[d]'' adding a verification process similar to that utilized under the CLR, stating that the CLR's passive verification process had various ''problems and weaknesses.'' [328] Another prescriber indicated that a verification requirement would waste a prescriber's time since the customer already receives a copy of the prescription.[329] The AAO recognized in its comment that the expansion of online eyeglass vendors has led to a growing need for third-party verification, but stated that ophthalmic practitioners have worked diligently to meet that need without the Eyeglass Rule mandating it.[330] The AAO also contended that, due to the larger volume of eyeglass prescriptions as compared to contact lens prescriptions, amending the Rule to require strict timeframes for prescribers to respond to verification requests would pose undue financial burden on prescribers.[331]

2. Analysis of Whether To Amend the Rule To Require Prescriber Response

The Commission declines to propose to amend the Rule to require that prescribers respond to third-party requests for prescriptions or the verification of prescription information. The Commission bases this decision on a number of factors. Initially, the Commission notes that the evidence regarding this issue is primarily anecdotal and the Commission does not, at present, have adequate data as to the number of such third-party requests, nor the percentage of requests that prescribers decline to fulfill. Furthermore, according to comments from the AAO and the AOA, many prescribers are complying with patient requests for duplicate copies of their prescription, even without such conduct being mandated by the Eyeglass Rule.[332] This may be because prescribers are required to respond to patient requests for their prescription under HIPAA's right of access to medical records and many state laws.[333]

#0817 submitted by Kumar. According to Warby Parker, its sales model reduces the cost of eyeglasses dramatically, offering a savings of approximately 75 percent as compared to prescription eyeglasses sold in traditional retail stores. The company indicated that it sells prescription eyeglasses starting at $95, and that consumers will often pay $400 or more elsewhere for eyeglasses of comparable quality. *Id.* Industry statistics show that, as of late 2015, online sellers were typically 50 to 60 percent less expensive than brick and mortar locations. *See* Vision Council, ''U.S. Optical Overview and Outlook,'' *supra* note 71, at 65 n.3.

[323] Opticians Association of America (Comment #0638 submitted by Allen); Opticians Alliance of New York (Comment #0642 submitted by Cullen); Duff (Comment #0653); South Carolina Association of Opticians (Comment #0822 submitted by Harbert); Groenke (Comment #0697); Schrup (Comment #0765); Kuhl (Comment #0766); Gorsuch (Comment #0773); Frein (Comment #0774); Hopkins (Comment #0776); Feldman (Comment #0780); Anderson (Comment #0781); Lyden (Comment #0792); Jackson (Comment #0707); Meinke (Comment #0795); Lorenczi (Comment #0796); Keas (Comment #0798); Burkhart (Comment #0805); Albee (Comment #0806); Rivera (Comment #0809); Warden (Comment #0820); Anderson (Comment #0821); Sansbury (Comment #0825); Williamson (Comment #0827); Ardis (Comment #0830); Folline Vision Centers (Comment #0837); Rump (Comment #0843); Murtha (Comment #0844); Heaton (Comment #0845); Gage-Halman (Comment #0846); Malonjao (Comment #0856); *see also* Jozwik (Comment #0002) (commenting that verification minimizes mistakes since the information is straight from the prescriber).

[324] NAOO (Comment #0748 submitted by Cutler); Warby Parker (Comment #0817 submitted by Kumar). Mandating passive verification may make it easier and faster for those consumers who have an expired or unsigned eyeglass prescription, or who have their specifications read from their current pair. However, passive verification would not benefit consumers who do not have anything to refer to containing their eyeglass specifications.

[325] Comment #0748 submitted by Cutler. The group also stated that the absence of any pattern of consumer health problems following more than ten years of the Contact Lens Rule's ''passive verification'' approach demonstrates that the ''FTC would be justified in addressing prescriber unwillingness to verify eyeglass prescriptions by taking the same approach in the Eyeglass Rule.''

[326] Publi (Comment #0040); Gupta (Comment #0446); Cerri (Comment #0509); Kiener (Comment #0593); Bolenbaker (Comment #0633); Smith (Comment #0652); Geist (Comment #0679).

[327] However, as noted in Section IV.B.1 above, the Commission's request for comment on whether prescribers should be required to provide duplicate copies upon request, the AOA responded that prescribers must be allowed to use their clinical judgment to determine whether it is appropriate to provide additional copies long after the refraction was performed. Comment #0849 submitted by Peele.

[328] In its Eyeglass Rule comment, the AOA did not specify what these problems and weaknesses are. Comment #0849 submitted by Peele. However, in its comment submitted pursuant to the Contact Lens Rule review, the AOA raised concerns about, among other things, automated robocall verifications, and sellers' lack of live contact persons available to respond to prescriber verification questions and concerns. CLR RFC Comment FTC–2015–0093–0623 submitted by Peele. In addition, the AOA has questioned the Commission's legal authority to add a verification requirement to the Eyeglass Rule without a congressional act authorizing it to do so. Comment #0849 submitted by Peele. In this NPRM and in the Rule review more generally, the Commission analyzes whether it meets the requisite section 18 factors before recommending any changes.

[329] Gupta (Comment #0446); *see also* Publi (Comment #0040) (consumer against verification requirement stating consumers already have their prescriptions).

[330] Comment #0864 submitted by Haber. The AAO stated that if practitioners are inflexible with regard to providing duplicate copies or verifying prescriptions, patients will go elsewhere for their eye care needs. *See also* NAOO (Comment #0748 submitted by Cutler) (stating most of its members honor requests to verify eyeglass prescriptions at no charge, but recognizing most members do not dispense eyeglasses, and therefore, have less monetary incentive to ignore or decline such requests).

[331] Comment #0864 submitted by Haber. There are approximately 165 million eyeglass wearers compared to about 45 million contact lens wearers. *See* VisionWatch Report, *supra* note 70, at 24 (165.4 million eyeglass wearers; 42.4 million contact lens wearers); Centers for Disease Control and Prevention, Contact Lenses: Fast Facts (July 26, 2018), *https://www.cdc.gov/contactlenses/fast-facts.html* (an estimated 45 million contact lens wearers in the U.S.). Although more individuals in the United States wear eyeglasses than contact lenses, many consumers do not order a new pair of eyeglasses every year. In fact, in 2019, consumers purchased approximately 79 million pairs of eyeglass frames and 88 million pairs of lenses, whereas nearly 103 million contact lens units were sold in the same period. *See* VisionWatch Report, *supra* note 70, at 12, 82. Further, many contact lens wearers make more than one order in a year. ''The Strength of Competition in the Sale of Rx Contact Lenses: An FTC Study,'' 45–46 n.18 (2005), *https://www.ftc.gov/sites/default/files/documents/reports/strength-competition-sale-rx-contact-lenses-ftc-study/050214contactlensrpt.pdf* (finding that just 12–20 percent of consumers purchase a year's supply at a time). As a result, the burden of responding to requests for a copy of, or verification of, eyeglass prescriptions is not necessarily greater than that for contact lens prescriptions.

[332] AAO (Comment #0864 submitted by Haber) (duplicate copies traditionally provided at no charge); AOA (Comment #0849 submitted by Peele) (calling provision of duplicate copies common practice among optometrists); Haas (Comment #0359); Sharma (Comment #0609); Berry (Comment #0673).

[333] 45 CFR 164.524(c). Although in order to exercise this right, consumers may have to file a formal HIPAA request and wait several days. *See* note 252, *supra.* Consumers in most states have a separate right of access to their medical records, including prescriptions, under state law. *See* Health Information and the Law, Individual Access to Medical Records: 50 State Comparison, *http://www.healthinfolaw.org/comparative-analysis/*

Moreover, the Commission has proposed a requirement for prescribers to obtain a signed confirmation from patients that they received a copy of their prescription. It is the Commission's belief that this proposal will remind prescribers to release prescriptions and increase compliance with the automatic release provision of the Rule,[334] resulting in more patients in possession of their prescription, and, consequently, less need for third-party verification. The signed confirmation proposal, in conjunction with consumers' ability to access an additional copy of their prescription through HIPAA, other laws, or voluntary release by prescribers, should ensure that the vast majority of consumers have a prescription in hand. With that prescription, consumers should experience greater convenience and flexibility, including increased choice of style and service, and lower costs.

The Commission's goal in adopting the Confirmation of Prescription Release requirement is to further the purpose of the Rule: to enable consumers to comparison-shop for eyeglasses. The Commission is mindful that, at present, a significant percentage of prescribers do not automatically provide a prescription, and many consumers cannot reasonably avoid the resulting injury.[335] The Commission is hopeful that compliance will improve without adding a requirement that prescribers provide prescriptions to, or verify prescriptions with, third parties.[336] The Commission therefore believes it is unnecessary at this time to impose possible additional costs upon prescribers that might arise from mandating they respond directly to third-party sellers' requests,[337] but may revisit this issue in the future if we receive additional information.

V. Prescription Requirements

A. Requiring Prescribers To Include Pupillary Distance on Eyeglass Prescriptions

The Commission's ANPR sought feedback on whether the Commission should amend the Rule's definition of prescription to require that prescribers provide pupillary distance on a prescription.[338] Pupillary distance is the measurement (in millimeters) of the distance between the pupils of one's eyes and is a measurement needed to properly fit a pair of eyeglasses.[339] Unlike a patient's refraction dimensions (sphere, cylinder, etc.), pupillary distance remains relatively constant for adults over time, although it can change a small amount.[340] According to prescriber and optician comments, providing a consumer with an accurate pupillary distance is important to the health of the patient,[341] as wearing eyeglasses made based on an inaccurate measurement can lead to visual discomfort,[342] headaches,[343] or even vision loss for some children.[344]

Under the Rule, a prescription is defined as ''the written specifications for lenses for eyeglasses which are derived from an eye examination, including all of the information specified by state law, if any, necessary to obtain lenses for eyeglasses.'' [345] The Rule defines an eye examination as ''the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.'' [346] The purpose of the Rule's ''prescription'' definition is to effectuate the separation of the exam and the sale of eyeglasses; it is not intended to preempt state regulations that determine what must be included in a prescription.[347] A review of current state laws demonstrates that only four states require the inclusion of pupillary distance in a prescription.[348]

Prior to the Rule's initial issuance, the Commission considered whether to require that prescriptions contain pupillary distance. After considering the various comments concerning whether pupillary distance and other measurements needed to make eyeglasses were part of the eye examination or the dispensing of eyeglasses, and whether prescribers or opticians were more qualified to take pupillary distance measurements, it left to the states the determination of whether a pupillary distance measurement was required prescription information.[349]

The manner of purchasing eyeglasses when the Commission first promulgated the Rule differed greatly from the present, however. Then, if a prescriber did not provide pupillary distance on prescriptions, consumers could generally obtain that measurement at the brick and mortar business where they purchased their eyeglasses. Today, consumers also have the option to purchase their eyeglasses online and need that measurement to place their order. Several commenters to this Rule review suggested that the Rule should now be amended to require that prescriptions include a patient's pupillary distance.[350]

Understanding what currently occurs in the marketplace with respect to

individual-access-medical-records-50-state-comparison (compiling and explaining state laws that give consumers the right to access their medical records).

[334] *See* Section IV.A.6, *supra.*

[335] *See* Section IV.A.4, *supra.*

[336] The Commission is not indicating that prescribers should ignore such requests, but rather is declining to propose to amend the Rule to mandate such a response.

[337] Several commenters pointed out that there is a burden associated with requiring prescribers to respond to requests for a copy of, or to verify a third-party seller's request for, a prescription, though they do not agree on how large the burden is. NAOO (Comment #0748 submitted by Cutler) (declaring that the overall burden would be trivial when compared to the benefits); Kiener (Comment #0593) (processing third-party requests poses a not insignificant operating expense); Opternative (now Visibly) (Comment #0853 submitted by Dallek) (stating its willingness to take on the burden for the benefit of greater consumer choice). Although the AOA did not address the burden of verification in its comment to the Eyeglass Rule, its comments during the CLR review raised concerns about the burden presented from the CLR's verification requirement. CLR RFC Comment FTC–2015–0093–0623 submitted by Peele.

[338] Eyeglass Rule ANPR, 80 FR 53274, 53276.

[339] *See* ACLens ''Measuring Pupillary Distance (PD),'' *https://www.aclens.com/measuring-pupillary-distance.* As discussed later in this section, some commenters explained that a pupillary distance measurement is more complex than this definition suggests.

[340] NAOO (Comment #0748 submitted by Cutler); *see also* Barry Santini, ''The Power and Politics of the PD,'' 20/20 Magazine (Mar. 2014), *http://www.2020mag.com/l-and-t/46893/* [hereinafter Santini article] (explaining that the average change in pupillary distance is three percent between the ages of 18 and 50, and changes even more slowly after the age of 60).

[341] *See, e.g.,* Opticians Association of America (Comment #0638 submitted by Allen); Opticians Association of Kentucky (Comment #0640 submitted by Castle); Opticians Association of Vermont (Comment #0641 submitted by Williams); Opticians Alliance of New York (Comment #0642 submitted by Cullen); South Carolina Association of Opticians (Comment #0822 submitted by Harbert); Robinson (Comment #0643); Duff (Comment #0653); Johnson (Comment #0654); Thetford (Comment #0659); Crabtree (Comment #0666); Groenke (Comment #0697).

[342] Several commenters also pointed out that an accurate pupillary distance is even more important for those consumers who have higher-powered prescriptions. *See, e.g.,* Opticians Association of Alaska, Inc. (Comment #0852 submitted by Brand); Heuer (Comment #0670); LensCrafters (Comment #0819 submitted by Tavel).

[343] Clark (Comment #0855).

[344] Opticians Association of Alaska, Inc. (Comment #0852 submitted by Brand) (incorrect pupillary distance for child with amblyopia (commonly known as ''lazy eye'') could lead to further vision loss and impairment); Peaslee (Comment #0700) (an incorrect pupillary distance could permanently damage a child's vision).

[345] 16 CFR 456.1(g).

[346] 16 CFR 456.1(b).

[347] *See* 16 CFR 456.1(g).

[348] Alaska Admin. Code tit. 12, § 48.920; Kan. Admin. Regs. § 65–8–4; 246 Mass. Code Regs. § 3.02; N.M. Stat. Ann. § 61–2–10.3. Arizona once required pupillary distance on prescriptions, but that requirement was removed. Ariz. Admin. Code § R4–21–306 (amended by final rulemaking at 22 Ariz. Admin. Reg. 328, eff. Mar. 28, 2016).

[349] Eyeglass I Report, *supra* note 6, at 255–59.

[350] *See* note 357, *infra.*

pupillary distance informs the Commission's discussion and analysis. Some prescribers who measure pupillary distance provide it on prescriptions automatically; others provide it free upon request or for a nominal fee, while others refuse to provide it to consumers.[351] Other prescribers do not ordinarily take pupillary distance, leaving that task to the optical dispensary that crafts a patient's eyeglasses. Some prescribers, particularly some ophthalmologists, commented that they do not have equipment to measure pupillary distance.[352]

Consumers who do not receive their pupillary distance on their prescription, and desire to purchase their eyeglasses online, are able to obtain that measurement in other ways, though it may cost them time, money, or, according to some commenters, accuracy. If the information is in a patient's medical file, the individual may obtain it by filing a HIPAA request, a process that may require filling out a form, paying a fee, and waiting up to 30 days.[353] Consumers may also obtain their pupillary distance measurements by visiting a third-party brick and mortar store. Consumers may have to pay for this measurement, although at least one online seller has offered to reimburse consumers up to a certain dollar amount for the measurement. Online sellers also offer directions and online tools for consumers to measure their own pupillary distance, or to have someone they know measure their pupillary distance.[354] Techniques suggested vary from using a credit card and webcam to using a millimeter ruler and a mirror.[355] However, some consumers reported problems with their vision when using eyeglasses made with pupillary distances they measured themselves using online tools.[356] It should be also pointed out that commenters did not opine on, and the Commission has not analyzed, whether the various methods consumers may use to determine their pupillary distance, or whether sellers manufacturing eyeglasses in accordance with self-measured pupillary distances, are permitted in all jurisdictions.

3. Comments on Whether To Require Pupillary Distance

Comments in favor of requiring that prescriptions contain pupillary distance were primarily from consumers, Warby Parker, and Warby Parker employees.[357] These commenters declared that the Rule should include pupillary distance to increase prescription portability and, therefore, the procompetitive effects of the Rule.[358] Warby Parker and consumers recounted numerous instances where they felt prescribers had engaged in anti-competitive behavior by refusing to provide, or by charging for, the measurement.[359] Warby Parker also alleged that prescribers refuse to give this measurement as a tactic to keep business because they know that consumers who request this measurement are taking their eyeglass business online.[360] Some consumers stated that they had to obtain their pupillary distance from another brick and mortar store before buying online, making it far less convenient to obtain new eyeglasses.[361] Some consumers said that they measured their pupillary distance themselves, but as a result experienced problems with their glasses.[362] The NAOO commented that self-estimating pupillary distance can result in lower accuracy and a higher number of eyeglass remakes, but that many online sellers have developed accurate alternative ways to measure pupillary distance.[363]

Warby Parker also commented that the Commission has previously objected to state regulatory proposals designed to withhold certain information necessary to fill an eyeglass prescription.[364] The eyeglass seller pointed to a 2011 FTC staff letter responding to the North Carolina State Board of Opticians' proposed rule that would have, among other things, redefined the meaning of prescriptions for eyeglasses and contact lenses so that ''measurements taken by opticians are not considered part of the patient's prescription, and are not required to be released as part of a prescription.'' [365] The 2011 staff letter, which did not specifically mention pupillary distance, was not an opinion by staff that pupillary distance is a necessary part of a valid eyeglass prescription, or that failure to include pupillary distance is an unfair act or practice. Rather, Commission staff was concerned that adoption of the North Carolina proposal would decrease consumers' existing access to information.[366] By contrast, the current document considers whether to

[351] NAOO (Comment #0748 submitted by Cutler); *see also* Fainzilberg (Comment #0051) (prescriber did not initially provide pupillary distance and later refused to give the measurement out over the phone); Wintermute (Comment #0067) (prescriber refused to provide pupillary distance measurement); Riding (Comment #0100) (prescriber gave consumer the ''runaround'' and provided the pupillary distance measurement a couple weeks after the request); Morris (Comment #0104) (prescriber did not provide the pupillary measurement on the prescription); Bray (Comment #0105) (same); Parazette-Nascimbene (Comment #0106) (same); Twardowski (Comment #0110) (same). The FTC has received complaints from consumers stating that their prescription did not include, or that their prescriber refused to provide them with, their pupillary distance. Other consumer complaints received by the FTC indicate that consumers have been charged by prescribers between $15 and $40 for a pupillary distance measurement.

[352] *See, e.g.,* Narula (Comment #0578); Hoffman (Comment #0587); Groenke (Comment #0697) (requirement would possibly mean prescribers would need to purchase expensive equipment); Hopkins (Comment #0776) (same); LensCrafters (Comment #0819 submitted by Tavel) (stating that the digital technology required to accurately obtain these measurements does not typically exist in the doctor's space); Alvarez (Comment #0838).

[353] 45 CFR parts 160, 164 (HHS has proposed reducing this time to require access be provided ''as soon as practicable,'' but in no case later than 15 days. *See* note 252, *supra*). One complication with filing a HIPAA request, however, is that a consumer may not know whether a pupillary distance measurement is in their doctor's medical file, and might not be able to find out until receiving the records. Some consumers, though, may already possess a previous prescription containing their pupillary distance.

[354] *See, e.g.,* Zenni Optical, ''How to Measure Your Pupillary Distance (PD),'' *http://www.zennioptical.com/measuring-pd-infographic;* Warby Parker, ''Measure your pupillary distance (PD),'' *https://www.warbyparker.com/pd/instructions.*

[355] *Id.*

[356] *See* note 362, *infra.*

[357] *See, e.g.,* Fainzilberg (Comment #0051); Wintermute (Comment #0067); Dingley (Comment #0062); DeLisle (Comment #0070; Twardowski (Comment #0110); Ramiah (Comment #0139); Cooney (Comment #0159); Dickens (Comment #0176); O'Dea (Comment #0188); Bailer (Comment #0191); Wieczorkowski (Comment #0210); Mackey (Comment #0739); Washington (Comment #0320); Beaudoin (Comment #0349); Myers (Comment #0351); Montgomery (Comment #0375); Greco (Comment #0406); Warby Parker (Comment #0817 submitted by Kumar); Cornwell (Comment #0829). *But see* Santini (Comment #0047) (optician in favor of adding a pupillary distance requirement to the Rule); 1–800 CONTACTS (Comment #0834 submitted by Williams) (in favor of adding a pupillary distance requirement to the Rule).

[358] *Id.*

[359] *See, e.g.,* Warby Parker (Comment #0817 submitted by Kumar); Fainzilberg (Comment #0051); Wintermute (Comment #0061); Wieczorkowski (Comment #0210); Mackey (Comment #0739); Montgomery (Comment #0375); Savransky (Comment #0378).

[360] Warby Parker (Comment #0817 submitted by Kumar).

[361] *See, e.g.,* Kao (Comment #0107); Evans (Comment #0109); Martin (Comment #0103); Nitekman (Comment #0112); Huet (Comment #0114); Cayabyab (Comment #0115); Smith (Comment #0118); Webb (Comment #0121); Grazado (Comment #0122); Weinberger (Comment #0123); Skinner (Comment #0124).

[362] Bailer (Comment #0191); Emanuel (Comment #0282); Land (Comment #0311).

[363] Comment #0748 submitted by Cutler.

[364] Comment #0817 submitted by Kumar.

[365] Letter from Susan S. DeSanti, Director, Office of Policy Planning, Joseph Farrell, Director, Bureau of Economics, and Richard A. Feinstein, Director, Bureau of Competition to Sue M. Kornegay, NC State Board of Opticians, Jan. 13, 2011, *https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-north-carolina-state-board-opticians-concerning-proposed-regulations-optical-goods/1101ncopticiansletter.pdf.*

[366] *Id.*

designate a failure to include pupillary distance as an unfair act or practice.

In contrast to Warby Parker and consumer commenters, ophthalmologists and optometrists commenting on the Rule almost universally declared that the Rule should not require that a prescription contain pupillary distance.[367] Some prescribers, especially ophthalmologists, stated that they do not take this measurement.[368] The AOA and LensCrafters commented that prescribers do not routinely take this measurement as part of an ''eye examination.'' [369] Other prescribers indicated that while they take a ''binocular'' pupillary distance measurement during their examination, this is not always precise enough for an optician to use in making eyeglasses.[370]

Prescribers further indicated that their principal opposition to a requirement that they include a pupillary distance on a prescription is that the measurement is part of the dispensing of eyeglasses and not part of a refractive examination,[371] and that the costs associated with taking these measurements are built into the eyewear product and not the examination.[372] Some prescribers stated that if taking a pupillary distance were to become a required part of an eye examination, the price of an eye examination would increase.[373] In fact, a number of prescribers commented that if required to include it, they would have to acquire new equipment and hire or train staff to take this measurement.[374] The AAO suggested that the addition of such a requirement might cause ophthalmologists to stop providing vision-correction exams for eyeglasses and contacts altogether, and focus solely on eye health and medical issues.[375]

Opticians, in general, are also largely opposed to the Rule requiring that a prescription contain pupillary distance.[376] Many opticians suggested that the pupillary distance measured by a prescriber's office should not be used to make eyeglasses.[377] Some opticians agreed with the prescribers who commented that prescribers' equipment is not always sufficiently precise.[378] Opticians stated that an accurate measurement depends on the intended use of the eyeglasses (*e.g.,* reading, computer use, driving) and specific frames chosen,[379] the latter being information that a prescriber rarely has at the time the prescription is written following the exam. According to some commenters, to obtain an accurate pupillary distance, one needs to know specifically the lens shape and size, as well as the horizontal and vertical placement of the glasses on an individual's face.[380] Some commenters also noted that there may be different pupillary distance measurements for near and far viewing distances, and so multi-focal lenses may have more than one pupillary distance.[381]

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[367] The AOA commented that the Rule should continue to defer to the states on this issue. Comment #0849 submitted by Peele.

[368] Pandit (Comment #0449) (ophthalmologist); Nichols (Comment #0461) (ophthalmologist); Perlmutter (Comment #0464) (ophthalmologist); Chung (Comment #0474) (ophthalmologist); Holler (Comment #0615) (ophthalmologist who has never taken pupillary distance in 17 years); Rosenblum (Comment #0629) (ophthalmologist who has never taken a pupillary distance); Alvarez (Comment #0838) (optometrist who has never taken a pupillary distance).

[369] AOA (Comment #0849 submitted by Peele); LensCrafters (Comment #0819 submitted by Tavel). It follows, according to the AOA, that since pupillary distance is not derived as part of an ''eye examination,'' it does not meet the Rule's definition of a prescription, and should not be required. Comment #0849 submitted by Peele.

[370] Robinson (Comment #0625); *see also* Shepard (Comment #0476) (forcing eye doctors to use old technology to write the pupillary distance on a prescription would be legislating old and outdated technology and not in the interest of patients); Hixson (Comment #0810) (the pupillary distance taken during the exam is an estimate and is often highly inaccurate). Eyeglass manufacturer and seller, ACLens, describes on its website that a binocular measurement is a measurement from one eye's pupil to the other. Monocular PD consists of two numbers and is the distance between the centers of each pupil to the bridge of the nose. *https://www.zennioptical.com/measuring-pd-infographic.* Some commenters stated that a monocular pupillary distance provides better centration and is therefore preferable for use in manufacturing eyeglasses. *See* LensCrafters (Comment #0819 submitted by Tavel).

[371] *See, e.g.,* AAO (Comment #0864 submitted by Haber); AOA (Comment #0849 submitted by Peele); Johnson (Comment #0654); Lowe (Comment #0380); Nichols (Comment #0461); Shepherd (Comment #0476); Patterson (Comment #0469); Chung (Comment #0474); Wareham (Comment #0498); Yuhas (Comment #0505); Mangano (Comment #0525); Groenke (Comment #0697); Hopkins (Comment #0776); Alvarez (Comment #0838). This view represents a change from the position many prescribers used to hold about what ought to be included in a prescription. Prior to adoption of the Eyeglass Rule, many in the optometric industry strenuously advocated for ''total vision care,'' in which it was the prescriber's responsibility to determine all of the parameters required to fabricate a pair of eyeglasses, including pupillary distance. *See* Eyeglass I Report, *supra* note 6, at 255–57 (citing testimony from the Indiana Optometric Association, Ohio State University College of Optometry, and Ron Fair, former president of the AOA).

[372] *See, e.g.,* Jones (Comment #0584); Goldberg (Comment #0824); AAO (Comment #0864 submitted by Haber).

[373] Patterson (Comment #0469); Groenke (Comment #0697); Hopkins (Comment #0776); AAO (Comment #0864 submitted by Haber). As a way to offset these costs, some commenters recommend that prescribers be able to charge consumers for this measurement. Kirkham (Comment #0511); Goodhew (Comment #0731).

[374] *See, e.g.,* Rosenblum (Comment #0629) (cost of providing care to patients will increase if he must hire an optician or optometrist); Hopkins (Comment #0776) (new equipment); Goldberg (Comment #0824) (prescribers are not trained and do not have staff to take pupillary distance); AAO (Comment #0864 submitted by Haber) (would have to hire extra staff); Narula (Comment #0578) (would require acquisition of costly equipment).

[375] AAO (Comment #0864 submitted by Haber); *see also* Kim (Comment #0508); Croyle (Comment #0519).

[376] *See, e.g.,* Opticians Association of America (Comment #0638 submitted by Allen); Opticians Alliance of New York (Comment #0642 submitted by Cullen); Opticians Association of Iowa (Comment #0646 submitted by Dalton); Opticians Association of Virginia (Comment #0647 submitted by Nelms); Poe (Comment #0648); Montavon (Comment #0649); Professional Opticians of Florida (Comment #0803 submitted by Couch); Opticians Association of Alaska, Inc. (Comment #0852 submitted by Brand); Shelton (Comment #0585); Evans (Comment #0661); Damisch (Comment #0675); Whatley (Comment #0676); Jackson (Comment #0793); Wood (Comment #0709); Chamberlain (Comment #0713); Connor (Comment #0721); Tanzi (Comment #0723); Oxenford (Comment #0724); Reed (Comment #0738); Shroyer (Comment #0743); Ahrens (Comment #0022); Hummel (Comment #0788). While the NAOO was unable to reach a consensus on this issue, it recognized that the absence of a pupillary distance on a prescription creates hurdles for consumers who wish to purchase their eyeglasses online. Comment #0748 submitted by Cutler.

[377] *See, e.g.,* Opticians Association of America (Comment #0638 submitted by Allen); Shelton (Comment #0585); Opticians Association of Iowa (Comment #0646 submitted by Dalton); Parent (Comment #0693); Evans (Comment #0661); Damisch (Comment #0675); Whatley (Comment #0676); Reynolds (Comment #0726).

[378] Opticians Association of Alaska, Inc. (Comment #0852 submitted by Brand); Fitzgerald (Comment #0818); *see also* Cooper (Comment #0562) (ophthalmologist who indicates he would be unable to provide an accurate pupillary distance measurement to his patients); LensCrafters (Comment #0819 submitted by Tavel) (stating that the digital technology required to accurately obtain the pupillary distance does not typically exist in the doctor's space).

[379] Edwards (Comment #0360); Cervantes (Comment #0671); Ahrens (Comment #0022); Stuart (Comment #0841); *see also* Shepherd (Comment #0476) (prescriber); Archibald (Comment #0729) (optometrist).

[380] Opticians Association of Virginia (Comment #0647 submitted by Nelms); Cervantes (Comment #0671); Archibald (Comment #0729); Ahrens (Comment #0022); *see also* Santini article, *supra* note 340 (as the sophistication of eyeglass lenses has advanced, prescribers have improved their understanding of how measurements beyond simple pupil location help optimize lens acuity, comfort, and utility). Commenters also stated that other measurements are needed for dispensing eyeglasses, such as base curve and segment height, and that prescribers are not also required to take those measurements. Edwards (Comment #0360) (as important as the pupillary distance generally is, other measurements and considerations are at least as important); Kalish (Comment #0048; Haas (Comment #0359); Yuhas (Comment #0505); Rosenblum (Comment #0629).

[381] Narula (Comment #0578); Hamilton (Comment #0867); Hamilton (Comment #0868); Archibald (Comment #0729); LensCrafters (Comment #0819 submitted by Tavel); *see also* ACLens, ''Measuring Pupillary Distance (PD),'' *https://www.aclens.com/measuring-pupillary-distance* (stating that if a consumer requires prescription bifocal glasses she will need both a near and distance PD and that the near PD is calculated by subtracting 3mm from the distance PD).

Opticians indicated they are trained to take an accurate pupillary distance as part of the process of fitting eyeglasses, whereas prescribers are not specifically trained to take this measurement.[382] According to these opticians, if prescribers are required to provide pupillary distance on a prescription, some opticians will by law be forced to adhere to the measurement on the prescription, rather than to their own measurement, which might be more accurate.[383] For instance, in North Carolina, state law specifies that an optician may not contradict measurements taken by a prescriber; in Oregon, opticians are required to grind eyeglasses in conformity with prescriptions.[384] Should the Commission require prescribers to include pupillary distance on prescriptions, opticians in North Carolina, Oregon, and other states with similar laws might no longer have the right to make glasses from their own pupillary distance measurements. Opticians also expressed concern that this might make them liable for errors resulting from improper measurements written by a prescriber and that they would have to absorb the costs involved in remaking the glasses, or pass along those costs to consumers.[385]

[382] *See, e.g.,* Opticians Association of America (Comment #0638 submitted by Allen); Damisch (Comment #0675). Some prescribers corroborated optician comments as to opticians' ability or training to take these measurements, or as to their own lack of training or ability to take these measurements. Lunsford (Comment #0346); Wnorowski (Comment #0484); Kopp (Comment #0491); Cooper (Comment #0562); Narula (Comment #0578); Fyffe (Comment #0581); Rosenblum (Comment #0629).

[383] *See, e.g.,* Opticians Association of America (Comment #0638 submitted by Allen); Opticians Association of Kentucky (Comment #0640 submitted by Castle); Opticians Association of Vermont (Comment #0641 submitted by Williams); Opticians Alliance of New York (Comment #0642 submitted by Cullen); Robinson (Comment #0643); Duff (Comment #0653); Johnson (Comment #0654); Thetford (Comment #0659); Crabtree (Comment #0666); Groenke (Comment #0697); Hopkins (Comment #0776); South Carolina Association of Opticians (Comment #0822 submitted by Harbert).

[384] 21 N.C. Admin. Code 40.0210; Or. Rev. Stat. § 683.520.

[385] *See, e.g.,* Opticians Association of America (Comment #0638 submitted by Allen); Opticians Association of Vermont (Comment #0641 submitted by Williams); Opticians Alliance of New York (Comment #0642 submitted by Cullen); Opticians Association of Kentucky (Comment #0640 submitted by Castle); Robinson (Comment #0643); Duff (Comment #0653); Johnson (Comment #0654); Thetford (Comment #0659); Crabtree (Comment #0666); Groenke (Comment #0697); Hopkins (Comment #0776); South Carolina Association of Opticians (Comment #0822 submitted by Harbert). On the other hand, some prescribers expressed concerns that they would be liable for mistakes made by opticians who use prescribers' pupillary distance measurements. Chung (Comment #0454); Nichols (Comment #0461); Michel (Comment #0472); Azar (Comment #0518).

4. Analysis of Whether To Amend the Rule To Require Pupillary Distance

To determine that an act or practice is unfair, the Commission must find that the act or practice causes or is likely to cause substantial injury to consumers; the injury is not reasonably avoidable by consumers themselves; and, the injury is not outweighed by countervailing benefits to consumers or to competition.[386] As previously discussed, purchasing eyeglasses online can be more convenient and less costly for consumers.[387] Without a pupillary distance measurement included on their prescriptions, some consumers may be hampered in their ability to shop online for eyeglasses because they must obtain this information independently. However, since other methods are available for consumers to obtain this measurement and use it to comparison shop, the Commission does not believe, at this time, that there is an adequate record to demonstrate that prescribers' failure to provide pupillary distance measurements on prescriptions constitutes substantial injury. As discussed above, those consumers who wish to shop online and do not already have their pupillary distance can obtain that measurement through other methods, many of which are no cost or relatively low-cost, and can thereafter provide sellers with this information. For example, a number of online sellers offer directions and online tools for consumers to measure their own pupillary distance, or to have someone they know measure their pupillary distance, using readily available objects like a credit card and a webcam.[388]

In addition, according to many prescribers and optician commenters, imposing a requirement to include pupillary distance in the prescription may be detrimental for prescribers and consumers in one or more of the following ways. Some prescribers would be required to take a measurement that they do not ordinarily take, or have never taken. According to commenters, due to a prescriber's use of inadequate equipment, or a lack of training, and the fact that prescribers do not have the benefit of adjusting the pupillary distance to accommodate the fit of a particular pair of eyeglasses, consumers may obtain inaccurate measurements.[389] Moreover, it is possible that optician reliance on a prescriber's measurements, mandated by law in some jurisdictions, could result in improperly-made eyeglasses, which would increase the inconvenience and cost to opticians, consumers, and prescribers.[390] If an optician makes a pair of eyeglasses using a prescriber-provided pupillary distance measurement that a consumer finds uncomfortable, the consumer would need to obtain a new prescription containing a revised pupillary distance before an optician could remake the eyeglasses. If these prescribers and optician commenters are correct, a requirement to include pupillary distance in prescriptions could be detrimental to consumers and competition.

In addition, if the Commission required prescribers to include pupillary distance measurements on prescriptions, it is unlikely that prescribers would use less expensive pupillary distance rulers and the like, but instead—for professional and liability reasons—would likely select more technologically sophisticated methods, such as a digital centration device, to take the measurement. Such devices, and the training, staff, and exam time necessary to operate the devices, could be costly. Some prescribers could pass these costs on to their patients in the form of higher prices.[391] Alternatively, some prescribers could choose not to provide refractive services.[392]

As is evidenced by the title of the Rule, ''Separation of examination and dispensing,'' the Rule distinguishes between the examination that determines refraction and the sale of eyeglasses. Pupillary distance involves the fitting of a pair of eyeglasses to one's face, and is thus typically considered part of the dispensing process. If the Commission required prescribers to include pupillary distance on prescriptions, in offices with dispensaries, the prescriber, instead of adding expensive pupillary-distance measurement equipment to the exam room, might lead the patient into the dispensary to measure the patient's pupillary distance. Such a shift would place the patient in the dispensary prior to the patient receiving her prescription, undercutting both the Rule's requirement to release eyeglass prescriptions to patients immediately upon completion of an eye examination, and the Rule's long-standing emphasis on keeping the refractive examination distinct from, and untied to, the sale of eyeglasses.

Based on its consideration of the relevant factors, the Commission is not convinced that there is adequate

[386] 15 U.S.C. 45(n).

[387] *See* Section I.C, *supra.*

[388] *See* Section V.A, *supra.*

[389] *See* notes 378–382, *supra.*

[390] *See* notes 383, 385, *supra.*

[391] *See* note 373, 374, *supra.*

[392] *See* note 375, *supra.*

evidence in the current rulemaking record to determine that the failure to provide a pupillary distance on a prescription is an unfair practice.[393] The Commission therefore does not propose requiring prescribers to include the pupillary distance measurement on prescriptions. It does not appear to the Commission that the potential benefits to consumers or competition from a Rule change requiring the inclusion of pupillary distance on prescriptions outweigh the consequences detailed by prescribers and opticians, especially if consumers who wish to purchase their eyeglasses online can obtain their pupillary distance independently, at no cost or a relatively low cost. The Commission understands that requiring prescribers to provide pupillary distance might be more convenient for some consumers and online retailers, and may help foster a competitive market, but the Commission believes, as it did at the time of the Rule's issuance, that absent a record demonstrating that the failure to include pupillary distance as part of the prescription constitutes an unfair practice, the states should continue to determine the contents of eyeglass prescriptions.[394] The Commission recognizes that it last invited comment on the question of whether to require the inclusion of pupillary distance in a prescription in its 2015 ANPR,[395] and the online market for optometry and eyeglasses may have evolved since that round of comments. Thus, it invites comments from any organizations or individuals who believe that, in analyzing this issue, the Commission should consider relevant changes to state regulations on the content of prescriptions, or to changes in the marketplace or to technology pertaining to pupillary distance, since it last sought comment.

B. Amending the Rule To Set an Expiration Date for Eyeglass Prescriptions

Although the 2015 ANPR for the Eyeglass Rule did not specifically request comment on the issue of expiration dates for eyeglass prescriptions, several commenters raised this topic. The Eyeglass Rule, as currently drafted, does not specifically address expiration dates for eyeglass prescriptions. Rather, the Rule defines an eyeglass prescription as the written specifications for lenses for eyeglasses, which are derived from an eye examination, including all of the information specified by state law, if any, necessary to obtain lenses for eyeglasses.[396] State laws determine whether a prescription must contain an expiration date, but these laws vary; some states require an expiration date on the prescription,[397] others do not.[398] Furthermore, to the extent state laws specify the length of time an eyeglass prescription is valid, these laws vary as well.[399]

Some commenters suggested a variety of Rule amendments that would address the length of an eyeglass prescription, while other commenters expressed the view that the Commission should not amend the Rule to set expiration dates for eyeglass prescriptions. In advocating for an amendment to the Rule, some commenters expressed concern that since the expiration period for eyeglass prescriptions is not standardized, it allows some states ''to impose arbitrary and, in some cases, unnecessarily short, expiration periods for prescriptions.'' [400] For example, Warby Parker commented that ''many state laws allow 'short-dated' prescriptions, which force consumers to go back to their eye care professional each year if they want to obtain a valid prescription for new eyeglasses.'' [401] Warby Parker argued that these provisions are without justification because the ''vast majority of [eyeglass] prescriptions do not change within one year, and there is no medical rationale for most patients to undergo annual eye exams.'' [402] U.S. Senator Charles Schumer requested that the Commission consider whether short-term prescriptions (for example, a year or less), are appropriate or fair for consumers given that vision does not necessarily change this rapidly.[403] 1–800 CONTACTS concurred with this view, stating that allowing states to impose ''arbitrary and, in some cases, unnecessarily short, expiration periods for prescriptions impairs the intent and effectiveness of the Eyeglass Rule and inhibits consumer's ability to choose to obtain eyeglasses from third-party sellers.'' [404] 1–800 CONTACTS pointed out that, for this reason, the Contact Lens Rule includes a provision that addresses the expiration of contact lens prescriptions.[405]

1–800 CONTACTS therefore proposed that the Commission amend the Eyeglass Rule to include a provision imposing a minimum expiration period for prescriptions, with an exception for documented medical necessity, as there is in the CLR.[406] Similarly, Warby Parker proposed that the Commission amend the Rule to adopt a three-year minimum prescription expiration timeframe, absent a documented medical basis for any particular short-dated prescription.[407]

Many consumers expressed frustration that eyeglass prescriptions expire too quickly and prevent them from purchasing new pairs of eyeglasses without undergoing another eye exam.[408] For example, some

[393] Since the Commission has not found the practice of failing to include a pupillary distance measurement on a prescription to be unfair, it does not need to evaluate whether this practice is prevalent.

[394] *See* Section V.A, *supra* (explaining that the Rule's definition of prescription, as the ''written specifications for lenses for eyeglasses which are derived from an eye examination, including all of the information specified by state law, if any, necessary to obtain lenses for eyeglasses,'' 16 CFR 456.1, leaves it to the states to determine what must be included in a prescription, and that only four states currently require the inclusion of pupillary distance measurements on prescriptions); *see also,* Section I.D, *supra* (discussing how state laws and regulations, and not the Eyeglass Rule, govern most aspects of professional practice and eyewear sales). Some commenters recommended that the Commission require a prescription to include a ''best corrected visual acuity'' or ''best corrected vision,'' a measurement that allows the person filling the eyeglass prescription to know what line of letters on an eye chart a consumer should be able to see with that prescription. Professional Opticians of Florida (Comment #0803 submitted by Couch); Stuart (Comment #0841). The Commission also believes that whether such a measurement is required on a prescription should be determined by the states.

[395] See Eyeglass Rule ANPR, 80 FR 53274, 53276.

[396] 16 CFR 456.1(g).

[397] Alaska Admin. Code 12 § 48.920; Cal. Bus. & Prof. Code § 2541.1; La. Admin. Code tit. 46, § LI–505; 246 Mass. Code Regs. 3.02; Miss. Code Ann. § 73–19–61; N.D. Admin. Code 56–02–04–03; 49 Pa. Code § 23.72.

[398] Ark. Code Ann. § 17–90–108 (A)(3); Md. Code Ann. Health Occ. § 11–504.

[399] Cal. Bus. & Prof. Code § 2541.1 (no less than two to four years from the date of issuance unless medical reason for shorter period); Fla. Stat. Ann. § 463.012 (expiration date of 5 years); Haw. Code R. § 16–92–2 (expiration date to be determined by licensed practitioner); Idaho Amin. Code R. § 24.10.450 (expiration date of at least one year); Iowa Admin. Code. r. 645–182.3 (expiration date not to exceed two years); La. Admin. Code tit. 46, § LI–505 (expiration date may not exceed 18 months, unless medical reason); see also, DC Mun. Regs. tit. 17, § 6416.1 (expiration date of one year unless medical reason for shorter time period).

[400] 1–800 CONTACTS (Comment #0834 submitted by Williams); *see also* Warby Parker (Comment #0817 submitted by Kumar).

[401] Comment #0817 submitted by Kumar (citing as examples the state statutes of Iowa, Mississippi, and Pennsylvania, as well as the District of Columbia's Eyeglass Rule).

[402] *Id.*

[403] Comment #0865.

[404] Comment #0834 submitted by Williams.

[405] *See* 16 CFR 315.6 (setting a minimum expiration date of one year after the issue date of a prescription with an exception based on a patient's ocular health).

[406] Comment #0834 submitted by Williams.

[407] Comment #0817 submitted by Kumar; *see also* Buntain (Comment #0529) (amend the Rule to prohibit short-dated prescriptions without a medical necessity); Read (Comment #0741) (make prescriptions valid for three years).

[408] *See, e.g.,* Skidelsky (Comment #0085); Hendrick (Comment #0088); Loeb (Comment #0314); Bevington (Comment #0419); Gough (Comment #0422); Kinlaw (Comment #0424);

Continued

commenters stated that their prescription rarely or never changes, but if they want new glasses or a second pair of glasses more than a year or two after their initial examination, a prescription expiration date may nonetheless require them to return to the prescriber's office for a new eye examination.[409] Some commenters discussed the costs associated with having to obtain another eye examination to get a prescription even though they were satisfied with their current prescription, or believed that their vision had not changed.[410] Other commenters argued that patients should be able to decide for themselves when they want to update their eyeglass prescriptions.[411]

Some commenters proposed that the Commission amend the Rule to prohibit eyeglass prescriptions from including an expiration date at all.[412] For example, the Opticians Association of Virginia stated that absent a medical reason with corroborating pathology, it saw no valid reason for an eyeglass prescription to contain an expiration date.[413] This commenter argued that eyeglasses worn by the patient do not expire on a given date, and accordingly, there is no reason for the underlying prescription to expire.[414] The association further explained that because opticians can use a customer's existing pair of eyeglasses to ascertain the prescription parameters and make another pair using those parameters, from neutralizing or duplicating eyeglasses, expiration dates can be (and often are) circumvented.[415]

However, other commenters, citing the importance of annual eye exams to consumers' eye health, stated that prescriptions should contain expiration dates, set at the discretion of the prescribing practitioner.[416] The AAO, and several other commenters, stated that the Rule should not be amended to extend the expiration of prescriptions beyond one year.[417] These commenters stressed the importance of yearly eye examinations, which function to monitor the health of the eye, and noted that patients' prescriptions often change. Many opticians, also advocating for yearly eye examinations, stated a preference for one-year expiration dates, but said that they would not be opposed to accepting prescriptions within a two-year period.[418] The AOA recommended that the Commission not amend the Rule to address expiration dates, but rather continue to defer to state law and the medical judgment of optometrists and ophthalmologists as to when a prescription should expire.[419] The Rule's purpose is to allow consumers to comparison-shop for eyeglasses. In its comment, Warby Parker stated that short-term prescriptions require patients to return to the eye care prescriber more frequently, giving the prescriber additional opportunities to sell eyeglasses to patients.[420] In support of this position, Warby Parker pointed to a handful of states that have enacted laws and regulations making the maximum effective date for prescription lenses one or two years. A review of various states' regulations on prescription expirations, however, indicates that many states do not regulate the length of eyeglass prescriptions.[421] Of the states that do regulate expiration dates, some set a floor for expiration, rather than a ceiling.[422] Of the states that do specifically limit the length of an eyeglass prescription, many set the expiration date at two or more years.[423]

Commenters seem to be arguing that expiration dates on prescriptions prevent consumers from continuing to purchase eyeglasses for a sufficiently long period before having to return to their eye doctors. The Commission lacks adequate evidence that eyeglass prescription expiration dates, whether imposed by state regulations or individual prescribers, impair comparison-shopping, and hence competition in the retail sale of eyeglasses, to an extent that would justify a new regulatory requirement.[424]

While requiring that consumers return to their prescriber periodically for exams may give the prescriber a competitive advantage in that they get a ''first shot'' at selling the consumers new eyeglasses, it does not necessarily limit the consumers' choices or ability to comparison-shop, particularly if the prescribers abide by the Rule's prescription release requirement.

Holden (Comment #0428); Steele (Comment #0432); Martin (Comment #0435); Miller (Comment #0437); Fernandez (Comment #0439); Washburn (Comment #0440); Birnbaum (Comment #0443); McLeod (Comment #0458); Kaminski (Comment #0462); Munkittrick (Comment #0465); Kaprielian (Comment #0488); Rouse (Comment #0496); Pearsall (Comment #0499); Simmons (Comment #0513); Iglinski (Comment #0516); Lauridsen (Comment #0526); Hamon (Comment #0537); Schutz (Comment #0549); Fair (Comment #0800); *see also* Garcia (Comment #0338) (Warby Parker employee reporting that consumers are unhappy with one-year expiration dates when their prescriptions have not changed); Beaudoin (Comment #0349) (same); Grecxo (Comment #0612) (Warby Parker optician reporting that expiration dates of less than two years make obtaining eyeglasses difficult and frustrating for some patients).

[409] *See, e.g.,* Nystrom (Comment #0254); Hollis (Comment #0307); Trout (Comment #0383); Bhattacharyya (Comment #0543); Morel (Comment #0712).

[410] *See, e.g.,* Sorenson (Comment #0080) (burden financially and time-wise to have to get re-examined every year); Kim (Comment #0192) (eye exams are expensive); Meszaros (Comment #0303) (one-year expiration dates increase annual costs without materially improving health care); Hollis (Comment #0526) (would like to see doctor less frequently); Gough (Comment #0422) (getting a new prescription not cheap); Holden (Comment #0428) (getting time off for an eye exam is difficult); Davis (Comment #0433) (have to pay for exam on top of the new eyeglasses); Martin (Comment #0435); Washburn (Comment #0440); Birnbaum (Comment #0443); Kaprielian (Comment #0488); Rouse (Comment #0496); Pearsall (Comment #0499); Buntain (Comment #0529); Buntain (Comment #0531) (prescriptions expire too soon and not everyone can afford to go to the doctor so often).

[411] *See, e.g.,* Hildenbrand (Comment #0049; Cordivari (Comment #0069); Sorenson (Comment #0080); Forrest (Comment #0270); Jump (Comment #0292); Loeb (Comment #0171); Richards (Comment #0401); Steele (Comment #0432); Davis (Comment #0433).

[412] *See, e.g.,* Forrest (Comment #0270) (prescriptions should not expire); Endelson (Comment #0407) (prescription should include date of examination but not an expiration date); Professional Opticians of Florida (Comment #0803 submitted by Couch) (recommending the prohibition of expiration dates on prescriptions for adult patients with low risk factors).

[413] Comment #0647 submitted by Nelms.

[414] *Id.; see also* Rhodes (Comment #0334) (one- or two-year expiration dates do not make sense and make it difficult to get replacement eyeglasses that one would otherwise be wearing but for losing them).

[415] Comment #0647 submitted by Nelms.

[416] Kalish (Comment #0048); Edwards (Comment #0360); Smith (Comment #0652); Lott (Comment #0655); Ambler (Comment #0025).

[417] Comment #0864 submitted by Haber; *see also* Adegbile (Comment #0004); Sung (Comment #0459); Jamison (Comment #0535); Moschell (Comment #0551); Shuler (Comment #0572); Cochrane (Comment #0583); Rozanec (Comment #0613); Leung (Comment #0623); Hicks (Comment #0624); Brosman (Comment #0637); Valentine (Comment #0644).

[418] Opticians Association of America (Comment #0638 submitted by Allen); Opticians Association of Kentucky (Comment #0640 submitted by Castle); Opticians Association of Vermont (Comment #0641 submitted by Williams); Opticians Alliance of New York (Comment #0642 submitted by Cullen); Ragan (Comment #0677); Opticians Association of Ohio (Comment #0683 submitted by Glasper); Parent (Comment #0693); Opticians Association of Iowa (Comment #0646 submitted by Dalton); Sasse (Comment #0733); Martin (Comment #0665); South Carolina Association of Opticians (Comment #0822 submitted by Harbert).

[419] Comment #0849 submitted by Peele.

[420] Comment #0817 submitted by Kumar.

[421] See, *e.g.,* Ark. Code Ann. § 17–90–108 (A)(3); Md. Code Ann., Health Occ. § 11–504; N.C. Gen. Stat. Ann. § 90–235; Utah Code Ann. § 58–16A–102 (prescription may include an expiration date).

[422] See Cal. Bus. & Prof. Code § 2541.1 (should not be less than 2–4 years); Idaho Amin. Code R. § 24.10.450 (must be at least one year); Wash. Rev. Code § 18.195.030 (at least two years).

[423] Fla. Stat. Ann. § 463.012 (valid for a period of 5 years); Iowa Admin. Code. r. 645–182.3 (not to exceed two years); Me. Rev. Stat. tit. 34 A–2 § 2417 (not more than two years unless medical reason for a longer period); Nev. Rev. Stat. § 637.175 (two years unless specified otherwise by prescriber); N.H. Rev. Stat. Ann. § 327–A:1 (not more than 24 months); 49 Pa. Code § 23.72 (cannot exceed two years).

[424] In its comment to the current rule review, the AOA stated its belief that eye care practitioners do not use expiration dates to impede the ability of their patients to purchase eyeglasses from other retailers. Comment #0849 submitted by Peele.

Absent evidence that expiration dates are impeding consumer choice, the Commission sees no support for the proposal that expiration dates need to be standardized.

Although some patients will not be able to purchase eyeglasses using a prescription more than one or two years old, this does not mean that they were foreclosed from comparison-shopping or from purchasing from the retailer of their choice when they initially purchased eyeglasses. Furthermore, as long as patients are provided a copy of the eyeglass prescription after the eye examination is completed, there is nothing in the record to support the contention that merely returning to a prescriber's office to obtain a new prescription will pressure the patient into purchasing from the prescriber. Accordingly, the Commission has determined not to propose to amend the Rule either to prohibit expiration dates or to set expiration dates for eyeglass prescriptions.[425]

C. Amending Other Rule Definitions

The Rule defines an ''eye examination'' as ''the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.'' [426] The AOA and several individual prescribers requested that the Commission modify the Rule to change the term ''eye examination'' to ''refraction.'' [427] These commenters stated that an eye examination determines the health of the eye and includes many components that are not used to determine the refractive condition. According to some commenters, the Rule's definition for, and use of, the phrase ''eye examination'' more accurately describes refractive services rather than the full scope of an eye examination.[428]

Two commenters, in particular, noted that that eye examinations and refractions are separate services and that the Commission's use of the terminology ''eye examination,'' instead of ''refraction,'' results in confusion for the consumer.[429] Such confusion may stem from the fact that, in addition to assessing a fee for determining the health of the eye—a fee often covered by health insurance or Medicare—prescribers charge patients a fee for the refractive examination that results in a prescription, a fee that Medicare does not cover.[430] The Rule currently allows eye care prescribers to refuse to provide the patient with their prescription when the patient has not paid for the ''eye examination''—which refers back to the definition describing the refraction—as long as the prescriber does not have different policies for those whose examination revealed that no ophthalmic goods were required.[431]

The Commission proposes to replace the term ''eye examination'' with ''refractive eye examination'' throughout the Rule. The Eyeglass Rule's purpose is to ensure that prescribers provide patients with a copy of their prescription at the completion of an eye examination determining the patient's refraction, and that this prescription be provided free of any additional charge, without obligation, and without a waiver. The Commission believes clarifying that the eye examination referred to in the Rule is a refractive examination would likely increase consumer understanding of their rights and prescriber compliance with the Rule.

VI. Recommendations Regarding the Commission's Complaint System

To assist the Commission in its enforcement of the Rule, Warby Parker suggested that the Commission create a more ''user-friendly'' online complaint process for consumers.[432] The online complaint process has changed significantly since the receipt of this comment. The current website is user-friendly, and consumers can easily find eye care as a category for their complaints.[433] On the home page, one of the 10 listed complaint categories is for ''health (ex. weight loss, eye care, treatment).'' When consumers select the health category, a new menu pops up which shows ''eye care'' as one of five choices, and after selecting that category, consumers are given ample room to describe their experience in a comment box under the request to ''Describe what happened.'' Accordingly, the Commission believes that the FTC complaint system is well-configured to capture and report eyeglass-related complaints it receives, whether they originate from consumers, prescribers, sellers, or others.

VII. Request for Comment

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before March 6, 2023. Write ''Eyeglass Rule, Project No. R511996'' on the comment. Your comment—including your name and your state—will be placed on the *https://www.regulations.gov* website.

Because of public health measures and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the *https://www.regulations.gov* website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write ''Eyeglass Rule, Project No. R511996'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex C), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not

[425] In its 2004 review of the Eyeglass Rule, the Commission declined to consider amending the Rule to set expiration dates for eyeglass prescriptions. In that proceeding, the Opticians Association of America asked the Commission to amend the Rule to prohibit the use of expiration dates for eyeglass prescriptions, with exceptions for specific, well-defined medical reasons, arguing that practitioners used arbitrary and unjustifiable expiration dates to deter consumers from using their eyeglass prescriptions. Ophthalmic Practice Rules, 69 FR 5451, 5454. Because there was no evidence in that record that eye care prescribers were using expiration dates as a means of impeding consumers' ability to purchase eyeglasses from other sellers or otherwise causing consumer injury, the Commission decided not to set expiration dates for eyeglass prescriptions. *Id.* Commission staff reached a similar conclusion in a prior Eyeglass Rule review, determining that prescription expiration duration should be left to the states. *See* 1980 Staff Report, *supra* note 25.

[426] 16 CFR 456.1(b).

[427] *See* AOA (Comment #0849 submitted by Peele); Brauer (Comment #0045); Yadon (Comment #0046; Bolenbaker (Comment #0633). Some of these commenters also stated that the defined term in the Rule is at odds with the definition of eye examination in the American Medical Association's Current Procedural Terminology codes to bill outpatient and office procedures, because that definition does not include a refraction. AOA (Comment #0849 submitted by Peele); Bolenbaker (Comment #0633).

[428] AOA (Comment #0849 submitted by Peele); Lunsford (Comment #0346); Bolenbaker (Comment #0633).

[429] Lehman (Comment #0610); Bolenbaker (Comment #0633).

[430] *See* Lehman (Comment #0610). Medicare does not cover refractive examinations for eyeglasses. *See* U.S. Centers for Medicare & Medicaid Services, ''Your Medicare Coverage,'' *https://www.medicare.gov/coverage/eye-exams.html.*

[431] The prescriber is permitted to withhold the prescription until the patient has paid for the eye examination, but only if that ophthalmologist or optometrist would have required immediate payment from that patient had the examination revealed that no ophthalmic goods were required. 16 CFR 456.2(a).

[432] Comment #0817 submitted by Kumar.

[433] *See www.reportfraud.ftc.gov.*

include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule § 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule § 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule § 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at *www.regulations.gov*—as legally required by FTC Rule § 4.9(b)—we cannot redact or remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule § 4.9(c), and the General Counsel grants that request.

Visit the Commission website at *http://www.ftc.gov* to read this NPRM and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before March 6, 2023. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

The Commission invites members of the public to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of proposed amendments to the Rule. The Commission requests that you provide factual data, and in particular, empirical data, upon which your comments are based. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted.

Questions

A. General Questions on Proposed Amendments: To maximize the benefits and minimize the costs for prescribers and sellers (including small businesses), the Commission seeks views and data on the following general questions for each of the proposed changes described in this NPRM:

1. What benefits would a proposed change confer and on whom? The Commission in particular seeks information on any benefits a change would confer on consumers of eyeglasses.

2. What costs or burdens would a proposed change impose and on whom? The Commission in particular seeks information on any burdens a change would impose on small businesses.

3. What regulatory alternatives to the proposed changes are available that would reduce the burdens of the proposed changes while providing the same benefits?

4. What additional information, tools, or guidance might the Commission provide to assist industry in meeting extant or proposed requirements efficiently?

5. What evidence supports your answers?

B. Marketplace, Technological, and State Regulatory Changes:

1. Since the public last had an opportunity to comment, are there any technological changes, changes in the marketplace, or to state regulations pertaining to pupillary distance, that the Commission should consider?

C. Confirmation of Prescription Release:

1. Would the proposed Confirmation of Prescription Release provision increase, decrease, or have no effect on compliance with the Rule's requirement that patients receive a copy of their prescription after the completion of a refractive eye examination? Why?

2. Would the proposed requirement that prescribers would have to maintain evidence of the Confirmation of Prescription Release for at least three years increase, decrease, or have no effect on the Commission's ability to enforce, and monitor compliance with, the Rule's automatic prescription release provision? Why?

3. Would the proposed Confirmation of Prescription Release requirement increase, decrease, or have no effect on the extent to which patients understand their rights under the Rule? Why?

4. Does the proposal to allow prescribers to satisfy the Confirmation of Prescription Release requirement by releasing a digital copy of the prescription to the patient (after obtaining the patient's verifiable affirmative consent), such as via online portal, electronic mail, or text message increase, decrease, or have no effect on the extent to which patients understand their rights under the Rule? Why?

5. If prescribers choose to comply with the Confirmation of Prescription Release provision by providing a digital copy of the prescription (if the patient gives verifiable affirmative consent), what costs or burdens are associated with retaining evidence that the prescription was sent, received, or made accessible, downloadable, and printable?

6. Do the potential benefits of the Confirmation of Prescription Release requirement—having more patients in possession of their prescription—outweigh the burden on prescribers of having to provide patients with a Confirmation of Prescription Release and preserve a record for three years? Why or why not?

7. What other factors should the Commission consider to lower the cost and improve the reliability of executing, storing, and retrieving Confirmations of Prescription Release?

8. Are there alternate ways that the Commission has not yet considered to design a Confirmation of Prescription Release requirement that would reduce the burden on prescribers while providing the same, or greater, benefits for consumers? What are they and how do they compare to the current proposal?

9. Are there alternate ways that the Commission has not yet considered in this Rule review to increase compliance with the Rule's requirement that patients receive a copy of their eyeglass prescription after the completion of a refractive eye examination? What are they and how do they compare to the current proposal?

10. Are there alternate ways that the Commission has not yet considered in its Rule review to increase the Commission's ability to enforce, and monitor compliance with, the Rule's automatic prescription release

provision? What are they and how do they compare to the current proposal?

11. Are there alternate ways that the Commission has not yet considered in its Rule review to increase the extent to which patients understand their rights under the Rule? What are they and how do they compare to the current proposal?

12. Under the Commission's proposal, the Confirmation of Prescription Release requirement and the accompanying recordkeeping provision shall not apply to prescribers who do not have a direct or indirect financial interest in the sale of eyeglasses, including, but not limited to, through an association, affiliation, or co-location with a prescription-eyewear seller. Aside from associations, affiliations, and co-locations with prescription-eyewear sellers, what other indirect financial interests exist in the sale of prescription eyewear that should disqualify a prescriber from the proposed exemption?

13. Does the Contact Lens Rule's Confirmation of Prescription Release requirement reduce or increase the need for a similar requirement for the Eyeglass Rule?

14. What evidence supports your answers?

D. *Electronic Delivery of Prescriptions:*

1. The Commission believes that providing patients with a digital copy of their prescription, in lieu of a paper copy, would satisfy the automatic prescription release requirement (§ 456.2) if the patient gives verifiable affirmative consent and is able to access, download, and print the prescription. The Commission seeks comment on the benefits or the burdens that the option to provide electronic delivery of prescriptions would confer.

2. Would prescribers choose to satisfy the automatic prescription release requirement through electronic delivery if permitted by the Rule?

3. Would a patient portal, email, or text message be feasible methods for prescribers to provide digital copies of prescriptions to patients? Are prescribers using any other electronic methods to provide patients with prescriptions?

4. What other technologies are available that could be implemented to improve prescription portability and thereby increase benefits and decrease burdens related to prescription release?

5. What evidence supports your answers?

E. *Insurance as Payment*

1. The Commission believes that it would be appropriate to amend the Eyeglass Rule to clarify that a patient's presentation of proof of insurance coverage shall be deemed to constitute a payment for purposes of determining when a prescription must be provided under 16 CFR 456.2(a). The Commission seeks comment on the benefits or the burdens that this clarification would confer.

2. Would clarifying that presentation of proof of insurance coverage shall be deemed to constitute a payment under § 456.2(a) increase, decrease, or have no effect on compliance with the Rule's requirement that patients receive a copy of their prescription after the completion of a refractive eye examination? Why?

3. Would clarifying that presentation of proof of insurance coverage shall be deemed to constitute a payment under § 456.2(a) increase, decrease, or have no effect on the Commission's ability to enforce, and monitor compliance with, the Rule's automatic prescription release provision? Why?

4. Would clarifying that presentation of proof of insurance coverage shall be deemed to constitute a payment under § 456.2(a) increase, decrease, or have no effect on the extent to which patients understand their rights under the Rule? Why?

5. What evidence supports your answers?

F. *Eye Examination Term*

1. Would changing the term ''eye examination'' throughout the Rule to ''refractive eye examination'' increase, decrease, or have no effect on compliance with the Rule's requirement that patients receive a copy of their prescription after the completion of a refractive eye examination? Why?

2. Would changing the term''eye examination'' throughout the Rule to ''refractive eye examination'' increase, decrease, or have no effect on the Commission's ability to enforce, and monitor compliance with, the Rule's automatic prescription release provision? Why?

3. Would changing the term ''eye examination'' throughout the Rule to ''refractive eye examination'' increase, decrease, or have no effect on the extent to which patients understand their rights under the Rule? Why?

4. Would using the term ''refractive eye examination'' in place of ''eye examination'' help avoid confusion over when the prescriber must release the prescription, and whether prescribers may withhold release of the prescription subject to any charges other than the one due for the refractive eye examination?

5. Is the current definition in the Rule, namely ''the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests,'' a clear and accurate way of describing a refractive eye examination?

6. Would using the term ''refractive eye examination'' in place of ''eye examination'' have any other consequences for eye care, positive or negative?

7. What evidence supports your answers?

VIII. Communications by Outside Parties to the Commissioners or Their Advisors

Pursuant to FTC Rule § 1.18(c)(1)(i)-(ii), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment. Written communications and summaries or transcripts of oral communications shall be placed on the rulemaking record if the communication is received before the end of the public comment period in response to this NPRM. They shall be placed on the public record if the communication is received later. Unless the outside party making an oral communication is a member of Congress, such communications are permitted only if advance notice is published in the Weekly Calendar and Notice of Sunshine Meetings.[434]

IX. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* requires federal agencies to obtain Office of Management and Budget (''OMB'') approval before undertaking a collection of information directed to ten or more persons. Pursuant to the regulations implementing the Paperwork Reduction Act,[435] an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number.

The Commission is proposing a number of modifications to the Rule that contain recordkeeping requirements that are collections of information as defined by OMB regulations that implement the PRA. First, the Commission is proposing to modify the Rule to require that prescribers either: (i) obtain from patients, and maintain for a period of not less than three years, a signed confirmation of prescription release on a separate stand-alone document; (ii) obtain from patients, and maintain for a period of not less than three years, a patient's signature on a confirmation of

[434] *See* 15 U.S.C. 57a(i)(2)(A); 16 CFR 1.18(c).

[435] 5 CFR 1320.8(b)(2)(vi).

prescription release included on a copy of a patient's prescription; (iii) obtain from patients, and maintain for a period of not less than three years, a patient's signature on a confirmation of prescription release included on a copy of a patient's refractive eye examination sales receipt; or (iv) provide each patient with a copy of the prescription via online portal, electronic mail, or text message, and for three years retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable by the patient. For prescribers who choose to offer an electronic method of prescription delivery, the proposed Rule would require that such prescribers identify the specific method or methods to be used, and maintain records or evidence of affirmative consent by patients to such digital delivery for three years. For instances where a consumer refuses to sign the confirmation or accept digital delivery of their prescription, the proposed Rule directs the prescriber to note the refusal and preserve this record as evidence of compliance. None of the proposed new requirements, however, would apply to prescribers who do not have a direct or indirect financial interest in the sale of eyeglasses.

The Commission hereby provides PRA burden estimates, analysis, and discussion for the burden of automatically releasing a prescription at the completion of a refractive eye exam, as well as the proposed requirement to collect patient signatures as confirmation of prescription release and as consent to electronic prescription delivery. Commission staff estimates these PRA burdens based on its long-standing knowledge and experience with the eye care industry.[436] The Commission is submitting these proposed amendments and a Supporting Statement to OMB for review.

A. Estimated Burden

The number of adult eyeglass wearers in the United States is currently estimated to be approximately 165 million.[437] Assuming a biennial refractive eyeglass exam for each eyeglass wearer,[438] approximately 82.5 million people would receive a copy of their eyeglass prescription every year. Historically, the Commission has estimated that it takes one minute to provide the patient with a prescription copy, and that it is the prescriber, and not the prescriber's office staff, that provides the prescription to the consumer.[439] We therefore estimate an annual disclosure burden for prescribers of approximately 1,375,000 hours (82.5 million annual exams × 1 min/60 mins).

Staff anticipates there will be an additional burden on individual prescribers' offices to maintain signed confirmation forms for a period of not less than three years, but believes the overall burden imposed by the Rule remains relatively small in the context of the overall market for eyeglasses and refractive examinations. Based on the Commission's assumption of the number of refractive eye examinations that occur annually, staff estimates that 82.5 million people would either read and sign a confirmation of prescription release, or sign a confirmation agreeing to receive their prescription electronically every year.

The Commission believes that generating and presenting the confirmation of prescription release will not require significant time or effort. The proposed requirement is flexible in that it allows any one of several different modalities and delivery methods, including adding the confirmation to existing documentation that prescribers routinely provide (sales receipts) or are already required to provide (prescriptions) to patients. The proposed requirement is also flexible in that it does not prescribe other details, such as the precise content or language of the patient confirmation, but merely requires that, if provided to the patient pursuant to options specified in § 456.3(a)(1), the confirmation from the patient must be in writing. At the same time, prescribers would not have to spend time formulating their own content for the confirmation, since the proposed Rule provides draft language that prescribers are free to use, should they so desire.

The four options for a prescriber to confirm a prescription release to a patient are set out in proposed § 456.3(a)(1)(i), (ii), (iii), and (iv). The requirement in options § 456.3(a)(1)(i), (ii), and (iii) to provide the patient with a confirmation of prescription release are not disclosures constituting an information collection under the PRA because the FTC, in § 456.3(a)(2), has supplied the prescriber with draft language the prescriber can use to satisfy this requirement.[440] As noted above, however, the requirement in (i), (ii), and (iii) to collect a patient's signature on the confirmation of prescription release and preserve it constitutes an information collection as defined by OMB regulations that implement the PRA. Nonetheless, the Commission believes it will require minimal time for a patient to read the confirmation and provide a signature. The Commission estimated in the Contact Lens Rule that it would take patients ten seconds to read the one-sentence confirmation of prescription release and provide a signature,[441] and the Commission believes that ten seconds is an appropriate estimate for the Eyeglass Rule confirmation as well.

The fourth proposed option, § 456.3(a)(1)(iv), does not, in and of itself, constitute an information collection under the PRA, since no new information that would not otherwise be provided under the Rule is provided to or requested from the patient.[442] Excluding that option from

[436] *See* Section I.B, *supra.*

[437] *See* VisionWatch Report, *supra* note 70, at 24.

[438] The Commission relies on industry sources for its estimate that eyeglass wearers typically obtain one refractive eye exam every two years. *See, e.g.,* AOA, Excel and Jobson Medical Information, The State of the Optometric Profession: 2013, at 4, *https://www.reviewob.com/wp-content/uploads/2016/11/8-21-13stateofoptometryreport.pdf* (showing an average interval between exams of 25 months); AOA, Comprehensive Eye Exams, *https://www.aoa.org/healthy-eyes/caring-for-your-eyes/eye-exams?sso=y* (showing recommended examination frequency for adult patients 18–64 of ''at least every two years'' for asymptomatic/low risk patients). In contrast to the CLR, which establishes a one-year minimum term for most contact lens prescriptions (16 CFR 315.6(a)) (a term-length mirrored by a majority of states, *see* CLR NPRM, 81 FR 88526, 88545, n.245), the Eyeglass Rule does not discuss or define prescription expiration terms, and many states do not set any limit for eyeglass prescriptions. *See* note 399, *supra* (summarizing a number of state laws that allow eyeglass prescriptions to be valid for periods longer than one year). Some eyeglass wearers, therefore, can legally go many years between refractive eye examinations. But the Commission will use two years as a basis for purposes of this assessment, since that is recommended interval for the majority of eyeglass wearers.

[439] It is quite possible that one minute is an overestimate of the amount of time required, and that in practice, this task takes less time and is often performed by office staff rather than the prescriber. As of now, however, we have not seen conclusive evidence to justify making a change to the approach we have repeatedly taken in the past. *See, e.g.,* CLR SNPRM, 84 FR 24664, 24693 n.347.

[440] ''The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within'' the definition of ''collection of information.'' 5 CFR 1320.3(c)(2). It is also notable that for the options in proposed §§ 456.3(a)(1)(ii) and (iii), the confirmation information would be printed on the same document—the prescription copy or sales receipt—that the prescriber would ordinarily provide to the consumer in any event.

[441] CLR Final Rule, 85 FR 50668, 50709. This estimate was based on responses to a consumer survey regarding how long it would take consumers to read the form, and a prior PRA estimate for consumers to complete a similar signed acknowledgment. *See* CLR SNPRM, 84 FR 24664, 24693.

[442] In order to utilize § 456.3(a)(1)(iv), however, a prescriber must obtain and maintain records or evidence of affirmative consent by patients to electronic delivery of their prescriptions. 16 CFR 456.1(h)(2). The burden to do so is included in the recordkeeping burden calculation of this PRA Section.

consideration, and assuming the remaining three options are exercised with equal frequency, 75% of approximately 82.5 million annual prescription releases will entail reading and signing a confirmation statement. Thus, assuming ten seconds for each release, prescribers would devote 171,875 hours, cumulatively (75% × 82.5 million prescriptions yearly × 10 seconds each/60secs/60mins) to obtaining patient signatures as confirmations of prescription release.[443]

Maintaining those signed confirmations for a period of not less than three years should also not impose substantial new burdens on individual prescribers and office staff. The majority of states already require that optometrists keep records of eye examinations for at least three years,[444] and thus many prescribers who opt to include the confirmation of prescription release on the prescription itself would be preserving that document, regardless. Similarly, most prescribers already retain customer sales receipts for financial accounting and recordkeeping purposes, and thus prescribers who opt to include the confirmation of prescription release on the sales receipt also could be retaining that document, regardless. Moreover, storing a one-page document per patient per year should not require more than a few seconds, and an inconsequential, or *de minimis,* amount of record space. Some prescribers might also present the confirmation of prescription release in electronic form, enabling patients to sign a computer screen or tablet directly, and have their confirmation immediately stored as an electronic document.

For other prescribers, the proposed recordkeeping requirement would likely require that office staff either preserve the confirmation in paper format, or electronically scan the signed confirmation and save it as an electronic document. For prescribers who preserve the confirmation electronically by scanning it, Commission staff estimates that saving such a document would consume approximately one minute of staff time. Commission staff does not possess detailed information on the percentage of prescribers' offices that currently use and maintain paper forms or electronic forms, or that scan paper files and maintain them electronically. Thus, for purposes of this PRA analysis, Commission staff will assume that *all* prescriber offices who opt for § 456.3(a)(1)(i), (ii), or (iii) require a full minute per confirmation for recordkeeping arising from the modifications. Excluding from PRA consideration the fourth option, § 456.3(a)(1)(iv), as there is no signature to obtain or retain, and assuming that prescribers elect the other options three-fourths or 75% of the time, the recordkeeping burden for all prescribers' offices to scan and save such confirmations would amount to 1,031,250 hours (75% × 82.5 million prescriptions yearly × one minute for scanning and storing/60mins) per year.

As noted previously, the fourth option for satisfying the confirmation of prescription release requirement does not necessitate that prescribers obtain or maintain a record of the patient's signature confirming receipt of her prescription. However, as explained in § 456.1(h)(2), under the Rule's new proposed definition of *Provide to the patient one copy,* in order to avail themselves of the fourth option, prescribers must obtain and maintain records or evidence of the patients' affirmative consent to electronic delivery for three years. The Commission will use the assumption that consumers sign such consents for electronic delivery pursuant to § 456.3(a)(1)(iv), for one quarter of the 82.5 million prescriptions released per year,[445] and that this task would take the same amount of time as to obtain and maintain a signature of the patient's confirmation of prescription release. Thus, the Commission will allot 401,042 hours[446] for the time required for prescribers to obtain patients' affirmative consent to electronic delivery of their prescriptions and maintain records of same.

Therefore, the estimated incremental PRA recordkeeping burden for prescribers and their staff resulting from the confirmation of prescription release modifications to the Rule amounts to 1,604,167 total hours (171,875 and 57,292 hours, respectively, to obtain signatures confirming release and consenting to electronic delivery, plus 1,031,250 and 343,750 hours, respectively, to maintain records of confirmation and consent for three years). Adding the estimated incremental PRA recordkeeping burden for prescribers and their staff from the confirmation of prescription release proposal to the burden from the requirement that prescribers provide patients with copies of their prescriptions yields a total disclosure and recordkeeping burden from the Rule of 2,979,167 hours for prescribers and their staff (1,375,000 disclosure hours + 1,604,167 recordkeeping hours).

B. Estimated Labor Cost

Commission staff derives labor costs by applying appropriate hourly-cost figures to the burden hours described above. The task to obtain patient confirmations and consent to electronic delivery could theoretically be performed by medical professionals (*e.g.,* optometrists, ophthalmologists) or their support staff (*e.g.,* dispensing opticians, medical technicians, office clerks). In its Contact Lens Rule review, the Commission requested comment as to whether prescribers or office staff are more likely to collect patient signatures and retain associated recordkeeping, but did not receive significant guidance on this.[447] Therefore, the Commission will continue to assume that optometrists will perform the task of collecting patient signatures, and that prescribers' office staff will perform the labor pertaining to printing, scanning, and storing of documents, even though these assumptions may lead to some overcounting of the burden (if, in actuality, prescribers' office staff obtain patient signatures).

According to the U.S. Bureau of Labor Statistics, salaried optometrists earn an average wage of $60.31 per hour, and general office clerks earn an average wage of $18.75 per hour.[448] Using the aforementioned estimate of 229,167 total prescriber labor hours for obtaining patient signatures, the resultant aggregate labor costs to obtain patient signatures is $13,821,062 (229,167 hours × $60.31). Applying a mean hourly wage for office clerks of $18.75 per hour to the aforementioned estimate of 1,375,000 hours for printing, scanning and storing of prescription release confirmations and consent agreements,

[443] Section 456.3(a)(3) also requires that in the event that a patient declines to sign a confirmation requested under paragraphs (a)(1)(i), (ii), or (iii), the prescriber must note the patient's refusal on the document and sign it. However, the Commission has no reason to believe that such notation should take any longer than for the patient to read and sign the document, so the Commission will maintain its calculation as if all confirmations requested under (a)(1)(i), (ii), or (iii) require the same amount of time.

[444] *See, e.g.,* 246 Mass. Code Regs. § 3.02 (requiring optometrists to maintain patient records for at least seven years); Wash. Admin. Code § 246–851–290 (requiring optometrists to maintain records of eye exams and prescriptions for at least five years); Iowa Admin. Code r. 645–182.2(2) (requiring optometrists to maintain patient records for at least five years).

[445] 20,625,000 prescriptions (82.5 million prescriptions × 25%).

[446] 57,292 hours (20,625,000 prescriptions yearly × 10 seconds/60secs/60mins) for obtaining the signature plus 343,750 hours (20,625,000 affirmative consents × one minute/60mins) for storing such records.

[447] CLR Final Rule, 85 FR 50668, 50710.

[448] Bureau of Labor Statistics, United States Department of Labor, Occupational Employment Statistics, *https://www.bls.gov/news.release/ocwage.t01.htm.*

labor costs for those tasks would total $25,781,250. Therefore, combining the aggregate labor costs for both prescribers and office staff to obtain signed patient confirmations and consent to electronic delivery and preserve the associated records, the Commission estimates the total annual labor burden of the confirmation of prescription release modification to be $39,602,312.

Adding the $39,602,312 burden from the confirmation of prescription release requirement to the $82,926,250 burden [449] from the prescription release requirement already in place yields a total estimated annual labor cost burden for the Eyeglass Rule of $122,528,562. While not insubstantial, this amount constitutes approximately one half of one percent of the estimated overall retail market for eyeglass sales in the United States.[450] Furthermore, the actual burden is likely to be less, because many prescribers' offices will require less than a minute to store the confirmation form.

C. Capital and Other Non-Labor Costs

The proposed recordkeeping requirements detailed above regarding prescribers impose negligible capital or other non-labor costs, as prescribers likely have already the necessary equipment and supplies (*e.g.,* prescription pads, patients' medical charts, scanning devices, recordkeeping storage) to perform those requirements.

The Commission invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (2) the accuracy of the FTC's burden estimates, including whether the methodology and assumptions used are valid; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of collecting information.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this document to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The *reginfo.gov* web link is a United States Government website produced by OMB and the General Services Administration (''GSA''). Under PRA requirements, OMB's Office of Information and Regulatory Affairs reviews federal information collections.

X. Preliminary Regulatory Analysis and Regulatory Flexibility Act Requirements

Under section 22 of the FTC Act, 15 U.S.C. 57b–3, the Commission must issue a preliminary regulatory analysis for a proceeding to amend a rule only when it: (1) estimates that the amendment will have an annual effect on the national economy of $100,000,000 or more; (2) estimates that the amendment will cause a substantial change in the cost or price of certain categories of goods or services; or (3) otherwise determines that the amendment will have a significant effect upon covered entities or upon consumers. For the reasons explained below, in the PRA section above, and in the main text of this document, the Commission has preliminarily determined that the proposed amendments will not have such effects on the national economy; on the cost of eye examinations or prescription eyeglasses; or on covered parties or consumers. The Commission, however, requests comment on the economic effects of the proposed amendments.

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires the Commission to conduct an analysis of the anticipated economic impact of the proposed amendments on small entities. The purpose of a regulatory flexibility analysis is to ensure the agency considers the impacts on small entities and examines alternatives that could achieve the regulatory purpose while minimizing burdens on small entities. Section 605 of the RFA provides that such an analysis is not required if the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.

The Commission does not anticipate that the proposed amendments will have a significant economic impact on small entities, although they may affect a substantial number of small businesses. The proposed amendments would require that prescribers obtain from patients, and maintain for a period of not less than three years, a signed confirmation of prescription release, acknowledging that patients received their eyeglass prescriptions at the completion of their refractive eye examination. The new proposals would also require some prescribers to obtain and maintain for three years a patient's consent to deliver prescriptions electronically, but only for prescribers who elect to offer this method of delivery as an alternative to providing prescriptions in paper, and only if the patient agrees.

As described in the PRA section of this document, the Commission approximates that collecting a patient's signature on the confirmation of prescription release (giving time for patient to read confirmation) in accordance with § 456.3(a)(1)(i), (ii), and (iii) will take approximately ten seconds. Providing the patient with the confirmation of prescription release in accordance with this provision will require prescribers' offices to present a form, receipt, or prescription and request a patient signature. The proposed amendments to the Rule provide prescribers with the language that they can use on a confirmation form, which will relieve prescribers of that burden, and a request to sign such confirmation will take a *de minimis* amount of time. This requirement may also involve some staff training, which the Commission believes will be minimal. As a result, the Commission believes that complying with § 456.3(a)(1)(i), (ii), and (iii)) will impose only minimal costs upon prescriber offices, but requests information about the associated costs and burdens.

The PRA section of this document addresses the burden for prescribers to maintain records of confirmation of receipt of prescriptions for at least three years, noting that the majority of states already require that optometrists keep records of eye examinations for at least three years, and estimating a full minute for prescribers to meet their recordkeeping obligations. Prescribers who decide to collect or maintain signatures electronically may already have electronic health records systems in place, but the Commission requests information on costs prescribers are likely to incur to comply with the recordkeeping proposals in this document.

In addition, the proposal to permit prescribers to deliver prescriptions electronically would require prescribers to obtain, and maintain for three years, a patient's consent to electronic prescription delivery. This requirement can be avoided altogether should a prescriber not wish to provide patients this option. Furthermore, whenever a prescriber enables a patient to receive a prescription electronically, this relieves the prescriber of the burden to obtain a signed prescription release confirmation

[449] 1,375,000 hours × $60.31 (average hourly wage for optometrists) = $82,926,250.

[450] According to The Vision Council, the eyeglass market (for frames and lenses) in the United States for the twelve months ending December 2019, totaled roughly $24.3 billion. *See* VisionWatch Report, *supra* note 70, at 69, 89; Vision Council, ''Consumer Barometer,'' Dec. 2019, at 18–19. The estimated total burden of the Rule of $122,528,562 thus amounts to approximately 0.5 percent of the total market.

from that patient. However, as explained in § 456.1(h)(2), under the Rule's new definition of *Provide to the patient one copy,* to avail themselves of the fourth option, prescribers must obtain and maintain records or evidence of the patients' affirmative consent to electronic delivery for three years. The PRA section of this document assumed that this task would take one minute and ten seconds, the same amount of time as to obtain and maintain a signature of the patient's confirmation of prescription release. The Commission requests information on costs that may be incurred by prescribers to comply with this option for prescription delivery.

Although the proposed amendments will impose a small burden upon prescribers, the proposed amendments should not have a significant or disproportionate impact on prescribers' costs. Therefore, based on available information, the Commission certifies that amending the Rule as proposed will not have a significant economic impact on a substantial number of small businesses.

Although the Commission certifies under the RFA that the proposed amendments, if promulgated, will not have a significant impact on a substantial number of small entities, the Commission has nonetheless determined it is appropriate to publish an Initial Regulatory Flexibility Analysis to inquire into the impact of the proposed amendments on small entities. Therefore, the Commission has prepared the following analysis:

B. Description of the Reasons the Agency Is Taking Action

In response to public comments, the Commission proposes amending the Rule to ensure that patients are receiving a copy of their eyeglass prescription at the completion of a refractive eye examination.

C. Statement of the Objectives of, and Legal Basis for, the Proposed Amendments

The objective of the proposed amendments is to clarify and update the Rule in accordance with marketplace practices. The Commission promulgated the Rule pursuant to section 18 of the FTC Act, 15 U.S.C. 57a. As noted earlier, the Commission has wide latitude in fashioning a remedy and need only show a ''reasonable relationship'' between the unfair or deceptive act at issue and the remedy.[451] The proposed amendments to the Rule requiring that prescribers obtain from patients, and maintain for a period of not less than three years, a signed confirmation of patients' receipt of their eyeglass prescriptions, permitting prescribers to comply with automatic prescription release via electronic delivery in certain circumstances, clarifying that the presentation of proof of insurance coverage shall be deemed to be a payment for the purpose of determining when a prescription must be provided under 16 CFR 456.2(a), and replacing the term ''eye examination'' with ''refractive eye examination,'' are reasonably related to remedying the unfair practices that led the Commission to promulgate the Rule.

D. Small Entities to Which the Proposed Amendments Will Apply

The proposed amendments apply to prescribers of eyeglasses. The Commission believes that many prescribers will fall into the category of small entities (*e.g.,* offices of optometrists less than $8 million in size).[452] Determining a precise estimate of the number of small entities covered by the Rule's prescription release requirements is not readily feasible because most prescribers' offices do not release the underlying revenue information necessary to make this determination.[453] Based on its knowledge of the eye care industry, including meetings with industry members and a review of industry publications, staff believes that a substantial number of these entities likely qualify as small businesses.[454] The Commission seeks comment with regard to the estimated number or nature of small business entities, if any, for which the proposed amendments would have a significant impact.

E. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Covered Small Entities and Professional Skills Needed To Comply

As explained earlier in this document, the proposed amendments require that prescribers obtain from patients, and maintain for a period of not less than three years (in paper or electronic form), a signed confirmation of prescription release, acknowledging that patients received their eyeglass prescriptions at the completion of their refractive eye examination. The amendments also permit prescribers to comply with automatic prescription release via electronic delivery in certain circumstances, clarify that the presentation of proof of insurance coverage shall be deemed to be a payment for the purpose of determining when a prescription must be provided under 16 CFR 456.2(a), and replace the term ''eye examination'' with ''refractive eye examination'' throughout the Rule.

The small entities potentially covered by these proposed amendments will include all such entities subject to the Rule. The professional skills necessary for compliance with the Rule as modified by the proposed amendments will include office and administrative support supervisors to create the confirmation form and clerical personnel to collect signatures from patients and maintain records. Compliance may include some minimal training time as well.[455] The Commission believes the burden imposed on small businesses by these requirements is relatively small, for the reasons described previously in this section as well as the PRA section of this document. The Commission invites comment and information on these issues, including estimates or data on specific compliance costs that small entities might be expected to incur.

F. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other federal statutes, rules, or policies duplicating, overlapping, or conflicting with the proposed amendments. As noted previously, the majority of states already require that optometrists—of which many are most likely small businesses—maintain records of eye examinations for at least

[451] *Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d at 988 (quoting *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 612–13 (1946)).

[452] *See* 13 CFR 121.201 *(Small Business Size Regulations).*

[453] 5 U.S.C. 601(6).

[454] According to one publication, 65 percent of optometrists work in a practice owned by an optometrist or ophthalmologist, practices that are likely small businesses. *See* AOA, ''An Action-Oriented Analysis of the State of the Optometric Profession: 2013,'' at 7, *https://documents.aoa.org/Documents/news/state_of_optometry.pdf.* This publication also reported that although it could not ascertain the precise number of independent optometric practices, it estimated that as of 2012, there were 14,000 to 16,000 optometric businesses with no corporate or institutional affiliation. *Id.*

[455] The Commission does not believe it will require significant training to learn when and how to obtain a patient signature and preserve it, particularly since prescribers' office staff will already know how to perform these tasks, due to similar signature requirements already in place for the Contact Lens Rule and the HIPAA NPP, among others.

three years. Further, as discussed elsewhere in this NPRM, HIPAA, the 21st Century Cures Act, and state laws provide consumers with a right of access to medical records, though the parameters and timing involved with access are different than the Eyeglass Rule.[456] The Commission also notes that prescribers may reduce any burden associated with the proposed amendments by using the same mechanism to obtain confirmation of receipt of a contact lens prescription (in accordance with the Contact Lens Rule) and an eyeglass prescription in cases when the prescriber provides both prescriptions to the patient at the same time, so long as the prescriber asks for separate signatures for each. The Commission invites additional comment on the issue of duplicative, overlapping or conflicting federal rules.

G. Significant Alternatives to the Proposed Amendments

The Commission has not proposed any specific small entity exemption or other significant alternatives, as the proposed amendments clarify and update the Rule in light of marketplace practices to ensure that patients are receiving a copy of their eyeglass prescription at the completion of a refractive eye examination. Under these limited circumstances, the Commission does not believe a special exemption for small entities or significant compliance alternatives are necessary or appropriate to minimize the compliance burden, if any, on small entities while achieving the intended purposes of the proposed amendments. As discussed above, the proposed recordkeeping requirement likely involves minimal burden and prescribers would be permitted to maintain records in either paper or electronic format. This recordkeeping burden could be reduced to the extent that prescribers have adopted electronic medical record systems, especially those where patient signatures can be recorded electronically and inputted automatically into the electronic record. Furthermore, prescribers also could scan signed paper copies of the confirmation and store those confirmations electronically to lower the costs of this recordkeeping requirement. Similarly, when using a text message, electronic mail, or an online patient portal to satisfy the prescription release requirement (assuming the patient's consent), prescribers may provide the required copy of the prescription electronically (*i.e.,* digital format). Nonetheless, the Commission seeks comment on the need, if any, for alternative compliance methods to reduce the economic impact of the Rule on small entities. If the comments filed in response to this NPRM identify small entities affected by the proposed amendments, as well as alternative methods of compliance that would reduce the economic impact of the proposed amendments on such entities, the Commission will consider the feasibility of such alternatives and determine whether they should be incorporated into the final rule.

[456] Prescribers may have EHRs in place to comply with these laws, as well as having certified health information technology to receive direct payments per the HITECH Act. The fact that prescribers' offices have EHRs and health information technology may make it less costly or burdensome for prescribers to comply with the proposed amendments to the Eyeglass Rule.

Proposed Rule Language

List of Subjects in 16 CFR Part 456

Advertising, Medical devices, Ophthalmic goods and services, Trade practices.

For the reasons set out in the preamble, the Federal Trade Commission proposes to amend 16 CFR part 456 to read as follows:

PART 456—OPHTHALMIC PRACTICE RULES (EYEGLASS RULE)

■ 1. Revise the authority citation for part 456 to read as follows:

Authority: 15 U.S.C. 57a.

■ 2. Amend § 456.1 by revising paragraphs (a), (b), (d), (e) and (g), and by adding paragraph (h) to read as follows:

§ 456.1 Definitions.

(a) A *patient* is any person who has had a refractive eye examination.

(b) A *refractive eye examination* is the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.

* * * * *

(d) *Ophthalmic services* are the measuring, fitting, and adjusting of ophthalmic goods subsequent to a refractive eye examination.

(e) An *ophthalmologist* is any Doctor of Medicine or Osteopathy who performs refractive eye examinations.

* * * * *

(g) A *prescription* is the written specifications for lenses for eyeglasses which are derived from a refractive eye examination, including all of the information specified by state law, if any, necessary to obtain lenses for eyeglasses.

(h) *Provide to the patient one copy* means giving a patient a copy of his or her prescription:

(1) On paper; or

(2) In a digital format that can be accessed, downloaded, and printed by the patient. For a copy provided in a digital format, the prescriber shall identify to the patient the specific method or methods of electronic delivery to be used, such as text message, electronic mail, or an online patient portal, and obtain the patient's verifiable affirmative consent to receive a digital copy through the identified method or methods; and maintain records or evidence of a patient's affirmative consent for a period of not less than three years. Such records or evidence shall be available for inspection by the Federal Trade Commission, its employees, and its representatives.

■ 3. Revise § 456.2 to read as follows:

§ 456.2 Separation of examination and dispensing.

It is an unfair act or practice for an ophthalmologist or optometrist to:

(a) Fail to provide to the patient one copy of the patient's prescription immediately after the refractive eye examination is completed. Provided: An ophthalmologist or optometrist may refuse to give the patient a copy of the patient's prescription until the patient has paid for the refractive eye examination, but only if that ophthalmologist or optometrist would have required immediate payment from that patient had the examination revealed that no ophthalmic goods were required. For purposes of the preceding sentence, the presentation of proof of insurance coverage for that service shall be deemed to be a payment;

(b) Condition the availability of a refractive eye examination to any person on a requirement that the patient agree to purchase any ophthalmic goods from the ophthalmologist or optometrist;

(c) Charge the patient any fee in addition to the ophthalmologist's or optometrist's refractive eye examination fee as a condition to releasing the prescription to the patient. Provided: An ophthalmologist or optometrist may charge an additional fee for verifying ophthalmic goods dispensed by another seller when the additional fee is imposed at the time the verification is performed; or

(d) Place on the prescription, or require the patient to sign, or deliver to the patient a form or notice waiving or disclaiming the liability or responsibility of the ophthalmologist or optometrist for the accuracy of the refractive eye examination or the accuracy of the ophthalmic goods and services dispensed by another seller.

■ 4. Revise § 456.3 to read as follows:

§ 456.3 Confirmation of prescription release.

(a)(1) Upon completion of a refractive eye examination, and after providing a copy of the prescription to the patient, the prescriber shall do one of the following:

(i) Request that the patient acknowledge receipt of the prescription by signing a separate statement confirming receipt of the prescription;

(ii) Request that the patient sign a prescriber-retained copy of the prescription that contains a statement confirming receipt of the prescription;

(iii) Request that the patient sign a prescriber-retained copy of the sales receipt for the refractive eye examination that contains a statement confirming receipt of the prescription; or

(iv) If a digital copy of the prescription was provided to the patient (via methods including an online portal, electronic mail, or text message), retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable.

(2) If the prescriber elects to confirm prescription release via paragraphs (a)(1)(i), (ii), or (iii) of this section, the prescriber may, but is not required to, use the statement, ''My eye care professional provided me with a copy of my prescription at the completion of my examination'' to satisfy the requirement.

(3) In the event the patient declines to sign a confirmation requested under paragraphs (a)(1)(i), (ii), or (iii) of this section, the prescriber shall note the patient's refusal on the document and sign it.

(b) A prescriber shall maintain the records or evidence required under paragraph (a) of this section for a period of not less than three years. Such records or evidence shall be available for inspection by the Federal Trade Commission, its employees, and its representatives.

(c) Paragraphs (a) and (b) of this section shall not apply to prescribers who do not have a direct or indirect financial interest in the sale of eye wear, including, but not limited to, through an association, affiliation, or co-location with an optical dispenser.

§§ 456.3 through 456.5 [Redesignated]

■ 5. Redesignate §§ 456.3 through 456.5 as §§ 456.4 through 456.6.

§ 456.3 [Reserved]

■ 6. Add and reserve a new § 456.3.

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2022–27828 Filed 12–30–22; 8:45 am]

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Vol. 88, No. 1

Tuesday, January 3, 2023

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FEDERAL REGISTER PAGES AND DATE, JANUARY

1–288 3

CFR PARTS AFFECTED DURING JANUARY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

7 CFR

Proposed Rules:
920 16
985 18

10 CFR

Proposed Rules:
30 25
40 25
50 25
70 25
72 25

12 CFR

1083 1

14 CFR

Proposed Rules:
61 34
63 34
65 34

15 CFR

6 3

16 CFR

Proposed Rules:
456 248

17 CFR

Proposed Rules:
240 128
242 128

21 CFR

101 6
876 8

33 CFR

Proposed Rules:
165 35

40 CFR

Proposed Rules:
180 38
721 41

47 CFR

73 10

Proposed Rules:
73 42

50 CFR

648 11

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Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List December 30, 2022

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A new table will be published in the first issue of each month.

DATE OF FR PUBLICATION	15 DAYS AFTER PUBLICATION	21 DAYS AFTER PUBLICATION	30 DAYS AFTER PUBLICATION	35 DAYS AFTER PUBLICATION	45 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION	90 DAYS AFTER PUBLICATION
January 3	Jan 18	Jan 24	Feb 2	Feb 7	Feb 17	Mar 6	Apr 3
January 4	Jan 19	Jan 25	Feb 3	Feb 8	Feb 21	Mar 6	Apr 4
January 5	Jan 20	Jan 26	Feb 6	Feb 9	Feb 21	Mar 6	Apr 5
January 6	Jan 23	Jan 27	Feb 6	Feb 10	Feb 21	Mar 7	Apr 6
January 9	Jan 24	Jan 30	Feb 8	Feb 13	Feb 23	Mar 10	Apr 10
January 10	Jan 25	Jan 31	Feb 9	Feb 14	Feb 24	Mar 13	Apr 10
January 11	Jan 26	Feb 1	Feb 10	Feb 15	Feb 27	Mar 13	Apr 11
January 12	Jan 27	Feb 2	Feb 13	Feb 16	Feb 27	Mar 13	Apr 12
January 13	Jan 30	Feb 3	Feb 13	Feb 17	Feb 27	Mar 14	Apr 13
January 17	Feb 1	Feb 7	Feb 16	Feb 21	Mar 3	Mar 20	Apr 17
January 18	Feb 2	Feb 8	Feb 17	Feb 22	Mar 6	Mar 20	Apr 18
January 19	Feb 3	Feb 9	Feb 21	Feb 23	Mar 6	Mar 20	Apr 19
January 20	Feb 6	Feb 10	Feb 21	Feb 24	Mar 6	Mar 21	Apr 20
January 23	Feb 7	Feb 13	Feb 22	Feb 27	Mar 9	Mar 24	Apr 24
January 24	Feb 8	Feb 14	Feb 23	Feb 28	Mar 10	Mar 27	Apr 24
January 25	Feb 9	Feb 15	Feb 24	Mar 1	Mar 13	Mar 27	Apr 25
January 26	Feb 10	Feb 16	Feb 27	Mar 2	Mar 13	Mar 27	Apr 26
January 27	Feb 13	Feb 17	Feb 27	Mar 3	Mar 13	Mar 28	Apr 27
January 30	Feb 14	Feb 21	Mar 1	Mar 6	Mar 16	Mar 31	May 1
January 31	Feb 15	Feb 21	Mar 2	Mar 7	Mar 17	Apr 3	May 1