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FEDERAL REGISTER

Vol. 88 Tuesday

No. 10 January 17, 2023

Pages 2599–2794

OFFICE OF THE FEDERAL REGISTER

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–1302; Project Identifier MCAI–2022–00062–E; Amendment 39–22301; AD 2023–01–07]

RIN 2120–AA64

Airworthiness Directives; GE Aviation Czech s.r.o. (Type Certificate Previously Held by WALTER Engines a.s., Walter a.s., and MOTORLET a.s.) Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all GE Aviation Czech s.r.o. (GEAC) H75–100, H75–200, H80, H80–100, H80–200, H85–100, and H85–200 model turboprop engines. This AD is prompted by the manufacturer revising the airworthiness limitations section (ALS) of the existing engine maintenance manual (EMM) to introduce updated coefficients for the calculation of the cyclic life and safe life for the main shaft. This AD requires revising the ALS of the existing EMM and the operator's existing approved maintenance or inspection program, as applicable, to incorporate the updated coefficients and recalculate the cycles accumulated on critical parts. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 21, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1302; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Barbara Caufield, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7146; email: *barbara.caufield@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all GEAC H75–100, H75–200, H80, H80–100, H80–200, H85–100, and H85–200 model turboprop engines. The NPRM published in the **Federal Register** on October 24, 2022 (87 FR 64175). The NPRM was prompted by AD 2022–0008, dated January 19, 2022, issued by the European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union (referred to after this as the MCAI). The MCAI states that the airworthiness limitations for H series engine models, which are approved by EASA, are currently defined and published in the ALS of the GEAC EMM. These instructions have been identified as mandatory for continued airworthiness. Failure to accomplish these instructions could result in an unsafe condition. The MCAI explains that recently GEAC published a revision to the ALS, introducing updated coefficients for the calculation of the cyclic life and safe life for the main shaft.

In the NPRM, the FAA proposed to require revising the ALS of the existing EMM and the operator's existing approved maintenance or inspection program, as applicable, to incorporate the updated coefficients and recalculate the cycles accumulated on critical parts. An owner/operator (pilot) holding at least a private pilot certificate may revise the ALS of the existing EMM, and the owner/operator must enter compliance with the applicable paragraphs of the AD into the aircraft records in showing compliance with this AD in accordance with 14 CFR 43.9(a) and 14 CFR 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439. This is an exception to the FAA's standard maintenance regulations. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1302.

Discussion of Final Airworthiness Directive

Comments

The FAA received no comments on the NPRM or on the determination of the costs.

Conclusion

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, this AD is adopted as proposed in the NPRM.

Related Service Information

The FAA reviewed the ALS of the GEAC EMM, Part No: 0983402, Rev. 22, dated December 18, 2020. This service information provides updated coefficients for the calculation of the cyclic life and safe life for the main shaft.

Costs of Compliance

The FAA estimates that this AD affects 33 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise the ALS of the EMM and the operator's existing approved maintenance or inspection program.	1 work-hour × $85 per hour = $85.	$0	$85	$2,805

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–01–07 GE Aviation Czech s.r.o (Type Certificate previously held by WALTER Engines a.s., Walter a.s., and MOTORLET a.s.): Amendment 39–22301; Docket No. FAA–2022–1302; Project Identifier MCAI–2022–00062–E.

(a) Effective Date

This airworthiness directive (AD) is February 21, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to GE Aviation Czech s.r.o. (Type Certificate previously held by WALTER Engines a.s., Walter a.s., and MOTORLET a.s.) H75–100, H75–200, H80, H80–100, H80–200, H85–100, and H85–200 model turboprop engines.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by the manufacturer revising the airworthiness limitations section (ALS) of the existing engine maintenance manual (EMM) to introduce updated coefficients for the calculation of the cyclic life and safe life for the main shaft. The FAA is issuing this AD to prevent failure of the engine. The unsafe condition, if not addressed, could result in uncontained release of a critical part, damage to the engine, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

(1) Within 90 days of the effective date of this AD, revise the ALS of the existing EMM and the existing approved maintenance or inspection program, as applicable, to incorporate the information in Table 1 to paragraph (g)(1) of this AD and recalculate the cycles accumulated on critical parts.

TABLE 1 TO PARAGRAPH (g)(1)—EQUIVALENT CYCLIC LIFE (N) AND SAFE LIFE OF CRITICAL PARTS

Description	Drawing No.	Abbreviated flight cycle coefficient		Flight mission coefficient	Equivalent cyclic life limit
		A_V	A_P	L	N
Main Shaft	M601–1017.75	0.47		1.05	16,000

(2) After performing the action required by paragraph (g)(1) of this AD, except as provided in paragraph (h) of this AD, no alternative life limits may be approved.

(3) The action required by paragraph (g)(1) of this AD may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with §§ 43.9(a) and 91.417(a)(2)(v). The record must be maintained as required by § 91.417, 121.380, or 135.439.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in § 39.19. In accordance with § 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(2) of this AD and email to: *ANE-AD-AMOC@faa.gov.*

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

(i) Additional Information

(1) Refer to European Union Aviation Safety Agency (EASA) AD 2022–0008, dated January 19, 2022, for related information. This EASA AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2022–1302.

(2) For more information about this AD, contact Barbara Caufield, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7146; email: *barbara.caufield@faa.gov.*

(j) Material Incorporated by Reference

None.

Issued on January 6, 2023.

Christina Underwood,

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

[FR Doc. 2023–00490 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–1225; Airspace Docket No. 22–AGL–31]

RIN 2120–AA66

Amendment of Class E Airspace; Plymouth and Winamac, IN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Plymouth and Winamac, IN. This action is due to airspace reviews conducted as part of the decommissioning of the Knox very high frequency (VHF) omnidirectional range (VOR) as part of the VOR Minimal Operational Network (MON) Program. The geographic coordinates of Plymouth Municipal Airport are also being updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, April 20, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace extending upward from 700 feet above the surface at Plymouth Municipal Airport, Plymouth, IN, and Arens Field, Winamac, IN, to support instrument flight rule operations at these airports.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (87 FR 66627; November 4, 2022) for Docket No. FAA–2022–1225 to amend the Class E airspace at Plymouth and Winamac, IN. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to 14 CFR part 71:

Amends the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (increased from a 6.3-mile) radius of Plymouth Municipal Airport, Plymouth, IN; and updates the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

And amends the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (decreased from a 7-mile) radius of Arens Field, Winamac, IN; and removes the city associated with the airport in the airspace legal description header to comply with changes to FAA Order JO 7400.2N, Procedures for Handling Airspace Matters.

This action is due to airspace reviews conducted as part of the decommissioning of the Knox VOR, which provided navigation information for the instrument procedures at this airport, as part of the VOR MON Program.

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

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5.a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist

that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AGL IN E5 Plymouth, IN [Amended]

Plymouth Municipal Airport, IN
(Lat. 41°21′54″ N, long. 86°18′01″ W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Plymouth Municipal Airport.

* * * * *

AGL IN E5 Winamac, IN [Amended]

Arens Field, IN
(Lat. 41°05′32″ N, long. 86°36′46″ W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Arens Field.

Issued in Fort Worth, Texas, on January 9, 2023.

Martin A. Skinner,

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

[FR Doc. 2023–00496 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–1113 Airspace Docket No. 22–AGL–20]

RIN 2120–AA66

Amendment of V–6, V–10, V–30, V–100, and V–233 in the Vicinity of Litchfield, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends VHF Omnidirectional Range (VOR) Federal airways V–6, V–10, V–30, V–100, and V–233 in the vicinity of Litchfield, MI. The airway modifications are necessary due to the planned decommissioning of the VOR portion of the Litchfield, MI, VOR/Distance Measuring Equipment (VOR/DME) navigational aid (NAVAID) which provides navigational guidance for portions of the affected VOR Federal airways listed above. The Litchfield VOR is being decommissioned as part of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Effective date 0901 UTC, April 20, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/*. For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

History

The FAA published a notice of proposed rulemaking (NPRM) for Docket No. FAA–2022–1113 in the **Federal Register** (87 FR 55927; September 13, 2022), amending VOR Federal airways V–6, V–10, V–30, V–100, and V–233 in the vicinity of Litchfield, MI, due to the planned decommissioning of the VOR portion of the Litchfield, MI, VOR/DME NAVAID. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal. No comments were received.

VOR Federal airways are published in paragraph 6010(a) of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airway actions listed in this document will be published subsequently in FAA Order JO 7400.11.

Differences From the NPRM

In the NPRM, the FAA noted the Litchfield, MI, Distance Measuring Equipment (DME) NAVAID was being retained as a mitigation to the planned decommissioning of the Litchfield VOR. However, subsequent to publication of the NPRM, the Central Service Area Director of Technical Operations approved the decommissioning of the collocated Litchfield, MI, DME concurrent with the planned decommissioning of the Litchfield VOR. The Litchfield DME currently is a Tactical Air Navigation (TACAN) operating as a DME only NAVAID.

The Litchfield DME has been shut down due to frequency interference with a Notice to Air Missions (NOTAM) reporting the out-of-service condition since December 2018. The Central Service Area Technical Support Operations Group (TSOG), Operational Engineering Support Group (OESG), and Spectrum Engineering Team, and the Federal Communication Commission (FCC) were all involved in an effort to locate the source of the interference, but the source was never found.

As a result, the FAA has no further plans to try to find the interference source and the Litchfield DME is being decommissioning with the Litchfield

VOR instead of being retained as addressed in the NPRM.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action amends 14 CFR part 71 by amending VOR Federal airways V–6, V–10, V–30, V–100, and V–233. The planned decommissioning of the Litchfield, MI, VOR/DME has made this action necessary. The VOR Federal airway changes are outlined below.

V–6: V–6 extends between the Oakland, CA, VOR/DME and the DuPage, IL, VOR/DME; between the intersection of the Chicago Heights, IL, VORTAC 358° and Gipper, MI, VORTAC 271° radials (NILES Fix) and the intersection of the Gipper, MI, VORTAC 092° and Litchfield, MI, VOR/DME 196° radials (MODEM Fix); and between the Philipsburg, PA, VORTAC and the La Guardia, NY, VOR/DME. The airway segment between the intersection of the Chicago Heights, IL, VORTAC 358° and Gipper, MI, VORTAC 271° radials (NILES Fix) and the intersection of the Gipper, MI, VORTAC 092° and Litchfield, MI, VOR/DME 196° radials (MODEM Fix) is removed. As amended, the airway is changed to extend between the Oakland VOR/DME and the DuPage VOR/DME and between the Philipsburg VORTAC and the La Guardia VOR/DME.

V–10: V–10 extends between the Pueblo, CO, VORTAC and the intersection of the Bradford, IL, VORTAC 058° and Joliet, IL, VOR/DME 287° radials (PLANO Fix); between the intersection of the Chicago Heights, IL, VORTAC 358° and Gipper, MI, VORTAC 271° radials (NILES Fix) and the Litchfield, MI, VOR/DME; and between the Youngstown, OH, VORTAC and the Lancaster, PA, VOR/DME. The airway segment between the Gipper, MI, VORTAC and the Litchfield, MI, VOR/DME is removed. As amended, the airway is changed to extend between the Pueblo VORTAC and the intersection of the Bradford VORTAC 058° and Joliet VOR/DME 287° radials (PLANO Fix), between the intersection of the Chicago Heights VORTAC 358° and Gipper VORTAC 271° radials (NILES Fix) and the Gipper VORTAC, and between the Youngstown VORTAC and the Lancaster VOR/DME.

V–30: V–30 extends between the Badger, WI, VOR/DME and the Litchfield, MI, VOR/DME; and between the Philipsburg, PA, VORTAC and the Solberg, NJ, VOR/DME. The airway segment between the Pullman, MI, VOR/DME and the Litchfield, MI, VOR/DME is removed. As amended, the airway is changed to extend between the Badger VOR/DME and the Pullman VOR/DME and between the Philipsburg VORTAC and the Solberg VOR/DME.

V–100: V–100 extends between the Medicine Bow, WY, VOR/DME and the O'Neill, NE, VORTAC; between the Waterloo, IA, VOR/DME and the Dubuque, IA, VORTAC; and between the Northbrook, IL, VOR/DME and the Litchfield, MI, VOR/DME. The airway segment between the Keeler, MI, VOR/DME and the Litchfield, MI, VOR/DME is removed. As amended, the airway is changed to extend between the Medicine Bow VOR/DME and the O'Neill VORTAC, between the Waterloo VOR/DME and the Dubuque VORTAC, and between the Northbrook, IL, VOR/DME and the Keeler VOR/DME.

V–233: V–233 extends between the Spinner, IL, VORTAC and the Litchfield, MI, VOR/DME; and between the Mount Pleasant, MI, VOR/DME and the Pellston, MI, VORTAC. The airway segment between the Goshen, IN, VORTAC and the Litchfield, MI, VOR/DME is removed. As amended, the airway is changed to extend between the Spinner VORTAC and the Goshen VORTAC and between the Mount Pleasant VOR/DME and the Pellston VORTAC.

All radials listed in the VOR Federal airway descriptions below are unchanged and stated in True degrees.

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

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action of amending VOR Federal airways V–6, V–10, V–30, V–100, and V–233, due to the planned decommissioning of the VOR portion of the Litchfield, MI, VOR/DME NAVAID, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points) and paragraph 5–6.5k, which categorically excludes from further environmental impact review the publication of existing air traffic control procedures that do not essentially change existing tracks, create new tracks, change altitude, or change concentration of aircraft on these tracks. As such, this action is not expected to result in any potentially significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, the FAA has reviewed this action for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. The FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–6 [Amended]

From Oakland, CA; INT Oakland 039° and Sacramento, CA, 212° radials; Sacramento; Squaw Valley, CA; Mustang, NV; Lovelock, NV; Battle Mountain, NV; INT Battle Mountain 062° and Wells, NV, 256° radials; Wells; 5 miles, 40 miles, 98 MSL, 85 MSL, Lucin, UT; 43 miles, 85 MSL, Ogden, UT; 11 miles, 50 miles, 105 MSL, Fort Bridger, WY; Rock Springs, WY; 20 miles, 39 miles, 95 MSL, Cherokee, WY; 39 miles, 27 miles, 95 MSL, Medicine Bow, WY; INT Medicine Bow 106° and Sidney, NE, 291° radials; Sidney; North Platte, NE; Grand Island, NE; Omaha, IA; Des Moines, IA; Iowa City, IA; Davenport, IA; INT Davenport 087° and DuPage, IL, 255° radials; to DuPage. From Philipsburg, PA; Selinsgrove, PA; Allentown, PA; Solberg, NJ; INT Solberg 107° and Yardley, PA, 068° radials; INT Yardley 068° and La Guardia, NY, 213° radials; to La Guardia.

* * * * *

V–10 [Amended]

From Pueblo, CO; 18 miles, 48 miles, 60 MSL, Lamar, CO; Garden City, KS; Dodge City, KS; Hutchinson, KS; Emporia, KS; INT Emporia 063°and Napoleon, MO, 243° radials; Napoleon; Kirksville, MO; Burlington, IA; Bradford, IL; to INT Bradford 058° and Joliet, IL, 287° radials. From INT Chicago Heights, IL, 358° and Gipper, MI, 271° radials; to Gipper. From Youngstown, OH; INT Youngstown 116° and Revloc, PA, 300° radials; Revloc; INT Revloc 107° and Lancaster, PA, 280° radials; to Lancaster.

* * * * *

V–30 [Amended]

From Badger, WI; INT Badger 102° and Pullman, MI, 303° radials; to Pullman. From Philipsburg, PA; Selinsgrove, PA; East Texas, PA; INT East Texas 095° and Solberg, NJ, 264° radials; to Solberg.

* * * * *

V–100 [Amended]

From Medicine Bow, WY; Scottsbluff, NE; Alliance, NE; Ainsworth, NE; to O'Neill, NE. From Waterloo, IA; to Dubuque, IA. From Northbrook, IL; INT Northbrook 095° and Keeler, MI, 271° radials; to Keeler.

* * * * *

V–233 [Amended]

From Spinner, IL; INT Spinner 061° and Roberts, IL, 233° radials; Roberts; Knox, IN; to Goshen, IN. From Mount Pleasant, MI; INT Mount Pleasant 351° and Gaylord, MI, 207° radials; Gaylord; to Pellston, MI.

* * * * *

Issued in Washington, DC, on January 6, 2023.

Scott M. Rosenbloom,

Manager, Airspace Rules and Regulations.

[FR Doc. 2023–00462 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–1318; Airspace Docket No. 22–AGL–33]

RIN 2120–AA66

Amendment of Class E Airspace; Mount Sterling and Pittsfield, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends the Class E airspace at Mount Sterling and Pittsfield, IL. This action is due to airspace reviews conducted as part of the decommissioning of the Quincy very high frequency (VHF) omnidirectional range (VOR) as part of the VOR Minimal Operational Network (MON) Program. The geographic coordinates of Pittsfield Penstone Municipal Airport, Pittsfield, IL, are also being updated to coincide with the FAA's aeronautical database.

DATES: Effective 0901 UTC, April 20, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends the Class E airspace extending upward from 700 feet above the surface at Mount Sterling Municipal Airport, Mount Sterling, IL, and Pittsfield Penstone Municipal Airport, Pittsfield, IL, to support instrument flight rule operations at these airports.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (87 FR 66632; November 4, 2022) for Docket No. FAA–2022–1318 to amend the Class E airspace at Mount Sterling and Pittsfield, IL. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in FAA Order JO 7400.11.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to 14 CFR part 71:

Amends the Class E airspace extending upward from 700 feet above the surface to within a 7.3-mile (increased from a 6.6-mile) radius of Mount Sterling Municipal Airport, Mount Sterling, IL;

And amends the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile

(decreased from a 7-mile) radius of Pittsfield Penstone Municipal Airport, Pittsfield, IL; and updates the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

This action is due to airspace reviews conducted as part of the decommissioning of the Quincy VOR, which provided navigation information for the instrument procedures at these airports, as part of the VOR MON Program.

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

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5.a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

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

* * * * *

AGL IL E5 Mount Sterling, IL [Amended]

Mount Sterling Municipal Airport, IL
(Lat. 39°59′07″ N, long. 90°48′15″ W)

That airspace extending upward from 700 feet above the surface within a 7.3-mile radius of Mount Sterling Municipal Airport.

* * * * *

AGL IL E5 Pittsfield, IL [Amended]

Pittsfield Penstone Municipal Airport, IL
(Lat. 39°38′20″ N, long. 90°46′43″ W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Pittsfield Penstone Airport.

Issued in Fort Worth, Texas, on January 9, 2023.

Martin A. Skinner,

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

[FR Doc. 2023–00495 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740, 742, and 774

[Docket No. 220909–0188]

RIN 0694–AI21

Implementation of Australia Group Decisions From 2021 and 2022 Virtual Meetings: Controls on Marine Toxins, Plant Pathogens and Biological Equipment

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) publishes this final rule to amend the Export Administration Regulations (EAR) to reflect decisions made at the November 2021 and March 2022 Australia Group (AG) Virtual Implementation Meetings and the AG Plenary Meeting held in July 2022. The amendments include revisions to certain Export Control Classification Numbers to clarify the controls on genetic elements and genetically modified organisms and the scope of the exclusion that applies to medical isolators ''specially designed'' for barrier nursing or transportation of infected patients; and makes clarifications by adding four naturally occurring, dual-use marine toxins (specifically, brevetoxins, gonyautoxins, nodularins and palytoxin) and removing cholera toxin. The addition of these four toxins is consistent with Section 1758 of the Export Control Reform Act of 2018 (ECRA) regarding emerging and foundational technologies. Finally, this rule also includes amendments to reflect the AG Plenary updates to the nomenclature of certain bacteria and fungi, and the clarification of the definition of ''disinfected'' as it applies to certain biological equipment.

DATES: This rule is effective January 17, 2023.

FOR FURTHER INFORMATION CONTACT: Dr. Tara Gonzalez, Chemical and Biological Controls Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, Telephone: (202) 482–3343, Email: *Tara.Gonzalez@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) (15 CFR parts 730–774) to reflect the decisions made at the November 2021 and March 2022 Australia Group (AG) Virtual Implementation Meetings and the AG Plenary Meeting held in Paris, France, from July 4 through July 8, 2022. The AG is a multilateral forum consisting of 42 participating countries and the European Union. These participants maintain export controls on a list of chemicals, biological agents, and related equipment and technology that could be used in a chemical or biological weapons program. The AG periodically reviews items on its control list to enhance the effectiveness of participating governments' national controls and to achieve greater harmonization among these controls.

At the November 2021 AG Virtual Implementation Meeting, the AG revised its ''Control List of Dual-Use Biological Equipment and Related Technology and Software'' to clarify the scope of the exclusion that applies to

medical isolators ''specially designed'' for barrier nursing or transportation of infected patients.

Consistent with decisions made at the AG's March 2022 Virtual Implementation Meeting, two AG common control lists (*i.e.,* the list of ''Human and Animal Pathogens and Toxins'' and the ''List of Plant Pathogens for Export Control'') were updated to clarify that the controls on genetic elements and genetically modified organisms include, *inter alia,* any gene(s) or translated product(s) specific to any controlled virus. Previously, the control text for viral genetic elements referred only to the risk posed by the nucleic acid sequence itself, and not to transcribed or translated products.

The AG also made changes to three of its common control lists to reflect the decisions made at its July 2022 Plenary Meeting. The AG revised its list of ''Human and Animal Pathogens and Toxins'' to add four naturally occurring, dual-use marine toxins (specifically, brevetoxins, gonyautoxins, nodularins and palytoxin) and remove cholera toxin. The AG also revised its ''Control List of Dual-Use Biological Equipment and Related Technology and Software'' by clarifying the definition of ''disinfected'' to more closely reflect the use of this term by the scientific and industrial communities. In addition, the AG revised its ''List of Plant Pathogens for Export Control'' to update the nomenclature for certain bacteria and fungi.

I. EAR Changes Reflecting the November 2021 AG Virtual Implementation Meeting Decision

Amendments to ECCN 2B352

Consistent with the decision made at the November 2021 AG Virtual Implementation Meeting, this rule amends ECCN 2B352 to reflect changes in the Notes to the AG controls on biocontainment chamber, isolators and biological safety cabinets described in the ''Control List of Dual-Use Biological Equipment and Related Technology and Software.'' Specifically, *Note 2 to 2B352.g.2* is revised to clarify that this ECCN controls any isolator having all of the characteristics described in 2B352.g.2.a through g.2.d, regardless of its intended use and its designation, except for medical isolators ''specially designed'' for barrier nursing or transportation of infected patients. Additional amendments to this ECCN, which reflect decisions made at the July 2022 AG Plenary Meeting, are described later in the preamble of this rule.

II. EAR Changes Reflecting the March 2022 AG Virtual Implementation Meeting Decision

Amendments to Export Control Classification Number (ECCN) 1C353

Consistent with the decision made at the March 2022 AG Virtual Implementation Meeting, this rule amends paragraph a.1 of ECCN 1C353 on the Commerce Control List (CCL), in Supplement No. 1 to part 774 of the EAR, to clarify that the controls on genetic elements and genetically modified organisms include, *inter alia,* any gene(s) or translated product(s) specific to any controlled virus. Prior to the publication of this final rule, this ECCN did not explicitly state that its controls on viral genetic elements also included translated product(s) specific to any controlled virus. The control text in ECCN 1C353.a previously referred to transcribed or translated product(s) only with respect to bacterial and fungal genetic elements described in paragraph a.2.a.

III. EAR Changes Reflecting the July 2022 AG Plenary Meeting Decisions

Amendments to ECCN 1C350

This final rule amends ECCN 1C350, consistent with the July 2022 AG Plenary Meeting update to the ''Export Control List: Chemical Weapons Precursors,'' by adding a clarification to *Technical Note 3* in this ECCN. This change is also consistent with a recommendation by the Organization for the Prohibition of Chemical Weapons (OPCW) to control all stereoisomers and isotopically-labeled forms of scheduled chemicals, even if they have different CAS numbers. Specifically, this rule revises the parenthetical ''(*e.g.,* hydrates),'' in the second sentence of *Technical Note 3,* to read ''(*e.g.,* hydrates, isotopically-labeled forms or all possible stereoisomers).''

Amendments to ECCN 1C351

This final rule reflects the recent updates to the AG ''Human and Animal Pathogens and Toxins'' common control list, as described above, by amending ECCN 1C351 to add four marine toxins (brevetoxins, gonyautoxins, nodularins and palytoxin) and remove cholera toxin. Specifically, the four marine toxins are added in alphabetical order to ECCN 1C351.d, where they are controlled for chemical/biological (CB) and anti-terrorism (AT) reasons. Certain other toxins in this ECCN are renumbered, accordingly, to reflect the addition of the marine toxins and the removal of cholera toxin.

This rule also makes conforming changes elsewhere in ECCN 1C351 to update references to certain toxins (*i.e.,* in the CW Reason for Control paragraph, License Requirements Notes 1 and 2, the License Exception STA eligibility paragraph and the Related Controls paragraph). Similar conforming amendments to the Chemical Weapons Convention (CWC) and License Exception Strategic Trade Authorization (STA) provisions in the EAR are described below.

As described in more detail below, BIS identified the synthesis and collection of the four marine toxins for evaluation according to the criteria in Section 1758 of the Export Control Reform Act of 2018 (ECRA), 50 U.S.C. 4801–4852, pertaining to emerging and foundational technologies. Other considerations prompted the decision to remove cholera toxin from the list of ''Human and Animal Pathogens and Toxins.'' At the time of its inclusion on this AG common control list, cholera toxin did not have any significant commercial or medical uses. However, in recent years, there has been a significant increase in biomedical research involving cholera toxins and in the use of cholera toxin in biomedical applications. Furthermore, cholera toxin, by itself (*i.e.,* in the absence of live bacteria), is known to have limited cytotoxicity (*e.g.,* compared to other toxins such as botulinum, saxitoxin, or ricin), and cannot be transmitted from person to person. Cholera toxin has not been the major focus of a biological weapons research program, although it may have been evaluated for such purposes. Consequently, the removal of chemical/biological (CB) controls on cholera toxins is not expected to have a significant impact on the proliferation, development, production or use of biological weapons, nor would the relative costs of such controls (*e.g.,* in terms of their impact on public health and on biomedical and related research) be justified going forward.

Expansion of ECCN 1E001 Controls

Although this rule does not amend ECCN 1E001 (which controls, *inter alia,* ''technology'' for the ''development'' or ''production'' of the human and animal pathogens and ''toxins'' described in ECCN 1C351), the heading of ECCN 1E001 indicates that, with limited exceptions, ECCN 1E001 controls ''technology for the ''development'' or ''production'' of items listed under Category 1C of the CCL. Consequently, ECCN 1E001 now controls ''technology'' for the ''development'' or ''production'' of the four marine toxins that are being added to ECCN 1C351 by this rule.

Other Conforming Amendments To Reflect the Reordering of Toxins in ECCN 1C351.d

This rule amends § 740.20—License Exception Strategic Trade Authorization (STA) to make conforming changes to the ECCN 1C351.d references in paragraph (b)(2)(v) and paragraph (b)(2)(vi). Specifically, § 740.20(b)(2)(v) is amended to reference the exclusion of ECCN 1C351.d.14 and d.15 items from License Exception STA eligibility, consistent with the proposed renumbering of ricin and saxitoxin (which were previously controlled under ECCN 1C351.d.11 and d.12, respectively). Similarly, § 740.20(b)(2)(vi) is amended, consistent with the renumbering of the toxins in ECCN 1C351.d, by revising the references to the ECCN 1C351.d toxins that are authorized (with certain limitations) under License Exception STA to destinations indicated in Country Group A:5 (see Supplement No. 1 to part 740 of the EAR).

This rule also makes conforming changes to § 742.18—Chemical Weapons Convention (CWC) and ECCN 1C991 (Vaccines, immunotoxins, medical products, diagnostic and food testing kits) to reflect the renumbering of the toxins in ECCN 1C351.d. Specifically, § 742.18(a)(1), (b)(1)(i), and (b)(1)(ii) and (iii) are amended to reference ECCN 1C351.d.14 and d.15, consistent with the renumbering of ricin and saxitoxin described above. In ECCN 1C991, 1C991.c.1 and .e are amended to make conforming changes to the references therein to ECCN 1C351 that are affected by the renumbering of the toxins in ECCN 1C351.d.

None of the conforming amendments described above changes the scope of the controls in the affected EAR provisions.

Amendments to ECCN 1C354

This final rule reflects the AG Plenary changes to the ''List of Plant Pathogens for Export Control,'' which updated the nomenclature for certain bacteria and fungi. Specifically, this rule amends ECCN 1C354.a by updating the nomenclature of the bacteria ''*Xanthomonas axonopodis* pv. *citri* (*Xanthomonas campestris* pv. *citri* A) (*Xanthomonas campestris* pv. *citri*)'' and ''*Clavibacter michiganensis* subspecies *sepedonicus* (syn. *Corynebacterium michiganensis* subspecies *sepedonicum or Corynebacterium sepedonicum*)'' to read ''*Xanthomonas citri* pv. *citri (Xanthomonas axonopodis* pv. *citri, Xanthomonas campestris* pv. *citri)*'' and ''*Clavibacter michiganensis* subsp. *sepedonicus,* (*Clavibacter sepedonicus, Clavibacter michiganense* subsp. *sepedonicus, Corynebacterium michiganensis* subsp. *sepedonicum, Corynebacterium sepedonicum*),'' respectively. In addition, ECCN 1C354.b is amended to update the nomenclature of the fungi ''*Cochliobolus miyabeanus* (*Helminthosporium oryzae*)'' and ''*Microcyclus ulei* (syn. *Dothidella ulei*)'' to read ''*Bipolaris oryzae* (*Cochliobolus miyabeanus, Helminthosporium oryzae*)'' and ''*Pseudocercospora ulei* (*Microcyclus ulei, Dothidella ulei*),'' respectively. To maintain the listing of these fungi in alphabetical order, ''*Bipolaris oryzae* (*Cochliobolus miyabeanus, Helminthosporium oryzae*),'' which was previously controlled under ECCN 1C354.b.2, is now controlled under ECCN 1C354.b.1 and ''*Colletotrichum kahawae* (*Colletotrichum coffeanum* var. *virulans*),'' which was previously controlled under ECCN 1C354.b.1, is now controlled under ECCN 1C354.b.2.

Amendments to ECCN 2B352

In addition to the ECCN 2B352 amendments described above (see discussion of amendments per the November 2021 AG Virtual Implementation Meeting decision), this final rule amends ECCN 2B352 to reflect the recent updates to the AG ''Control List of Dual-Use Biological Equipment and Related Technology and Software,'' by revising the definition of ''disinfected'' to more closely reflect the use of this term by the scientific and industrial communities. Specifically, this rule amends the *Technical Note* following ECCN 2B352.d.2 by revising the definition of ''disinfected'' to indicate that this term ''denotes a process to reduce the number of microorganisms, but not usually of bacterial spores, through the use of chemical agents, without necessarily killing or removing all organisms.'' This change eliminates what appeared to be a disparity between the commonly accepted use of this term in scientific and industrial circles and the previous AG definition, wherein the latter described both ''disinfection'' and ''sterilization'' as being distinct from ''sanitization'' (with ''sanitization'' referring to cleaning procedures designed to lower the microbial content of equipment without necessarily achieving elimination of all microbial infectivity or viability).

Marine Toxins Identified for Evaluation Under Section 1758 of ECRA

In advance of the 2022 AG Plenary meeting, BIS identified the synthesis and collection of the four marine toxins addressed in this final rule for evaluation according to the criteria in Section 1758 of ECRA, pertaining to emerging and foundational technologies. These marine toxins have the potential (through either accidental or deliberate release) to cause casualties in humans or animals, degrade equipment, or damage crops or the environment. Because these toxins are now capable of being more easily isolated and purified due to novel synthesis methods and equipment, BIS determined that the absence of export controls on the toxins could be exploited for biological weapons purposes.

Consistent with the emerging and foundational technologies notice and comment requirements in Section 1758(a)(2)(C) of ECRA (50 U.S.C. 4817(a)(2)(C)), BIS published a proposed rule on May 23, 2022 (87 FR 31195), to provide the public with notice and the opportunity to comment on its proposal to amend ECCN 1C351 on the CCL to add these marine toxins to ECCN 1C351.

Comments Submitted in Response to BIS's May 23 Proposed Rule

BIS received comments from two respondents in response to the publication of its May 23 proposed rule. The comments from these respondents, together with BIS's responses, are described below.

Comment: One respondent indicated that clarification was needed concerning whether any of the four marine toxins proposed for control have an identified and specific biological synthesis pathway. In the respondent's opinion, if this were the case, then certain genes or gene clusters may become subject to control as a result of imposing controls on the toxin. If not, then the respondent thought it unlikely that any genes or gene clusters would become subject to control as a consequence of controlling the toxin.

BIS response: ECCN 1C353.a.3 controls any genetically modified organism that contains, or any genetic element that codes for, any toxins (or their subunits) controlled by 1C351.d. Genetically modified organisms and genetic elements are defined in *Technical Notes 1 and 2,* respectively, in ECCN 1C353. To the extent that any genes and gene clusters became subject to control under ECCN 1C353, as a result of the imposition of controls on the four marine toxins and their subunits under ECCN 1C351.d, they would be among the genetically modified organisms and genetic elements described in ECCN 1C353.a.3. BIS believes that the controls described in ECCN 1C353.a.3 are sufficiently clear

in this respect and, consequently, that no further clarification is necessary.

Comment: Another respondent submitted comments that addressed COVID vaccines and treatments within the context of the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights (TRIPS).

BIS response: These TRIPS-based comments were not responsive to the request for comments in BIS's May 23 proposed rule, as they were focused almost exclusively on the potential relationship between intellectual property rights and the availability of COVID vaccines within various countries. Furthermore, the comments did not specifically address whether and, if so, how export controls would impact the availability of such vaccines in those countries. Consequently, these comments are not addressed in this final rule.

Saving Clause

Shipments of items removed from eligibility for export, reexport or transfer (in-country) under a license exception or without a license (*i.e.,* under the designator ''NLR'') as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export, on January 17, 2023, pursuant to actual orders for export, reexport or transfer (in-country) to a foreign destination, may proceed to that destination under the previously applicable license exception or without a license (NLR) so long as they are exported, reexported or transferred (in-country) before March 20, 2023. Any such items not actually exported, reexported or transferred (in-country) before midnight, on March 20, 2023, require a license in accordance with this regulation.

''Deemed'' exports of ''technology'' and ''source code'' removed from eligibility for export under a license exception or without a license (under the designator ''NLR'') as a result of this regulatory action may continue to be made under the previously available license exception or

without a license (NLR) before March 20, 2023. Beginning at midnight on March 20, 2023, such ''technology'' and ''source code'' may no longer be released, without a license, to a foreign national subject to the ''deemed'' export controls in the EAR when a license would be required to the home country of the foreign national in accordance with this regulation.

Export Control Reform Act of 2018

The Export Control Reform Act of 2018 (ECRA), as amended, codified at 50 U.S.C. 4801–4852, serves as the authority under which BIS issues this final rule.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 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 and of reducing costs, harmonizing rules, and promoting flexibility. This final rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this final rule has been reviewed by the Office of Management and Budget (OMB).

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. Although this rule makes important changes to the EAR for items controlled for chemical/biological reasons, BIS believes that the overall increases in burdens and costs associated with the following information collections due to this rule will be minimal:

- OMB control number 0694–0088 (Simplified Network Application Processing System)—this collection includes license applications and carries a burden estimate of 29.4 minutes per manual or electronic submission;
- OMB Control Number 0694–0096 (Five Year Records Retention Period)—this collection includes recordkeeping requirements and carries a burden estimate of less than 1 minute per response;
- OMB Control Number 0607–0152 (Automated Export System (AES) Program)—this collection carries a burden hour estimate of 3 minutes per electronic submission and contains the Electronic Export Information (EEI) filing requirements under the Automated Export System (AES).

Additional information regarding these collections of information, including all background materials, can be found at *https://www.reginfo.gov/public/do/PRAMain* and using the search function to enter either the title of the collection or the OMB Control Number.

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

4. As stated in the preamble of this final rule, the amendments contained in this rule reflect decisions made at the Australia Group (AG) Plenary Meeting held in Paris, France, from July 4 through July 8, 2022. Therefore, pursuant to Section 1762 of the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. Sec. 4821), this action is exempt from the Administrative Procedure Act (APA) (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation and delay in effective date.

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this final rule by the APA or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 601 *et seq.*), are not applicable.

Consistent with the emerging and foundational technologies notice and comment requirements in Section 1758(a)(2)(C) of ECRA (50 U.S.C. 4817(a)(2)(C)), BIS published a proposed rule on May 23, 2022 (87 FR 31195), to provide the public with notice and the opportunity to comment on its proposal to amend ECCN 1C351 on the Commerce Control List (CCL) to add four marine toxins (*i.e.,* brevetoxins, gonyautoxins, nodularins and palytoxin) to ECCN 1C351, the synthesis and collection of which BIS had identified for evaluation according to the criteria in Section 1758 of the Export Control Reform Act of 2018 (ECRA) pertaining to emerging and foundational technologies. In addition, consistent with the Regulatory Flexibility Act, BIS prepared an initial regulatory flexibility analysis (IRFA) of the impact that the proposed rule, if adopted, would have on small businesses. The IRFA prepared by BIS requested comments on the analyses and conclusions contained therein, including the overall conclusion that the amendments in BIS's May 23 proposed rule would not have a significant economic impact on a substantial number of small entities.

BIS received comments from two respondents on its May 23 proposed rule—these comments and BIS's responses are summarized in the preamble of this final rule. BIS did not

receive any comments in response to the analyses and conclusions contained in the IRFA for its May 23 proposed rule. Accordingly, no regulatory flexibility analysis is required for this final rule, and none has been prepared.

List of Subjects

15 CFR Part 740

Administrative practice and procedure, Exports Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements, Terrorism.

For the reasons stated in the preamble, parts 740, 742, and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 740—LICENSE EXCEPTIONS

■ 1. The authority citation for part 740 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 7201 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 2. Section 740.20 is amended by revising paragraph (b)(2)(v) and paragraph (b)(2)(vi) introductory text to read as follows:

§ 740.20 License Exception Strategic Trade Authorization (STA).

* * * * *

(b) * * *

(2) * * *

(v) License Exception STA may not be used for any item controlled by ECCN 1C351.a, .b, .c, .d.14, .d.15 or .e, ECCNs 1C353, 1C354, 1E001 (*i.e.,* for technology, as specified in ECCN 1E001, for items controlled by ECCN 1C351.a, .b, .c, .d.14, .d.15 or .e or ECCNs 1C353 or 1C354) or ECCN 1E351.

(vi) Toxins controlled by ECCN 1C351.d.1 through 1C351.d.13 and 1C351.d.16 through 1C351.d.21 are authorized under License Exception STA to destinations indicated in Country Group A:5 (See supplement no. 1 to this part 740), subject to the following limits. For purposes of this paragraph (b)(2)(vi), all such toxins that are sent from one exporter, reexporter or transferor to a single end-user, on the same day, constitute one shipment.

* * * * *

PART 742—CONTROL POLICY—CCL BASED CONTROLS

■ 3. The authority citation for part 742 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320; Notice of November 10, 2021, 86 FR 62891 (November 12, 2021).

■ 4. Section 742.18 is amended by revising paragraph (a)(1), paragraph (b)(1)(i) introductory text, and paragraphs (b)(1)(ii) and (iii) to read as follows:

§ 742.18 Chemical Weapons Convention (CWC or Convention).

* * * * *

(a) * * *

(1) Schedule 1 chemicals and mixtures controlled under ECCN 1C351. A license is required for CW reasons to export or reexport Schedule 1 chemicals controlled under ECCN 1C351.d.14 or .d.15 to all destinations including Canada. CW applies to 1C351.d.14 for ricin in the form of Ricinus Communis AgglutininII (RCA_{II}), which is also known as ricin D or Ricinus Communis LectinIII (RCL_{III}), and Ricinus Communis LectinIV (RCL_{IV}), which is also known as ricin E. CW applies to 1C351.d.15 for saxitoxin identified by C.A.S. #35523–89–8. (Note that the advance notification procedures and annual reporting requirements described in § 745.1 of the EAR also apply to exports of Schedule 1 chemicals.)

* * * * *

(b) * * *

(1) * * *

(i) *Exports to States Parties to the CWC.* Applications to export Schedule 1 Chemicals controlled under ECCN 1C351.d.14 or .d.15 to States Parties to the CWC (destinations listed in supplement no. 2 to part 745 of the EAR) generally will be denied, unless all of the following conditions are met:

* * * * *

(ii) *Exports to States not party to the CWC.* Applications to export Schedule 1 chemicals controlled under ECCN 1C351.d.14 or .d.15 to States not Party to the CWC (destinations not listed in supplement no. 2 to part 745 of the EAR) generally will be denied, consistent with U.S. obligations under the CWC to prohibit exports of these chemicals to States not Party to the CWC.

(iii) *Reexports.* Applications to reexport Schedule 1 chemicals controlled under ECCN 1C351.d.14 or .d.15 generally will be denied to all destinations (including both States Parties to the CWC and States not Party to the CWC).

* * * * *

PART 774—THE COMMERCE CONTROL LIST

■ 5. The authority citation for part 774 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

■ 6. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1, revise ECCNs 1C350, 1C351, 1C353, 1C354, 1C991, and 2B352 to read as follows:

Supplement No. 1 to Part 774—The Commerce Control List

* * * * *

1C350 Chemicals that may be used as precursors for toxic chemical agents (see List of Items Controlled).

License Requirements

Reason for Control: CB, CW, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
CB applies to entire entry.	CB Column 2.

CW applies to 1C350.b and .c. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CW reasons. A license is required, for CW reasons, to export or reexport Schedule 2 chemicals and mixtures identified in 1C350.b to States not Party to the CWC (destinations not listed in Supplement No. 2 to part 745 of the EAR). A license is required, for CW reasons, to export Schedule 3 chemicals and mixtures identified in 1C350.c to States not Party to the CWC, unless an End-Use Certificate issued by the government of the importing country has been obtained by the exporter prior to export. A license is required, for CW reasons, to reexport Schedule 3 chemicals and mixtures identified in 1C350.c from a State not Party to the CWC to any other State not Party to the CWC. (See § 742.18 of the EAR for license requirements and policies for toxic and precursor chemicals controlled for CW reasons. See § 745.2 of the EAR for End-Use Certificate requirements that apply to

exports of Schedule 3 chemicals to countries not listed in Supplement No. 2 to part 745 of the EAR.)

AT applies to entire entry. The Commerce Country Chart is not designed to determine licensing requirements for items controlled for AT reasons in 1C350. A license is required, for AT reasons, to export or reexport items controlled by 1C350 to a country in Country Group E:1 of Supplement No. 1 to part 740 of the EAR. (See part 742 of the EAR for additional information on the AT controls that apply to Iran, North Korea, and Syria. See part 746 of the EAR for additional information on sanctions that apply to Iran, North Korea, and Syria.)

License Requirement Notes

1. SAMPLE SHIPMENTS: Subject to the following requirements and restrictions, a license is not required for sample shipments when the cumulative total of these shipments does not exceed a 55-gallon container or 200 kg of a single chemical to any one consignee during a calendar year. A consignee that receives a sample shipment under this exclusion may not resell, transfer, or reexport the sample shipment, but may use the sample shipment for any other legal purpose unrelated to chemical weapons.

a. Chemicals Not Eligible

A. [Reserved]

B. CWC Schedule 2 chemicals (States not Party to the CWC). No CWC Schedule 2 chemical or mixture identified in 1C350.b is eligible for sample shipment to States not Party to the CWC (destinations not listed in Supplement No. 2 to part 745 of the EAR) without a license.

b. Countries Not Eligible: Countries in Country Group E:1 of Supplement No. 1 to part 740 of the EAR are not eligible to receive sample shipments of any chemicals controlled by this ECCN without a license.

c. Sample shipments that require an End-Use Certificate for CW reasons: No CWC Schedule 3 chemical or mixture identified in 1C350.c is eligible for sample shipment to States not Party to the CWC (destinations not listed in Supplement No. 2 to part 745 of the EAR) without a license, unless an End-Use Certificate issued by the government of the importing country is obtained by the exporter prior to export (see § 745.2 of the EAR for End-Use Certificate requirements).

d. Sample shipments that require a license for reasons set forth elsewhere in the EAR: Sample shipments, as described in this Note 1, may require a license for reasons set forth elsewhere in the EAR. See, in particular, the end-use/end-user restrictions in part 744 of the EAR, and the restrictions that apply to embargoed countries in part 746 of the EAR.

e. Annual report requirement. The exporter is required to submit an annual written report for shipments of samples made under this Note 1. The report must be on company letterhead stationery (titled ''Report of Sample Shipments of Chemical Precursors'' at the top of the first page) and identify the chemical(s), Chemical Abstract Service Registry (C.A.S.) number(s), quantity(ies), the ultimate consignee's name and address, and the date of export for all sample shipments that were made during the previous calendar year. The report must be submitted no later than February 28 of the year following the calendar year in which the sample shipments were made, to: U.S. Department of Commerce, Bureau of Industry and Security, 14th Street and Pennsylvania Ave. NW, Room 2099B, Washington, DC 20230, Attn: ''Report of Sample Shipments of Chemical Precursors.''

2. MIXTURES:

a. Mixtures that contain precursor chemicals identified in ECCN 1C350, in concentrations that are below the levels indicated in 1C350.b through .d, are controlled by ECCN 1C395 or 1C995 and are subject to the licensing requirements specified in those ECCNs.

b. A license is not required under this ECCN for a mixture, when the controlled chemical in the mixture is a normal ingredient in consumer goods packaged for retail sale for personal use. Such consumer goods are designated EAR99. However, a license may be required for reasons set forth elsewhere in the EAR.

Note to Mixtures: *Calculation of concentrations of AG-controlled chemicals:*

a. Exclusion. No chemical may be added to the mixture (solution) for the sole purpose of circumventing the Export Administration Regulations;

b. Percent Weight Calculation. When calculating the percentage, by weight, of ingredients in a chemical mixture, include all ingredients of the mixture, including those that act as solvents.

3. COMPOUNDS. Compounds created with any chemicals identified in this ECCN 1C350 may be shipped NLR (No License Required), without obtaining an End-Use Certificate, unless those compounds are also identified in this entry or require a license for reasons set forth elsewhere in the EAR.

4. TESTING KITS: Certain medical, analytical, diagnostic, and food testing kits containing small quantities of chemicals identified in this ECCN 1C350, are excluded from the scope of this ECCN and are controlled under ECCN 1C395 or 1C995. (Note that replacement reagents for such kits are controlled by this ECCN 1C350 if the reagents contain one or more of the precursor chemicals identified in 1C350 in concentrations equal to or greater than the control levels for mixtures indicated in 1C350.)

Technical Notes:

1. For purposes of this entry, a ''mixture'' is defined as a solid, liquid or gaseous product made up of two or more ingredients that do not react together under normal storage conditions.

2. The scope of this control applicable to Hydrogen Fluoride (see 1C350.d.14 in the List of Items Controlled) includes its liquid, gaseous, and aqueous phases, and hydrates.

3. Precursor chemicals in ECCN 1C350 are listed by name, Chemical Abstract Service (CAS) number and CWC Schedule (where applicable). Precursor chemicals of the same structural formula (e.g., hydrates, isotopically-labeled forms or all possible stereoisomers) are controlled by ECCN 1C350, regardless of name or CAS number. CAS numbers are shown to assist in identifying whether a particular precursor chemical or mixture is controlled under ECCN 1C350, irrespective of nomenclature. However, CAS numbers cannot be used as unique identifiers in all situations because some forms of the listed precursor chemical have different CAS numbers, and mixtures containing a precursor chemical listed in ECCN 1C350 may also have different CAS numbers.

List Based License Exceptions (See Part 740 for a Description of all License Exceptions)

LVS: N/A

GBS: N/A

List of Items Controlled

Related Controls: See USML Category XIV(c) for related chemicals ''subject to the ITAR'' (see 22 CFR parts 120 through 130).

Related Definitions: See § 770.2(k) of the EAR for synonyms for the chemicals listed in this entry.

Items:

a. [Reserved]

b. Australia Group-controlled precursor chemicals also identified as Schedule 2 chemicals under the CWC, as follows, and mixtures in which at least one of the following chemicals constitutes 30 percent or more of the weight of the mixture:

b.1. (C.A.S. #7784–34–1) Arsenic trichloride;

b.2. (C.A.S. #76–93–7) Benzilic acid;

b.3. (C.A.S. #78–38–6) Diethyl ethylphosphonate;

b.4. (C.A.S. #683–08–9) Diethyl methylphosphonate;

b.5. (C.A.S. #15715–41–0) Diethyl methylphosphonite;

b.6. (C.A.S. #2404–03–7) Diethyl-N,N-dimethylphosphoroamidate;

b.7. (C.A.S. #41480–75–5) N,N-Diisopropylaminoethanethiol hydrochloride;

b.8. (C.A.S. #5842–07–9) N,N-Diisopropyl-beta-aminoethane thiol;

b.9. (C.A.S. #96–80–0) N,N-Diisopropyl-beta-aminoethanol;

b.10. (C.A.S. #96–79–7), N,N-Diisopropyl-beta-aminoethyl chloride;

b.11. (C.A.S. #4261–68–1) N,N-Diisopropyl-beta-aminoethyl chloride hydrochloride;

b.12. (C.A.S. #6163–75–3) Dimethyl ethylphosphonate;

b.13. (C.A.S. #756–79–6) Dimethyl methylphosphonate;

b.14. (C.A.S. #677–43–0) N,N-dimethylamino-phosphoryl dichloride;

b.15. (C.A.S. #1498–40–4) Ethyl phosphonous dichloride [Ethyl phosphinyl dichloride];

b.16. (C.A.S. #430–78–4) Ethyl phosphonus difluoride [Ethyl phosphinyl difluoride];

b.17. (C.A.S. #1066–50–8) Ethyl phosphonyl dichloride;

b.18. (C.A.S. #993–13–5) Methylphosphonic acid;

b.19. (C.A.S. #676–98–2) Methylphosphonothioic dichloride.

b.20. (C.A.S. #464–07–3) Pinacolyl alcohol;

b.21. (C.A.S. #1619–34–7) 3-Quinuclidinol;

b.22. (C.A.S. #111–48–8) Thiodiglycol.

c. Australia Group-controlled precursor chemicals also identified as Schedule 3 chemicals under the CWC, as follows, and mixtures in which at least one of the following chemicals constitutes 30 percent or more of the weight of the mixture:

c.1. (C.A.S. #762–04–9) Diethyl phosphite;
c.2. (C.A.S. #868–85–9) Dimethyl phosphite (dimethyl hydrogen phosphite);
c.3. (C.A.S. #139–87–7) Ethyldiethanolamine;
c.4. (C.A.S. #10025–87–3) Phosphorus oxychloride;
c.5. (C.A.S. #10026–13–8) Phosphorus pentachloride;
c.6. (C.A.S. #7719–12–2) Phosphorus trichloride;
c.7. (C.A.S. #10545–99–0) Sulfur dichloride;
c.8. (C.A.S. #10025–67–9) Sulfur monochloride;
c.9. (C.A.S. #7719–09–7) Thionyl chloride;
c.10. (C.A.S. #102–71–6) Triethanolamine;
c.11. (C.A.S. #122–52–1) Triethyl phosphite;
c.12. (C.A.S. #121–45–9) Trimethyl phosphite.

d. Other Australia Group-controlled precursor chemicals not also identified as Schedule 1, 2, or 3 chemicals under the CWC, as follows, and mixtures in which at least one of the following chemicals constitutes 30 percent or more of the weight of the mixture:
d.1. (C.A.S. #1341–49–7) Ammonium hydrogen fluoride;
d.2. (C.A.S. #107–07–3) 2-Chloroethanol;
d.3. (C.A.S. #109–89–7) Diethylamine;
d.4. (C.A.S. #100–37–8) N,N-Diethylaminoethanol;
d.5. (C.A.S. #589–57–1) Diethyl chlorophosphite;
d.6. (C.A.S. #298–06–6) O,O-Diethyl phosphorodithioate;
d.7. (C.A.S. #2465–65–8) O,O-Diethyl phosphorothioate;
d.8. (C.A.S. #108–18–9) Di-isopropylamine;
d.9. (C.A.S. #124–40–3) Dimethylamine;
d.10. (C.A.S. #506–59–2) Dimethylamine hydrochloride;
d.11. (C.A.S. #762–77–6) Ethyl chlorofluorophosphate;
d.12. (C.A.S. #1498–51–7) Ethyl dichlorophosphate;
d.13. (C.A.S. #460–52–6) Ethyl difluorophosphate;
d.14. (C.A.S. #7664–39–3) Hydrogen fluoride;
d.15. (C.A.S. #3554–74–3) 3-Hydroxyl-1-methylpiperidine;
d.16. (C.A.S. #76–89–1) Methyl benzilate;
d.17. (C.A.S. #754–01–8) Methyl chlorofluorophosphate;
d.18. (C.A.S. #677–24–7) Methyl dichlorophosphate;
d.19. (C.A.S. #22382–13–4) Methyl difluorophosphate;
d.20. (C.A.S. #14277–06–6) N,N Diethylacetamidine;
d.21. (C.A.S. #53510–30–8) N,N-Diethylbutanamidine;
d.22. (C.A.S. #90324–67–7) N,N-Diethylformamidine;
d.23. (C.A.S. #1342789–47–2) N,N Diethylisobutanamidine;
d.24. (C.A.S. #84764–73–8) N,N-Diethylpropanamidine;
d.25. (C.A.S. #1315467–17–4) N,N-Diisopropylbutanamidine;
d.26. (C.A.S. #857522–08–8) N,N-Diisopropylformamidine;
d.27. (C.A.S. #2909–14–0) N,N-Dimethylacetamidine;
d.28. (C.A.S. #1340437–35–5) N,N-Dimethylbutanamidine;
d.29. (C.A.S. #44205–42–7) N,N-Dimethylformamidine;
d.30. (C.A.S. #321881–25–8) N,N-Dimethylisobutanamidine;
d.31. (C.A.S. #56776–14–8) N,N-Dimethylpropanamidine;
d.32. (C.A.S. #1339586–99–0) N,N-Dipropylacetamidine;
d.33. C.A.S. #1342422–35–8) N,N-Dipropylbutanamidine;
d.34. (C.A.S. #48044–20–8) N,N-Dipropylformamidine;
d.35. (C.A.S. #1342700–45–1) N,N-Dipropylisobutanamidine;
d.36. (C.A.S. #1341496–89–6) N,N-Dipropylpropanamidine;
d.37. (C.A.S. #1314–80–3) Phosphorus pentasulfide;
d.38. (C.A.S. #75–97–8) Pinacolone;
d.39. (C.A.S. #7789–29–9) Potassium bifluoride;
d.40. (C.A.S. #151–50–8) Potassium cyanide;
d.41. (C.A.S. #7789–23–3) Potassium fluoride;
d.42. (C.A.S. #3731–38–2) 3-Quinuclidone;
d.43. (C.A.S. #1333–83–1) Sodium bifluoride;
d.44. (C.A.S. #143–33–9) Sodium cyanide;
d.45. (C.A.S. #7681–49–4) Sodium fluoride;
d.46. (C.A.S. #16893–85–9) Sodium hexafluorosilicate;
d.47. (C.A.S. #1313–82–2) Sodium sulfide;
d.48. (C.A.S. #637–39–8) Triethanolamine hydrochloride;
d.49. (C.A.S. #116–17–6) Tri-isopropyl phosphite.

1C351 Human and animal pathogens and ''toxins,'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: CB, CW, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
CB applies to entire entry.	CB Column 1.

CW applies to 1C351.d.14 and .d.15 and a license is required for CW reasons for all destinations, including Canada, as follows: CW applies to 1C351.d.14 for ricin in the form of (1) Ricinus communis AgglutininII (RCA_{II}), also known as ricin D or Ricinus Communis LectinIII (RCL_{III}) and (2) Ricinus communis LectinIV (RCL_{IV}), also known as ricin E. CW applies to 1C351.d.15 for saxitoxin identified by C.A.S. #35523–89–8. See § 742.18 of the EAR for licensing information pertaining to chemicals subject to restriction pursuant to the Chemical Weapons Convention (CWC). The Commerce Country Chart is not designed to determine licensing requirements for items controlled for CW reasons.

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
AT applies to entire entry.	AT Column 1.

License Requirement Notes: *1. All vaccines and 'immunotoxins' are excluded from the scope of this entry. Certain medical products and diagnostic and food testing kits that contain biological toxins controlled under 1C351.d, with the exception of toxins controlled for CW reasons under 1C351.d.14 or .d.15, are excluded from the scope of this entry. Vaccines, 'immunotoxins,' certain medical products, and diagnostic and food testing kits excluded from the scope of this entry are controlled under ECCN 1C991.*

2. For the purposes of this entry, only saxitoxin is controlled under 1C351.d.15; other members of the paralytic shellfish poison family (e.g., neosaxitoxin) are designated EAR99.

3. Clostridium perfringens strains, other than the epsilon toxin-producing strains of Clostridium perfringens described in 1C351.c.12, are excluded from the scope of this entry, since they may be used as positive control cultures for food testing and quality control.

4. Unless specified elsewhere in this ECCN 1C351 (e.g., in License Requirement Notes 1–3), this ECCN controls all biological agents and ''toxins,'' regardless of quantity or attenuation, that are identified in the List of Items Controlled for this ECCN, including small quantities or attenuated strains of select biological agents or ''toxins'' that are excluded from the lists of select biological agents or ''toxins'' by the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture (USDA), or the Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services (HHS), in accordance with their regulations in 9 CFR part 121 and 42 CFR part 73, respectively.

5. Biological agents and pathogens are controlled under this ECCN 1C351 when they are an isolated live culture of a pathogen agent, or a preparation of a toxin agent that has been isolated or extracted from any source or material, including living material that has been deliberately inoculated or contaminated with the agent. Isolated live cultures of a pathogen agent include live cultures in dormant form or in dried preparations, whether the agent is natural, enhanced or modified.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

Special Conditions for STA

STA: (1) Paragraph (c)(1) of License Exception STA (§ 740.20(c)(1)) may be used for items in 1C351.d.1 through 1C351.d.13 and 1C351.d.16 through 1C351.d.21. See § 740.20(b)(2)(vi) for restrictions on the quantity of any one toxin that may be exported in a single shipment and the number of shipments that may be made to any one end user in a single calendar year. Also see the Automated Export System (AES) requirements in § 758.1(b)(4) of the EAR. (2) Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any items in 1C351.

List of Items Controlled

Related Controls: (1) Certain forms of ricin and saxitoxin in 1C351.d.14 and .d.15 are CWC Schedule 1 chemicals (see § 742.18 of the EAR). The U.S. Government must provide advance notification and annual reports to the OPCW of all exports of Schedule 1 chemicals. See § 745.1 of the EAR for notification procedures. See 22 CFR part 121, Category XIV and § 121.7 for CWC Schedule 1 chemicals that are ''subject to the ITAR.'' (2) The Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, and the Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services, maintain controls on the possession, use, and transfer within the United States of certain items controlled by this ECCN (for APHIS, see 7 CFR 331.3(b), 9 CFR 121.3(b), and 9 CFR 121.4(b); for CDC, see 42 CFR 73.3(b) and 42 CFR 73.4(b)). (3) See 22 CFR part 121, Category XIV(b), for modified biological agents and biologically derived substances that are ''subject to the ITAR.''

Related Definitions: For the purposes of this entry, 'immunotoxins' are monoclonal antibodies linked to a toxin with the intention of destroying a specific target cell while leaving adjacent cells intact.

Items:

a. Viruses identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows:

a.1. African horse sickness virus;

a.2. African swine fever virus;

a.3. Andes virus;

a.4. Avian influenza (AI) viruses identified as having high pathogenicity (HP), as follows:

a.4.a. AI viruses that have an intravenous pathogenicity index (IVPI) in 6-week-old chickens greater than 1.2; *or*

a.4.b. AI viruses that cause at least 75% mortality in 4- to 8-week-old chickens infected intravenously.

Note: *Avian influenza (AI) viruses of the H5 or H7 subtype that do not have either of the characteristics described in 1C351.a.4 (specifically, 1C351.a.4.a or .a.4.b) should be sequenced to determine whether multiple basic amino acids are present at the cleavage site of the haemagglutinin molecule (HA0). If the amino acid motif is similar to that observed for other HPAI isolates, then the isolate being tested should be considered as HPAI and the virus is controlled under 1C351.a.4.*

a.5. Bluetongue virus;

a.6. Chapare virus;

a.7. Chikungunya virus;

a.8. Choclo virus;

a.9. Classical swine fever virus (Hog cholera virus);

a.10. Crimean-Congo hemorrhagic fever virus;

a.11. Dobrava-Belgrade virus;

a.12. Eastern equine encephalitis virus;

a.13. Ebolavirus (includes all members of the Ebolavirus genus);

a.14. Foot-and-mouth disease virus;

a.15. Goatpox virus;

a.16. Guanarito virus;

a.17. Hantaan virus;

a.18. Hendra virus (Equine morbillivirus);

a.19. Japanese encephalitis virus;

a.20. Junin virus;

a.21. Kyasanur Forest disease virus;

a.22. Laguna Negra virus;

a.23. Lassa virus;

a.24. Louping ill virus;

a.25. Lujo virus;

a.26. Lumpy skin disease virus;

a.27. Lymphocytic choriomeningitis virus;

a.28. Machupo virus;

a.29. Marburgvirus (includes all members of the Marburgvirus genus);

a.30. Middle East respiratory syndrome-related coronavirus (MERS-related coronavirus);

a.31. Monkeypox virus;

a.32. Murray Valley encephalitis virus;

a.33. Newcastle disease virus;

a.34. Nipah virus;

a.35. Omsk hemorrhagic fever virus;

a.36. Oropouche virus;

a.37. Peste-des-petits ruminants virus;

a.38. Porcine Teschovirus;

a.39. Powassan virus;

a.40. Rabies virus and all other members of the Lyssavirus genus;

a.41. Reconstructed 1918 influenza virus;

Technical Note: *1C351.a.41 includes reconstructed replication competent forms of the 1918 pandemic influenza virus containing any portion of the coding regions of all eight gene segments.*

a.42. Rift Valley fever virus;

a.43. Rinderpest virus;

a.44. Rocio virus;

a.45. Sabia virus;

a.46. Seoul virus;

a.47. Severe acute respiratory syndrome-related coronavirus (SARS-related coronavirus);

a.48. Sheeppox virus;

a.49. Sin Nombre virus;

a.50. St. Louis encephalitis virus;

a.51. Suid herpesvirus 1 (Pseudorabies virus; Aujeszky's disease);

a.52. Swine vesicular disease virus;

a.53. Tick-borne encephalitis virus (Far Eastern subtype, formerly known as Russian Spring–Summer encephalitis virus—see 1C351.b.3 for Siberian subtype);

a.54. Variola virus;

a.55. Venezuelan equine encephalitis virus;

a.56. Vesicular stomatitis virus;

a.57. Western equine encephalitis virus; *or*

a.58. Yellow fever virus.

b. Viruses identified on the APHIS/CDC ''select agents'' lists (see Related Controls paragraph #2 for this ECCN), but not identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows:

b.1. [Reserved];

b.2. [Reserved]; *or*

b.3. Tick-borne encephalitis virus (Siberian subtype, formerly West Siberian virus—see 1C351.a.53 for Far Eastern subtype).

c. Bacteria identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows:

c.1. Bacillus anthracis;

c.2. Brucella abortus;

c.3. Brucella melitensis;

c.4. Brucella suis;

c.5. Burkholderia mallei (Pseudomonas mallei);

c.6. Burkholderia pseudomallei (Pseudomonas pseudomallei);

c.7. Chlamydia psittaci (Chlamydophila psittaci);

c.8. Clostriduim argentinense (formerly known as Clostridium botulinum Type G), botulinum neurotoxin producing strains;

c.9. Clostridium baratii, botulinum neurotoxin producing strains;

c.10. Clostridium botulinum;

c.11. Clostridium butyricum, botulinum neurotoxin producing strains;

c.12. Clostridium perfringens, epsilon toxin producing types;

c.13. Coxiella burnetii;

c.14. Francisella tularensis;

c.15. Mycoplasma capricolum subspecies capripneumoniae (''strain F38'');

c.16. Mycoplasma mycoides subspecies mycoides SC (small colony) (a.k.a. contagious bovine pleuropneumonia);

c.17. Rickettsia prowazekii;

c.18. Salmonella enterica subspecies enterica serovar Typhi (Salmonella typhi);

c.19. Shiga toxin producing Escherichia coli (STEC) of serogroups O26, O45, O103, O104, O111, O121, O145, O157, and other shiga toxin producing serogroups;

Note: *Shiga toxin producing Escherichia coli (STEC) includes, inter alia, enterohaemorrhagic E. coli (EHEC), verotoxin producing E. coli (VTEC) or verocytotoxin producing E. coli (VTEC).*

c.20. Shigella dysenteriae;

c.21. Vibrio cholerae; *or*

c.22. Yersinia pestis.

d. ''Toxins'' identified on the Australia Group (AG) ''List of Human and Animal Pathogens and Toxins for Export Control,'' as follows, or their subunits:

d.1. Abrin;

d.2. Aflatoxins;

d.3. Botulinum toxins;

d.4. Brevetoxins;

d.5. Clostridium perfringens alpha, beta 1, beta 2, epsilon and iota toxins;

d.6. Conotoxins;

d.7. Diacetoxyscirpenol;

d.8. Gonyautoxins;

d.9. HT–2 toxin;

d.10. Microcystins (Cyanginosins);

d.11. Modeccin;

d.12. Nodularins;

d.13. Palytoxin;

d.14. Ricin;

d.15. Saxitoxin;

d.16. Shiga toxins (shiga-like toxins, verotoxins, and verocytotoxins);

d.17. Staphylococcus aureus enterotoxins, hemolysin alpha toxin, and toxic shock syndrome toxin (formerly known as Staphylococcus enterotoxin F);

d.18. T–2 toxin;

d.19. Tetrodotoxin;

d.20. Viscumin (Viscum album lectin 1); *or*

d.21. Volkensin.

e. ''Fungi'', as follows:

e.1. Coccidioides immitis; *or*

e.2. Coccidioides posadasii.

* * * * *

1C353 Genetic elements and genetically modified organisms, as follows (see List of Items Controlled).

License Requirements

Reason for Control: CB, AT

Control(s)	Country chart (See Supp. No. 1 to part 738)
CB applies to entire entry.	CB Column 1.
AT applies to entire entry.	AT Column 1.

License Requirements Notes:

1. Vaccines that contain genetic elements or genetically modified organisms identified in this ECCN are controlled by ECCN 1C991.

2. Unless specified elsewhere in this ECCN 1C353 (*e.g.,* in License Requirement Note 1), this ECCN controls genetic elements or genetically modified organisms for all biological agents and ''toxins,'' regardless of quantity or attenuation, that are identified in the List of Items Controlled for this ECCN, including genetic elements or genetically modified organisms for attenuated strains of select biological agents or ''toxins'' that are excluded from the lists of select biological agents or ''toxins'' by the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, or the Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services, in accordance with the APHIS regulations in 7 CFR part 331 and 9 CFR part 121 and the CDC regulations in 42 CFR part 73.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

List of Items Controlled

Related Controls: (1) The Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, and the Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services, maintain controls on the possession, use, and transfer within the United States of certain items controlled by this ECCN, including (but not limited to) certain genetic elements, recombinant nucleic acids, and recombinant organisms associated with the agents or toxins in ECCN 1C351 or 1C354 (for APHIS, see 7 CFR 331.3(c), 9 CFR 121.3(c), and 9 CFR 121.4(c); for CDC, see 42 CFR 73.3(c) and 42 CFR 73.4(c)). (2) See 22 CFR part 121, Category XIV(b), for modified biological agents and biologically derived substances that are subject to the export licensing jurisdiction of the U.S. Department of State, Directorate of Defense Trade Controls.
Related Definition: N/A
Items:

a. Any genetically modified organism that contains, or any genetic element that codes for, any of the following:

a.1. Any gene, genes, translated product or translated products specific to any virus controlled by 1C351.a or .b or 1C354.c;

a.2. Any gene or genes specific to any bacterium controlled by 1C351.c or 1C354.a, or any fungus controlled by 1C351.e or 1C354.b, and which;

a.2.a. In itself or through its transcribed or translated products represents a significant hazard to human, animal or plant health; *or*

a.2.b. Could endow or enhance pathogenicity; *or*

a.3. Any toxins, or their subunits, controlled by 1C351.d.

b. [Reserved].

Technical Notes:

1. Genetically modified organisms include organisms in which the nucleic acid sequences have been created or altered by deliberate molecular manipulation.

2. ''Genetic elements'' include, inter alia, chromosomes, genomes, plasmids, transposons, vectors, and inactivated organisms containing recoverable nucleic acid fragments, whether genetically modified or unmodified, or chemically synthesized in whole or in part. For the purposes of this ECCN 1C353, nucleic acids from an inactivated organism, virus, or sample are considered to be 'recoverable' if the inactivation and preparation of the material is intended or known to facilitate isolation, purification, amplification, detection, or identification of nucleic acids.

3. This ECCN does not control nucleic acid sequences of shiga toxin producing Escherichia coli of serogroups O26, O45, O103, O104, O111, O121, O145, O157, and other shiga toxin producing serogroups, other than those genetic elements coding for shiga toxin, or for its subunits.

4. 'Endow or enhance pathogenicity' is defined as when the insertion or integration of the nucleic acid sequence or sequences is/are likely to enable or increase a recipient organism's ability to be used to deliberately cause disease or death. This might include alterations to, *inter alia:* virulence, transmissibility, stability, route of infection, host range, reproducibility, ability to evade or suppress host immunity, resistance to medical countermeasures, or detectability.

1C354 Plant pathogens, as follows (see List of Items Controlled).

License Requirements

Reason for Control: CB, AT

Control(s)	Country chart (See Supp. No. 1 to part 738)
CB applies to entire entry.	CB Column 1.
AT applies to entire entry.	AT Column 1.

License Requirements Notes

1. All vaccines are excluded from the scope of this ECCN. See ECCN 1C991 for vaccines.

2. Unless specified elsewhere in this ECCN 1C354 (e.g., in License Requirement Note 1), this ECCN controls all biological agents, regardless of quantity or attenuation, that are identified in the List of Items Controlled for this ECCN, including small quantities or attenuated strains of select biological agents that are excluded from the list of PPQ select agents and ''toxins'' by the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, in accordance with their regulations in 7 CFR part 331.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

List of Items Controlled

Related Controls: (1) The Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, maintains controls on the possession, use, and transfer within the United States of certain items controlled by this ECCN (see 7 CFR 331.3(c), 9 CFR 121.3(c), and 9 CFR 121.4(c)). (2) See 22 CFR part 121, Category XIV(b), for modified biological agents and biologically derived substances that are subject to the export licensing jurisdiction of the U.S. Department of State, Directorate of Defense Trade Controls.
Related Definitions: N/A
Items:

a. Bacteria, as follows:

a.1. *Xanthomonas albilineans;*

a.2. *Xanthomonas citri pv. citri (Xanthomonas axonopodis* pv. *citri, Xanthomonas campestris* pv. *citri);*

a.3. *Xanthomonas oryzae* [this species of proteobacteria is identified on the APHIS ''select agents'' list (see Related Controls paragraph for this ECCN), but only the pathovar *Xanthomonas oryzae* pv. *oryzae* (syn. *Pseudomonas campestris* pv. *oryzae*) is identified on the Australia Group (AG) ''List of Plant Pathogens for Export Control'']

a.4. *Clavibacter michiganensis* subsp. *sepedonicus* (*Clavibacter sepedonicus, Clavibacter michiganense* subsp. *sepedonicus, Corynebacterium michiganensis* subsp. *sepedonicum, Corynebacterium sepedonicum*);

a.5. *Ralstonia solanacearum,* race 3, biovar 2;

a.6. *Raythayibactor toxicus* [this bacterium is identified on the APHIS ''select agents'' list (see the Related Controls paragraph for this ECCN), but is not identified on the Australia Group (AG) ''List of Plant Pathogens for Export Control'']

b. Fungi, as follows:

b.1. *Bipolaris oryzae* (*Cochliobolus miyabeanus, Helminthosporium oryzae*);

b.2. *Colletotrichum kahawae* (*Colletotrichum coffeanum* var. *virulans*);

b.3. *Pseudocercospora ulei* (*Microcyclus ulei, Dothidella ulei*);

b.4. *Puccinnia graminis* ssp. *graminis* var. *graminis/Puccinia graminis* ssp. *graminis* var. *stakmanii* (*Puccinia graminis* [syn. *Puccinia graminis* f. sp. *tritici*]);

b.5. *Puccinia striiformis* (syn. *Puccinia glumarum*);

b.6. *Magnaporthe oryzae* (Pyricularia oryzae);

b.7. *Peronosclerospora philippinensis* (*Peronosclerospora sacchari*);

b.8. *Sclerophthora rayssiae* var. *zeae;*

b.9. *Synchytrium endobioticum;*

b.10. *Tilletia indica;*

b.11. *Thecaphora solani;*

b.12. *Phoma glycinicola* (formerly *Pyrenochaeta glycines*) [this fungus is identified on the APHIS ''select agents'' list (see the Related Controls paragraph for this ECCN), but is not identified on the Australia Group (AG) ''List of Plant Pathogens for Export Control'']

c. Viruses, as follows:

c.1. Andean potato latent virus (Potato Andean latent tymovirus);

c.2. Potato spindle tuber viroid.

* * * * *

1C991 Vaccines, immunotoxins, medical products, diagnostic and food testing kits, as follows (see List of Items Controlled).

License Requirements

Reason for Control: CB, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
CB applies to 1C991.c.	CB Column 3.
AT applies to entire entry.	AT Column 1.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

List of Items Controlled

Related Controls: (1) Medical products containing ricin or saxitoxin, as follows, are controlled for CW reasons under ECCN 1C351:

(a) Ricinus communis AgglutininII (RCA_{II}), also known as ricin D, or Ricinus Communis LectinIII (RCL_{III});

(b) Ricinus communis LectinIV (RCL_{IV}), also known as ricin E; *or*

(c) Saxitoxin identified by C.A.S. #35523–89–8.

(2) The export of a ''medical product'' that is an ''Investigational New Drug'' (IND), as defined in 21 CFR 312.3, is subject to certain U.S. Food and Drug Administration (FDA) requirements that are independent of the export requirements specified in this ECCN or elsewhere in the EAR. These FDA requirements are described in 21 CFR 312.110 and must be satisfied in addition to any requirements specified in the EAR.

(3) Also see 21 CFR 314.410 for FDA requirements concerning exports of new drugs and new drug substances.

Related Definitions: For the purpose of this entry, 'immunotoxins' are monoclonal antibodies linked to a toxin with the intention of destroying a specific target cell while leaving adjacent cells intact. For the purpose of this entry, 'medical products' are: (1) Pharmaceutical formulations designed for testing and human (or veterinary) administration in the treatment of medical conditions; (2) prepackaged for distribution as clinical or medical products; and (3) approved by the U.S. Food and Drug Administration either to be marketed as clinical or medical products or for use as an ''Investigational New Drug'' (IND) (see 21 CFR part 312). For the purpose of this entry, 'diagnostic and food testing kits' are specifically developed, packaged and marketed for diagnostic or public health purposes. Biological toxins in any other configuration, including bulk shipments, or for any other end-uses are controlled by ECCN 1C351. For the purpose of this entry, 'vaccine' is defined as a medicinal (or veterinary) product in a pharmaceutical formulation, approved by the U.S. Food and Drug Administration or the U.S. Department of Agriculture to be marketed as a medical (or veterinary) product or for use in clinical trials, that is intended to stimulate a protective immunological response in humans or animals in order to prevent disease in those to whom or to which it is administered.

Items:

Technical Note: *For purposes of the controls described in this ECCN, 'toxins' refers to those toxins, or their subunits, controlled under ECCN 1C351.d.*

a. Vaccines containing, or designed for use against, items controlled by ECCN 1C351, 1C353 or 1C354.

b. Immunotoxins containing toxins controlled by 1C351.d;

c. Medical products that contain any of the following:

c.1. Toxins controlled by ECCN 1C351.d (except for botulinum toxins controlled by ECCN 1C351.d.3, conotoxins controlled by ECCN 1C351.d.6, or items controlled for CW reasons under ECCN 1C351.d.14 or .d.15); *or*

c.2. Genetically modified organisms or genetic elements controlled by ECCN 1C353.a.3 (except for those that contain, or code for, botulinum toxins controlled by ECCN 1C351.d.3 or conotoxins controlled by ECCN 1C351.d.6);

d. Medical products not controlled by 1C991.c that contain any of the following:

d.1. Botulinum toxins controlled by ECCN 1C351.d.3;

d.2. Conotoxins controlled by ECCN 1C351.d.6; *or*

d.3. Genetically modified organisms or genetic elements controlled by ECCN 1C353.a.3 that contain, or code for, botulinum toxins controlled by ECCN 1C351.d.3 or conotoxins controlled by ECCN 1C351.d.6;

e. Diagnostic and food testing kits containing toxins controlled by ECCN 1C351.d (except for items controlled for CW reasons under ECCN 1C351.d.14 or .d.15).

* * * * *

2B352 Equipment Capable of Use in Handling Biological Materials, as Follows (See List of Items Controlled).

License Requirements

Reason for Control: CB, AT

Control(s)	*Country chart (See Supp. No. 1 to part 738)*
CB applies to entire entry.	CB Column 2.
AT applies to entire entry.	AT Column 1.

List Based License Exceptions (See Part 740 for a Description of All License Exceptions)

LVS: N/A
GBS: N/A

List of Items Controlled

Related Controls: See ECCNs 1A004 and 1A995 for protective equipment that is not covered by this entry. Also see ECCN 9A120 for controls on certain ''UAV'' systems designed or modified to dispense an aerosol and capable of carrying elements of a payload in the form of a particulate or liquid, other than fuel ''parts'' or ''components'' of such vehicles, of a volume greater than 20 liters.

Related Definitions: (1) ''Lighter than air vehicles''—balloons and airships that rely on hot air or on lighter-than-air gases, such as helium or hydrogen, for their lift. (2) ''UAVs''—Unmanned Aerial Vehicles. (3) ''VMD''—Volume Median Diameter.

Items:

a. Containment facilities and related equipment, as follows:

a.1. Complete containment facilities at P3 or P4 containment level.

Technical Note to 2B352.a.1: P3 or P4 (BL3, BL4, L3, L4) containment levels are as specified in the WHO Laboratory Biosafety Manual (3rd edition, Geneva, 2004).

a.2. Equipment designed for fixed installation in containment facilities specified in paragraph a.1 of this ECCN, as follows:

a.2.a. Double-door pass-through decontamination autoclaves;

a.2.b. Breathing air suit decontamination showers;

a.2.c. Mechanical-seal or inflatable-seal walkthrough doors.

b. Fermenters and components as follows:

b.1. Fermenters capable of cultivation of micro-organisms or of live cells for the production of viruses or toxins, without the propagation of aerosols, having a total internal volume of 20 liters or greater.

b.2. Components designed for such fermenters, as follows:

b.2.a. Cultivation chambers designed to be sterilized or disinfected in situ;

b.2.b. Cultivation chamber holding devices; *or*

b.2.c. Process control units capable of simultaneously monitoring and controlling two or more fermentation system parameters (*e.g.,* temperature, pH, nutrients, agitation, dissolved oxygen, air flow, foam control).

Technical Notes to 2B352.b:

1. Fermenters include bioreactors (including single-use (disposable) bioreactors), chemostats and continuous-flow systems.

2. Cultivation chamber holding devices controlled by 2B352.b.2.b include single-use cultivation chambers with rigid walls.

c. Centrifugal separators capable of the continuous separation of pathogenic microorganisms, without the propagation of aerosols, and having all of the following characteristics:

c.1. One or more sealing joints within the steam containment area;

c.2. A flow rate greater than 100 liters per hour;

c.3. ''Parts'' or ''components'' of polished stainless steel or titanium; *and*

c.4. Capable of in-situ steam sterilization in a closed state.

Technical Note to 2B352.c: Centrifugal separators include decanters.

d. Cross (tangential) flow filtration equipment and ''accessories'', as follows:

d.1. Cross (tangential) flow filtration equipment capable of separation of microorganisms, viruses, toxins or cell cultures having all of the following characteristics:

d.1.a. A total filtration area equal to or greater than 1 square meter (1 m^2); *and*

d.1.b. Having any of the following characteristics:

d.1.b.1. Capable of being sterilized or disinfected in-situ; *or*

d.1.b.2. Using disposable or single-use filtration ''parts'' or ''components''.

N.B.: 2B352.d.1 does not control reverse osmosis and hemodialysis equipment, as specified by the manufacturer.

d.2. Cross (tangential) flow filtration ''parts'' or ''components'' (*e.g.,* modules, elements, cassettes, cartridges, units or plates) with filtration area equal to or greater than 0.2 square meters (0.2 m^2) for each ''part'' or ''component'' and designed for use in cross (tangential) flow filtration equipment controlled by 2B352.d.1.

Technical Note: *In this ECCN, ''sterilized'' denotes the elimination of all viable microbes from the equipment through the use of either physical (e.g., steam) or chemical agents. ''Disinfected'' denotes a process to reduce the number of microorganisms, but not usually of bacterial spores, through the use of chemical agents, without necessarily killing or removing all organisms.*

e. Steam, gas or vapor sterilizable freeze-drying equipment with a condenser capacity of 10 kg of ice or greater in 24 hours (10 liters of water or greater in 24 hours) and less than 1000 kg of ice in 24 hours (less than 1,000 liters of water in 24 hours).

f. Spray-drying equipment capable of drying toxins or pathogenic microorganisms having all of the following characteristics:

f.1. A water evaporation capacity of ≥0.4 kg/h and ≤400 kg/h;

f.2. The ability to generate a typical mean product particle size of ≤10 micrometers with existing fittings or by minimal modification of the spray-dryer with atomization nozzles enabling generation of the required particle size; *and*

f.3. Capable of being sterilized or disinfected in situ.

g. Protective and containment equipment, as follows:

g.1. Protective full or half suits, or hoods dependent upon a tethered external air supply and operating under positive pressure.

Technical Note to 2B352.g.1: 2B352.g.1 does not control suits designed to be worn with self-contained breathing apparatus.

g.2. Biocontainment chambers, isolators, or biological safety cabinets having all of the following characteristics, for normal operation:

g.2.a. Fully enclosed workspace where the operator is separated from the work by a physical barrier;

g.2.b. Able to operate at negative pressure;

g.2.c. Means to safely manipulate items in the workspace; *and*

g.2.d. Supply and exhaust air to and from the workspace is high-efficiency particulate air (HEPA) filtered.

Note 1 to 2B352.g.2: 2B352.g.2 controls class III biosafety cabinets, as specified in the WHO Laboratory Biosafety Manual (3rd edition, Geneva, 2004) or constructed in accordance with national standards, regulations or guidance.

Note 2 to 2B352.g.2: 2B352.g.2 controls any isolator having all of the characteristics described in 2B352.g.2.a through g.2.d, regardless of its intended use and its designation, except for medical isolators ''specially designed'' for barrier nursing or transportation of infected patients.

h. Aerosol inhalation equipment designed for aerosol challenge testing with microorganisms, viruses or toxins, as follows:

h.1. Whole-body exposure chambers having a capacity of 1 cubic meter or greater;

h.2. Nose-only exposure apparatus utilizing directed aerosol flow and having a capacity for the exposure of 12 or more rodents, or two or more animals other than rodents, and closed animal restraint tubes designed for use with such apparatus.

i. Spraying or fogging systems and ''parts'' and ''components'' therefor, as follows:

i.1. Complete spraying or fogging systems, ''specially designed'' or modified for fitting to aircraft, ''lighter than air vehicles,'' or ''UAVs,'' capable of delivering, from a liquid suspension, an initial droplet ''VMD'' of less than 50 microns at a flow rate of greater than 2 liters per minute;

i.2. Spray booms or arrays of aerosol generating units, ''specially designed'' or modified for fitting to aircraft, ''lighter than air vehicles,'' or ''UAVs,'' capable of delivering, from a liquid suspension, an initial droplet ''VMD'' of less than 50 microns at a flow rate of greater than 2 liters per minute;

i.3. Aerosol generating units ''specially designed'' for fitting to the systems as specified in paragraphs i.1 and i.2 of this ECCN.

Technical Notes to 2B352.i:

1. Aerosol generating units are devices ''specially designed'' or modified for fitting to aircraft and include nozzles, rotary drum atomizers and similar devices.

2. This ECCN does not control spraying or fogging systems, ''parts'' and ''components,'' as specified in 2B352.i, that are demonstrated not to be capable of delivering biological agents in the form of infectious aerosols.

3. Droplet size for spray equipment or nozzles ''specially designed'' for use on aircraft or ''UAVs'' should be measured using either of the following methods (pending the adoption of internationally accepted standards):

a. Doppler laser method,

b. Forward laser diffraction method.

j. Nucleic acid assemblers and synthesizers that are both:

j.1 Partly or entirely automated; *and*

j.2. Designed to generate continuous nucleic acids greater than 1.5 kilobases in length with error rates less than 5% in a single run.

* * * * *

Thea D. Rozman Kendler,

Assistant Secretary, for Export Administration.

[FR Doc. 2023–00397 Filed 1–13–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOMELAND SECURITY

Customs and Border Protection

19 CFR Chapter I

Termination of Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Uganda

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Announcement of termination of arrival restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security to terminate arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda due to an outbreak of Ebola disease in Uganda. These restrictions directed such flights to only land at one of the United States airports where the United States Government had focused public health resources to implement enhanced public health measures.

DATES: The arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda are terminated as of 11:59 p.m. Eastern Standard Time on January 11, 2023.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations, U.S. Customs and Border Protection at 202–255–7018.

SUPPLEMENTARY INFORMATION:

Background

On October 12, 2022, the Secretary of Homeland Security announced arrival restrictions applicable to flights carrying persons who have recently traveled from, or were otherwise present within, Uganda, consistent with 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, in a **Federal Register** document titled ''Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Uganda'' (87 FR 61488). For purposes of the October 2022 arrival restrictions, a person recently traveled from Uganda if that person departed from, or was otherwise present within, Uganda within 21 days of the date of the person's entry or attempted entry into the United States.

For the reasons set forth below, the Secretary has decided to terminate the arrival restrictions applicable to flights

carrying persons who have recently traveled from, or were otherwise present within, Uganda. These restrictions funnel relevant arriving air passengers to one of five designated airports of entry where the U.S. is implementing enhanced public health measures. Since November 27, 2022, there have been no new confirmed Ebola disease cases reported in Uganda and two 21-day incubation periods have passed. With no new hospitalized patients with Ebola disease, and no contacts of confirmed Ebola disease cases still requiring monitoring, the potential risk for Ebolavirus exposure in Uganda has greatly diminished. Therefore, flight arrival restrictions are no longer required for flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda.

Notice of Termination of Arrival Restrictions Applicable to All Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Uganda

Pursuant to 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, and effective as of 11:59 p.m. Eastern Standard Time on January 11, 2023, for all affected flights arriving at a United States airport, I hereby terminate the arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda announced in the Arrival Restrictions document published at 87 FR 61488 (October 12, 2022).

Alejandro Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2023–00793 Filed 1–11–23; 4:45 pm]

BILLING CODE 9111–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 862

[Docket No. FDA–2022–N–3335]

Medical Devices; Clinical Chemistry and Clinical Toxicology Devices; Classification of the Prognostic Test for Assessment of Liver Related Disease Progression

AGENCY: Food and Drug Administration, HHS.

ACTION: Final amendment; final order.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is classifying the prognostic test for assessment of liver related disease progression 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 prognostic test for assessment of liver related disease progression'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 17, 2023. The classification was applicable on August 20, 2021.

FOR FURTHER INFORMATION CONTACT: Irene Tebbs, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 3526, Silver Spring, MD 20993–0002, 340–402–0283, *Irene.Tebbs@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Upon request, FDA has classified the prognostic test for assessment of liver related disease progression 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 4, 2020, FDA received Siemens Healthcare Diagnostics Inc.'s request for De Novo classification of the ADVIA Centaur Enhanced Liver Fibrosis. 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 August 20, 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 862.1622.[1] We have named the generic type of device prognostic test for assessment of liver related disease progression, and it is identified as a device intended to measure one or more analytes obtained from human samples as an aid in assessing progression of liver related disease. This device is not intended for diagnosis of any disease, for monitoring the effect of any therapeutic product, for assessing progression to hepatocellular carcinoma, or for assessing disease progression in individuals with viral hepatitis. It is also not intended for the detection of viruses, viral antigens, or antibodies to viruses.

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—PROGNOSTIC TEST FOR ASSESSMENT OF LIVER RELATED DISEASE PROGRESSION RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures
False negative results leading to delayed assessment or treatment.	Certain design verification and validation activities, including certain clinical studies; and Certain labeling information, including certain warnings and performance information.
False positive results leading to unnecessary medical procedures.	Certain design verification and validation activities, including certain clinical studies; and Certain labeling information, including certain warnings and performance information.

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 801and 809, regarding labeling, have been approved under OMB control number 0910–0485.

List of Subjects in 21 CFR Part 862

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 862 is amended as follows:

PART 862—CLINICAL CHEMISTRY AND CLINICAL TOXICOLOGY DEVICES

■ 1. The authority citation for part 862 continues to read as follows:

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

■ 2. Add § 862.1622 to subpart B to read as follows:

§ 862.1622 Prognostic test for assessment of liver related disease progression.

(a) *Identification.* A prognostic test for assessment of liver related disease progression is intended to measure one or more analytes obtained from human samples as an aid in assessing progression of liver related disease. This device is not intended for diagnosis of any disease, for monitoring the effect of any therapeutic product, for assessing progression to hepatocellular carcinoma, or for assessing disease progression in individuals with viral hepatitis. It is also not intended for the detection of viruses, viral antigens, or antibodies to viruses.

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

(1) Design verification and validation must include clinical validation data providing:

(i) Information demonstrating clinical performance in a population of patients with liver disease for the different risk categories (*e.g.,* at lower risk, at higher risk) for progression of their disease using well characterized clinical specimens representing the intended use population collected from multiple

[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.

intended clinical sites, or an alternative study design determined to be appropriate by FDA.

(ii) Information demonstrating that the outcomes measured and the length of followup are clinically relevant for the progression of the specified liver disease.

(iii) Information demonstrating that the clinical criteria for determining whether the target disease is present and that the exclusion and inclusion criteria for subjects who have the target disease are appropriate.

(iv) Information demonstrating test performance of the complete test system, including any sample collection and processing steps.

(v) Information, provided or referenced, generated in samples from non-diseased individuals, that demonstrate the upper and lower reference intervals for the output provided by the device.

(2) The labeling required under 21 CFR 809.10(b) must include:

(i) A warning statement that test results are not intended to diagnose disease or for monitoring the effect of any therapeutic product.

(ii) A warning statement that test results are intended to be used in conjunction with other clinical and diagnostic findings, consistent with professional standards of practice, including information obtained by alternative methods, and clinical evaluation, as appropriate.

(iii) A warning statement that describes any limitations on the clinical interpretation(s) of the test results.

(iv) Detailed information on device performance, including any limitations to the data generated in the clinical study(ies) and information on device performance in relevant subgroups (*e.g.,* severity of liver disease at the beginning of the observation period) observed in the clinical study(ies).

(v) Information on the analytical performance of the device, including demonstration of reproducibility across multiple sites and multiple reagent lots, or an alternative reproducibility study design determined to be appropriate by FDA.

Dated: January 6, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–00480 Filed 1–13–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

30 CFR Part 1241

[Docket No. ONRR–2022–0003; DS63644000 DR2000000.CH7000 234D1113RT]

RIN 1012–AA35

2023 Civil Monetary Penalty Inflation Adjustments

AGENCY: Office of Natural Resources Revenue (''ONRR''), Interior.

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (codified at 28 U.S.C. 2461 note), as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (referred to herein as the ''Inflation Adjustment Acts''), and Office of Management and Budget (''OMB'') guidance, ONRR is adjusting for inflation the civil monetary penalty (''CMP'') amounts it assesses under the Federal Oil and Gas Royalty Management Act of 1982 (''FOGRMA'').

DATES: This rule is effective on January 13, 2023.

FOR FURTHER INFORMATION CONTACT: For questions on procedural issues, contact Luis Aguilar, Regulatory Specialist, by telephone at (303) 231–3418 or by email to *Luis.Aguilar@onrr.gov.* For questions on technical issues, contact Michael Marchetti, Enforcement Program Manager, by telephone at (303) 231–3125 or by email to *Michael.Marchetti@onrr.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. ONRR's Inflation-Adjusted Maximum Rates
III. Procedural Matters
A. Regulatory Planning and Review (Executive Orders 12866 and 13563)
B. Regulatory Flexibility Act
C. Small Business Regulatory Enforcement Fairness Act
D. Unfunded Mandates Reform Act
E. Takings (Executive Order 12630)
F. Federalism (Executive Order 13132)
G. Civil Justice Reform (Executive Order 12988)
H. Consultation With Indian Tribes (Executive Order 13175)
I. Paperwork Reduction Act
J. National Environmental Policy Act
K. Effects on the Energy Supply (Executive Order 13211)
L. Clarity of This Regulation
M. Administrative Procedure Act

I. Background

FOGRMA, at 30 U.S.C. 1719(a)–(d), authorizes the Secretary of the Interior (''Secretary'') to assess CMPs for royalty reporting and other violations. Pursuant to authority delegated to it by the Secretary, ONRR published regulations at 30 CFR part 1241 implementing the Secretary's CMP authority. The Inflation Adjustment Acts (Pub. L. 114–74) require Federal agencies to publish annual CMP inflation adjustments in the **Federal Register** by January 15th of each year.

The Inflation Adjustment Acts and OMB Memorandum No. M–23–05, December 15, 2022 (''OMB Memorandum'') specify that the annual inflation adjustments are based on the percent change between the Consumer Price Index for all Urban Consumers (''CPI–U'') published by the Department of Labor for the month of October in the year of the previous adjustment, and the October CPI–U for the preceding year. The OMB Memorandum further specifies that the cost-of-living adjustment multiplier for 2023, not seasonally adjusted, is 1.07745 for CY 2023 (the October 2022 CPI–U (298.012) divided by the October 2021 CPI–U (276.589) = 1.07745). ONRR used this guidance to calculate required inflation adjustments. Pursuant to the Inflation Adjustment Acts, any increases in CMPs are rounded to the nearest whole dollar and the new maximum penalty rates apply to CMPs assessed after the date the increase takes effect.

II. ONRR's Inflation-Adjusted Maximum Rates

This final rule increases the maximum CMP dollar amounts for each of the four violation categories identified in 30 U.S.C. 1719(a)–(d) and implemented by 30 CFR part 1241. The following table identifies the applicable ONRR regulations, the dollar amounts set forth in the regulations, and the adjusted amounts.

30 CFR citation	Current maximum penalty	2023 inflation adjustment multiplier	2023 adjusted maximum penalty
1241.52(a)(2)	$1,368	1.07745	$1,474
1241.52(b)	13,693	1.07745	14,754
1241.60(b)(1)	27,384	1.07745	29,505

30 CFR citation	Current maximum penalty	2023 inflation adjustment multiplier	2023 adjusted maximum penalty
1241.60(b)(2)	68,462	1.07745	73,764

III. Procedural Matters

A. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (''E.O.'') 12866 provides that the Office of Information and Regulatory Affairs (''OIRA'') in the OMB will review all significant rules. OIRA has determined that agency regulations intended only to implement the annual inflation adjustments are not significant, provided they are consistent with the OMB Memorandum. Because ONRR is only implementing the annual inflation adjustments in this final rule, this rule is not significant under E.O. 12866.

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

B. Regulatory Flexibility Act

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601, *et seq.,* because the rule only makes an adjustment for inflation. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires agencies to adjust civil penalties with an annual inflation adjustment. Therefore, the RFA does not apply to this rulemaking.

C. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

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

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

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

D. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. This rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. Therefore, ONRR is not required to provide a statement containing the information that the Unfunded Mandates Reform Act (2 U.S.C. 1531, *et seq.*) requires because this rule is not an unfunded mandate.

E. Takings (E.O. 12630)

This rule does not result in a taking of private property or otherwise have takings implications under E.O. 12630. Therefore, this rule does not require a takings implication assessment.

F. Federalism (E.O. 13132)

Under the criteria in section 1 of E.O. 13132, this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement.

G. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a), which requires that ONRR review all regulations to eliminate errors and ambiguity and to write them to minimize litigation; and

(b) Meets the criteria of section 3(b)(2), which requires that ONRR write all regulations in clear language, using clear legal standards.

H. Consultation With Indian Tribal Governments (E.O. 13175)

The Department of the Interior (''DOI'') strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. Under the DOI's consultation policy and the criteria in E.O. 13175, ONRR evaluated this rule and determined that it will have no substantial, direct effects on Federally recognized Indian Tribes and does not require consultation.

I. Paperwork Reduction Act

This rule:

(a) Does not contain any new information collection requirements; and

(b) Does not require a submission to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). *See* 5 CFR 1320.4(a)(2).

J. National Environmental Policy Act of 1969 (''NEPA'')

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. ONRR is not required to provide a detailed statement under NEPA because this rule qualifies for categorical exclusion under 43 CFR 46.210(i) in that this rule is ''. . . of an administrative, financial, legal, technical, or procedural nature . . . .'' ONRR also has determined that this rule is not involved in any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211 and, therefore, does not require a Statement of Energy Effects.

L. Clarity of This Regulation

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

(a) Be logically organized;

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

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

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

(e) Use lists and tables wherever possible.

If you feel that ONRR has not met these requirements, send your

comments to *ONRR_RegulationsMailbox@onrr.gov*. Your comments should be as specific as possible. For example, you should identify the number of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

M. Administrative Procedure Act

The Act requires agencies to publish annual inflation adjustments by January 15 of each year, notwithstanding section 553 of the Administrative Procedure Act. OMB has interpreted this direction to mean that the usual APA public procedure for rulemaking—which includes public notice of a proposed rule, an opportunity for public comment, and a delay in the effective date of a final rule—is not required when agencies issue regulations to implement the annual adjustments to civil penalties that the 2015 Act requires. *See* OMB Memorandum, M–23–05, at pages 3–4. Accordingly, ONRR is issuing the 2023 annual adjustments as a final rule without prior notice or an opportunity for comment and with an effective date immediately upon publication in the **Federal Register**.

List of Subjects in 30 CFR Part 1241

Administrative practice and procedure, Coal, Geothermal energy, Indian-lands, Mineral royalties, Natural gas, Oil and gas exploration, Penalties, Public lands—mineral resources.

Howard M. Cantor,

Acting Director for the Office of Natural Resources Revenue.

Authority and Issuance

For the reasons discussed in the preamble, ONRR amends 30 CFR part 1241 as set forth below:

PART 1241—PENALTIES

■ 1. The authority citation for part 1241 continues to read as follows:

Authority: 25 U.S.C. 396 *et seq.,* 396a *et seq.,* 2101 *et seq.;* 30 U.S.C. 181 *et seq.,* 351 *et seq.,* 1001 *et seq.,* 1701 *et seq.;* 43 U.S.C. 1301 *et seq.,* 1331 *et seq.,* 1801 *et seq.*

§ 1241.52 [Amended]

■ 2. Amend § 1241.52 by:

■ a. In paragraph (a)(2), removing ''$1,368'' and adding in its place ''$1,474''.

■ b. In paragraph (b) introductory text, removing ''$13,693'' and adding in its place ''$14,754''.

§ 1241.60 [Amended]

■ 3. Amend § 1241.60 by:

■ a. In paragraph (b)(1) introductory text, removing ''$27,384'' and adding in its place ''$29,505''.

■ b. In paragraph (b)(2), removing ''$68,462'' and adding in its place ''$73,764''.

[FR Doc. 2023–00737 Filed 1–13–23; 8:45 am]

BILLING CODE 4335–30–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 583

Publication of Global Magnitsky Sanctions Regulations Web General Licenses 3 and 4

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of web general licenses.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing two general licenses (GLs) issued pursuant to the Global Magnitsky Sanctions Regulations: GLs 3 and 4, each of which was previously made available on OFAC's website.

DATES: GLs 3 and 4 were issued on December 9, 2022. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

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

SUPPLEMENTARY INFORMATION:

Electronic Availability

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

Background

On December 9, 2022, OFAC issued GLs 3 and 4 to authorize certain transactions otherwise prohibited by the Global Magnitsky Sanctions Regulations, 31 CFR part 583. Each GL was made available on OFAC's website (*www.treas.gov/ofac*) when it was issued. Both GLs have an expiration date of March 9, 2023. The text of these GLs is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Global Magnitsky Sanctions Regulations

31 CFR Part 583

GENERAL LICENSE NO. 3

Authorizing Transactions Related to Debt or Equity of Pingtan Marine Enterprise Ltd.

(a) Except as provided in paragraphs (d) and (e) of this general license, all transactions prohibited by the Global Magnitsky Sanctions Regulations, 31 CFR part 583 (GMSR), that are ordinarily incident and necessary to the divestment or transfer, or facilitation of the divestment or transfer, of debt or equity of Pingtan Marine Enterprise Ltd. (PME) to a non-U.S. person are authorized through 12:01 a.m. eastern standard time, March 9, 2023.

(b) Except as provided in paragraph (e) of this general license, all transactions prohibited by the GMSR that are ordinarily incident and necessary to facilitating, clearing, and settling trades of debt or equity of PME that were placed prior to 4:00 p.m. eastern standard time, December 9, 2022, are authorized through 12:01 a.m. eastern standard time, March 9, 2023.

(c) Except as provided in paragraph (e) of this general license, all transactions prohibited by the GMSR that are ordinarily incident and necessary to the wind down of financial contracts or other agreements linked to the debt or equity of PME and entered into prior to 4:00 p.m. eastern standard time, December 9, 2022 are authorized through 12:01 a.m. eastern standard time, March 9, 2023, provided that any payments to a blocked person are made into a blocked account in accordance with the GMSR.

NOTE TO PARAGRAPH (C). The wind down of financial contracts or other agreements linked to the debt or equity of PME includes the delisting of PME from a U.S. securities exchange.

(d) Paragraph (a) of this general license does not authorize:

(1) U.S. persons to sell, or to facilitate the sale of debt or equity of PME to, directly or indirectly, any person whose property and interests in property are blocked; or

(2) U.S. persons to purchase or invest in, or to facilitate the purchase of or investment in, directly or indirectly, debt or equity of PME, other than purchases of or investments in debt or equity of PME that are ordinarily incident and necessary to the divestment or transfer of debt or equity of PME as described in paragraph (a) of this general license.

(e) This general license does not authorize any transactions otherwise prohibited by the GMSR, including transactions involving any person blocked pursuant to the GMSR other than PME, unless separately authorized.

Andrea M. Gacki,
Director,
Office of Foreign Assets Control.

Dated: December 9, 2022.

OFFICE OF FOREIGN ASSETS CONTROL

Global Magnitsky Sanctions Regulations

31 CFR Part 583

GENERAL LICENSE NO. 4

Authorizing the Wind Down of Transactions Involving Certain Vessels

(a) Except as provided in paragraph (b) of this general license, all transactions ordinarily incident and necessary to the wind down of any transaction involving any vessel in which any of the following blocked entities have an interest that are prohibited by the Global Magnitsky Sanctions Regulations, 31 CFR part 583 (GMSR), are authorized through 12:01 a.m. eastern standard time, March 9, 2023, provided that any payment to a blocked person must be made into a blocked account in accordance with the GMSR:

(1) Dalian Ocean Fishing Co., Ltd.;

(2) Fujian Provincial Pingtan County Ocean Fishing Group Co., Ltd.;

(3) Fuzhou Honglong Ocean Fishing Co., Ltd.;

(4) Pingtan Marine Enterprise Ltd.; or

(5) Any entity in which one or more of the above entities own, directly or indirectly, individually or in the aggregate, a 50 percent or greater interest.

(b) This general license does not authorize:

(1) The entry into any new commercial contracts involving the entities or vessels described in paragraph (a) of this general license, except as authorized by paragraph (a); or

(2) Any transactions otherwise prohibited by the GMSR, including transactions involving any person blocked pursuant to the GMSR other than the blocked entities described in paragraph (a) of this general license, unless separately authorized.

Andrea M. Gacki,
Director,
Office of Foreign Assets Control,

Dated: December 9, 2022.

Andrea M. Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2023–00348 Filed 1–13–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2022–1004]

RIN 1625–AA00

Safety Zones; Delaware River Dredging, Marcus Hook, PA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing two temporary safety zones on the waters of the Delaware River in portions of Marcus Hook Range and Anchorage 7, off Marcus Hook Range. The safety zones temporarily restrict vessel traffic from transiting or anchoring in portions of the Delaware River while maintenance dredging is being conducted within the Delaware River. The safety zones are needed to protect personnel, vessels, and the marine environment from hazards created by dredging operations. Entry of vessels or persons into these zones is prohibited unless specifically authorized by the COTP or his designated representatives.

DATES: This rule is effective without actual notice from January 17, 2023 through April 15, 2023. For the purposes of enforcement, actual notice will be used from January 10, 2023 until January 17, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2022–1004 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Petty Officer Dylan Caikowski, Waterways Management Branch, U.S. Coast Guard Sector Delaware Bay; telephone (215) 271–4814, email *SecDelBayWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable and contrary to the public interest. There is insufficient time to allow for a reasonable comment period prior to the start date for dredging operations. The rule must be in force by January 10, 2023 to serve its purpose of ensuring the safety of the public from hazards associated with dredging operations, such as submerged and floating pipeline, booster pumps, head sections and vessels with a restricted ability to maneuver.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** for the same reasons discussed above.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The COTP has determined that there are potential hazards associated with dredging operations. The purpose of this rulemaking is to ensure the safety of personnel, vessels, and the marine environment within a 250-yard radius of dredging operations and all associated pipeline and equipment.

IV. Discussion of the Rule

This rule establishes two safety zones from January 10, 2023, through April 15, 2023. The safety zones are necessary to facilitate annual maintenance dredging of the Delaware River in the vicinity of Marcus Hook Range and Anchorage 7 off Marcus Hook Range (as described in 33 CFR 110.157(a)(8)). Dredging will most likely be conducted with the dredge ESSEX, though other dredges may be used, along with associated dredge pipeline and boosters. The pipeline consists of a combination of floating hoses immediately behind the dredge and submerged pipeline leading to upland disposal areas. Due to the hazards related to dredging operations, the associated pipeline and the location of submerged pipeline, safety zones are being established in the following areas:

(1) Safety zone one includes all navigable waters within 250 yards of the

dredge displaying lights and shapes for vessels restricted in ability to maneuver as described in 33 CFR 83.27, and all related dredge equipment when the dredge is operating in Marcus Hook Range, and Anchorage 7. This safety zone is being established for the duration of the maintenance project. Vessels requesting to transit the safety zone must contact the dredge on VHF channel 13 or 16 at least 1 hour prior to arrival to arrange safe passage. At least one side of the main navigational channel will be kept clear for safe passage of vessels in the vicinity of the safety zone. At no time will the entire main navigational channel be closed to vessel traffic. Vessels should avoid meeting in these areas where one side of the main navigational channel is open and proceed per this rule and the Rules of the Road (33 CFR subchapter E).

(2) Safety zone two includes all the waters of Anchorage 7 off Marcus Hook Range, as described in 33 CFR 110.157(a)(8). Vessels wishing to anchor in Anchorage 7 off Marcus Hook Range while this rule is in effect must obtain permission from the COTP at least 24 hours in advance by calling (215) 271–4807. Vessels requesting permission to anchor within Anchorage 7 off Marcus Hook must be at least 650 feet in overall length. The COTP will permit, at maximum, only one vessel to anchor at a time, on a ''first-come, first-served'' basis. Vessels will only be allowed to anchor for a 12 hour period. Vessels that require an examination by the Public Health Service, Customs, or Immigration authorities will be directed to an anchorage by the COTP for the required inspection. Vessels are encouraged to use Anchorage 9 near the entrance to Mantua Creek, Anchorage 10 at Naval Base, Philadelphia, and Anchorage 6 off Deepwater Point Range as alternative anchorages.

Preference is being given to vessels at least 650 feet in length in Anchorage 7 while this rule is in effect, because vessels of this size are limited in their ability to utilize other anchorages due to draft. Smaller vessels maintain a host of other options to include, but are not limited to, Anchorage 9 and 10 as recommended above.

Entry into, transiting, or anchoring within safety zone one is prohibited unless vessels obtain permission from the COTP or make satisfactory passing arrangements with the operating dredge per this rule and the Rules of the Road (33 CFR subchapter E). The COTP may issue updates regarding the vessel and equipment being utilized for these dredging operations via Marine Safety Information Bulletin and Broadcast Notice to Mariners.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on size, location, duration, and traffic management of the safety zones. The safety zones will be enforced in an area and in a manner that does not conflict with transiting commercial and recreational traffic. At least one side of the main navigational channel will be open for vessels to transit at all times. Moreover, the Coast Guard will work in coordination with the pilots to ensure vessel traffic can transit the area safely.

Although this regulation will restrict access to regulated areas, the effect of this rule will not be significant because there are a number of alternate anchorages available for vessels to anchor. Furthermore, vessels may transit through the safety zones with the permission of the COTP or make satisfactory passing arrangements with the dredge ESSEX, or other dredge(s) that may be used in accordance with this rule and the Rules of the Road (33 CFR subchapter E). The Coast Guard will notify the maritime public about the safety zones through maritime advisories, allowing mariners to alter their plans accordingly.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves two safety zones to protect waterway users that would prohibit entry within 250 yards of dredging operations and will close only one side of the main navigation channel. Vessels can request permission to enter the channel. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–1004, to read as follows.

§ 165.T05–1004 Safety Zones, Delaware River Dredging; Marcus Hook, PA.

(a) *Location.* The following areas are safety zones: (1) Safety zone one includes all waters within 250 yards of the dredge displaying lights and shapes for vessels restricted in ability to maneuver as described in 33 CFR 83.27, as well as all related dredge equipment, while the dredge is operating in Marcus Hook Range. For enforcement purposes Marcus Hook Range includes all navigable waters of the Delaware River shoreline to shoreline, bound by a line drawn perpendicular to the center line of the channel at the farthest upriver point of the range to a line drawn perpendicular to the center line of the channel at the farthest downriver point of the range.

(2) Safety zone two includes all the waters of Anchorage 7 off Marcus Hook Range, as described in 33 CFR 110.157(a)(8) and depicted on U.S. Nautical Chart 12312.

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

Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port to assist with enforcement of the safety zone described in paragraph (a) of this section.

(c) *Regulations.* (1) Entry into or transiting within the safety zone one is prohibited unless vessels obtain permission from the Captain of the Port via VHF–FM channel 16 or 215–271–4807, or make satisfactory passing arrangements via VHF–FM channel 13 or 16 with the operating dredge per this section and the rules of the Road (33 CFR subchapter E). Vessels requesting to transit shall contact the operating dredge via VHF–FM channel 13 or 16 at least 1 hour prior to arrival.

(2) Vessels desiring to anchor in safety zone two, Anchorage 7 off Marcus Hook Range, must obtain permission from the COTP at least 24 hours in advance by calling (215) 271–4807. The COTP will permit, at maximum, one vessel at a time to anchor on a ''first-come, first-served'' basis. Vessels will only be allowed to anchor for a 12 hour period. Vessels that require an examination by the Public Health Service, Customs, or Immigration authorities will be directed to an anchorage for the required inspection by the COTP.

(3) Vessels desiring to anchor in safety zone two, Anchorage 7 off Marcus Hook Range, must be at least 650 feet in length overall.

(4) This section applies to all vessels except those engaged in the following operations: enforcement of laws, service of aids to navigation, and emergency response.

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

(e) *Enforcement period.* This rule will be enforced from January 10, 2023, through April 15, 2023, unless cancelled earlier by the Captain of the Port.

Dated: January 10, 2023.

Jonathan D. Theel,

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

[FR Doc. 2023–00665 Filed 1–13–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 277

[COE–2020–0012]

RIN 0710–AB35

Water Resources Policies and Authorities: Navigation Policy: Cost Apportionment of Bridge Alterations

AGENCY: U.S. Army Corps of Engineers, Department of Defense.

ACTION: Final rule.

SUMMARY: This final rule removes the U.S. Army Corps of Engineers' part titled Water Resources Policies and Authorities: Navigation Policy: Cost Apportionment of Bridge Alterations. Each removed section of this part is out-of-date and otherwise covers internal agency operations that have no public compliance component or adverse public impact. Therefore, this part can be removed from the CFR.

DATES: This rule is effective on January 17, 2023.

ADDRESSES: Department of the Army, U.S. Army Corps of Engineers, ATTN: CECW–EC (Mr. Robert Bank), 441 G Street NW, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Ms. Amy K. Frantz at (202) 761–0106 or by email at *Amy.K.Frantz@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This final rule removes 33 CFR part 277, Water Resources Policies and Authorities: Navigation Policy: Cost Apportionment of Bridge Alterations. The rule was initially published in the **Federal Register** on May 30, 1979 (44 FR 31129). The regulation was promulgated to adapt Coast Guard procedures under the Truman-Hobbs Act in 33 U.S.C. 516 to Corps navigation project feasibility plan formulation, with regard to apportionment of costs between Bridge Owners and the Government, when the Government requires bridge alteration to avoid obstruction of navigation. The underlying Coast Guard procedures for bridge alteration cost apportionment at 33 CFR 116.50 were updated in 1995 (60 FR 20902) while the Corps' regulation was never subsequently amended. The calculations for the cost apportionment are the responsibility of the Coast Guard and the Corps uses the current Coast Guard calculations in planning formulations for new projects when they involve bridges falling under the Truman-Hobbs Act. The rule was published, at that time, in the **Federal Register** to aid public accessibility. The solicitation of public comment for this removal is unnecessary because the rule is out-of-date and otherwise covers internal agency operations that have no public compliance component or adverse public impact. Applicable guidance on bridge alteration cost apportionment is found in current Coast Guard procedures at 33 CFR 116.50, Apportionment of costs under the Truman-Hobbs Act. For current public accessibility purposes, the internal implementing process for the applicable guidance is in Engineer Regulation 1165–2–25, ''Navigation Policy: Cost Apportionment of Bridge Alterations'' (available at *https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1165-2-25.pdf?ver=2013-09-08-233442-167*). The agency policy is only applicable to field operating activities having Civil Works responsibilities and provides guidance specific to the Corps' policies and guidelines for the apportionment of bridge alteration costs required in connection with navigation improvements recommended in reports transmitted to the Chief of Engineers for approval or submitted to Congress for authorization.

This rule removal is being conducted to reduce confusion for the public as well as for the Corps regarding the current policy which governs the Corps' cost apportionment of bridge alterations. Because the regulation does not place a burden on the public, its removal does not provide a reduction in public burden or costs.

This rule is not significant under Executive Order (E.O.) 12866, ''Regulatory Planning and Review.''

List of Subjects in 33 CFR Part 277

Bridges, Coast Guard, Navigation (water).

PART 277—[REMOVED]

■ Accordingly, by the authority of 5 U.S.C. 301, 33 CFR part 277 is removed.

Approved by:

Michael L. Connor,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2023–00538 Filed 1–13–23; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AR50

Emergent Suicide Care

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its medical regulations to implement section 201 of the Veterans Comprehensive Prevention, Access to Care, and Treatment Act of 2020, which directs VA to furnish, reimburse, and pay for emergent suicide care for certain individuals, to include the provision of emergency transportation necessary for such care.

DATES:

Effective date: This interim final rule is effective on March 20, 2023.

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

ADDRESSES: Comments must be submitted through *www.regulations.gov.* Except as provided below, comments received before the close of the comment period will be available at *www.regulations.gov* for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: *http://www.regulations.gov.* VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Joseph Duran, Office of Integrated Veteran Care (16EO3), Veterans Health Administration, Department of Veterans Affairs, Ptarmigan at Cherry Creek, Denver, CO 80209; (303) 370–1637. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On December 5, 2020, the Veterans Comprehensive Preventions, Access to Care and Treatment Act of 2020, Public Law (Pub. L.) 116–214 (the Act), was enacted into law. Section 201 of the Act created a new section 1720J in title 38, United States Code (U.S.C.), to authorize VA to provide emergent suicide care to certain individuals. Section 1720J(b) of 38 U.S.C. provides that an individual is eligible for emergent suicide care if they are in acute suicidal crisis and are either (1) a veteran as defined in 38 U.S.C. 101, or (2) an individual described in 38 U.S.C. 1720I(b). Individuals described in section 1720I(b) are (1) former members of the Armed Forces, including the reserve components; who, (2) while serving in the active military, naval, air, or space services, were discharged or released therefrom under a condition that is not honorable but is also not (A) a dishonorable discharge or (B) a discharge by court-martial; who (3) is not enrolled in the health care system established by section 1705 of title 38 U.S.C.; and (4)(A)(i) served in the Armed Forces for a period of more than 100 cumulative days; and (ii) was deployed in a theater of combat operations, in support of a contingency operation, or in an area at a time during which hostilities are occurring in that area during such service, including by controlling an unmanned aerial vehicle from a location other than such theater or area; or (B) while serving in the Armed Forces, was the victim of a physical assault of a sexual nature, a battery of a sexual nature, or sexual harassment (as defined in section 1720D(f) of title 38 U.S.C.).

Section 1720J(a) requires VA to (1) furnish emergent suicide care to an eligible individual at a medical facility of the Department; (2) pay for emergent suicide care provided to an eligible individual at a non-Department facility; and (3) reimburse an eligible individual for emergent suicide care provided to

the eligible individual at a non-Department facility. This interim final rule will establish new regulations in title 17, Code of Federal Regulations (CFR), at 38 CFR 17.1200 through 17.1230, to implement the provisions of 38 U.S.C. 1720J as described above as well as implement other substantive provisions as required by 38 U.S.C. 1720J to include: the duration of emergent suicide care that VA must provide; prohibition on charge for such care provided; rates VA will pay or reimburse for emergent suicide care (to include for emergency transportation required for such care); and required definitions.

17.1200 Purpose and Scope

Section 17.1200 explains the purpose and scope of these new regulations. Paragraph (a) states that §§ 17.1200 through 17.1230 implement VA's authority under 38 U.S.C. 1720J to provide emergent suicide care. This language will use the term provide, which VA will define in § 17.1205 to mean furnished directly by VA, paid for by VA, or reimbursed by VA. This language will both expressly recognize in regulation VA's statutory authority to provide this care, as well as the three means by which VA must provide this care, consistent with 38 U.S.C. 1720J(a). We will explain at a later point in this preamble (in the section regarding payments) the different considerations that apply when VA provides care directly in a VA facility compared to when VA pays or reimburses for care provided in a non-VA facility.

Paragraph (b) states that §§ 17.1200 through 17.1230 establish criteria specific to VA's provision of emergent suicide care under 38 U.S.C. 1720J, which do not affect eligibility for other care under chapter 17 of title 38, U.S.C., that may otherwise be received by an individual eligible under § 17.1210 (where § 17.1210 will establish eligibility for emergent suicide care, as explained later in this preamble). We believe this language is necessary to clarify that VA's provision of emergent suicide care under section 1720J is distinct from other care under chapter 17 of title 38 U.S.C., because VA has been providing the same types of care to veterans under the authority of section 1710 and 38 CFR 17.38 as part of the medical benefits package. However, we note that section 1720J not only expands eligibility for this care to individuals who would not be eligible to receive the same care under section 1710, but also offers the additional benefits of (1) having such care be at no cost to the individual (*e.g.,* not subject to otherwise applicable VA copayments), and (2) having VA pay the cost of emergency transportation necessary to receive the care, without the individual having to meet otherwise applicable transportation criteria in VA regulations. Because emergent suicide care offered under section 1720J offers benefits in addition to those already administered by VA under other authorities (*e.g.,* section 1720J provides that there will be no charges for such care, and provides for coverage of emergency transportation necessary to receive such care), § 17.1200(b) will state that if an individual is eligible under § 17.1210, they will receive emergent suicide care in accordance with §§ 17.1200–17.1230 and not under other regulations through which emergent or other care may be provided. We believe this will ensure that the additional benefits under section 1720J as stated above will be available to individuals eligible under § 17.1210. However, language in § 17.1200(b) will also clarify that eligibility under § 17.1210 does not affect eligibility for other care under chapter 17 of title 38 U.S.C. We believe this language will ensure that receipt of care under §§ 17.1200 through 17.1230 does not impact the receipt of other care.

17.1205 Definitions

Section 17.1205 will define key terms that apply to §§ 17.1200–17.1230. The definitions are listed in alphabetical order, beginning with the term acute suicidal crisis, and are consistent with the terms defined in 38 U.S.C. 1720J(h).

The term acute suicidal crisis is defined to mean an individual was determined to be at imminent risk of self-harm by a trained crisis responder or health care provider. This definition is necessary to qualify when an individual is eligible to have VA provide emergent suicide care, as required by section 1720J(b), and is identical to the definition of acute suicidal crisis in section 1720J(h)(1). We will further define the terms trained crisis responder and health care provider to clarify who may make the determination that an individual is in acute suicidal crisis. We will more comprehensively discuss the determination of acute suicidal crisis in the section of the preamble that addresses eligibility criteria. The term acute suicidal crisis will be used in a regulatory section related to eligibility for emergent suicide care, as explained later in this preamble.

The term crisis residential care is defined as emergent suicide care provided in a residential facility other than a hospital (that is not a personal residence) that provides 24-hour medical supervision. This definition is necessary to qualify a type of setting in which VA can provide emergent suicide care in section 1720J(c)(1)(A). This definition is also consistent with the definition of crisis residential care in section 1720J(h)(2), although VA's definition would add that the facility other than a hospital must not be a personal residence and must be able to provide 24-hour medical supervision. The additional criterion related to 24-hour medical supervision will clarify that VA only provides emergent suicide care in a residential facility setting that can adequately monitor the safety and medical condition of an individual that has been determined to be in acute suicidal crisis. Such crisis residential settings could include but not be limited to crisis residential programs (such as residential treatment centers) administered by either a State or private business but would not include any care that could be received in a personal residence because section 1720J(h)(2)(B) requires that emergent suicide care be provided in a facility. We will not define more specific types of modality, therapies, or treatments that may be received as part of crisis residential care, as that would be unduly limiting given that care and treatment for individuals in acute suicidal crisis will vary. This term will be used in a regulatory section related to the duration of emergent suicide care, as explained later in this preamble.

The term crisis stabilization care is defined to mean, with respect to an individual in acute suicidal crisis, care that ensures, to the extent practicable, immediate safety and reduces: the severity of distress; the need for urgent care; or the likelihood that the severity of distress or need for urgent care will increase during the transfer of that individual from a facility at which the individual has received care for that acute suicidal crisis. This definition is necessary to provide context for VA's provision of care under section 1720J(a) and is identical to the definition of crisis stabilization care in section 1720J(h)(3). This term also qualifies the term emergent suicide care, as discussed below.

The term emergent suicide care is defined to mean crisis stabilization care provided to an individual eligible under § 17.1210 pursuant to a recommendation from the Veterans Crisis Line or when such individual has presented at a VA or non-VA facility in an acute suicidal crisis. This definition is necessary to provide context for VA's provision of care under section 1720J(a) and is consistent with the definition of emergent suicide care in 1720J(h)(4). A

section of this preamble related to § 17.1220 will discuss some examples of care that we envision being provided as emergent suicide care, but we do note here that we do not intend to define such care more specifically by identifying distinct modalities, therapies, or treatments—we do not want the definition of emergent suicide care to unduly limit potentially stabilizing services that will vary based on the unique needs of the individuals in acute suicidal crisis.

The term health care provider is defined as a VA or non-VA provider who is licensed to practice health care by a State and who is performing within the scope of their practice as defined by a State or VA practice standard. This definition is necessary to qualify who may make the determination of whether an individual is in acute suicidal crisis as required by section 1720J(b) and (h)(1). This term is not defined in section 1720J, so we have based the definition on a similar definition used in VHA Directive 1100.20, which relates to the credentialing of VA health care providers. Such providers will include but not be limited to physicians and registered nurses. This term will be used in a regulatory section related to eligibility for emergent suicide care, as explained later in this preamble.

The term health plan contract is defined as having the same meaning as that term is defined in 38 U.S.C. 1725(f)(2). This definition is necessary because section 1720J(f)(3) provides that VA may recover the costs of emergent suicide care it provides, other than for such care for a service-connected disability, if the eligible individual that received such care was entitled to the care or payment for such care under a health-plan contract. This term will be used in a regulatory section related to VA's payment for emergent suicide care, as explained later in this preamble.

The term inpatient care is defined to mean care received by an individual during their admission to a hospital. This definition is necessary to qualify the types of settings in which VA can provide emergent suicide care in section 1720J(c)(1)(A). The term inpatient care is not defined in section 1720J, and VA has based its definition on plain language that we believe is clearly understandable. This term will be used in a regulatory section related to the duration of emergent suicide care that VA provides, as explained later in this preamble.

Non-VA facility is defined to mean a facility that meets the definition in 38 U.S.C. 1701(4). This definition is necessary to qualify a type of facility in which emergent suicide care may be provided and where VA must pay or reimburse for such care under section 1720J(a)(2) and (3). We note that the term non-VA facility is intended to be equivalent to the term ''non-Department facilities'' that will be cross referenced in section 1701(4). Because the term in section 1701(4) is further dependent on the definition of ''facilities of the Department'' in section 1701(3), we will further define the term VA facility later in the definitions (to cross reference section 1701(3)). We recognize that defining non-VA facility to cross reference the definition in section 1701(4) will essentially qualify any facility type that is not owned or operated by VA. However, we will not further characterize the types of non-VA facilities (*e.g.,* hospitals, or outpatient clinics), as 1720J authorizes VA to provide for both inpatient and outpatient care.

The term outpatient care is defined to mean care received by an individual that is not described within the definition of inpatient care under § 17.1205 to include telehealth, and without the provision of room or board. This term is not defined in section 1720J, and VA has based its definition on plain language that we believe is clearly understandable. We will not define more specific types of modality, therapies, or treatments that may be received as outpatient care, as that would be unduly limiting. This term will be used in a regulatory section related to the duration of emergent suicide care that VA provides, as explained later in this preamble.

The terms provide, provided, or provision are defined to mean furnished directly by VA, paid for by VA, or reimbursed by VA. These terms will simplify mention of VA's obligations under section 1720J(a)(1)–(3) for ease of understanding as appropriate throughout the regulations.

The term trained crisis responder is defined as an individual who responds to emergency situations in the ordinary course of their employment and therefore can be presumed to possess adequate training in crisis intervention. This definition is necessary to qualify who may make the determination of whether an individual is in acute suicidal crisis as required by section 1720J(b) and (h)(1). This term is not defined in section 1720J, and VA only has expertise in the training levels of its own Veterans Crisis Line (VCL) responders. VA considered but ultimately decided against defining the term trained crisis responder to be limited to only VCL responders, as that would have unnecessarily limited those individuals that may, in the ordinary course of their employment, have the knowledge and expertise to assess suicidal crisis and in fact direct individuals in such crisis to seek care. Instead, the definition of trained crisis responder uses plain language to qualify training that would be expected of individuals who respond to emergencies, where such individuals include but are not limited to Veteran Crisis Line responders, law enforcement or police officers, firefighters, and emergency medical technicians. We note that a determination of acute suicidal crisis is a qualifier for eligibility for VA's provision of emergent suicide care, and that determination can be made by either a health care provider or a trained crisis responder under section 1720J(b). However, the level and duration of emergent suicide care to be provided to individuals eligible for such care is a medical determination to be made only by health care providers, as will be discussed later in the section of the preamble related to duration of care.

VA facility is defined to mean a facility that meets the definition in 38 U.S.C. 1701(3). This definition is necessary to qualify a type of facility in which emergent suicide care must be directly furnished by VA under section 1720J(a)(1). We note that the definition that will be cross referenced in section 1701(3) is for ''facilities of the Department,'' which is equivalent to a VA facility. We will not more specifically list the types of VA facilities (*e.g.,* VA Medical Center or VA Community Based Outpatient Clinic) in which emergent suicide care will be directly furnished by VA, as this will be too limiting if VA nomenclature for types of VA facilities changes or if level of services available in types of VA facilities changes. VA will be able to internally track those facilities that meet the definition in section 1701(3) for purposes of directly furnishing emergent suicide care.

Veterans Crisis Line is defined to mean the hotline under 38 U.S.C. 1720F(h). This definition is consistent with section 1720J(h)(6) and is necessary to provide context for the use of this same term in the definition of emergent suicide care.

17.1210 Eligibility

Section 17.1210 will establish criteria to determine an individual's eligibility for emergent suicide care. Paragraph (a) will establish that an individual is eligible if they were determined to be in acute suicidal crisis and are either: (1) a veteran as that term is defined in 38 U.S.C. 101, or (2) an individual described in 38 U.S.C. 1720I(b). Language in § 17.1210(a) will mirror

eligibility language from section 1720J(b), as we believe such language is clear and does not require further interpretation through regulation. Particularly, we will not regulate characteristics of how acute suicidal crisis may appear or present in an individual or other parameters that must be met, beyond the definition of acute suicidal crisis in § 17.1205 to mean the individual was determined to be at imminent risk of self-harm by a trained crisis responder or health care provider. The determination of imminent risk of self-harm could vary greatly based on the individual and be based on a totality of circumstances and information as assessed by the trained crisis responder or health care provider, to include but not be limited to direct statements from an individual, as well as other pertinent information such as knowledge of an individual's past or present behaviors that signal a risk of self-harm, or even an individual's past suicide attempts that could evidence additional risk of self-harm. We will not regulate, however, that an individual must communicate any particular language, or that their behavior must meet any particular parameters, or that they must have any type of diagnosis to indicate that they are in acute suicidal crisis.

Regarding language in section 1720J(b)(1) and § 17.1210(a)(1), a veteran as defined in section 101, means a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable. Rather than restating this definition from 38 U.S.C. 101, § 17.1210(a)(1) will reference section 101 in the event the definition of veteran under the statute may change (for instance, the definition of veteran in section 101 was amended by sec. 926(a)(1) of Public Law 116–283 on January 1, 2021, to substitute ''air, or space service'' for ''or air service''). We note that section 1720J(b)(1) does not establish that a veteran must be enrolled in VA healthcare in accordance with VA's healthcare enrollment authority in section 1705 and as regulated in § 17.36. We therefore will also amend § 17.37, VA's regulation related to veteran enrollment not being required to receive certain health care and services, to add a new paragraph (l) to establish that a veteran need not be enrolled to receive emergent suicide care pursuant to 38 CFR 17.1200–17.1230.

Regarding language in section 1720J(b)(2) and § 17.1210(a)(2), individuals described in section 1720I(b) are: (1) former members of the Armed Forces, including the reserve components; who, (2) while serving in the active military, naval, air, or space services, were discharged or released therefrom under a condition that is not honorable but is also not (A) a dishonorable discharge or (B) a discharge by court-martial; who (3) is not enrolled in the health care system established by section 1705 of title 38 U.S.C.; and (4)(A)(i) served in the Armed Forces for a period of more than 100 cumulative days; and (ii) was deployed in a theater of combat operations, in support of a contingency operation, or in an area at a time during which hostilities are occurring in that area during such service, including by controlling an unmanned aerial vehicle from a location other than such theater or area; or (B) while serving in the Armed Forces, was the victim of a physical assault of a sexual nature, a battery of a sexual nature, or sexual harassment (as defined in section 1720D(f) of title 38 U.S.C.). Rather than restating these requirements from statute, § 17.1210(a)(2) will reference section 1720I(b) in the event such qualifying eligibility under the statute may change.

VA believes it is important to avoid delays in receipt of emergent suicide care if an individual's status as a veteran or status as described in section 1720I(b) cannot be confirmed upon a determination of acute suicidal crisis or prior to the need to initiate the provision of care. Therefore, § 17.1210(b) will establish that VA may initiate the provision of emergent suicide care for an individual in acute suicidal crisis prior to that individual's status under § 17.1210(a)(1) or (2) being confirmed. If VA is unable to confirm an individual's status under paragraph (a)(1) or (2) of this section, and such individual is not otherwise eligible for care under another VA authority, VA shall charge that individual for the care provided consistent with 38 CFR 17.102(a) and (b)(1), which are regulatory provisions applicable to VA's provision of care to individuals later found to be ineligible.

17.1215 Periods of Emergent Suicide Care

Section 17.1215 will establish criteria related to the length of time an eligible individual will be provided emergent suicide care, consistent with section 1720J(c).

Paragraph (a) will establish that, unless extended under paragraph (b), emergent suicide care will be provided to an eligible individual under § 17.1210 from the date acute suicidal crisis is determined to exist (as determined to exist by a trained crisis responder or health care provider, per the definition of acute suicidal crisis in § 17.1205): (1) through inpatient care or crisis residential care, as long as the care continues to be clinically necessary, but not to exceed 30 calendar days; or (2) If inpatient care or crisis residential care is unavailable, or if such care is not clinically appropriate, through outpatient care, as long as the care continues to be clinically necessary, but not to exceed 90 calendar days. The 30-day limitation for a period of inpatient or crisis residential care in § 17.1215(a)(1) is required by section 1720J(c)(1)(A), and the 90-day period limitation for outpatient care in § 17.1215(a)(2) is required by section 1720J(c)(1)(B). Section 17.1215(b) will permit VA to extend either of these limited timeframes in the event VA determines that an individual continues to require care to address the effects of an acute suicidal crisis, consistent with section 1720J(c)(2).

Section 17.1215(a)(1) and (2) will establish the 30- and 90-day time limits as calendar day limits. There is no indication in section 1720J that these time limits should be measured in business days, and calendar days is the reasonable measurement in the context of furnishing emergent suicide care because the risk of self-harm and stabilization of an individual's condition continues despite weekend days or holidays. We note that § 17.1215(b) will allow an extension of the timeframes in the event VA determines the individual continues to require care to address the effects of acute suicidal crisis and, therefore, requires additional emergent suicide care.

Section 17.1215(a)(1) and (2) will establish the availability of 30 calendar days of inpatient and crisis residential care, as well as 90 days of outpatient care, instead of only one type of care (inpatient/residential versus outpatient) being available for an individual eligible under § 17.1210. We do not interpret the word ''or'' in section 1720J(c)(1)(A) to mean that outpatient care under section 1720J(c)(1)(B) is available only if an individual did not receive inpatient or crisis residential care. Rather, we interpret that sections 1720J(c)(1)(A) and (B) should be read together to afford an individual the opportunity to receive inpatient care (except if such care is not available or is inappropriate) but not to prevent such an individual from then receiving outpatient care to ensure they remain stable. Even if an individual is medically stable for discharge from an inpatient or crisis residential care setting, continued treatment after discharge from a facility may be necessary to prevent immediate relapse

into a new or worsened state of crisis or to otherwise provide clinically necessary care to address the effects of the acute suicidal crisis. Indeed, the definition of crisis stabilization care in § 17.1205 provides that such care is not only that which ensures, to the extent practicable, immediate safety but is also care that ''reduces: the severity of stress, [and] the need for urgent care. . . .''. Therefore, VA will not regulate outpatient care to be solely available as an alternative to inpatient or crisis residential care, as we envision nearly all individuals in acute suicidal crisis will require some level of emergent suicide care on an inpatient basis to be followed by care on an outpatient basis.

Paragraph (b) in § 17.1215 will permit the 30 and 90 calendar day timeframes in § 17.1215(a)(1) and (2) to be extended if VA determines that an individual continues to require care to address the effects of the acute suicidal crisis. This language is consistent with section 1720J(c)(2), where only the Secretary [of VA] is authorized to extend a period of care beyond the 30 or 90 days. Although we recognize that non-VA health care providers may be able to determine if an individual continues to require care to address the effects of the acute suicidal crisis upon the expiration of a 30-day or 90-day timeframe, such an extension of care would still need to be approved by VA as clinically necessary before VA would pay or reimburse for the additional care. This would not necessarily mean that VA's approval of an extension must always occur prior to care being extended; VA would not want to create situations where administrative matters could delay the extension of required care. Rather, VA would only pay or reimburse for extensions of care if VA found such extensions to be warranted. The process of non-VA health care providers submitting claims for payment for providing emergent suicide care is discussed below in the section related to § 17.1225. In that process, we would expect that, in most cases, non-VA providers would submit requests for extensions of care to VA prior to a 30- or 90-day period of care lapsing.

§ 17.1220 Provision of Emergent Suicide Care

As stated earlier in the preamble we will not specifically regulate any distinct modalities, therapies, or treatments as falling under or being excluded from the meaning of the term emergent suicide care, because we do not want to unduly limit the provision of care that will vary based on the needs of individuals in acute suicidal crisis. However, we do not want this lack of specificity to imply that any type of care or service that may be recommended would be provided by VA as emergent suicide care. To better characterize the types of care that will be provided, we interpret the phrases ''immediate safety'' and ''reduce severity'' from the definition of crisis stabilization care, which is incorporated into the definition of emergent suicide care in § 17.1205, to enable VA to provide care and services that are needed to immediately stabilize an individual's vital signs and ensure their physical safety, as well as care and services to reduce the severity of symptoms related to the acute suicidal crisis. Such care can include medical and surgical services as well as mental health services. For instance, an individual in acute suicidal crisis could require emergency room care to stabilize bleeding from a self-inflicted injury and then require inpatient hospitalization to further monitor vitals and personal safety. Upon discharge from the hospital, this individual could then require some level of outpatient care to attend group or individual mental health therapy, as well as receive prescription medications, to reduce the severity of symptoms related to the acute suicidal crisis.

As stated above, while VA is interpreting emergent suicide care more broadly than that which is immediately necessary to stabilize an individual, we do not want to imply that any type of care or service will be covered. Therefore, § 17.1220(a) will establish that emergent suicide care will be provided to individuals eligible under § 17.1210 only if it is determined by a health care provider to be clinically necessary and in accord with generally accepted standards of medical practice. This language will allow clinicians to make appropriate decisions about what care should be provided. The types of care described in the preceding paragraph, for instance, would be clinically necessary and generally in accord with the standards of medical practice of emergent care and supportive care after an emergency. To further ensure the safety and appropriateness of emergent suicide care provided under these regulations, § 17.1220(b) will establish that prescription drugs, biologicals, and medical devices that may be provided during a period of emergent suicide care under § 17.1215 must be approved by the Food and Drug Administration, unless the treating VA facility or non-VA facility is conducting formal clinical trials under an Investigational Device Exemption or an Investigational New Drug application, or the drugs or biologicals are prescribed under a compassionate use exemption. VA regulates this same general restriction for FDA-approval with certain caveats under the medical benefits package available to all enrolled veterans in 38 CFR 17.38, and we find it to be reasonable to apply to this program of emergent suicide care.

§ 17.1225 Payment or Reimbursement for Emergent Suicide Care

Section 17.1225 will establish criteria related to VA's payment or reimbursement of emergent suicide care, consistent with sections 1720J(d) and (f).

We will first discuss the provisions established in 1720J(f) related to the prohibitions on charge for individuals who are eligible to receive emergent suicide care under section 1720J. Section 1720J(f)(1)(A) establishes that if VA provides care to an eligible individual under section 1720J(a) (meaning VA directly furnishes such care, pays for such care furnished in a non-VA facility, or reimburses an eligible individual for care that was furnished in a non-VA facility), VA may not charge the eligible individual for any costs of such care. Paragraph (a) of § 17.1225 will therefore state that VA may not charge individuals eligible under § 17.1210 for care received under § 17.1215, and § 17.1225(a)(1) and (a)(2) will more specifically characterize this lack of charge in the context of care VA furnishes directly in a VA facility as compared to care furnished in a non-VA facility, respectively.

Paragraph (a)(1) of § 17.1225 will state that for care furnished in a VA facility, VA will not charge any copayment or other costs that would otherwise be applicable under chapter 17 of 38 CFR. Because veterans eligible under 17.1210(a)(1) may be subject to copayments for other types of care they received from VA, we will further amend applicable VA copayment regulations at §§ 17.108 and 17.110 (related to veteran copayments for inpatient and outpatient care, and for medications, respectively) to ensure that veterans who are eligible for emergent suicide care under section 1720J(b)(1) and § 17.1210(a)(1) are not subject to charges for such care furnished in a VA facility. Former members of the Armed Forces receiving care under 38 U.S.C. 1720I are not subject to VA's copayments so no further exceptions are needed. We note that this prevention of charge to such individuals will only apply to the extent they were eligible under § 17.1210(a); if VA is not able to confirm eligibility under § 17.1210(a),

then VA shall charge an individual under § 17.1210(b) (at charges consistent with 38 CFR 17.102(a) and (b)(1)).

Paragraph (a)(2) of § 17.1225 will establish that for care furnished in a non-VA facility, VA will either: (i) pay for the care furnished, subject to paragraphs (b)–(d) of § 17.1225, or (ii) reimburse an eligible individual under § 17.1210 for the costs incurred by the individual for the care received, subject to paragraph (e) of § 17.1225. The language in § 17.1225(a)(2)(i) and (ii) implements VA's payment and reimbursement of emergent suicide care under 1720J(a)(2)–(3) and the prohibition of charge under section 1720J(f)(A).

Paragraphs (b) through (d) of § 17.1225 will further outline parameters for VA's payment of care, consistent with provisions in section 1720J(f)(2). Section 1720J(f)(2)(A) requires VA to reimburse a non-VA facility for the reasonable value of emergent suicide care if VA pays for such care to be provided in a non-VA facility under section 1720J(a)(2), and section 1720J(f)(2)(B)(i) further provides that VA may determine such reimbursement amounts in a similar manner as VA determines reimbursement amounts for medical care and services provided in non-VA facilities under any other provision of chapter 17 of title 38 U.S.C. We interpret the provisions of section 1720J(f)(2)(A) and (f)(2)(B)(i) together to allow VA to establish rates it will pay for emergent suicide care provided in non-VA facilities in accordance with parameters VA has already established to pay for medical care provided in non-VA facilities. VA pays non-VA providers and facilities under the Veterans Community Care Program (VCCP) as established by 38 U.S.C. 1703. Under that authority VA is required to purchase care through negotiated agreements. Therefore, when emergent suicide care is provided pursuant to a contract, VA will pay for that care in accordance with the terms of that contract.

Unlike VCCP, it is possible that a non-VA provider or facility could provide emergent suicide care not pursuant to a contract, but still be eligible for payment from VA. In these instances, rather than looking to a different authority under which VA pays for medical care provided in non-VA facilities, VA will establish a payment structure that is substantively similar to the terms of its existing agreements for the purchase of care under VCCP when a provider or facility is not under contract with VA. This will establish parity in payments rates between contracted and non-contracted emergent suicide care, and a hierarchy of payment rates that will ensure that the public will be able to determine what the payment rates are and ensure that a rate always exists for any eligible care.

Paragraph (b) of § 17.1225 will therefore establish that the amounts paid by VA for care furnished under § 17.1225(a)(2)(i) will either: (1) be established pursuant to contracts, or (2) if there no amount determinable under paragraph (b)(1) (*e.g.,* there is no contract), VA will pay amounts as established in § 17.1225(b)(2)(i) through (v).

Depending on where the care was provided, and what pricing schedule amounts exist for the specific services provided, VA will pay the Alaska VA Fee Schedule Amount (as calculated pursuant to 38 CFR 17.56(b)), the Medicare fee schedule or prospective payment system amount, the Critical Access Hospital rate, the VA Fee Schedule amount (as posted on *VA.gov*), or billed charges. The hierarchy established in § 17.1225(b)(2)(i) through (v) is substantively similar to methodologies VA uses to calculate payment rates for care purchased under an agreement and furnished to veterans by non-VA providers and facilities, and we believe is reasonable to apply when emergent suicide care is furnished not pursuant to a contract.

Paragraph (c) of § 17.1225 will establish that payment by VA under § 17.1225(a)(2)(i) (*i.e.,* payment for emergent suicide care provided in non-VA facilities) shall, unless rejected and refunded within 30 calendar days of receipt, extinguish all liability on the part of the individual who received care, and that neither the absence of a contract or agreement between the Secretary and the provider nor any provision of a contract, agreement, or assignment to the contrary shall operate to modify, limit, or negate this requirement. This language is consistent with section 1720J(f)(2)(B)(ii), which establishes that the requirements of section 1725(c)(3) will apply with respect to payments VA makes under section 1720J(f)(2)(A) (*i.e.,* those payments VA makes for emergent suicide care provided in a non-VA facility). Section 1725(c)(3) establishes that payment by VA on behalf of a veteran to a provider of emergency treatment shall, unless rejected and refunded by the provider within 30 days of receipt, extinguish any liability on the part of the veteran for that treatment, and that neither the absence of a contract or agreement between VA and the provider nor any provision of a contract, agreement, or assignment to the contrary shall operate to modify, limit, or negate this requirement.

Paragraph (d) of § 17.1225 will establish criteria to obtain payment from VA for emergent suicide care provided in a non-VA facility. Although section 1720J does not contain language related to such criteria (there is no language related to the submission of any particular billing or claims information to VA, in any specific format or within a certain timeframe), minimal regulation is necessary to provide a framework for submission of information to be reviewed by VA. Notably, section 1720J only refers to VA payment for emergent suicide care to non-VA facilities (see 1720J(f)(2)). However, to ensure we capture all potential sources through which such care may be provided in non-VA facilities and for which VA may pay, § 17.1225(d) will establish that either a health care provider or a non-VA facility (as those terms are defined in § 17.1205) may obtain payment from VA. Paragraph (d)(1) will address care furnished pursuant to a contract with VA, and paragraph (d)(2) will address when care is not furnished pursuant to a contract.

Paragraph (d)(1) of § 17.1225 will establish that health care providers and non-VA facilities who provide emergent suicide care pursuant to a contract will follow all applicable provisions and instructions in such contract to receive payment. Paragraph (d)(2) will establish that if the care was not provided pursuant to a contract, providers or facilities will submit to VA a standard billing form and other information as required no later than 180 calendar days from the date the care was furnished. We will not state a specific form name or number in § 17.1225(d)(2) to avoid having to revise our regulations if the form may change in the future. However, paragraph (d)(2) will further provide a website to locate more specific procedures and instructions for submission of that form and other information within the 180-day timeframe. The 180-day timeframe in which to submit to VA information for payment is consistent with the timeframe that non-VA entities or providers must submit claims for payment to VA for hospital care or medical services furnished in non-VA facilities under 38 U.S.C. 1703D(b). Section 1703D is applicable to all such care that VA is authorized to provide under chapter 17 of 38 U.S.C., including 1720J.

Section 1720J(d) does require an eligible individual who receives emergent suicide care at a non-VA facility (or a person acting on behalf of the individual) to notify VA of such care

within seven days of admission to such facility. We interpret this provision to evidence Congressional intent that, if VA will be responsible for payment of care in a non-VA facility, VA must have reasonable notice of the care having been initiated. Without such notice, VA will not be able to: confirm eligibility for such care; evaluate whether care that has or will be furnished meets the definition of emergent suicide care and is generally in accord with standards of medical practice; determine whether an extension of emergent suicide care might be warranted; or coordinate for potential continued care (for which the individual may be eligible) after emergent suicide care is no longer necessary. However, section 1720J(f)(4) also provides that VA may not charge an eligible individual for any cost of emergent suicide care provided solely by reason of VA not having been notified of such care within the seven days pursuant to section 1720J(d). We interpret the language in section 1720J(f)(4) to mean that VA may not itself charge an eligible individual or hold them liable for the costs of emergent care provided in a non-VA facility for lack of notice, such that VA may not regulate a seven-day notice requirement with regards to limiting or barring payment to non-VA providers for emergent suicide care furnished in a non-VA facility. Therefore, VA has elected not to regulate any notice requirement. However, VA will make materials available on its public facing websites to communicate the importance of timely notice to VA of emergent suicide care received at a non-VA facility (as VA does for its other programs of emergency care) for purposes of care coordination and timely consideration of factors to support VA's payment of or reimbursement for such emergent suicide care.

Paragraph (e) of § 17.1225 will implement the requirement in section 1720J(a)(3) that VA must reimburse an eligible individual for emergent suicide care provided in a non-VA facility. Consistent with the rationale expressed above, § 17.1225(e) will mirror language in § 17.1225(d)(2), to establish that individuals eligible under § 17.1210 must submit to VA a standard billing form and other information as required no later than 180 calendar days from the date the individual paid for emergent suicide care to obtain reimbursement from VA. Paragraph (e) will also contain language to direct individuals to a VA website to obtain more specific information related to the specific billing form and other required information, as well as submission procedures, to obtain reimbursement. Although individuals eligible under § 17.1210 may not themselves be non-VA entities or providers as contemplated under the section 1703D(b) requirement to submit claims information within 180 days, we nonetheless find this timeframe reasonable, and section 1720J does not contain language that specifically addresses the timeframe in which information must be submitted to VA for purposes of reimbursement. We also note that we do not anticipate many reimbursement requests to be submitted to VA, as we believe a majority of health care providers and non-VA facilities (as those terms are defined in § 17.1205) will submit claims for payment to VA directly for emergent suicide care furnished in non-VA facilities.

Paragraph (f) of § 17.1225 will establish that VA may recover costs of care it has paid or reimbursed under § 17.1225(a)(2)(i) and (ii), other than for such care for a service-connected disability, if the individual who received the care is entitled to the care (or payment of the care) under a health plan contract (as that term is defined in section 1725(f)(2), as referenced in 1720J(h)(5) and § 17.1205). This language is consistent with section 1720J(f)(3), which authorizes VA to recover the costs of emergent suicide care (other than for a service-connected disability) if the individual that received the care is entitled to receive it or have it paid for under a health plan contract. Paragraph (f) will further provide that such recovery would generally follow VA regulations at 38 CFR 17.100 through 17.106, which implement VA's right under 38 U.S.C. 1729 to recover from a third party the charges for care or services that VA furnished or paid under chapter 17 of title 38 U.S.C., to the extent the recipient of such services would be eligible to receive payment for the care or services from such third party if VA had not already furnished or paid. We believe reference to the regulations that implement recovery under section 1729 is reasonable to inform VA's recovery of costs for emergent suicide care because section 1729 applies to all care and services that VA is obligated by law to furnish or pay for under chapter 17 of title 38 U.S.C., and section 1720J(f)(3) does not otherwise expressly require VA to follow any specific VA statute or regulations related to recovery of costs for care and services furnished or paid.

§ 17.1230 Payment or Reimbursement for Emergency Transportation

Section 17.1230 will establish criteria related to VA's payment or reimbursement of emergency transportation to a facility for the receipt of emergent suicide care, consistent with sections 1720J(f)(1)(B).

Section 1720J(f)(1)(B) provides that VA will pay the costs of emergency transportation to a facility for emergent suicide care, as such costs are determined pursuant to 38 U.S.C. 1725, to the extent practicable. Although section 1720J does not further define the term ''emergency transportation,'' we believe it is reasonable to characterize it as an ambulance or air ambulance, as these are common transports for individuals to receive emergent care such as emergent suicide care. We also believe it is reasonable to interpret that emergency transport can be furnished to either a VA or a non-VA facility, as those are the two types of facilities where section 1720J authorizes care to be furnished (see section 1720J(a), (d), and (f)). Therefore, § 17.1230(a) will state that VA will pay or reimburse for the costs of emergency transportation (*i.e.,* ambulance or air ambulance) to a VA facility or non-VA facility for the provision of emergent suicide care to an eligible individual under § 17.1210.

The language in section 1720J(f)(1)(B) provides that VA will pay for the costs of emergency transportation as such costs are determined pursuant to 38 U.S.C. 1725, to the extent practicable. Section 1725 establishes VA's authority to pay or reimburse for the reasonable value of emergency treatment furnished in a non-VA facility to a veteran for emergency care that is not associated with a service-connected condition. Notably, section 1725 does not contain language related to VA paying or reimbursing for emergency transportation that is necessary to receive authorized emergency care. However, VA regulates the provision of emergency transportation necessary to receive emergency care furnished under section 1725 (in 38 CFR 17.1003) and regulates a methodology to calculate rates VA will pay or reimburse for such transportation (in 38 CFR 17.1005). Therefore, we interpret section 1720J(f)(1)(B) to authorize VA to calculate the costs VA will pay or reimburse for emergency transportation necessary to receive emergent suicide care under section 1720J(a) pursuant to 38 CFR 17.1005, to the extent practicable. Because VA finds it practicable to apply § 17.1005 to emergency transportation necessary to receive emergent suicide care,

§ 17.1230(a)(1) will establish that for claims submitted by providers of emergency transportation, rates of payment for transportation under § 17.1230(a) will be calculated as they are under 38 CFR 17.1005(a)(1) through (3). We note that § 17.1005(a) establishes the general payment limitations and parameters to calculate payments, although we believe only paragraphs (a)(1)–(a)(3) would be applicable for emergency transportation necessary to receive emergent suicide care (and the remainder of § 17.1005(b) through (d) establishes other substantive restrictions that would not apply in the context of emergency transportation for emergent suicide care under §§ 17.1200 through 17.1230). Section 17.1230(a)(1) would further clarify that, for purposes of § 17.1230, the term emergency treatment in § 17.1005(a) should be read to mean emergency transportation. Similar to reimbursement for emergent suicide care under § 17.1225, § 17.1230(a)(2) will establish that for claims of reimbursement for emergency transportation from individuals eligible under § 17.1210, VA will reimburse the costs such individuals incurred for the emergency transportation.

To maintain parity in claims processing between the emergent suicide care and the emergency transportation necessary to receive such care, § 17.1230(b) and (c) will establish essentially the same procedures that must be followed in § 17.1225(d)(2) and (e) to be paid or reimbursed by VA for the emergent suicide care itself. Paragraphs (b) and (c) of § 17.1230 will state that, to obtain payment or reimbursement (respectively) for emergency transportation furnished under paragraph (a) of this section, the provider of such services or the individual eligible to receive reimbursement for services must submit to VA a standard billing form and other required information no later than 180 calendar days from the date the services were furnished or the date that the individual paid for the services, and that submission instructions to include required form(s) and other information can be found at *www.va.gov.*

Lastly, we will reiterate in § 17.1230(d) the same requirement from § 17.1225(e), that payment by VA for emergency transportation shall, unless rejected and refunded within 30 calendar days of receipt, extinguish all liability on the part of the individual who received care, and that no provision of a contract, agreement, or assignment to the contrary shall operate to modify, limit, or negate this requirement. Section 17.1230(d) will apply this requirement to VA payments for emergency transportation, although the requirement in section 1720J(f)(2)(B)(ii) relates only to payments VA makes for emergent suicide care in a non-VA facility under section 1720J(f)(2)(A). However, we do not read section 1720J to otherwise prevent VA from applying this same requirement to the emergency transportation necessary to receive emergent suicide care, and we believe is reasonable to ensure that the individual who received such care is not subject to any potential balance billing for associated emergency transportation.

Administrative Procedure Act

The Administrative Procedure Act (APA), codified in part at 5 U.S.C. 553, generally requires agencies publish substantive rules in the **Federal Register** for notice and comment.

However, pursuant to 5 U.S.C. 553(b)(B), general notice and the opportunity for public comment are not required with respect to a rulemaking when an ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' In accordance with 5 U.S.C. 553(b)(B), the Secretary has concluded that there is good cause to publish this rule without prior opportunity for public comment. This rule implements the mandates of 38 U.S.C. 1720J to establish a new program to provide emergent suicide care to ensure, to the extent practicable, the immediate safety and reduced distress of an eligible individual in acute suicidal crisis.

Suicide is a national public health concern, and it is preventable. The rate of veteran suicide in the United States remains high, despite great effort. As detailed in VA's 2021 National Veteran Suicide Prevention Annual Report, the average number of veteran suicide deaths per day in 2019 was 17.2. (Available online: *https://www.mentalhealth.va.gov/docs/data-sheets/2021/2021-National-Veteran-Suicide-Prevention-Annual-Report-FINAL-9-8-21.pdf*). Of those 17.2 deaths per day, 6.8 were veterans who recently used VA health care (that is, these veterans had received VA health care services within the preceding two years) and 10.4 were veterans who had not recently used VA health care. See *https://www.mentalhealth.va.gov/docs/data-sheets/2021/2021-National-Veteran-Suicide-Prevention-Annual-Report-FINAL-9-8-21.pdf.* There has also been an increase in call volume to the Veterans Crisis Line (VCL). In fiscal year (FY) 2019, VCL answered an average daily call volume of 1590.67 calls compared with 1765.02 in FY 2020 and 1807.52 in FY 2021, with VCL call volume increasing over 22% in direct-date comparisons from FY 2019 to FY 2021. Additionally, as of July 16, 2022, the new National Suicide Prevention Hotline number (988) has a feature to connect veterans to the Veterans Crisis Line, which may also encourage individuals who are veterans but do not seek VA care to be made aware of emergent suicide care under this program. This rule will also implement payment or reimbursement of emergent suicide care for veterans regardless of enrollment status, to include costs associated with emergency transportation to receive such care, which VA believes will assist more veterans and former service members in seeking care to prevent suicide.

Veterans, in particular, may be uniquely vulnerable to negative mental health effects of the Coronavirus Disease–2019 (COVID–19) pandemic such as suicidality due to their older age, previous trauma exposures, and higher pre-pandemic prevalence of physical and psychiatric risk factors and conditions. See Na, P.J., Tsai, J., Hill, M.L., Nichter, B., Norman, S.B., Southwick, S.M., & Pietrzak, R.H. (2021). Prevalence, risk and protective factors associated with suicidal ideation during the COVID–19 pandemic in U.S. military veterans with pre-existing psychiatric conditions. *Journal of Psychiatric Research, 137,* 351–359. In an analysis of data from the National Health and Resilience in Veterans Study, researchers found that 19.2% of veterans screened positive for suicidal ideation during the pandemic, and such veterans had lower income, were more likely to have been infected with COVID–19, reported greater COVID–19-related financial and social restriction stress, and increases in psychiatric symptoms and loneliness during the pandemic when compared to veterans without suicidal ideation. See the National Health and Resilience in Veterans Study. Additionally, they found that among veterans who were infected with COVID–19, those aged 45 or older and who reported lower purpose in life were more likely to endorse suicidal ideation. See the National Health and Resilience in Veterans Study. These researchers noted that monitoring for suicide risk and worsening psychiatric symptoms in older veterans who have been infected with COVID–19 may be important, and that interventions that enhance purpose in life may help protect against suicidal ideation in this population.

Furthermore, studies have shown increased rates of suicide after pandemics such as the 1918 Influenza (H1N1) pandemic and the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak, in which increased risk factors associated with negative impacts of pandemics were believed to contribute to suicide. See Wasserman IM. The impact of epidemic, war, prohibition and media on suicide: United States, 1910–1920. Suicide Life Threat Behav. 1992 Summer;22(2):240–54. PMID: 1626335.; *See also,* Cheung YT., Chau PH., and Yip PS. A revisit on older adults' suicides and severe acute respiratory syndrome (SARS) epidemic in Hong Kong. Int J Geriatr Psychiatry. 2008; 23: 1231–1238. Thus, increased suicide death could occur after the COVID–19 pandemic unless action is taken. See Gunnell, D., Appleby, L., Arensman, E., Hawton, K., John, A., Kapur, N., Khan, M., O'Connor, R.C., & Pirkis, J. (2020). Suicide risk and prevention during the COVID–19 pandemic. The Lancet Psychiatry, 7(6), 468–471. Consistent with the recommendations of this research, this rule will support both VA and non-VA facilities in providing emergent suicide care, to enable more resources to reach veterans.

It is critical that this rulemaking publish without delay and that the rule be effective upon publication, as the emergent suicide care will reach a specific population at risk of suicide, particularly those veterans who are not enrolled with VA, which is especially needed during the COVID–19 pandemic and the immediate period following this pandemic. Delay in implementing this rule would have a severe detrimental impact on the availability of health care for veterans in life threatening situations.

The expanded eligibility for this care, the associated transportation to receive such care, and the prohibition on charge for the care are all unique factors that we believe will encourage individuals to seek care where they may not have previously. These unique factors, however, also created a need for VA to take additional time beyond the Congressional deadline in section 201(c) of the Act to complete the required policy analysis and decision-making processes that preceded this rule—this is particularly true because the Act requires VA not only to directly furnish emergent suicide care, but then also to pay and reimburse for such care furnished in non-VA facilities. VA did not want to implement this program of emergent suicide care piecemeal, and additional time beyond the Congressional deadline was needed to ensure VA could simultaneously furnish this care directly, as well as enable processes whereby the care could be paid for or reimbursed when furnished in non-VA facilities. For instance, VA has had to plan and initiate multiple systems changes to ensure that copayments or other potential costs are not charged to individuals who would be eligible for this care. Systems changes were also needed to recognize expanded eligibility for this care, particularly because such eligibility changes depending on whether an acute suicidal crisis is present or whether symptoms related to such crisis continue to require care under this program.

For these reasons, the Secretary has concluded that ordinary notice and comment procedures would be impracticable and contrary to the public interest and is accordingly issuing this rule as an interim final rule. The Secretary will consider comments that are received within 60 days after the date that this interim final rule is published in the **Federal Register** and address them in a subsequent **Federal Register** document announcing a final rule incorporating any changes made in response to the public comments.

For the reasons set forth above, the Secretary also finds that there is good cause under 5 U.S.C. 553(d)(3) to publish this rule with an effective date that is less than 30 days from the date of publication.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

Unfunded Mandates

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

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), 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 Office of Management and Budget (OMB) control number. See also 5 CFR 1320.8(b)(2)(vi).

This interim final rule will impose new collections of information requirements and burden. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval. Notice of OMB approval for this information collection will be published in the **Federal Register**.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Sections 17.1225 and 17.1230 contain new collections of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collections of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the new collection of information contained in this rulemaking should be submitted through *www.regulations.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AR50—Emergent Suicide Care'' and should be sent within 60 days of publication of this rulemaking. The collection of information associated with this rulemaking can be viewed at: *www.reginfo.gov/public/do/PRAMain.*

A comment to OMB is best assured of having its full effect if OMB receives it

within 30 days of publication. This does not affect the deadline for the public to comment on the interim final rule.

The Department considers comments by the public on proposed collections of information in—

• Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;

• Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;

• Enhancing the quality, usefulness, and clarity of the information to be collected; and

• Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

The collections of information contained in 38 CFR 17.1225 and 17.1230 are described immediately following this paragraph, under their respective titles.

Title: Submission of Medical Record Information Under the COMPACT Act.

OMB Control No: 2900—(new).

CFR Provisions: 38 CFR 17.1225 and 17.1230.

• *Summary of collection of information:* This amended collection requires providers of emergent suicide care in non-VA facilities, or providers of emergency transportation necessary to receive such care, pursuant to 38 U.S.C. 1720J, to submit to VA certain information to receive payment or reimbursement for the provision of such care or transportation.

• *Description of need for information and proposed use of information:* This collection of information is necessary to evaluate and determine eligibility for emergent suicide care and transportation and to ensure that any payment amounts are for the provision of such care in accordance with the parameters established in 38 CFR 17.1200–17.1230.

• *Description of likely respondents:* Health care providers of emergent suicide care in non-VA facilities and providers of emergency transportation necessary to receive such care.

• *Estimated number of respondents:* 26,910 health care and transportation providers annually.

• *Estimated frequency of responses:* 3.4 annually.

• *Estimated average burden per response:* 5 minutes.

• *Estimated total annual reporting and recordkeeping burden:* 7,624 hours.

• *Estimated annual cost to respondents for the hour burdens for collections of information:* $ 213,562.

Title: VA form 10–320, Claim reimbursement form.

OMB Control No: 2900—(new).

CFR Provision: 38 CFR 17.1225 and 17.1230.

• *Summary of collection of information:* This new collection of information requires individuals eligible for emergent suicide care, and who have paid costs for such care or associated emergency transportation to receive such care, to submit to VA certain information to receive reimbursement for such costs incurred.

• *Description of need for information and proposed use of information:* This collection of information is necessary to evaluate and determine eligibility for emergent suicide care and to ensure that any reimbursement amounts are for the provision of such care in accordance with the parameters established in 38 CFR 17.1200–17.1230.

• *Description of likely respondents:* Individuals eligible under 38 CFR 17.1210 who have incurred costs for the provision of emergent suicide care in or associated emergency transportation to non-VA facilities that VA must reimburse.

• *Estimated number of respondents:* 155.

• *Estimated frequency of responses:* 1.

• *Estimated average burden per response:* 10 minutes.

• *Estimated total annual reporting and recordkeeping burden:* 26 hours.

• *Estimated annual cost to respondents for the hour burdens for collections of information:* $ 728.

Assistance Listings

The Assistance listing number and title for the programs affected by this document is 64.009, Veterans Medical Care Benefits; 64.011—Veterans Domiciliary Care; 64.012—Veterans Dental Care; 64.013—Veterans Prescription Service; 64.014—Veterans Prosthetic Appliances; 64.015—Veterans State Domiciliary Care; 64.026—Veterans State Nursing Home Care; 64.029—Veterans State Adult Day Health Care; 64.033—Purchase Care Program; 64.040—CHAMPVA; 64.041—VHA Inpatient Medicine; 64.042—VHA Outpatient Specialty Care; 64.043—VHA Inpatient Surgery; 64.044—VHA Mental Health Residential; 64.045—VHA Home Care; 64.046—VHA Outpatient Ancillary Services; 64.047—VHA Inpatient Psychiatry; 64.048—VHA Primary Care; 64.049—VHA Mental Health clinics; 64.050—VHA Community Living Center; 64.053—VHA Diagnostic Care.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on August 11, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Consuela Benjamin,

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

For the reasons stated in the preamble, the Department of Veterans Affairs revises 38 CFR part 17 as set forth below:

PART 17—MEDICAL

■ 1. The authority citation for part 17 is amended to read in part as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

* * * * *

Section 17.37 is also issued under 38 U.S.C. 101, 1701, 1705, 1710, 1720J, 1721, 1722.

* * * * *

Section 17.108 is also issued under 38 U.S.C. 501, 1703, 1710, 1725A, 1720J, and 1730A.

* * * * *

Section 17.110 is also issued under 38 U.S.C. 501, 1703, 1710, 1720D, 1720J, 1722A, and 1730A.

* * * * *

Sections 17.1200 through 17.1230 are also issued under 38 U.S.C. 1720J.

* * * * *

■ 2. Amend § 17.37 by adding paragraph (l) and removing the authority citation at the end of the section.

The addition reads as follows:

§ 17.37 Enrollment not required—provision of hospital and outpatient care to veterans.

* * * * *

(l) An individual may receive emergent suicide care pursuant to 38 U.S.C. 1720J and 38 CFR 17.1200–17.1230.

■ 3. Amend § 17.108 by adding paragraph (e)(19) to read as follows:

§ 17.108 Copayments for inpatient hospital care and outpatient medical care.

* * * * *

(e) * * *

(19) Emergent suicide care as authorized under 38 CFR 17.1200–17.1230.

* * * * *

■ 4. Amend § 17.110 by adding paragraph (c)(13) to read as follows:

§ 17.110 Copayments for medication.

* * * * *

(c) * * *

(13) Medication for an individual as part of emergent suicide care as authorized under 38 CFR 17.1200–17.1230.

■ 5. Add an undesignated section heading and §§ 17.1200 through 17.1230 to read as follows:

* * * * *

Emergent Suicide Care

Sec.
17.1200 Purpose and scope.
17.1205 Definitions.
17.1210 Eligibility.
17.1215 Periods of emergent suicide care.
17.1220 Provision of emergent suicide care.
17.1225 Payment or reimbursement for emergent suicide care.
17.1230 Payment or reimbursement of emergency transportation.

* * * * *

Emergent Suicide Care

§ 17.1200 Purpose and scope.

(a) *Purpose.* Sections 17.1200 through 17.1230 implement VA's authority under 38 U.S.C. 1720J to provide emergent suicide care.

(b) *Scope.* If an individual is eligible under § 17.1210, VA will provide emergent suicide care under §§ 17.1200 through 17.1230 and not under other regulations in title 38 CFR through which emergent or other care could be provided. Eligibility under § 17.1210, however, does not affect eligibility for other care under chapter 17 of title 38, U.S.C.

§ 17.1205 Definitions.

For purposes of sections §§ 17.1200 through 17.1230:

Acute suicidal crisis means an individual was determined to be at imminent risk of self-harm by a trained crisis responder or health care provider.

Crisis residential care means emergent suicide care provided in a residential facility other than a hospital (that is not a personal residence) that provides 24-hour medical supervision.

Crisis stabilization care means, with respect to an individual in acute suicidal crisis, care that ensures, to the extent practicable, immediate safety and reduces: the severity of distress; the need for urgent care; or the likelihood that the severity of distress or need for urgent care will increase during the transfer of that individual from a facility at which the individual has received care for that acute suicidal crisis.

Emergent suicide care means crisis stabilization care provided to an individual eligible under § 17.1210 pursuant to a recommendation from the Veterans Crisis Line or when such individual has presented at a VA or non-VA facility in an acute suicidal crisis.

Health care provider means a VA or non-VA provider who is licensed to practice health care by a State and who is performing within the scope of their practice as defined by a State or VA practice standard.

Health-plan contract has the same meaning as that term is defined in 38 U.S.C. 1725(f)(2).

Inpatient care means care received by an individual during their admission to a hospital.

Non-VA facility means a facility that meets the definition in 38 U.S.C. 1701(4).

Outpatient care means care received by an individual that is not described within the definition of ''inpatient care'' under this section to include telehealth, and without the provision of room or board.

Provide, provided, or provision means furnished directly by VA, paid for by VA, or reimbursed by VA.

Trained crisis responder means an individual who responds to emergency situations in the ordinary course of their employment and therefore can be presumed to possess adequate training in crisis intervention.

VA facility means a facility that meets the definition in 38 U.S.C. 1701(3).

Veterans Crisis Line means the hotline under 38 U.S.C. 1720F(h).

§ 17.1210 Eligibility.

(a) An individual is eligible for emergent suicide care if they were determined to be in acute suicidal crisis and are either of the following:

(1) A veteran as that term is defined in 38 U.S.C. 101; or

(2) An individual described in 38 U.S.C. 1720I(b).

(b) VA may initiate provision of emergent suicide care for an individual in acute suicidal crisis prior to that individual's status under paragraphs (a)(1) or (2) of this section being confirmed. If VA is unable to confirm an individual's status under paragraph (a)(1) or (2) of this section, VA shall bill that individual for the emergent suicide care provided consistent with 38 CFR 17.102(a) and (b)(1).

§ 17.1215 Periods of emergent suicide care.

(a) Unless extended under paragraph (b) of this section, emergent suicide care will be provided to an individual eligible under § 17.1210 from the date acute suicidal crisis is determined to exist:

(1) Through inpatient care or crisis residential care, as long as the care continues to be clinically necessary, but not to exceed 30 calendar days; or

(2) If care under paragraph (a)(1) of this section is unavailable, or if such care is not clinically appropriate, through outpatient care, as long as the care continues to be clinically necessary, but not to exceed 90 calendar days.

(b) VA may extend a period under paragraph (a) of this section if such period is ending and VA determines that an individual continues to require care to address the effects of the acute suicidal crisis.

§ 17.1220 Provision of emergent suicide care.

(a) Emergent suicide care will be provided to individuals eligible under § 17.1210 only if it is determined by a health care provider to be clinically necessary and in accord with generally accepted standards of medical practice.

(b) Prescription drugs, biologicals, and medical devices that may be provided during a period of emergent suicide care under § 17.1215 must be approved by the Food and Drug Administration, unless the treating VA facility or non-VA facility is conducting formal clinical trials under an Investigational Device Exemption or an Investigational New Drug application, or the drugs, biologicals, or medical devices are prescribed under a compassionate use exemption.

§ 17.1225 Payment or reimbursement for emergent suicide care.

(a) VA will not charge individuals eligible under § 17.1210 who receive care under § 17.1215 any costs for such care.

(1) For care furnished in a VA facility, VA will not charge any copayment or other costs that would otherwise be applicable under 38 CFR chapter 17.

(2) For care furnished in a non-VA facility, VA will either:

(i) Pay for the care furnished, subject to paragraphs (b) through (d) of this section; or

(ii) Reimburse an individual eligible under § 17.1210 for the costs incurred by the individual for the care received, subject to paragraph (e) of this section.

(b) The amounts paid by VA for care furnished under paragraph (a)(2)(i) of this section will:

(1) Be established pursuant to contracts, or agreements, or

(2) If there is no amount determinable under paragraph (b)(1) of this section, VA will pay the following amounts:

(i) For care furnished in Alaska for which a VA Alaska Fee Schedule (see 38 CFR 17.56(b)) code and amount exists: The lesser of billed charges or the VA Alaska Fee Schedule amount. The VA Alaska Fee Schedule only applies to physician and non-physician professional services. The schedule uses the Health Insurance Portability and Accountability Act mandated national standard coding sets.

(ii) For care not within the scope of paragraph (b)(2)(i) of this section, and for which an applicable Medicare fee schedule or prospective payment system amount exists for the period in which the service was provided (without any changes based on the subsequent development of information under Medicare authorities) (hereafter ''Medicare rate''): The lesser of billed charges or the applicable Medicare rate.

(iii) For care not within the scope of paragraph (b)(2)(i) of this section, furnished by a facility currently designated as a Critical Access Hospital (CAH) by CMS, and for which a specific amount is determinable under the following methodology: The lesser of billed charges or the applicable CAH rate verified by VA. Data requested by VA to support the applicable CAH rate shall be provided upon request. Billed charges are not relevant for purposes of determining whether a specific amount is determinable under the above methodology.

(iv) For care not within the scope of paragraphs (b)(2)(i) through (iii) of this section and for which there exists a VA Fee Schedule amount for the period in which the service was performed: The lesser of billed charges or the VA Fee Schedule amount for the period in which the service was performed, as posted on *VA.gov.*

(v) For care not within the scope of paragraphs (b)(2)(i) through (iv) of this section: Billed charges.

(c) Payment by VA under paragraph (a)(2)(i) of this section shall, unless rejected and refunded within 30 calendar days of receipt, extinguish all liability on the part of the individual who received care. Neither the absence of a contract or agreement between the Secretary and the provider nor any provision of a contact, agreement, or assignment to the contrary shall operate to modify, limit, or negate this requirement.

(d) To obtain payment under paragraph (a)(2)(i) of this section, a health care provider or non-VA facility must:

(1) If the care was provided pursuant to a contract, follow all applicable provisions and instructions in such contract to receive payment.

(2) If the care was not provided pursuant to a contract with VA, submit to VA a standard billing form and other information as required no later than 180 calendar days from the date services were furnished. Submission instructions, to include required forms and other information, can be found at *www.va.gov.*

(e) To obtain reimbursement under paragraph (a)(2)(ii) of this section, an individual eligible under § 17.1210 must submit to VA a standard billing form and other information as required no later than 180 calendar days from the date the individual paid for emergent suicide care. Submission instructions, to include required forms and other information, can be found at *www.va.gov.*

(f) VA may recover costs of care it has paid or reimbursed under paragraphs (a)(2)(i) and (ii) of this section, other than for such care for a service-connected disability, if the individual who received the care is entitled to the care (or payment of the care) under a health plan contract. Such recovery procedures will generally comply with 38 CFR 17.100–17.106.

§ 17.1230 Payment or reimbursement of emergency transportation.

(a) VA will pay or reimburse for the costs of emergency transportation (*i.e.,* ambulance or air ambulance) to a VA facility or non-VA facility for the provision of emergent suicide care to an eligible individual under § 17.1210.

(1) For claims submitted by providers of emergency transportation, rates of payment for emergency transportation under paragraph (a) of this section will be calculated as they are under 38 CFR 17.1005(a)(1) through (3). For purposes of this section, the term ''emergency treatment'' in § 17.1005(a) should be read to mean ''emergency transportation.''

(2) For claims submitted by an individual eligible under § 17.1210, VA will reimburse for emergency transportation under paragraph (a) of this section the costs such individual incurred for the emergency transportation.

(b) To obtain payment for emergency transportation furnished under paragraph (a) of this section, the provider of such transportation must submit to VA a standard billing form and other information as required no later than 180 calendar days from the date transportation was furnished. Submission instructions, to include required forms and other information, can be found at *www.va.gov.*

(c) To obtain reimbursement for emergency transportation under paragraph (a) of this section, an individual eligible under § 17.1210 must submit to VA a standard billing form and other information as required no later than 180 calendar days from the date the individual paid for such transportation. Submission instructions, to include required forms and other information, can be found at *www.va.gov.*

(d) Payment by VA under paragraph (a) of this section shall, unless rejected and refunded within 30 calendar days of receipt, extinguish all liability on the part of the individual who received care. No provision of a contact, agreement, or assignment to the contrary shall operate to modify, limit, or negate this requirement.

[FR Doc. 2023–00298 Filed 1–13–23; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 36

RIN 2900–AR79

Federal Civil Penalties Inflation Adjustment Act Amendments; Correction

AGENCY: Department of Veterans Affairs.

ACTION: Correcting amendments.

SUMMARY: On January 6, 2023, the Department of Veterans Affairs (VA) published in the **Federal Register** a final rule that provided public notice of inflationary adjustments to the maximum civil monetary penalties

assessed or enforced by VA, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (the Act), for calendar year 2023. This correction addresses a typographical error in the published final rule.

DATES: This correction is effective January 17, 2023. The correction is applicable as of January 6, 2023.

FOR FURTHER INFORMATION CONTACT: Stephanie Li, Chief, Regulations Team, Loan Guaranty Service (26), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 632–8862. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA is correcting its regulations published on January 6, 2023, in the **Federal Register** at 88 FR 986 in the final rule ''RIN 2900–AR79, Federal Civil Penalties Inflation Adjustment Act Amendments''. The final rule submitted for publication contained a typographical error; specifically, two digits were transposed in the second amendatory instruction. The final rule lists the current amount at 38 CFR 36.4340 as ''$25,067'', but the current amount is ''$25,076''.

List of Subjects in 38 CFR Part 36

Condominiums, Housing, Individuals with disabilities, Loan programs—housing and community development, Loan programs—veterans, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Veterans.

For the reasons stated in the preamble, 38 CFR part 36 is corrected by making the following correcting amendment:

PART 36—LOAN GUARANTY

■ 1. The authority citation for part 36 continues to read as follows:

Authority: 38 U.S.C. 501 and 3720.

§ 36.4340 [Amended]

■ 2. In § 36.4340, amend paragraphs (k)(1)(i) introductory text and (k)(3) by removing ''$25,076'' and adding in its place ''$27,018''.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2023–00716 Filed 1–13–23; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0439; FRL–9870–02–R9]

Air Plan Approval; California; San Diego County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve a revision to the San Diego County Air Pollution Control District's (SDCAPCD or ''District'') portion of the California State Implementation Plan (SIP). This revision concerns a negative declaration for the 2008 8-hour ozone National Ambient Air Quality Standards (NAAQS) in the ozone nonattainment area under the jurisdiction of the SDCAPCD and one volatile organic compound (VOC) rule covering transfer of organic compounds into mobile transport trucks. We are approving a local rule to regulate these emission sources under the Clean Air Act (CAA or ''the Act'') and the negative declaration. We are also correcting sections in the Code of Federal Regulations (CFR) to reflect the current status of certain provisions of the California SIP.

DATES: This rule is effective on February 16, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2022–0439. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Donnique Sherman, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4129 or by email at *sherman.donnique@epa.gov.*

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

Table of Contents

I. Proposed Action
II. Public Comments and EPA Responses
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V. Statutory and Executive Order Reviews

I. Proposed Action

On June 3, 2022 (87 FR 33697), the EPA proposed to approve the following submittals into the California SIP.

Local agency	Document title	Adopted/ amended	Submitted
SDCAPCD	Rule 61.2 Transfer of Organic Compounds into Mobile Transport Tanks	02/10/2021	04/20/2021
SDCAPCD	2020 Reasonably Available Control Technology (RACT) Demonstration for the National Ambient Air Quality Standards for Ozone in San Diego County, October 2020—*Negative Declaration for Non-CTG Major VOC Sources.*	10/14/2020	12/29/2020

As mentioned in our proposed action, these submittals correct deficiencies identified in the EPA's December 3, 2020 (85 FR 77996) partial disapproval of SDCAPCD's 2008 Eight-Hour Ozone Reasonably Available Control Technology Demonstration for San Diego County (''2008 RACT SIP''). SDCAPCD Rule 61.2 is designed to decrease VOC emissions during the transfer of liquid compounds into mobile transport tanks. The submitted negative declaration is a formally adopted declaration that there are currently no sources of VOC emissions in the portion of the ozone nonattainment area regulated by SDCAPCD that exceed the 100 tons per year VOC threshold for Moderate ozone nonattainment areas and are not covered by a Control Techniques Guidelines (CTG) document. We proposed to approve these submittals because we have determined that they comply with

the relevant CAA requirements. Our proposed action contains more information on the submittals and our evaluation.

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period. During the comment period we received one comment in support of the EPA's June 3, 2022 proposed action.

III. EPA Action

No comments were submitted that change our assessment of the submittals as described in our proposed action. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is fully approving into the California SIP SDCAPCD's negative declaration for non-CTG major VOC sources for the 2008 RACT SIP Moderate area requirements and Rule 61.2. The February 10, 2021 version of Rule 61.2 will replace the previously approved version of this rule (amended July 26, 2000) in the SIP. The approval of these submittals stops all sanctions and Federal implementation plan clocks started by our December 3, 2020 (85 FR 77996) partial disapproval action on the SDCAPCD 2008 RACT SIP. We are also correcting an error in the CFR concerning another deficiency previously identified in the SDCAPCD 2008 RACT SIP that has since been addressed by the State of California. In our rulemaking promulgating that approval, we failed to remove the language in the CFR that codified the disapproval, which could result in public confusion about the status of the California SIP.

On October 22, 2021 (86 FR 58593), the EPA published a final rule entitled ''Air Plan Approval; California; San Diego Air Pollution Control District'' that approved revisions to the SDCAPCD portion of the California SIP. That rule approved the February 10, 2021 versions of Rule 67.6.1 and Rule 67.6.2 into the California SIP, replacing previously approved versions of these rules. The revision to Rule 67.6.1 fixed the deficiency identified in our partial disapproval of SDCAPCD's 2008 RACT SIP with respect to the requirement to establish RACT-level controls for sources covered by the ''Control Techniques Guidelines for Industrial Cleaning Solvents'' (85 FR 77996). However, the EPA's final rule inadvertently failed to include amendatory instructions to remove the industrial cleaning solvents category from the regulatory text at 40 CFR 52.237(b)(2)(i)(D), where it is listed as a disapproved element of SDCAPCD's RACT SIP. This action corrects the regulatory text to reflect the current status of SDCAPCD's RACT SIP.

In this rule, the EPA will remove the industrial cleaning solvents CTG category from the regulatory text at 40 CFR 52.237(b)(2)(i)(D), as SDCAPCD has met its RACT SIP obligations with respect to this CTG category (86 FR 58593). The EPA has determined that this action falls under the ''good cause'' exemption in section 553(b)(3)(B) of the Administrative Procedure Act (APA) which, upon finding ''good cause,'' authorizes agencies to dispense with public participation where public notice and comment procedures are impracticable, unnecessary, or contrary to public interest. Public notice and comment for this action is unnecessary because the underlying rules were already subject to a 30-day comment period, and this action is merely updating the regulatory text accordingly. Further, this action is consistent with the purpose and rationale of the final rules. Because this action does not change the EPA's analyses or overall actions, no purpose would be served by additional public notice and comment. Consequently, additional public notice and comment are unnecessary.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of SDCAPCD Rule 61.2, ''Transport of Organic Compounds into Mobile Transport Tanks,'' revision adopted on February 10, 2021, which regulates VOC emissions during the transfer of liquid compounds into mobile transport tanks. The EPA has made, and will continue to make, these documents available through *www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the

Executive order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

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

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

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The State did not evaluate environmental justice considerations as part of its SIP submittal. There is no information in the record inconsistent with the stated goals of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and indigenous peoples.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 20, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: December 16, 2022.

Martha Guzman Aceves,

Regional Administrator, Region IX.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(285)(i)(E)(*2*), (c)(565)(i)(A)(*4*), and (c)(584)(ii)(A)(*4*) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(285) * * *

(i) * * *

(E) * * *

(*2*) Previously approved on August 26, 2003, in paragraph (c)(285)(i)(E)(*1*) of this section and now deleted with replacement in paragraph (c)(565)(i)(A)(*4*) of this section, Rule 61.2, amended on July 26, 2000.

* * * * *

(565) * * *

(i) * * *

(A) * * *

(*4*) Rule 61.2, ''Transport of Organic Compounds into Mobile Transport Tanks,'' revision adopted on February 10, 2021.

* * * * *

(584) * * *

(ii) * * *

(A) * * *

(*4*) Negative Declaration for Major Non-CTG Stationary Sources of VOC, as submitted in the 2020 Reasonably Available Control Technology Demonstration for the National Ambient Air Quality Standards for Ozone in San Diego County, adopted on October 14, 2020, for the 2008 ozone NAAQS.

* * * * *

■ 3. Section 52.222 is amended by revising paragraph (a)(5)(ii) to read as follows:

§ 52.222 Negative declarations.

(a) * * *

(5) * * *

(ii) The following negative declarations for the 2008 ozone NAAQS were adopted by the San Diego County Air Pollution Control District.

TABLE 4 TO PARAGRAPH (a)(5)(ii)—NEGATIVE DECLARATIONS FOR THE 2008 OZONE NAAQS

CTG document No.	Title	Adopted: 12/14/2016 Submitted: 4/12/2017 SIP Approved: 12/03/2020	Adopted: 10/14/2020 Submitted: 12/29/2020 SIP Approved: 6/29/2022	Adopted: 10/14/2020 Submitted: 12/29/2020 SIP Approved: 1/17/2023
EPA–450/2–77–008	Control of Volatile Organic Emissions from Existing Stationary Sources—Volume II: Surface Coating of Cans, Coils, Paper, Fabrics, Automobiles, and Light-Duty Trucks (Automobiles, and light-duty truck coatings only).	X		
EPA–450/2–77–025	Control of Refinery Vacuum Producing Systems, Wastewater Separators, and Process Unit Turnarounds.	X		
EPA–450/2–77–032	Control of Volatile Organic Emissions from Existing Stationary Sources—Volume III: Surface Coating of Metal Furniture.	X		
EPA–450/2–77–033	Control of Volatile Organic Emissions from Existing Stationary Sources—Volume IV: Surface Coating of Insulation of Magnet Wire.	X		
EPA–450/2–77–034	Control of Volatile Organic Emissions from Existing Stationary Sources—Volume V: Surface Coating of Large Appliances.	X		
EPA–450/2–78–029	Control of Volatile Organic Emissions from Manufacture of Synthesized Pharmaceutical Products.		X	
EPA–450/2–78–030	Control of Volatile Organic Emissions from Manufacture of Pneumatic Rubber Tires	X		
EPA–450/2–78–032	Control of Volatile Organic Emissions from Existing Stationary Sources—Volume VII: Factory Surface Coating of Flat Wood Paneling.	X		
EPA–450/2–78–036	Control of Volatile Organic Compound Leaks from Petroleum Refinery Equipment	X		

TABLE 4 TO PARAGRAPH (a)(5)(ii)—NEGATIVE DECLARATIONS FOR THE 2008 OZONE NAAQS—Continued

CTG document No.	Title	Adopted: 12/14/2016 Submitted: 4/12/2017 SIP Approved: 12/03/2020	Adopted: 10/14/2020 Submitted: 12/29/2020 SIP Approved: 6/29/2022	Adopted: 10/14/2020 Submitted: 12/29/2020 SIP Approved: 1/17/2023
EPA–450/3–82–009	Control of Volatile Organic Compound Emissions from Large Petroleum Dry Cleaners.	X		
EPA–450/3–83–006	Control of Volatile Organic Compound Leaks from Synthetic Organic Chemical Polymer and Resin Manufacturing Equipment.	X		
EPA–450/3–83–007	Control of Volatile Organic Compound Equipment Leaks from Natural Gas/Gasoline Processing Plants.	X		
EPA–450/3–83–008	Control of Volatile Organic Compound Emissions from Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins.	X		
EPA–450/3–84–015	Control of Volatile Organic Compound Emissions from Air Oxidation Processes in Synthetic Organic Chemical Manufacturing Industry.	X		
EPA–450/4–91–031	Control of Volatile Organic Compound Emissions from Reactor Processes and Distillation Operations in Synthetic Organic Chemical Manufacturing Industry.	X		
EPA–453/R–97–004	Control of Volatile Organic Compound Emissions from Coating Operations at Aerospace Manufacturing and Rework Operations.	X		
	Aerospace MACT, *see the* FEDERAL REGISTER *of 6/6/94*			
EPA–453/R–06–004	Control Techniques Guidelines for Flat Wood Paneling Coatings	X		
EPA 453/R–07–004	Control Techniques Guidelines for Large Appliance Coatings	X		
EPA 453/R–07—005	Control Techniques Guidelines for Metal Furniture Coatings	X		
EPA–453/R–08–003	Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings Tables 3–6.		X	
EPA–453/R–08–004	Control Techniques Guidelines for Fiberglass Boat Manufacturing Materials		X	
EPA–453/R–08–006	Control Techniques Guidelines for Automobile and Light-Duty Truck Assembly Coatings.	X		
— N/A —	Major non-CTG VOC sources			X

* * * * *

§ 52.237 [Amended]

■ 4. Section 52.237 is amended by removing and reserving paragraph (b)(2).

[FR Doc. 2022–27871 Filed 1–13–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0962; FRL–10505–01–R9]

Finding of Failure To Submit State Implementation Plan Revisions Required Under Clean Air Act Section 185; California; Sacramento Metro Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The EPA is taking final action finding that the state of California has failed to submit state implementation plan (SIP) revisions for the Sacramento Metro nonattainment area to satisfy certain requirements of the Clean Air Act (CAA) for the 2008 8-hour ozone National Ambient Air Quality Standards (NAAQS). Specifically, these requirements pertain to the assessment and collection of fees under CAA section 185. This action triggers certain CAA deadlines for the imposition of sanctions if California does not submit the required SIP revisions within the specified timeframes. This finding also establishes a CAA deadline for the EPA to promulgate federal implementation plans (FIPs) to address the CAA section 185 requirements if the State does not submit or the EPA does not approve the State's section 185 SIP revisions.

DATES: This action is effective on February 16, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2022–0962. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Mae Wang, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4137 or by email at *wang.mae@epa.gov.*

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

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I. Background

A. The Sacramento Metro Ozone Nonattainment Area

The Sacramento Metro ozone nonattainment area in California consists of Sacramento and Yolo counties and portions of El Dorado, Placer, Solano and Sutter counties. For a precise description of the geographic boundaries of the Sacramento Metro area for the 2008 ozone NAAQS, see the Code of Federal Regulations (CFR) at 40 CFR 81.305. Several local air agencies have jurisdiction in this area. Sacramento County is under the jurisdiction of the Sacramento Metropolitan Air Quality Management District (Sacramento Metropolitan AQMD). Yolo County and the eastern portion of Solano County comprise the Yolo-Solano Air Quality Management District (Yolo-Solano AQMD). The southern portion of Sutter County is

part of the Feather River Air Quality Management District (Feather River AQMD). The western portion of Placer County is part of the Placer County Air Pollution Control District (Placer County APCD). Lastly, the western portion of El Dorado County is part of the El Dorado County Air Quality Management District (El Dorado County AQMD). In California, the California Air Resources Board (CARB) is the agency responsible for the adoption and submission of SIPs and SIP revisions to the EPA. Working jointly with CARB, local and regional air pollution control districts in California are responsible for the development of regional air quality plans. These agencies adopt and submit their plans to CARB for state adoption and submission to the EPA as revisions to the California SIP.

On May 21, 2012 (77 FR 30088), the EPA designated the Sacramento Metro area as nonattainment for the 2008 ozone standard and classified the area as Severe-15. This designation was effective on July 20, 2012. The 8-hour ozone designations and classifications for California areas are codified at 40 CFR 81.305.

B. Statutory and Regulatory Requirements

Section 185 of the CAA requires states with Severe and Extreme ozone nonattainment areas to have a plan that implements the program specified in that section. The CAA section 185 fee program provides for collecting fees from each major stationary source of volatile organic compounds (VOC) and oxides of nitrogen (NO_X) for each calendar year following a failure to attain the ozone standard by the applicable attainment date. While CAA section 185 expressly mentions VOC, CAA section 182(f) extends the application of this provision to NO_X by providing that ''plan provisions required under [subpart D] for major stationary sources of [VOC] shall also apply to major stationary sources of [NO_X].'' CAA section 185(b) specifies the method for computing the fee amount. Section 185(a) specifies that the fee is payable for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone. Each such plan revision should include procedures for assessment and collection of such fees. No source is required to pay any fee for emissions during a year for which the area receives an extension of their attainment date under CAA section 181(a)(5).

On March 6, 2015 (80 FR 12263), the EPA established a final rule for implementing the 2008 ozone NAAQS. That rule established deadlines for submitting various elements of an ozone nonattainment area SIP. The due date for fee programs is codified at 40 CFR 51.1117. For each ozone nonattainment area initially classified Severe or Extreme for the 2008 ozone NAAQS, the state must submit a SIP revision within 10 years of the effective date of the area's nonattainment designation that meets the requirements of CAA section 185. The deadline for California to submit CAA section 185 fee programs for the Sacramento Metro area for the 2008 ozone NAAQS was July 20, 2022.

C. Consequences of Findings of Failure To Submit a SIP

Section 179(a) of the CAA specifies the consequences if the EPA finds that a state has failed to make a required SIP submission, if the EPA has determined that a submitted SIP is incomplete, or if the EPA has disapproved a SIP submission. Additionally, CAA section 110(c) specifies that any of these findings also triggers an obligation for the EPA to promulgate a FIP within 2 years of the finding if the state has not submitted and the EPA has not approved the required submission. The first finding, that a state has failed to submit a plan or one or more elements of a plan required under the CAA, is the finding relevant to this action.

The EPA is finding that the state of California has failed to make required CAA section 185 fee program SIP submissions for portions of the Sacramento Metro nonattainment area for the 2008 8-hour ozone NAAQS. Pursuant to CAA section 179(a) and (b) and 40 CFR 52.31, the EPA must affirmatively determine that California has submitted the required plan revisions for the Sacramento Metro area within 18 months of the effective date of this rulemaking, or the offset sanction identified in CAA section 179(b)(2) and 40 CFR 52.31 will apply in each portion of the area that remains subject to the finding. Additionally, if the EPA has not affirmatively determined that the State has made a complete submission for the area within 6 months after the offset sanction is imposed, then the highway funding sanction will apply to each portion of the area that remains subject to the finding, in accordance with CAA section 179(b)(1) and 40 CFR 52.31. Lastly, CAA section 110(c) requires that no later than 2 years after the effective date of this finding, the EPA must promulgate a FIP if the State has not submitted and the EPA has not approved the required SIP revisions as fully meeting the CAA section 185 fee obligation for the 2008 ozone NAAQS. The 18- and 24-month clocks for any area will stop and the sanctions will not take effect if the EPA finds that the State has made a complete submittal within the required timeframe.

II. EPA Action

In this action, the EPA is making a finding that the state of California has failed to submit CAA section 185 fee programs for the 2008 ozone NAAQS for the portions of the Sacramento Metro ozone nonattainment area that are under the jurisdiction of the following air agencies: El Dorado County AQMD, Placer County APCD, Sacramento Metropolitan AQMD, and Yolo-Solano AQMD. California submitted a CAA section 185 fee program SIP revision for the Feather River AQMD portion of the Sacramento Metro area on July 5, 2022, and it was determined complete on October 28, 2022. Therefore, the portion of the Sacramento Metro ozone nonattainment area that is under the jurisdiction of the Feather River AQMD is not subject to this action. This finding starts the 18-month emission offset sanctions clock, the 24-month highway funding sanctions clock, and a 24-month clock for promulgation by the EPA of a FIP.

III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at *https://www2.epa.gov/laws-regulations/*laws-and-executive-orders.

A. Notice and Comment Under the Administrative Procedure Act (APA)

Section 553 of the APA, 5 U.S.C. 553(b)(3)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The EPA has determined that there is good cause for making this final agency action without prior proposal and opportunity for comment because no significant EPA judgment is involved in making findings of failure to submit SIPs, or elements of SIPs, required by the CAA, where states and territories have made no submissions, or incomplete submissions, to meet the requirement. Thus, notice and public procedures are unnecessary. The EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

B. Executive Order 12866: Regulatory Planning and Review, and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and therefore was not submitted to the Office of Management and Budget (OMB) for review.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of the PRA because it does not impose additional requirements or create any new information collection burdens.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA (2 U.S.C. 1531–1538) and does not significantly or uniquely affect small governments. This action does not impose any new requirements. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, result from this action.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175, because this action does not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not create any new regulations. This action finds that a state has failed to submit required SIP revisions.

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

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

J. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. This action does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health effects of their programs, policies, and activities on minority populations and low-income populations in the United States. The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not directly affect the level of protection provided to human health or the environment. This action finds that a state has not met the requirement to submit CAA section 185 fee program SIP revisions and begins clocks that could result in the imposition of sanctions if the state continues to not meet this statutory obligation. If the state fails to submit the required SIP revisions or submits SIP revisions that the EPA cannot approve, then the EPA will be required to develop the plans in lieu of the state.

L. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

M. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 20, 2023. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

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

Dated: December 23, 2022.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2023–00567 Filed 1–13–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R08–OAR–2022–0929; FRL–10462–02–R8]

Approval and Promulgation of Implementation Plans; Colorado; Delegation of Authority of the Federal Plan for Existing Hospital, Medical, Infectious Waste Incinerators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: With this direct final rule, the Environmental Protection Agency (EPA) is providing notice and codifying approval of a request submitted by the Colorado Department of Public Health and Environment (CDPHE) on June 27, 2022 for delegation of authority to implement and enforce the Federal Plan Requirements for Hospital/Medical/

Infectious Waste Incinerators (HMIWI) Constructed On or Before December 1, 2008 (the Federal Plan), within the state of Colorado. The Federal Plan establishes emission limits and monitoring, operating, and recordkeeping requirements for HMIWI units constructed on or before December 1, 2008, or modified on or before April 6, 2010. A Memorandum of Agreement (MOA) was signed on July 21, 2022 by the CDPHE Air Pollution Control Division Director, Michael Ogletree. This MOA constitutes the mechanism for the transfer of authority from the EPA to CDPHE. The MOA became effective upon signature by Regional Administrator, KC Becker, on August 8, 2022. The MOA delineates policies, responsibilities, and procedures by which the Federal Plan will be administered and enforced by the CDPHE, as well as the authorities retained by EPA.

DATES: This direct final rule is effective on March 20, 2023 without further notice, unless EPA receives adverse written comments on or before February 16, 2023. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2022–0929. All documents in the docket are listed on the *http://www.regulations.gov* website. 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 material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Allison Reibach, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD–IO, 1595 Wynkoop Street, Denver, Colorado 80202–1129, telephone number: (303) 312–6949, email address: *reibach.allison@epa.gov.*

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

I. Why is EPA using a direct final rule?

EPA is publishing this rule without prior proposal because we view this as a non-controversial action and anticipate no adverse comments. However, in the Proposed Rules section of this **Federal Register**, we are publishing a separate document that will serve as the proposal to approve the delegation if relevant adverse comments are received. This rule will be effective on March 20, 2023 without further notice unless we receive adverse comment by February 16, 2023. If we receive adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the direct final rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so now.

II. Background

Section 129 of the Clean Air Act (the ''CAA'' or ''Act''), titled ''Solid Waste Combustion,'' requires EPA to develop and adopt standards for solid waste incineration units pursuant to sections 111(d) and 129 of the Act. On April 4, 2011, EPA promulgated revisions to the emissions guidelines (EG) for HMIWI units (76 FR 18407). Codified at 40 CFR part 60, subparts Ce, this final rule sets limits for nine pollutants under section 129 of the CAA: Cadmium (Cd), carbon monoxide (CO), hydrogen chloride (HCl), lead (Pb), mercury (Hg), nitrogen oxides (NO_X), particulate matter (PM), dioxins/furans, and sulfur dioxide (SO_2). The EG apply to existing HMIWI units, which are those units that commenced construction on or before December 1, 2008, or that commenced modification on or before April 6, 2010 (see 40 CFR 60.32e).

CAA section 129 also requires each state in which HMIWI units are operating to submit a plan to implement and enforce the EG with respect to such units. State plan requirements must be ''at least as protective'' as the EG and become Federally enforceable upon approval by EPA. The procedures for adoption and submittal of state plans are codified in 40 CFR part 60, subpart B. For states that do not submit a plan, EPA is required to develop and implement a Federal Plan within two years following promulgation of the emission guidelines. The EPA implementation and enforcement of the Federal Plan is viewed as an interim measure until states assume their role as the preferred implementers of the emission guidelines requirements stipulated in the Federal Plan. Accordingly, EPA promulgated the HMIWI Federal Plan on May 13, 2013 (78 FR 28051). In this rulemaking, EPA strongly encouraged state and local agencies in jurisdictions that did not submit approvable state plans to request delegation of the HMIWI Federal Plan so that they can have the primary responsibility for implementing and enforcing regulations affecting existing HMIWI units, consistent with the intent of section 129 of the CAA.

III. Submittal and EPA Approval of Requests for Delegation of the Federal Plan

On June 27, 2022, CDPHE requested delegation of authority from EPA to implement and enforce the Federal Plan for existing HMIWI units, codified at 40 CFR part 62, subpart HHH. The scope of the request from the CDPHE included all affected facilities within the State of Colorado. The delegation of authority does not apply to sources located in Indian Country.

The EPA evaluates requests for delegation of the HMIWI Federal Plan pursuant to the provisions of the HMIWI Federal Plan and the EPA's Delegations Manual. Pursuant to the HMIWI Federal Plan, a state may meet its CAA section 111(d)/129 obligations by submitting an acceptable written request for delegation of the Federal Plan that includes the following elements: (1) A demonstration of adequate resources and legal authority to administer and enforce the Federal Plan; (2) an inventory of affected HMIWI units, an inventory of emissions from affected HMIWI units, and provisions for state progress reports); (3) certification that the hearing on the state delegation request; and (4) a commitment to enter into a MOA with the Regional Administrator that sets forth the terms, conditions, and effective date of the delegation and that serves as the mechanism for the transfer of authority (see 40 CFR 62.14401) (78 FR 28051). CDPHE met delegation requirements (1) through (3) in a letter to EPA dated June 27, 2022, which is included in the docket for this action, as well as requirement (4), which is addressed below.

Pursuant to the EPA's Delegations Manual, item 7–139, Implementation and Enforcement of 111(d)(2) and 111(d)(2)/129(b)(3) Federal Plans, a copy of which is included in the Supporting Documents for this action, the Regional Administrator is authorized to delegate authority to implement and enforce section 111(d)/129 Federal Plans to states. Whereas a state plan implementing the EG must be submitted by the state, a local agency may directly request delegation of authority to implement the HMIWI Federal Plan with respect to sources within its jurisdiction, provided it has authority under state law to do so and has met the delegation requirements

identified above (78 FR 28051). The requirements and limitations of a delegation agreement are set forth in item 7–139 of the Delegations Manual. Consistent with those requirements, the EPA prepared an MOA between the EPA and CDPHE which defines policies, responsibilities, and procedures pursuant to the HMIWI Federal Plan by which the Federal Plan will be administered by CDPHE. Subsequently, on July 21, 2022, Michael Ogletree, Director of the Colorado Air Pollution Control Division of CDPHE signed the MOA, thus agreeing to the terms and conditions of the MOA and accepting responsibility for implementation and enforcement of the policies and procedures of the Federal Plan, except for certain authorities (*e.g.,* approval of major alternatives to test methods or monitoring) retained by the EPA. The EPA continues to retain enforcement authority along with CDPHE. The MOA, and resulting delegation of authority, became effective upon signature by the Regional Administrator on August 8, 2022.[1]

The EPA has evaluated the CDPHE submittal for consistency with the CAA, EPA regulations, and EPA policy. CDPHE has met all the requirements of the EPA's guidance for obtaining delegation of authority to implement and enforce the HMWI Federal Plan. CDPHE entered into a MOA with EPA and it became effective on August 8, 2022. Accordingly, the EPA is approving the CDPHE request dated June 27, 2022 for delegation of authority to implement and enforce the Federal Plan for existing HMIWI units. EPA will continue to retain certain specific authorities as specified in the HMIWI Federal Plan and as indicated in the MOA (*e.g.,* authority to approve major alternatives to test methods or monitoring, etc.).

III. Final Action

In this action, EPA is codifying approval of a request submitted by CDPHE for delegation of authority to implement and enforce the Federal Plan for existing HMIWI units in Colorado, pursuant to 40 CFR part 62, subpart HHH.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator has the authority to delegate the authority to implement a 111(d)/129 Federal Plan that complies with the provisions of the CAA and applicable Federal regulations (see 40 CFR 60.27*).* In reviewing 111(d)/129 Federal Plan delegation requests, EPA's role is to approve state choices, provided that they meet the criteria of the CAA and of EPA's implementing regulations. Accordingly, this action merely codifies in the Code of Federal Regulations EPA's delegation of authority to implement the Federal Plan and does not impose additional requirements beyond those imposed by the already-applicable Federal Plan. For that reason, this action:

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 20, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 62

Environmental protection, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Waste treatment and disposal.

Dated: January 5, 2023.

KC Becker,

Regional Administrator, Region 8.

For the reasons set forth in the preamble, 40 CFR part 62 is amended as follows:

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

■ 1. The authority citation for part 62 continues to read as follows:

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

Subpart G—Colorado

■ 2. Revise § 62.1360 to read as follows:

§ 62.1360 Identification of plan—delegation of authority.

On August 8, 2022, EPA signed a Memorandum of Agreement (MOA) that

[1] The MOA is located in our docket (Docket ID No. EPA–R08–OAR-[docket number]). found at *www.regulations.gov.*

defines policies, responsibilities, and procedures pursuant to 40 CFR part 62, subpart HHH (the Federal Plan) by which the Federal Plan will be administered by the Colorado Department of Public Health and Environment (CDPHE).

■ 3. Revise § 62.1361 to read as follows:

§ 62.1361 Identification of sources.

The MOA and related Federal Plan apply to existing hospital/medical/infectious waste incinerators for which construction was commenced on or before December 1, 2008, or for which modification was commenced on or before April 6, 2010.

■ 4. Revise § 62.1362 to read as follows:

§ 62.1362 Effective date.

The delegation became fully effective on August 8, 2022, the date the MOA was signed by the EPA Region 8 Regional Administrator.

[FR Doc. 2023–00411 Filed 1–13–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 410 and 414

[CMS–6088–N]

RIN 0938–ZB76

Medicare Program; Updates to Face-to-Face Encounter and Written Order Prior to Delivery List

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Update to certain codes.

SUMMARY: This document announces updates to the Healthcare Common Procedure Coding System (HCPCS) codes on the Required Face-to-Face Encounter and Written Order Prior to Delivery List.

DATES: The implementation is effective on April 17, 2023.

FOR FURTHER INFORMATION CONTACT:
Cristine Egan (410) 786–8088.
Olufemi Shodeke (410) 786–1649.
Jennifer Phillips (410) 786–1023.
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SUPPLEMENTARY INFORMATION:

I. Background

On November 8, 2019, the Centers for Medicare & Medicaid Services published a final rule titled, ''Medicare Program; End-Stage Renal Disease Prospective Payment System, Payment for Renal Dialysis Services Furnished to Individuals with Acute Kidney Injury, End-Stage Renal Disease Quality Incentive Program, Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Fee Schedule Amounts, DMEPOS Competitive Bidding Program (CBP) Amendments, Standard Elements for a DMEPOS Order, and Master List of DMEPOS Items Potentially Subject to a Face-to-Face Encounter and Written Order Prior to Delivery and/or Prior Authorization Requirements'' (84 FR 60648). The rule became effective January 1, 2020, harmonizing the lists of DMEPOS items created by former rules and establishing one ''Master List of DMEPOS Items Potentially Subject to Face-to-Face Encounter and Written Orders Prior to Delivery and/or Prior Authorization Requirements'' (the ''Master List''). The rule provided that items would be selected from the Master List for inclusion on the Face-to-Face Encounter and Written Orders Prior to Delivery List and/or Prior Authorization List through the **Federal Register**. It also clarified that certain items (that is, power mobility devices (PMDs)) require a face-to-face encounter per statute and would remain on the list indefinitely.

On January 13, 2022, in accordance with the November 2019 final rule (84 FR 60648), we selected codes from the Master List and published the first iteration of the Required Face-to-Face Encounter and Written Order Prior to Delivery List (hereinafter referred to as ''F2F/WOPD List''). (For more detailed information see 87 FR 2051). The F2F/WOPD List became effective on April 13, 2022. It included 46 K-codes representative of PMDs as well as 7 Healthcare Common Procedure Coding System (HCPCS) that describe other items.

II. Provisions of the Document

This document announces that CMS has selected an additional set of items to be added to the F2F/WOPD List.

A. Reiteration of the Face-to-Face Encounter and Written Order Prior to Delivery List Process and DMEPOS Items Currently on The List

The F2F/WOPD List, as described at § 410.38(c)(8), is comprised of PMDs, per statute, and those items selected from the Master List (which is described in §§ 410.38(c)(7) and 414.234(b)). Items on this list require a face-to-face encounter and a written order prior to delivery as a condition of payment.

In the November 2019 final rule, we stated that since the face-to-face encounter and written orders are statutorily required for PMDs, per section 1834(a)(1)(E)(iv) of the Act, they are included on the Master List and the F2F/WOPD List in accordance with our statutory obligation, and will remain there. These codes, as listed in Table 1, will remain on the F2F/WOPD List.

TABLE 1—STATUTORILY REQUIRED POWER MOBILITY DEVICES

[Currently on the list]

HCPCS	Description
K0800	Power Operated Vehicle, Group 1 Standard, Patient Weight Capacity Up To And Including 300 Pounds.
K0801	Power Operated Vehicle, Group 1 Heavy Duty, Patient Weight Capacity, 301 To 450 Pounds.
K0802	Power Operated Vehicle, Group 1 Very Heavy Duty, Patient Weight Capacity 451 To 600 Pounds.
K0806	Power Operated Vehicle, Group 2 Standard, Patient Weight Capacity Up To And Including 300 Pounds.
K0807	Power Operated Vehicle, Group 2 Heavy Duty, Patient Weight Capacity 301 To 450 Pounds.
K0808	Power Operated Vehicle, Group 2 Very Heavy Duty, Patient Weight Capacity 451 To 600 Pounds.
K0813	Power Wheelchair, Group 1 Standard, Portable, Sling/Solid Seat And Back, Patient Weight Capacity Up To And Including 300 Pounds.
K0814	Power Wheelchair, Group 1 Standard, Portable, Captains Chair, Patient Weight Capacity Up To And Including 300 Pounds.
K0815	Power Wheelchair, Group 1 Standard, Sling/Solid Seat And Back, Patient Weight Capacity Up To And Including 300 Pounds.
K0816	Power Wheelchair, Group 1 Standard, Captains Chair, Patient Weight Capacity Up To And Including 300 Pounds.
K0820	Power Wheelchair, Group 2 Standard, Portable, Sling/Solid Seat/Back, Patient Weight Capacity Up To And Including 300 Pounds.

TABLE 1—STATUTORILY REQUIRED POWER MOBILITY DEVICES—Continued

[Currently on the list]

HCPCS	Description
K0821	Power Wheelchair, Group 2 Standard, Portable, Captains Chair, Patient Weight Capacity Up To And Including 300 Pounds.
K0822	Power Wheelchair, Group 2 Standard, Sling/Solid Seat/Back, Patient Weight Capacity Up To And Including 300 Pounds.
K0823	Power Wheelchair, Group 2 Standard, Captains Chair, Patient Weight Capacity Up To And Including 300 Pounds.
K0824	Power Wheelchair, Group 2 Heavy Duty, Sling/Solid Seat/Back, Patient Weight Capacity 301 To 450 Pounds.
K0825	Power Wheelchair, Group 2 Heavy Duty, Captains Chair, Patient Weight Capacity 301 To 450 Pounds.
K0826	Power Wheelchair, Group 2 Very Heavy Duty, Sling/Solid Seat/Back, Patient Weight Capacity 451 To 600 Pounds.
K0827	Power Wheelchair, Group 2 Very Heavy Duty, Captains Chair, Patient Weight Capacity 451 To 600 Pounds.
K0828	Power Wheelchair, Group 2 Extra Heavy Duty, Sling/Solid Seat/Back, Patient Weight Capacity 601 Pounds Or More.
K0829	Power Wheelchair, Group 2 Extra Heavy Duty, Captains Chair, Patient Weight Capacity 601 Pounds Or More.
K0835	Power Wheelchair, Group 2 Standard, Single Power Option, Sling/Solid Seat/Back, Patient Weight Capacity Up To And Including 300 Pounds.
K0836	Power Wheelchair, Group 2 Standard, Single Power Option, Captains Chair, Patient Weight Capacity Up To And Including 300 Pounds.
K0837	Power Wheelchair, Group 2 Heavy Duty, Single Power Option, Sling/Solid Seat/Back, Patient Weight Capacity 301 To 450 Pounds.
K0838	Power Wheelchair, Group 2 Heavy Duty, Single Power Option, Captains Chair, Patient Weight Capacity 301 To 450 Pounds.
K0839	Power Wheelchair, Group 2 Very Heavy Duty, Single Power Option, Sling/Solid Seat/Back, Patient Weight Capacity 451 To 600 Pounds.
K0840	Power Wheelchair, Group 2 Extra Heavy Duty, Single Power Option, Sling/Solid Seat/Back, Patient Weight Capacity 601 Pounds Or More.
K0841	Power Wheelchair, Group 2 Standard, Multiple Power Option, Sling/Solid Seat/Back, Patient Weight Capacity Up To And Including 300 Pounds.
K0842	Power Wheelchair, Group 2 Standard, Multiple Power Option, Captains Chair, Patient Weight Capacity Up To And Including 300 Pounds.
K0843	Power Wheelchair, Group 2 Heavy Duty, Multiple Power Option, Sling/Solid Seat/Back, Patient Weight Capacity 301 To 450 Pounds.
K0848	Power Wheelchair, Group 3 Standard, Sling/Solid Seat/Back, Patient Weight Capacity Up To And Including 300 Pounds.
K0849	Power Wheelchair, Group 3 Standard, Captains Chair, Patient Weight Capacity Up To And Including 300 Pounds.
K0850	Power Wheelchair, Group 3 Heavy Duty, Sling/Solid Seat/Back, Patient Weight Capacity 301 To 450 Pounds.
K0851	Power Wheelchair, Group 3 Heavy Duty, Captains Chair, Patient Weight Capacity 301 To 450 Pounds.
K0852	Power Wheelchair, Group 3 Very Heavy Duty, Sling/Solid Seat/Back, Patient Weight Capacity 451 To 600 Pounds.
K0853	Power Wheelchair, Group 3 Very Heavy Duty, Captains Chair, Patient Weight Capacity, 451 To 600 Pounds.
K0854	Power Wheelchair, Group 3 Extra Heavy Duty, Sling/Solid Seat/Back, Patient Weight Capacity 601 Pounds Or More.
K0855	Power Wheelchair, Group 3 Extra Heavy Duty, Captains Chair, Patient Weight Capacity 601 Pounds Or More.
K0856	Power Wheelchair, Group 3 Standard, Single Power Option, Sling/Solid Seat/Back, Patient Weight Capacity Up To And Including 300 Pounds.
K0857	Power Wheelchair, Group 3 Standard, Single Power Option, Captains Chair, Patient Weight Capacity Up To And Including 300 Pounds.
K0858	Power Wheelchair, Group 3 Heavy Duty, Single Power Option, Sling/Solid Seat/Back, Patient Weight Capacity 301 To 450 Pounds.
K0859	Power Wheelchair, Group 3 Heavy Duty, Single Power Option, Captains Chair, Patient Weight Capacity 301 To 450 Pounds.
K0860	Power Wheelchair, Group 3 Very Heavy Duty, Single Power Option, Sling/Solid Seat/Back, Patient Weight Capacity 451 To 600 Pounds.
K0861	Power Wheelchair, Group 3 Standard, Multiple Power Option, Sling/Solid Seat/Back, Patient Weight Capacity Up To And Including 300 Pounds.
K0862	Power Wheelchair, Group 3 Heavy Duty, Multiple Power Option, Sling/Solid Seat/Back, Patient Weight Capacity 301 To 450 Pounds.
K0863	Power Wheelchair, Group 3 Very Heavy Duty, Multiple Power Option, Sling/Solid Seat/Back, Patient Weight Capacity 451 To 600 Pounds.
K0864	Power Wheelchair, Group 3 Extra Heavy Duty, Multiple Power Option, Sling/Solid Seat/Back, Patient Weight Capacity 601 Pounds Or More.

Section 1834(a)(11)(B) of the Act authorizes the Secretary to select other DMEPOS HCPCS codes that will require a face-to-face encounter and written order prior to delivery as a condition of payment. The November 2019 final rule established a process of placing other DMEPOS items, in addition to PMDs, on the F2F/WOPD List. We included in the 2022 **Federal Register** seven additional DMEPOS HCPCS codes not required by statute. These items were selected from the Master List to be placed on the F2F/WOPD List and are listed in Table 2. The items listed in both Table 1 and Table 2 will remain on the F2F/WOPD list.

TABLE 2—NON-STATUTORILY REQUIRED DMEPOS ITEMS

[Currently on the list]

HCPCS	Description
E0748	Osteogenesis Stimulator, Electrical, Non-Invasive, Spinal Applications.
L0648	Lumbar-Sacral Orthosis, Sagittal Control, With Rigid Anterior And Posterior Panels, Posterior Extends From Sacrococcygeal Junction To T–9 Vertebra, Produces Intracavitary Pressure To Reduce Load On The Intervertebral Discs, Includes Straps, Closures, May Include Padding, Shoulder Straps, Pendulous Abdomen Design, Prefabricated, Off-The-Shelf.
L0650	Lumbar-Sacral Orthosis, Sagittal-Coronal Control, With Rigid Anterior And Posterior Frame/Panel(S), Posterior Extends From Sacrococcygeal Junction To T–9 Vertebra, Lateral Strength Provided By Rigid Lateral Frame/Panel(S), Produces Intracavitary Pressure To Reduce Load On Intervertebral Discs, Includes Straps, Closures, May Include Padding, Shoulder Straps, Pendulous Abdomen Design, Prefabricated, Off-The-Shelf.
L1832	Knee Orthosis, Adjustable Knee Joints (Unicentric Or Polycentric), Positional Orthosis, Rigid Support, Prefabricated Item That Has Been Trimmed, Bent, Molded, Assembled, Or Otherwise Customized To Fit A Specific Patient By An Individual With Expertise.
L1833	Knee Orthosis, Adjustable Knee Joints (Unicentric Or Polycentric), Positional Orthosis, Rigid Support, Prefabricated, Off-The Shelf.
L1851	Knee Orthosis (KO), Single Upright, Thigh And Calf, With Adjustable Flexion And Extension Joint (Unicentric Or Polycentric), Medial-Lateral And Rotation Control, With Or Without Varus/Valgus Adjustment, Prefabricated, Off-The-Shelf.
L3960	Shoulder Elbow Wrist Hand Orthosis, Abduction Positioning, Airplane Design, Prefabricated, Includes Fitting And Adjustment.

B. New DMEPOS Items Being Placed on the Face-to-Face Encounter and Written Order Prior to Delivery List

PMDs are included on the F2F/WOPD List per statutory obligation. For the other DMEPOS items, we consider factors such as operational limitations, item utilization, cost-benefit analysis (for example, comparing the cost of review versus the anticipated amount of improper payment identified), emerging trends (for example, billing patterns, medical review findings), vulnerabilities identified in official agency reports, or other analysis such as acute needs and pandemic impacts.

When selecting items, we balance our program integrity goals with the needs of Medicare enrollees, particularly those in need of medical devices to assist with functional activities and ambulation within their home. In consideration of access issues, we note that the face-to-face regulation at 42 CFR 410.38(d)(2)(ii) allows for use of telehealth, provided that the requirements in 42 CFR 410.78 and 414.65 are met.

The first iteration of the F2F/WOPD list was released earlier in the COVID–19 Public Health Emergency (PHE). The unprecedented PHE, coupled with the list's newness, led the Agency to initially proceed with the selection of seven items. Feedback received to date has been positive. We have not been notified of any issues related to Medicare beneficiaries' access, and billing trends have been consistent with anticipated volumes.

Lower limb orthoses (LLO) and lumbar-sacral orthoses (LSO) have been identified by CMS' Comprehensive Error Rate Testing (CERT) program as two of the top 20 DMEPOS service types with improper payments over the past several years, and have been associated with recent fraud schemes. In 2021, LLOs had an improper payment rate of 50.6 percent and LSOs had an improper payment rate of 44.2 percent. The CERT improper payment rate is a measurement of payments that that do not meet Medicare requirements. Insufficient documentation and medical necessity are the top two LLO and LSO errors noted in the 2021 CERT report.[1]

In an effort to ensure practitioner involvement, via in-person face-to-face encounters or telehealth encounters meeting Medicare's regulatory requirements, we are adding the following 10 additional HCPCS codes for inclusion on the Required F2F/WOPD List. We are releasing these codes in this **Federal Register** publication with 90 days' notice prior to implementation. At this time, we are not removing any items from the F2F/WOPD List.

TABLE 3—NEW NON-STATUTORILY REQUIRED DMEPOS ITEMS

HCPCS	Description
L0631	Lumbar-Sacral Orthosis, Sagittal Control, With Rigid Anterior And Posterior Panels, Posterior Extends From Sacrococcygeal Junction To T–9 Vertebra, Produces Intracavitary Pressure To Reduce Load On The Intervertebral Discs, Includes Straps, Closures, May Include Padding, Shoulder Straps, Pendulous Abdomen Design, Prefabricated Item That Has Been Trimmed, Bent, Molded, Assembled, Or Otherwise Customized To Fit A Specific Patient By An Individual With Expertise.
L0637	Lumbar-Sacral Orthosis, Sagittal-Coronal Control, With Rigid Anterior And Posterior Frame/Panels, Posterior Extends From Sacrococcygeal Junction To T–9 Vertebra, Lateral Strength Provided By Rigid Lateral Frame/Panels, Produces Intracavitary Pressure To Reduce Load On Intervertebral Discs, Includes Straps, Closures, May Include Padding, Shoulder Straps, Pendulous Abdomen Design, Prefabricated Item That Has Been Trimmed, Bent, Molded, Assembled, Or Otherwise Customized To Fit A Specific Patient By An Individual With Expertise.
L1843	Knee Orthosis, Single Upright, Thigh And Calf, With Adjustable Flexion And Extension Joint (Unicentric Or Polycentric), Medial-Lateral And Rotation Control, With Or Without Varus/Valgus Adjustment, Prefabricated Item That Has Been Trimmed, Bent, Molded, Assembled, Or Otherwise Customized To Fit A Specific Patient By An Individual With Expertise.

[1] 2021 Medicare Fee-for-Service Supplemental Improper Payment Data *https://www.cms.gov/files/document/2021-medicare-fee-service-supplemental-improper-payment-data.pdf-0.*

TABLE 3—NEW NON-STATUTORILY REQUIRED DMEPOS ITEMS—Continued

HCPCS	Description
L1932	Ankle Foot Orthosis, Rigid Anterior Tibial Section, Total Carbon Fiber Or Equal Material, Prefabricated, Includes Fitting And Adjustment.
L1940	Ankle Foot Orthosis, Plastic Or Other Material, Custom-Fabricated.
L1951	Ankle Foot Orthosis, Spiral, (Institute Of Rehabilitative Medicine Type), Plastic Or Other Material, Prefabricated, Includes Fitting And Adjustment.
L1960	Ankle Foot Orthosis, Posterior Solid Ankle, Plastic, Custom-Fabricated.
L1970	Ankle Foot Orthosis, Plastic With Ankle Joint, Custom-Fabricated.
L2005	Knee Ankle Foot Orthosis, Any Material, Single Or Double Upright, Stance Control, Automatic Lock And Swing Phase Release, Any Type Activation, Includes Ankle Joint, Any Type, Custom Fabricated.
L2036	Knee Ankle Foot Orthosis, Full Plastic, Double Upright, With Or Without Free Motion Knee, With Or Without Free Motion Ankle, Custom Fabricated.

The current complete F2F/WOPD List is available on the following CMS website: *https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical-Review/FacetoFaceEncounterRequirementforCertainDurableMedicalEquipment.*

We believe transparency and education will aid in compliance with these payment requirements and continued access. As such, we will make information widely available to the public at appropriate literacy levels regarding face-to-face encounter requirements, written order prior to delivery requirements, and necessary documentation for items on F2F/WOPD List.

We continue to believe greater practitioner involvement in the care of Medicare enrollees in need of items included on the F2F/WOPD List will help further our program integrity goals of reducing fraud, waste, and abuse. It will also help ensure Medicare enrollee receipt of items specific to their medical needs. For items on the F2F/WOPD List, the written order/prescription must be communicated to the supplier prior to delivery. For such items, we require the treating practitioner to have a face-to-face encounter with the Medicare enrollee within the 6 months preceding the date of the written order/prescription. If the face-to-face encounter is a telehealth encounter, the requirements of 42 CFR 410.78 and 414.65 must be met for DMEPOS coverage purposes.

Consistent with § 410.38(d), the face-to-face encounter must be documented in the pertinent portion of the medical record (for example, history, physical examination, diagnostic tests, summary of findings, progress notes, treatment plans or other sources of information that may be appropriate). The supporting documentation must include subjective and objective beneficiary specific information used for diagnosing, treating, or managing a clinical condition for which the DMEPOS item(s) is ordered. Upon request by CMS or its review contractors, a supplier must submit additional documentation to support and substantiate the medical necessity for the DMEPOS item.

Section 410.38(c)(8) of the Act states new additions to the F2F/WOPD list will be communicated to the public and effective no less than 60 days after a **Federal Register** document publication and a CMS website posting. To assist stakeholders in preparing for implementation of the new items, these changes will become effective 90 days after publication of this rule. Stakeholders may refer to the CMS website posting for more information on the implementation date.

III. Collection of Information Requirements

This document announces the selection of additional HCPCS codes to be placed on the F2F/WOPD List. These updates to the F2F/WOPD List do not constitute information collections requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

IV. Regulatory Impact Statement

We have examined the impact of this regulatory document as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A Regulatory Impact Analysis (RIA) must be prepared for major rules with significant regulatory action/s and/or with economically significant effects ($100 million or more in any 1 year). This regulatory document is not significant and does not reach the economic threshold and thus is not considered a major regulatory document.

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $8.0 million to $41.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined, and the Secretary certifies, that this regulatory document will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary

certifies, that this regulatory document will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2022, that threshold is approximately $165 million. This regulatory document will have no consequential effect on State, local, or tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule or other regulatory document) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulatory document does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this document was reviewed by the Office of Management and Budget.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Lynette Wilson, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: January 11, 2023.

Lynette Wilson,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2023–00718 Filed 1–13–23; 8:45 am]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 22–376; RM–11934; DA 23–20; FR ID 122718]

Television Broadcasting Services Norwell, Massachusetts

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: On October 27, 2022, the Media Bureau, Video Division (Bureau) issued a *Notice of Proposed Rulemaking* (*NPRM*) in response to a petition for rulemaking filed by RNN Boston License Co., LLC (Petitioner), the licensee of WWMD (Station), channel 10, Norwell, Massachusetts, requesting the substitution of channel 36 for channel 10 at Norwell in the Table of TV Allotments. For the reasons set forth in the *Report and Order* referenced below, the Bureau amends FCC regulations to substitute channel 36 for channel 10 at Norwell.

DATES: Effective January 17, 2023.

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

SUPPLEMENTARY INFORMATION: The proposed rule was published at 87 FR 68432 on November 15, 2022. The Petitioner filed comments in support of the petition reaffirming its commitment to apply for channel 36. No other comments were filed.

The Bureau believes the public interest would be served by substituting channel 36 for channel 10 at Norwell, Massachusetts. The Station has received many complaints from viewers unable to receive a reliable signal on VHF channel 10, and 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. An analysis conducted using the Commission's *TVStudy* software tool indicates that WWDP's proposed channel substitution is predicted to create areas where viewers may lose service. However, the Bureau believes any possible harm resulting from the loss of service to some viewers is outweighed by the overall benefit of improving reception to the Station's viewers, including in the Station's community of license. Moreover, the viewers in the loss area are already well-served by five or more stations and no viewers will lose service from one of the four major networks or any noncommercial educational station. As the Petitioner points out, the Commission is generally most concerned where there is a loss of an area's only network or noncommercial educational TV service, or where the loss results in an area becoming less that well-served, *i.e.,* served by fewer than five full-power stations.

This is a synopsis of the Commission's *Report and Order,* MB Docket No. 22–376; RM–11934; DA 23–20, adopted January 9, 2023, and released January 9, 2023. 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 TV Allotments, under Massachusetts, by revising the entry for Norwell to read as follows:

§ 73.622 Table of TV Allotments.

* * * * *

(j) * * *

Community	Channel No.
* * * * *	
MASSACHUSETTS	
* * * * *	
Norwell	36
* * * * *	

[FR Doc. 2023–00617 Filed 1–13–23; 8:45 am]
BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 22–146; RM–11925; DA 23–17; FR ID 122668]

Television Broadcasting Services Memphis, Tennessee

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: On April 5, 2022, the Media Bureau, Video Division (Bureau) issued a *Notice of Proposed Rulemaking* (*NPRM*) in response to a petition for rulemaking filed by Gray Television Licensee, LLC (Petitioner or Gray), the licensee of WMC–TV (Station or WMC–TV), channel 5, Memphis, Tennessee, requesting the substitution of channel 30 for channel 5 at Memphis in the Table of TV Allotments. For the reasons set forth in the *Report and Order* referenced below, the Bureau amends FCC regulations to substitute channel 30 for channel 5 at Memphis.

DATES: Effective January 17, 2023.

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

SUPPLEMENTARY INFORMATION: The proposed rule was published at 87 FR 22166 on April 14, 2022. The Petitioner filed comments in support of the petition reaffirming its commitment to apply for channel 30. No other comments were filed.

The Bureau believes the public interest would be served by substituting channel 30 for channel 5 at Memphis, Tennessee. The proposed channel substitution will resolve significant over-the-air reception problems in WMC–TV's service area due to its operation on a low VHF channel, reception problems which the Commission has recognized can exist on VHF channels. An analysis using the Commission's *TVStudy* software tool indicates that WMC–TV's move from channel 5 to channel 30 is predicted to create an area where 4,072 persons may lose service. The loss area, however, is largely overlapped by the noise limited contours of other NBC affiliated stations and most viewers will continue to receive service from five or more stations. In addition, the Petitioner acquired three LPTV stations and constructed modified facilities to deliver NBC programming to viewers in the loss area. As a result, only 64 persons would either (1) no longer receive NBC network programming or (2) no longer receive service from five or more full power television services. In practice, Gray expects that few, if any, persons who are currently able to receive WMC–TV's over-the-air signal on channel 5 would no longer be able to receive WMC–TV's over-the-air signal as a result of the Station's transition to channel 30. Although the Petitioner's proposal would result in a loss for a limited number of viewers, the Bureau finds that the overall benefits of the proposed channel change outweighs any possible harm to the public interest when taking into account the ability of all but a *de minimis* number of viewers to access NBC programming from another source.

This is a synopsis of the Commission's *Report and Order,* MB Docket No. 22–146; RM–11925; DA 23–17, adopted January 9, 2023, and released January 9, 2023. 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 TV Allotments, under Tennessee, by revising the entry for Memphis to read as follows:

§ 73.622 Table of TV Allotments.

* * * * *

(j) * * *

Community	Channel No.
* * * * *	
TENNESSEE	
* * * * *	
Memphis	13, 23, 25, 28, *29, 30, 31, 33
* * * * *	

[FR Doc. 2023–00618 Filed 1–13–23; 8:45 am]
BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 230109–0004; RTID 0648–XC472]

Revisions to Framework Adjustment 63 to the Northeast Multispecies Fishery Management Plan and Sector Annual Catch Entitlements

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

ACTION: Final rule; adjustment to specifications.

SUMMARY: This final rule announces carryover allocation from fishing year 2021 into fishing year 2022 for the Northeast Multispecies sectors program. This action is necessary to distribute carryover quota to sectors. The carryover adjustments in this rule are routine and formulaic, and industry expects them each year.

DATES: Effective January 13, 2023, through April 30, 2023.

FOR FURTHER INFORMATION CONTACT: Spencer Talmage, Fishery Management Specialist, (978) 281–9232.

SUPPLEMENTARY INFORMATION: On July 15, 2022, we published a final rule approving Framework Adjustment 63 to the Northeast Multispecies Fishery Management Plan (FMP) (87 FR 42375), which set or adjusted annual catch limits (ACL) for 5 of the 20 groundfish stocks, and 2022 ACLs for three shared U.S./Canada stocks. This rule distributes unused sector quota carried over from fishing year 2021 to fishing year 2022.

Sector Carryover Allocations From Fishing Year 2021

Carryover regulations at 50 CFR 648.87(b)(1)(i)(C) allow each groundfish sector to carry over an amount of unused annual catch entitlement (ACE) up to 10 percent of the sector's original ACE for each stock (except for Georges Bank [GB] yellowtail flounder) that is unused at the end of the fishing year into the following fishing year. We are required to adjust ACE carryover to ensure that the total unused ACE combined with the overall sub-ACL does not exceed the acceptable biological catch (ABC) for the fishing year in which the carryover may be harvested. We have completed 2021 fishing year data reconciliation with sectors and determined final 2021 fishing year sector catch and the amount of allocation that sectors may carry over from the 2021 to the 2022 fishing year. Accordingly, unused ACE from fishing year 2021 available to carry over to fishing year 2022 has been reduced for the following stocks: GB cod; GB haddock; Gulf of Maine (GOM) haddock; Southern New England/Mid-Atlantic (SNE/MA) yellowtail flounder; Cape Cod/GOM yellowtail flounder; American plaice, witch flounder; GB winter flounder; GOM winter flounder; SNE/MA winter flounder; redfish; white hake; and pollock. The only stock for which carryover was a full 10 percent of the original quota allocation from fishing year 2021 was GOM cod. Complete details on carryover reduction percentages can be found at: *https://www.greateratlantic.fisheries.noaa.gov/ro/fso/reports/h/groundfish_catch_accounting.*

Table 1 includes the maximum amount of allocation that sectors may carry over from the 2021 to the 2022 fishing year. Table 2 includes the *de minimis* amount of carryover for each sector for the 2022 fishing year. If the overall ACL for any allocated stock is exceeded for the 2022 fishing year, the allowed carryover harvested by a sector, minus the pounds in the sector's *de minimis* amount, will be counted against its allocation to determine whether an overage subject to an accountability measure occurred. Tables 3 and 4 list the final ACE available to sectors for the 2022 fishing year, including finalized carryover amounts for each sector, as adjusted down when necessary to equal each stock's ABC.

BILLING CODE 3510–22–P

Table 1 -- Finalized Carryover ACE from Fishing Year 2021 to Fishing Year 2022 (lb)

Sector	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	0	4,007	417	0	175,758	2,704	0	5	1,447	1,603	1,800	9	2,806	396	6,762	3,836	57,586
MCCS	0	766	8,542	0	318,361	165,856	0	73	4,224	44,330	18,245	543	1,947	773	115,794	51,084	227,108
MOON	0	3,717	2,743	0	356,825	55,123	0	24	2,552	2,734	2,969	426	995	941	56,532	2,719	177,751
NEFS 2	0	2,021	15,861	0	995,505	332,301	0	47	21,236	35,663	23,995	1,450	8,577	1,608	181,053	9,709	245,450
NEFS 4	0	2,301	6,645	0	541,913	132,626	0	64	5,412	30,331	13,249	312	2,598	382	24,305	15,836	115,911
NEFS 5	0	146	192	0	54,114	1,705	0	527	802	1,470	1,073	142	294	4,355	219	173	646
NEFS 6	0	967	1,742	0	334,079	65,704	0	146	3,545	14,508	9,843	776	1,661	734	81,139	8,708	61,875
NEFS 7	0	143	14	0	37,014	251	0	29	43	798	416	136	19	72	1,880	281	3,060
NEFS 8	0	3,030	1,408	0	856,526	76,030	0	216	5,834	24,266	10,423	13,411	1,382	3,933	63,323	16,046	67,603
NEFS 10	0	163	1,473	0	16,463	19,159	0	15	3,627	3,446	3,352	4	3,184	231	3,989	1,553	12,888
NEFS 11	0	123	6,886	0	3,232	41,671	0	0	2,065	5,064	2,627	1	716	7	22,374	9,515	148,075
NEFS 12	0	195	1,868	0	8,733	16,282	0	0	7,276	2,541	1,021	0	4,615	100	2,715	1,057	13,136
NEFS 13	0	3,933	478	0	1,988,995	14,606	0	686	5,932	27,872	15,829	8,763	814	6,803	52,839	8,111	45,717
SHS1	0	1,734	1,780	0	703,735	134,966	0	30	2,402	36,233	15,218	3,527	896	1,172	98,328	19,877	109,108
SHS2	0	127	999	0	168,382	22,360	0	130	4,807	9,196	239	31	1,473	3,205	13,522	2,799	21,595
SHS3	0	5,278	4,409	0	2,437,422	358,264	0	203	8,153	64,173	31,809	7,939	1,084	8,348	384,144	80,174	332,722
Total	0	28,651	55,457	0	8,997,057	1,439,608	0	2,195	79,357	304,228	152,108	37,470	33,061	33,060	1,108,918	231,478	1,640,231

Georges Bank Cod Fixed Gear Sector (FGS), Maine Coast Community Sector (MCCS), Mooncusser Sector (MOON), Maine Permit Bank (MPB), New Hampshire Permit Bank (NHPB), Northeast Fishery Sectors (NEFS), and Sustainable Harvest Sector (SHS).

Table 2 -- *De Minimis* Carryover ACE from Fishing Year 2021 to Fishing Year 2022 (lb)

Sector	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	0	622	42	0	25,846	282	0	1	261	292	319	3	498	63	1,130	458	9,674
MCCS	0	116	950	0	50,694	19,081	0	8	980	9,019	3,580	93	493	116	18,778	6,045	39,354
MOON	0	646	371	0	63,875	5,739	0	3	461	498	527	118	177	157	10,000	2,719	32,819
NEFS 2	0	345	1,423	0	176,140	32,046	0	4	3,469	5,549	3,752	400	1,344	260	31,404	3,580	42,910
NEFS 4	0	400	664	0	97,007	13,808	0	8	978	5,524	2,575	87	461	64	14,063	3,629	21,401
NEFS 5	0	26	19	0	13,462	178	0	61	145	253	180	53	52	662	39	40	140
NEFS 6	0	168	174	0	59,803	6,840	0	18	641	2,642	1,746	215	295	122	14,353	1,985	11,424
NEFS 7	0	25	1	0	6,626	26	0	4	8	146	74	38	3	12	333	35	565
NEFS 8	0	545	149	0	162,779	8,817	0	26	1,063	4,537	1,925	3,751	246	653	11,965	2,087	13,002
NEFS 10	0	29	156	0	2,947	2,069	0	2	680	707	617	1	584	39	710	289	2,407
NEFS 11	0	21	675	0	578	4,332	0	0	349	907	452	0	124	1	3,958	1,889	27,332
NEFS 12	0	34	186	0	1,563	1,695	0	0	1,314	463	181	0	638	17	480	130	2,426
NEFS 13	0	674	38	0	354,362	1,406	0	83	984	4,965	2,629	2,425	110	1,118	9,269	978	8,359
SHS1	0	397	283	0	159,271	20,553	0	7	749	8,041	3,509	1,438	209	370	29,148	7,270	31,783
SHS2	0	127	90	0	35,691	2,237	0	16	866	1,452	239	31	260	537	2,347	731	4,523
SHS3	0	911	397	0	428,305	31,540	0	29	1,565	10,885	5,234	2,444	193	1,319	58,789	8,845	55,340
Total	0	5,086	5,618	0	1,638,949	150,649	0	270	14,513	55,880	27,539	11,097	5,687	5,510	206,766	40,710	303,459

Table 3 -- Total ACE Available to Sectors in Fishing Year 2022 including Final Carryover (mt)

Sector	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	19	12	2	103	1,149	14	0	0	12	14	15	0	24	3	54	23	465
MCCS	3	2	47	202	2,242	941	2	0	46	429	171	4	23	6	904	297	1,888
MOON	19	12	18	255	2,804	285	1	0	22	24	25	6	8	8	479	213	1,569
MPB	0	0	3	3	31	79	0	0	2	31	10	0	1	0	79	33	240
NEFS 2	10	6	72	702	7,739	1,604	2	0	167	268	181	19	65	13	1,507	167	2,058
NEFS 4	12	7	33	387	4,259	686	2	0	47	264	123	4	22	3	649	172	1,023
NEFS 5	1	0	1	54	581	9	1	3	7	12	9	2	3	32	2	2	7
NEFS 6	5	3	9	238	2,626	340	3	1	31	126	84	10	14	6	688	94	546
NEFS 7	1	0	0	26	291	1	1	0	0	7	4	2	0	1	16	2	27
NEFS 8	16	10	7	649	7,123	434	22	1	51	217	92	176	12	31	571	102	620
NEFS 10	1	1	8	12	129	103	0	0	32	34	29	0	28	2	34	14	115
NEFS 11	1	0	34	2	25	215	0	0	17	43	22	0	6	0	190	90	1,307
NEFS 12	1	1	9	6	69	84	0	0	63	22	9	0	31	1	23	6	116
NEFS 13	20	12	2	1,413	15,563	70	35	4	47	238	126	114	5	54	444	48	400
NHPB	0	0	3	0	0	2	0	0	0	1	0	0	0	0	2	2	16
SHS 1	12	7	14	635	6,908	994	5	0	35	381	166	67	10	17	1,367	339	1,491
SHS 2	8	4	5	142	1,553	112	5	1	41	70	30	49	12	26	113	34	215
SHS 3	27	17	20	1,708	18,825	1,593	14	1	75	523	252	114	9	64	2,841	438	2,661
Total	156	95	286	6,538	71,918	7,568	94	13	697	2,704	1,346	568	274	265	9,962	2,075	14,764

Table 4 -- Total ACE Available to Sectors in Fishing Year 2022 including Final Carryover (1,000 lb)

Sector	GB Cod East	GB Cod West	GOM Cod	GB Haddock East	GB Haddock West	GOM Haddock	GB Yellowtail Flounder	SNE/MA Yellowtail Flounder	CC/GOM Yellowtail Flounder	Plaice	Witch Flounder	GB Winter Flounder	GOM Winter Flounder	SNE/MA Winter Flounder	Redfish	White Hake	Pollock
FGS	41	25	5	227	2,533	31	0	0	28	31	34	0	53	7	120	50	1,025
MCCS	8	5	104	446	4,942	2,074	4	1	102	946	376	10	51	12	1,994	656	4,162
MOON	42	26	40	562	6,183	629	3	0	49	53	56	12	19	17	1,057	471	3,460
MPB	0	0	7	6	67	175	0	0	5	68	21	0	3	0	173	73	528
NEFS 2	23	14	158	1,548	17,061	3,537	3	0	368	591	399	41	143	28	3,321	368	4,536
NEFS 4	26	16	73	853	9,390	1,513	5	1	103	583	271	9	49	7	1,431	379	2,256
NEFS 5	2	1	2	118	1,282	19	3	7	15	27	19	5	6	71	4	4	15
NEFS 6	11	7	19	526	5,789	750	7	2	68	279	184	22	31	13	1,516	207	1,204
NEFS 7	2	1	0	58	641	3	3	0	1	15	8	4	0	1	35	4	60
NEFS 8	36	22	16	1,431	15,703	958	49	3	112	478	203	389	26	69	1,260	225	1,368
NEFS 10	2	1	17	26	285	226	0	0	72	74	65	0	62	4	75	30	254
NEFS 11	1	1	74	5	56	475	0	0	37	96	48	0	13	0	418	198	2,881
NEFS 12	2	1	20	14	151	186	0	0	139	49	19	0	68	2	51	14	256
NEFS 13	44	27	4	3,115	34,310	155	78	9	104	524	279	251	12	119	980	106	882
NHPB	0	0	7	0	0	5	0	0	0	2	0	0	0	0	4	4	35
SHS 1	26	15	30	1,400	15,231	2,190	12	1	77	840	366	147	22	38	3,013	747	3,287
SHS 2	18	9	10	314	3,424	246	11	2	91	154	65	108	27	57	248	76	474
SHS 3	60	37	44	3,765	41,503	3,512	31	3	165	1,153	555	252	20	140	6,263	965	5,867
Total	344	209	631	14,415	158,551	16,685	207	29	1,536	5,962	2,968	1,253	605	584	21,963	4,575	32,549

Classification

NMFS is issuing this rule pursuant to 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), which provides specific authority for implementing this action. Section 305(d) authorizes NMFS to take action to carry out provisions in FMPs and of the MSA. In a previous action taken pursuant to section 304(b), NMFS approved the Council designed provisions in the FMP to authorize NMFS to annually adjust and distribute sector carryover consistent with MSA requirements to prevent overfishing and achieve optimum yield. See § 648.87(b)(1)(i)(C). The NMFS Assistant Administrator has determined that this final rule is consistent with the Northeast Multispecies FMP, other provisions of the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable laws.

This final rule is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(3)(B), we find good cause to waive prior public notice and opportunity for public comment on the allocation adjustments because allowing time for notice and comment is impracticable, unnecessary, and contrary to the public interest. We also find good cause to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(1) and (3), so that this final rule may become effective in a timely manner and the fishery may maximize the economic benefits of the adjusted allocations to the fishery.

Notice and comment and a 30-day delay in effectiveness would be impracticable, unnecessary, and contrary to the public interest. The distribution of unused quota carried over from the previous fishing year is an annual adjustment action that is expected by industry. These adjustments increase available catch, and sector vessels will be able to fish for this additional catch as soon as this action is in effect, which will provide increased operational flexibility and ability to catch its available allocation. They are routine, formulaic, and authorized by regulation. The public had prior notice and opportunity to participate in the development of and comment on the regulations implementing this process and expects this adjustment each year. Delaying these adjustments would result in a delay in the distribution of unused carryover to sectors, and could negate or reduce the intended economic benefits and increased operational flexibility provided by these adjustments. Carryover from 2021 was only recently finalized because it is based on data that was not available until the late fall upon the conclusion of the catch accounting process for fishing year 2021.

Also, because advanced notice and the opportunity for public comment are not required for this action under the Administrative Procedure Act, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* do not apply to this rule. Therefore, no final regulatory flexibility analysis is required and none has been prepared.

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

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

Dated: January 10, 2023.

Samuel D. Rauch, III,

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

[FR Doc. 2023–00575 Filed 1–13–23; 8:45 am]

BILLING CODE 3510–22–C

Proposed Rules

Federal Register
Vol. 88, No. 10
Tuesday, January 17, 2023

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0018; Project Identifier AD–2022–00883–R]

RIN 2120–AA64

Airworthiness Directives; Sikorsky Aircraft Corporation Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2022–02–01, which applies to Sikorsky Aircraft Corporation Model S–92A helicopters with certain part-numbered main rotor stationary swashplate assemblies (swashplate assemblies) that have accumulated 1,600 or more total hours time-in-service (TIS) installed. AD 2022–02–01 requires visually inspecting the swashplate assembly at specified intervals and depending on the results, removing the swashplate assembly from service. Since the FAA issued AD 2022–02–01, the FAA determined it was necessary to expand the applicability and require more detailed inspections to address the unsafe condition. This proposed AD would retain the actions of AD 2022–02–01, expand the applicability, add a detailed recurring visual inspection, and require either eddy current inspections (ECI) or fluorescent penetrant inspections (FPI). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by March 3, 2023.

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

- *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2023–0018; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For Sikorsky service information identified in this NPRM, contact your local Sikorsky Field Representative or Sikorsky's Service Engineering Group at Sikorsky Aircraft Corporation, Mailstop K100, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–946–4337 (1–800–Winged–S); email *wcs_cust_service_eng.gr-sik@lmco.com.* Operators may also log on to the Sikorsky 360 website at *sikorsky360.com*.
- You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Jared Hyman, Aerospace Engineer, Boston ACO Branch, Compliance & Airworthiness Division, FAA, 1200 District Avenue, Burlington, Massachusetts 01803; telephone (781) 238–7799; email: *9-AVS-AIR-BACO-COS@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–0018; Project Identifier AD–2022–00883–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Jared Hyman, Aerospace Engineer, Boston ACO Branch, Compliance & Airworthiness Division, FAA, 1200 District Avenue, Burlington, Massachusetts 01803; telephone (781) 238–7799; email: *9-AVS-AIR-BACO-COS@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2022–02–01, Amendment 39–21898 (87 FR 2316, January 14, 2022) (AD 2022–02–01), for Sikorsky Aircraft Corporation Model S–92A helicopters with a swashplate assembly part number (P/N) 92104–15011–042 or P/N 92104–15011–043 that has accumulated 1,600 or more total hours TIS, installed. AD 2022–02–01 was prompted by a notification of an in-service crack in a swashplate assembly inner ring. The crack, discovered during a routine inspection, extended between the uniball bore and

near the right-hand trunnion to servo attach bolt hole. This condition, if not detected and corrected, could result in fretting wear on the shoulder that supports the clamp-up of the uniball outer race, failure of the swashplate assembly, and subsequent loss of control of the helicopter. AD 2022–02–01 requires, within 50 hours TIS and thereafter at intervals not to exceed 50 hours TIS, visually inspecting the upper and lower surfaces of the swashplate assembly for a crack, nick, dent, and scratch. If there is a crack, nick, dent, or scratch that exceeds allowable limits, AD 2022–02–01 requires removing the swashplate assembly from service before further flight. The agency issued AD 2022–02–01 to address the unsafe condition on these products.

Actions Since AD 2022–02–01 Was Issued

Since the FAA issued AD 2022–02–01, Sikorsky Aircraft Corporation issued Sikorsky S–92 Helicopter Alert Service Bulletin ASB 92–62–010, Basic Issue, dated January 26, 2022 (ASB 92–62–010), for Sikorsky Aircraft Corporation Model S–92A helicopters with serial numbers 920006 and subsequent equipped with swashplate assembly P/N 92104–15011–042 or P/N 92104–15011–043, delivered as of January 26, 2022 (the issuance date of ASB 92–62–010). ASB 92–62–010 specifies a visual inspection of the swashplate assembly for cracks followed by recurring 50-hour inspections. Depending on the accrued flight time, maximum gross weight, or suspicion of cracks, ASB 92–62–010 specifies performing either an FPI or ECI. Prior to the FAA issuing AD 2022–02–01, Sikorsky Aircraft provided a comment to the NPRM (86 FR 47041, August 23, 2021) for that AD stating that the 50-hour recurring inspections proposed in the NPRM were insufficient based on recent fatigue evaluations, which had introduced a new failure mode. Sikorsky Aircraft further stated that this new failure mode requires improved detection capability, which would be introduced in a forthcoming revision to Sikorsky S–92 Helicopter Alert Service Bulletin ASB 92–62–009, Basic Issue, dated February 6, 2019 (ASB 92–62–009). Sikorsky Aircraft explained that the planned revision would specify special inspections at 50-hour, 375-hour, and 1,500-hour intervals to visually detect a potential fatigue crack at specific regions of the swashplate and would include criteria for when to accomplish an FPI or ECI. Since providing that comment, Sikorsky Aircraft has updated its guidance and retained ASB 92–62–009 and issued ASB 92–62–010. The special 375-hour and 1,500-hour inspections with added specific focus on the swashplate region were incorporated into the maintenance manual and not into a service bulletin. Based on continued analysis, the FAA has determined that the unsafe condition could exist on swashplate assemblies regardless of accumulated usage and accordingly has expanded the applicability of this proposed AD. In addition, the FAA has determined it is necessary to require more detailed inspections to address the new failure mode.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed ASB 92–62–010, which specifies a visual inspection of the swashplate assembly to determine if there are any cracks and initiates a 50-hour recurring visual inspection. If cracks are found, ASB 92–62–010 specifies replacing the swashplate assembly. Dependent on accrued flight time or suspicion of cracks, an FPI or ECI is performed. ASB 92–62–010 also specifies returning the swashplate assembly, uniball bearing, trunnions, and all attachment hardware to Sikorsky for investigation if cracks are found.

This proposed AD would also require ASB 92–62–009, which the Director of the Federal Register approved for incorporation by reference as of February 18, 2022 (87 FR 2316, January 14, 2022).

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

Proposed AD Requirements in This NPRM

This proposed AD would continue to require, for swashplate assemblies that have accumulated 1,600 or more total hours TIS, certain recurring visual inspections. This proposed AD would also expand the visual inspections required by AD 2022–02–01 and revise the applicability statement of AD 2022–02–01. This proposed AD would require accomplishing the actions specified in the service information already described, except as discussed under ''Differences Between this AD and the Service Information.''

Differences Between This Proposed AD and the Service Information

The applicability statement in this proposed AD does not identify airframe serial numbers, whereas the effectivity of ASB 92–62–010 does. This proposed AD would affect all swashplate assemblies P/N 92104–15011–042 and P/N 92104–15011–043 regardless of delivery date, whereas the effectivity of ASB 92–62–010 is for those part-numbered swashplate assemblies delivered as of January 26, 2022 (the issuance date of ASB 92–62–010). ASB 92–62–009 specifies a one-time visual inspection of the swashplate assembly; this proposed AD would require recurring visual inspections of the swashplate assembly to determine if any crack, nick, dent, or scratch develops over time. This proposed AD does not require returning parts to or contacting Sikorsky, while ASB 92–62–009 and ASB 92–62–010 specify performing those actions.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 89 helicopters of U.S. registry. The FAA estimates the following costs to comply with this proposed AD. Labor costs are estimated at $85 per work-hour.

Visually inspecting a swashplate assembly would take about 1.0 work-hour, for an estimated cost of $85 per helicopter and $7,565 for the U.S. fleet, per inspection cycle.

Performing an ECI or FPI would take about 8.0 work-hours, for an estimated cost of $680 per helicopter and $60,520 for the U.S. fleet, per inspection cycle.

Replacing the swashplate assembly, if required, would take about 16 work-hours and parts cost about $389,720, for an estimated cost of $391,080 per helicopter.

Authority for This Rulemaking

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of

that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive 2022–02–01, Amendment 39–21898 (87 FR 2316, January 14, 2022); and

■ b. Adding the following new airworthiness directive:

Sikorsky Aircraft Corporation: Docket No. FAA–2023–0018; Project Identifier AD–2022–00883–R.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) action by March 3, 2023.

(b) Affected ADs

This AD replaces AD 2022–02–01, Amendment 39–21898 (87 FR 2316, January 14, 2022) (AD 2022–02–01).

(c) Applicability

This AD applies to Sikorsky Aircraft Corporation Model S–92A helicopters, certificated in any category, with a main rotor stationary swashplate assembly (swashplate assembly) part number (P/N) 92104–15011–042 or P/N 92104–15011–043 installed.

(d) Subject

Joint Aircraft System Component (JASC) Code: 6230, Main Rotor Mast/Swashplate.

(e) Unsafe Condition

This AD was prompted by the discovery of a crack on the swashplate assembly inner ring. The FAA is issuing this AD to detect cracks that could result in fretting wear on the shoulder that supports the clamp-up of the uniball outer race. The unsafe condition, if not addressed, could result in failure of the swashplate assembly and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Definition

For the purposes of this AD, a ''suspected crack'' is a nick, scratch, or crack in the paint or primer that includes observable metallic base material.

(h) Required Actions

(1) For helicopters with swashplate assemblies identified in paragraph (c) of this AD that have accumulated 1,600 or more total hours time-in-service on the swashplate assembly, within 50 hours time-in-service (TIS) from February 18, 2022 (the effective date of AD 2022–02–01), and thereafter at intervals not to exceed 50 hours TIS, visually inspect the swashplate assembly for a crack, nick, dent, and scratch, by following the Accomplishment Instructions, Section 3, paragraph B. (except paragraphs B.(2)(a) through (c)) of Sikorsky S–92 Helicopter Alert Service Bulletin ASB 92–62–009, Basic Issue, dated February 6, 2019. If there is a crack, nick, dent, or scratch that exceeds the allowable limits, before further flight, remove the swashplate assembly from service.

(2) For helicopters with swashplate assemblies identified in paragraph (c) of this AD, within 50 hours TIS after the effective date of this AD, and thereafter at intervals not to exceed 50 hours TIS, visually inspect the swashplate assembly for surface discontinuities and suspected cracks by following the Accomplishment Instructions, Section 3., paragraphs B.(1) through (3), of Sikorsky S–92 Helicopter Alert Service Bulletin ASB 92–62–010, Basic Issue, dated January 26, 2022 (ASB 92–62–010). If there is any surface discontinuity or suspected crack, before further flight, remove the trunnion and accomplish an eddy current inspection (ECI) or fluorescent penetrant inspection (FPI) for a crack by accomplishing the actions in paragraph (h)(2)(i) or (ii) of this AD, as applicable.

(i) Accomplish an ECI by following the Accomplishment Instructions, Section 3, paragraphs C.(1) through (6), but not paragraph C.(6)(c)(1)., of ASB 92–62–010.

(ii) Accomplish an FPI by following the Accomplishment Instructions, Section 3, paragraphs D.(1) through (5), except paragraph D.(4), of ASB 92–62–010.

(3) For helicopters with a swashplate assembly identified in paragraph (c) of this AD certified for operation at a maximum gross weight of 26,500 lbs. that have accumulated 8,600 or more total hours TIS on the swashplate assembly, or certified for operation at a maximum gross weight of 27,700 lbs. that have accumulated 3,300 or more total hours TIS on the swashplate assembly, within 50 hours TIS after the effective date of this AD, and thereafter at intervals not to exceed 50 hours TIS, with the trunnion installed, accomplish an ECI or FPI of the uniball lower bore lip, uniball upper bore, and each trunnion mount bolt hole for a crack by accomplishing the actions in paragraph (h)(3)(i) or (ii) of this AD, as applicable.

(i) Accomplish an ECI by following the Accomplishment Instructions, Section 3, paragraphs C.(2) through (6), but not paragraph C.(6)(c)1., of ASB 92–62–010.

(ii) Accomplish an FPI by following the Accomplishment Instructions, Section 3, paragraphs D.(2), (3), and (5) of ASB 92–62–010.

(4) If there is a crack as a result of any of the inspections required by paragraph (h)(2) or (3) of this AD, before further flight, remove the swashplate assembly from service.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Boston ACO, Compliance & Airworthiness Division, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j) of this AD.

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

(j) Related Information

For more information about this AD, contact Jared Hyman, Aerospace Engineer, Boston ACO Branch, Compliance & Airworthiness Division, FAA, 1200 District Avenue, Burlington, Massachusetts 01803; telephone (781) 238–7799; email: *9-AVS-AIR-BACO-COS@faa.gov.*

(k) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) Sikorsky S–92 Helicopter Alert Service Bulletin ASB 92–62–010, Basic Issue, dated January 26, 2022.

(ii) [Reserved]

(4) The following service information was approved for IBR on February 18, 2022 (87 FR 2316, January 14, 2022).

(i) Sikorsky S–92 Helicopter Alert Service Bulletin ASB 92–62–009, Basic Issue, dated February 6, 2019.

(ii) [Reserved]

(5) For Sikorsky Aircraft Corporation service information identified in this AD, contact your local Sikorsky Field Representative or Sikorsky's Service Engineering Group at Sikorsky Aircraft Corporation, Mailstop K100, 124 Quarry Road, Trumbull, CT 06611; telephone 1–800–946–4337 (1–800–Winged–S); email *wcs_cust_service_eng.gr-sik@lmco.com.* Operators may also log on to the Sikorsky 360 website at *sikorsky360.com.*

(6) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on January 10, 2023.

Christina Underwood,

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

[FR Doc. 2023–00698 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2022–1798 Airspace Docket No. 22–AAL–32]

RIN 2120–AA66

Proposed Revocation of Colored Federal Airway Blue 2 (B–2); Point Lay, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to revoke Colored Federal airway Blue 2 (B–2) in the vicinity of Point Lay, AK due to the pending decommissioning of the Point Lay (PIZ) Non-directional Beacon (NDB), Hotham NDB (HHM), and Fort Davis NDB (FDV) in Alaska.

DATES: Comments must be received on or before March 3, 2023.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: (800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2022–1798 Airspace Docket No. 22–AAL–32 at the beginning of your comments. You may also submit comments through the internet at *www.regulations.gov.*

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

FOR FURTHER INFORMATION CONTACT: Steven Roff, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–3657.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the route structure as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System (NAS).

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2022–1798 Airspace Docket No. 22–AAL–32) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2022–1798 Airspace Docket No. 22–AAL–32.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Western Service Center, Federal Aviation Administration, 2200 South 216th St., Des Moines, WA 98198.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022. FAA Order JO 7400.11G is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The aviation industry/users have indicated a desire for the FAA to transition the Alaskan en route navigation structure away from the dependency on NDBs. Advances in technology have allowed for alternative navigation methods to support decommissioning high-cost ground navigation equipment. In 2021, the FAA conducted a study in accordance with FAA Order JO 7400.2, Procedures for Handling Airspace Matters, on whether to decommission PIZ, HHM, and FDV due to the ongoing high cost of maintenance and repairs. Interested parties were invited to submit comments on the study. No comments were received and the FAA scheduled PIZ, HHM, and FDV to be decommissioned.

Colored Federal airway B–2 navigates between PIZ and FDV. Decommissioning PIZ and FDV would render this route unusable. Accordingly, the FAA proposes to revoke B–2 in its entirety. United States Navigational (RNAV) routes T–366, T–367, T–364, and T–260 overlay or parallel the entire route, which mitigates the impact of revoking B–2.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to revoke Colored Federal airway B–2 in the vicinity of Pont Lay, AK due to the scheduled decommissioning of PIZ, HHM, and FDV. B–2 currently extends between PIZ and FDV. The FAA proposes to revoke B–2 in its entirety.

Colored Federal airways are published in paragraph 6009(d) of FAA Order JO 7400.11G dated August 19, 2022 and effective September 15, 2022, which is incorporated by reference in 14 CFR 71.1. The Colored Federal airway listed in this document would be removed subsequently in FAA Order JO 7400.11.

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

Regulatory Notices and Analyses

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

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

Paragraph 6009(d) Colored Federal Airways.

* * * * *

B–2 [Remove]

* * * * *

Issued in Washington, DC, on January 9, 2023.

Brian Konie,

Acting Manager, Airspace Rules and Regulations.

[FR Doc. 2023–00531 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 1

[File No. R307001]

Petition for Rulemaking of Jonathan Askin, Professor of Clinical Law, Brooklyn Law School

AGENCY: Federal Trade Commission.

ACTION: Receipt of petition; request for comment.

SUMMARY: Please take notice that the Federal Trade Commission (''Commission'') received a petition for rulemaking from Jonathan Askin, Professor of Clinical Law, Brooklyn School, and has published that petition online at *https://www.regulations.gov.* The Commission invites written comments concerning the petition. Publication of this petition is pursuant to the Commission's Rules of Practice and Procedure, and does not affect the legal status of the petition or its final disposition.

DATES: Comments must identify the petition docket number and be filed by February 16, 2023.

ADDRESSES: You may view the petition, identified by docket number FTC–2023–0002, and submit written comments concerning its merits by using the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit sensitive or confidential information. You may read background documents or comments received at *https://www.regulations.gov* at any time.

FOR FURTHER INFORMATION CONTACT: Daniel Freer, Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, *dfreer@ftc.gov,* (202) 326–2663.

SUPPLEMENTARY INFORMATION: Pursuant to Section 18(a)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 57a(1)(B), and FTC Rule 1.31(f), 16 CFR 1.31(f), notice is hereby given that the above-captioned petition has been filed with the Secretary of the Commission and has been placed on the public record for a period of thirty (30) days. Any person may submit comments in support of or in opposition to the petition. All timely and responsive comments submitted in connection with this petition will become part of the public record. The Commission will not consider the petition's merits until after the comment period closes.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your

comment does not include any sensitive or confidential information. In particular, your comment should not include 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).

Authority: 15 U.S.C. 46; 15 U.S.C. 57a; 5 U.S.C. 601 note.

April J. Tabor,

Secretary.

[FR Doc. 2023–00671 Filed 1–13–23; 8:45 am]

BILLING CODE 6750–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2022–0481; FRL–9630–03–OAR]

RIN 2060–AV78

New Source Performance Standards Review for Secondary Lead Smelters; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of public comment period.

SUMMARY: On December 1, 2022, the U.S. Environmental Protection Agency (EPA) proposed a rule titled ''New Source Performance Standards Review for Secondary Lead Smelters.'' The EPA is extending the comment period on this proposed rule that currently closes on January 17, 2023, by 15 days. The comment period will now remain open until February 1, 2023, to allow additional time for stakeholders and Tribal Nations to review and comment on the proposal.

DATES: The public comment period for the proposed rule published in the **Federal Register** (FR) on December 1, 2022 (87 FR 73708), originally ending January 17, 2023, is being extended by 15 days. Written comments must be received on or before February 1, 2023.

ADDRESSES: Submit comments, identified by Docket ID No. EPA–HQ–OAR–2022–0481, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2022–0481 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2022–0481.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2022–0481, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier (by scheduled appointment only):* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal holidays).

Instructions. All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: For questions about this action, contact Tonisha Dawson, Metals and Inorganic Chemicals Group, Sector Policies and Programs Division (D243–02), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–1454 fax number: (919) 541–4991 email address: *dawson.tonisha@epa.gov.*

SUPPLEMENTARY INFORMATION:

Rationale. Based on consideration of a request letter received from an industry representative (Association of Battery Recyclers, Inc.), which is available in the docket for this proposed rule, the EPA is extending the public comment period for an additional 15 days. Therefore, the public comment period will end on February 1, 2023.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2022–0481. All documents in the docket are listed in *https://www.regulations.gov/.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov.*

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2022–0481. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically to *https://www.regulations.gov/* any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment.

Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/.* Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, note the docket ID, mark the outside of the digital storage media as CBI, and identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.,* Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address *oaqpscbi@epa.gov,* and as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2022–0481. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

Penny Lassiter,

Director, Sector Policy and Programs Division.

[FR Doc. 2023–00669 Filed 1–13–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R08–OAR–2022–0929; FRL–10462–01–R8]

Approval and Promulgation of Implementation Plans; Colorado; Delegation of Authority of the Federal Plan for Existing Hospital, Medical, Infectious Waste Incinerators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or the ''Agency'') is proposing approval of a request submitted by the Colorado Department of Public Health and Environment (CDPHE) on June 27, 2022 for delegation of authority to implement and enforce Federal Plan Requirements for Hospital/Medical/Infectious Waste Incinerators (HMIWI) Constructed On or Before December 1, 2008 (the Federal Plan), within the state of Colorado. The Federal Plan establishes emission limits and monitoring, operating, and recordkeeping requirements for HMIWI units constructed on or before December 1, 2008, or modified on or before April 6, 2010. A Memorandum of Agreement (MOA) was signed on July 21, 2022 by the CDPHE Air Pollution Control Division Director, Michael Ogletree. This MOA constitutes the mechanism for the transfer of authority from the EPA to CDPHE. The MOA became effective upon signature by Regional Administrator, KC Becker, on August 8, 2022. The MOA delineates policies, responsibilities, and procedures by which the Federal plan will be administered and enforced by the CDPHE, as well as the authorities retained by EPA. The MOA and the request letter are included in the docket for this action. Accordingly, EPA is proposing to approve CDPHE's submittal in accordance with the Clean Air Act (CAA).

DATES: Written comments must be received on or before February 16, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2022–0929, to the Federal Rulemaking Portal: *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets.*

Docket: All 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 material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically in *www.regulations.gov.* To reduce the risk of COVID–19 transmission, for this action we do not plan to offer hard copy review of the docket. Please email or call the person listed in the **FOR FURTHER INFORMATION CONTACT** section if you need to make alternative arrangements for access to the docket.

FOR FURTHER INFORMATION CONTACT: Allison Reibach, Air and Radiation Division, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–ARD–ATRM, 1595 Wynkoop Street, Denver, Colorado 80202–1129, telephone number: (303) 312–6949, email address: *reibach.allison@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' and ''our'' means EPA. In the Final Rules section of this **Federal Register**, EPA is approving this action as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this proposed rule, no

further activity is contemplated. If EPA receives such comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. For additional information, see the direct final rule which is located in the Final Rules section of this **Federal Register**.

List of Subjects in 40 CFR Part 62

Environmental protection, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Waste treatment and disposal.

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

Dated: January 5, 2023.

KC Becker,

Regional Administrator, Region 8.

[FR Doc. 2023–00410 Filed 1–13–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 9

[PS Docket No. 18–64; FCC 22–96; FR ID 121633]

Location-Based Routing for Wireless 911 Calls

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (the FCC or Commission) proposes rules to more precisely route wireless 911 calls and texts to Public Safety Answering Points (PSAPs), which can result in faster response times during emergencies. Wireless 911 calls have historically been routed to PSAPs based on the location of the cell tower that handles the call. Sometimes, however, the 911 call is routed to the wrong PSAP because the cell tower is not in the same jurisdiction as the 911 caller. This can happen, for instance, when an emergency call is placed near a county border. These misrouted 911 calls must be transferred from one PSAP to another, which consumes time and resources and can cause confusion and delay in emergency response. The Notice of Proposed Rulemaking (*NPRM*) proposes to require wireless and covered text providers to deploy technology that supports location-based routing, a method that relies on precise information about the location of the wireless caller's device, on some networks and to use location-based routing to route 911 voice calls and texts originating on those networks when caller location is accurate and timely. In addition, the *NPRM* proposes to require CMRS and covered text providers to deliver 911 calls, texts, and associated routing information in internet Protocol (IP) format upon request of certain 911 authorities.

DATES: Comments are due on or before February 16, 2023, and reply comments are due on or before March 20, 2023.

ADDRESSES: You may submit comments, identified by PS Docket No. 18–64, by any of the following methods:

- *Federal Communications Commission's Website: https://www.fcc.gov/ecfs/.* Follow the instructions for submitting comments.
- *Mail:* Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy,* public notice, DA 20–304 (March 19, 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

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

FOR FURTHER INFORMATION CONTACT: Rachel Wehr, Attorney Advisor, Policy and Licensing Division, Public Safety and Homeland Security Bureau, (202) 418–1138, *Rachel.Wehr@fcc.gov,* or Brenda Boykin, Deputy Division Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau, (202) 418–2062, *Brenda.Boykin@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking (*NPRM*), FCC 22–96, in PS Docket No. 18–64, adopted on December 21, 2022, and released on December 22, 2022. The full text of this document is available at *https://www.fcc.gov/edocs/search-results?t=quick&fccdaNo=22-96.*

Initial Paperwork Reduction Act of 1995 Analysis

This *NPRM* may contain proposed new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on any information collection requirements contained in this document, as required by the PRA. If the Commission adopts any new or modified information collection requirements, they will be submitted to OMB for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated in the **DATES** section above. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998), *https://transition.fcc.gov/Bureaus/OGC/Orders/1998/fcc98056.pdf.*

The Commission will treat this proceeding as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within 2 business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and

arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule § 1.1206(b). In proceedings governed by rule § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Synopsis

Background

In this *NPRM,* we propose to require wireless carriers and covered text providers to implement location-based routing for 911 calls and texts nationwide.[1] With location-based routing, wireless providers that originate 911 calls and texts use precise information about the location of the wireless caller's device to route 911 calls and texts to the appropriate PSAP for that location.[2] Nationwide implementation of location-based routing will significantly reduce misrouted 911 calls and texts and the delays associated with transferring misrouted 911 calls and texts from one PSAP to another. For the millions of wireless 911 callers seeking emergency assistance each year, improving call routing will reduce emergency response times and save lives.

In 2018, the Commission released a Notice of Inquiry that sought to determine the best way to avoid misrouted 911 calls.[3] Earlier this year, we refreshed the record on location-based routing with a public notice that sought to update the record on developments since the release of the Notice of Inquiry, including recent technological improvements in location-based routing and the extent to which wireless carriers have deployed location-based routing in their networks.[4]

Developments since the Notice of Inquiry and comments in response to the public notice make clear that location technology has advanced significantly since 2018. Location-based routing appears to now be technologically feasible, and indeed is already being implemented by some wireless carriers. Moreover, implementing location-based routing on a nationwide basis has the potential to provide significant public safety benefits. Accordingly, in this *NPRM,* we propose rules to require all wireless carriers and covered text providers to implement location-based routing for all 911 calls and texts nationwide, including calls and texts originating in legacy, transitional, and Next Generation 911 (NG911)-capable[5] public safety jurisdictions. Specifically, we propose to:

- Require all Commercial Mobile Radio Service (CMRS) providers to (1) deploy technology that supports location-based routing on their IP-based networks (*i.e.,* 4G, 5G, and subsequent generations of IP-based networks) and (2) use location-based routing to route all 911 voice calls originating on their IP-based networks when caller location information available during origination of the 911 call meets certain requirements for accuracy and timeliness. Nationwide CMRS providers would have six months from the effective date of final rules to meet these requirements. Non-nationwide CMRS providers would have an additional year (*i.e.,* eighteen months from the effective date of final rules) to meet the same requirements.
- Require covered text providers to (1) deploy technology that supports location-based routing and (2) use location-based routing to route all 911 texts originating on their IP-based networks when location information available during origination of the 911 text meets certain requirements for accuracy and timeliness. Covered text providers would have eighteen months from the effective date of final rules to meet these requirements.
- Establish baseline requirements with respect to the accuracy and timeliness of location information used for location-based routing. When location information does not meet one or both of these requirements, CMRS providers and covered text providers would be required to route 911 calls and texts based on the best available location information, which may include latitude/longitude coordinates of the cell tower.

To help ensure that public safety jurisdictions transitioning to NG911 can realize the benefits of location-based routing in an efficient and cost-effective manner, we also propose to:

- Require CMRS providers and covered text providers to deliver 911 calls, texts, and associated routing information in IP format upon request of 911 authorities who have established the capability to accept NG911-compatible IP-based 911 communications. Nationwide CMRS providers and covered text providers would be subject to this requirement six months from the effective date of final rules on location-based routing or within six months of a valid request for IP-based service from a local or state public safety authority, whichever is later. Non-nationwide CMRS providers would have an additional six months to comply with this requirement.

We believe that the above proposals for location-based routing of 911 calls and texts will promote the safety of life and property by helping to ensure that those in need of emergency assistance can receive the help they need in a more timely manner. We seek comment on the tentative conclusions, proposals, and analyses set forth in this *NPRM,* as well as on any alternative approaches.

Legacy E911 Routing

When 911 service was first introduced, all 911 calls originated from wireline networks, and wireline providers used the fixed location of the calling telephone to route 911 calls to the nearest PSAP. With the deployment of the first generation of cellular service,

[1] In this *NPRM,* we use ''wireless carrier'' to mean Commercial Mobile Radio Service (CMRS) provider as defined in 47 CFR 9.3. The Commission defines the term ''covered text provider'' as including ''all CMRS providers as well as all providers of interconnected text messaging services that enable consumers to send text messages to and receive text messages from all or substantially all text-capable U.S. telephone numbers, including through the use of applications downloaded or otherwise installed on mobile phones.'' 47 CFR 9.10(q)(1).

[2] For purposes of this *NPRM,* we use the term ''caller'' to mean senders of both 911 voice calls and 911 texts except where otherwise indicated.

[3] *Location-Based Routing for Wireless 911 Calls,* PS Docket No. 18–64, Notice of Inquiry, 33 FCC Rcd 3238, 3238 through 40, paragraphs 1, 3 through 4 (2018) (*Notice of Inquiry*).

[4] *Federal Communications Commission Seeks to Refresh the Record on Location-Based Routing for Wireless 911 Calls,* PS Docket No. 18–64, public notice, FCC 22–42, 2022 WL 2128689, at *1 (June 9, 2022) (*public notice*).

[5] In this *NPRM,* we use ''NG911-capable'' to refer to PSAPs or jurisdictions that have implemented IP-based network and software components that are capable of supporting the provision of NG911, including but not limited to an Emergency Services internet Protocol Network (ESInet).

wireless 911 calls could originate from any location served by the wireless network, and the caller could move locations during the call. To enable timely routing of wireless 911 calls, CMRS providers typically programmed their networks to use the location of the first cell tower receiving the call to determine the nearest PSAP and route the call accordingly. This became the basis for routing of wireless Enhanced 911 (E911) calls (legacy E911 routing).

In legacy E911 routing, because the location of the cell tower may be some distance from the caller's location, CMRS providers may route a wireless 911 call to a PSAP other than the one designated by the relevant state or local 911 authority to receive calls from the actual location of the caller. For example, a cell tower in Northern Virginia may pick up a wireless 911 call originating in Washington, DC, but route the call to a Virginia PSAP.[6] The Commission considers calls routed to a PSAP other than the one designated for the actual location of the caller to be ''misrouted.''[7] Misroutes can occur for several reasons, including when more than one PSAP is within the coverage area of a cell site or sector.[8] The record indicates that misroutes are frequent where legacy E911 routing is used. NENA: The 9–1–1 Association (NENA) estimates that 23 million calls using legacy E911 routing are misrouted annually. Other parties estimate that approximately 11–12% of legacy E911 calls are misrouted,[9] and the percentage of misrouted calls can vary between and even within jurisdictions. For example, the Fayetteville (Arkansas) Police Department reports that 30% of the 911 calls its jurisdiction receives are misrouted from neighboring jurisdictions.[10] Intrado estimates that Palm Beach County, Florida, experiences misrouted calls at a rate as high as 20–50% along PSAP boundaries.

When a 911 call is misrouted, the answering telecommunicator must transfer the call to the PSAP that has jurisdiction to dispatch aid to the 911 caller's location. This process consumes time and resources for both the transferring PSAP and the receiving PSAP and delays the dispatch of first responders to render aid.[11] Commenters submit anecdotal evidence that a typical misroute introduces a delay of about a minute.[12] NENA estimates that call transfers consume over 200,000 hours per year of excess 911 professional labor. Misrouted wireless calls can also contribute to confusion and delay in emergency response.[13] This delay can have deadly consequences.[14]

2018 Notice of Inquiry

In 2018, the Commission released a Notice of Inquiry seeking comment on issues related to misrouted wireless 911 calls, including the feasibility of location-based routing.[15] The Commission observed that it had not previously addressed the accuracy of wireless 911 call routing. Historically,

[6] *See, e.g.,* Jodie Fleischer et al., *Nearly 100,000 Local 911 Calls Each Year Sent to Wrong 911 Center, Require Transfer,* NBC4 Washington (Apr. 20, 2021), *https://www.nbcwashington.com/investigations/nearly-100000-local-911-calls-each-year-sent-to-wrong-911-center-require-transfer/2646442/* (discussing the number of 911 calls that require transfer from one jurisdiction to another in the Washington, DC, region).

[7] *Notice of Inquiry,* 33 FCC Rcd at 3239, paragraph 2 & n.1. The misroutes that are the subject of this proceeding generally result from current 911 call routing mechanisms that rely on cell tower location and are working as designed, not from technical failure of those mechanisms. *Id.* In addition, the Commission's definition of misroute excludes transfers that occur as the result of preexisting routing arrangements. *E.g.,* T-Mobile USA, Inc. (T-Mobile) Comments at 2 n.3 (rec. July 11, 2022) (T-Mobile Comments) (noting that a state emergency service office may adopt policies requiring calls from state highways to be routed to state police instead of city or county agencies, ''even if the state highway is located in city or county boundaries'').

[8] *See* Communications Security, Reliability and Interoperability Council (CSRIC) V, Working Group 1, Evolving 911 Services, Final Report—Task 2: 911 Location-Based Routing at 9 (2016), *https://transition.fcc.gov/bureaus/pshs/advisory/csric5/WG1_Task2_FinalReport_092016.docx* (*CSRIC V LBR Report*). The CSRIC is a Federal advisory committee subject to the requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2, and charged with providing recommendations to the Commission to ensure, among other things, the security and reliability of communications systems. FCC, *Communications Security, Reliability, and Interoperability Council, https://www.fcc.gov/about-fcc/advisory-committees/communications-security-reliability-and-interoperability-council-0* (last visited Nov. 22, 2022).

[9] *E.g.,* The Association of Public-Safety Communications Officials International, Inc. (APCO) Comments at 2 (rec. July 11, 2022) (APCO Comments) (citing Alliance for Telecommunications Industry Solutions (ATIS), Analysis of Predetermined Cell Sector Routing Outcomes Compared to Caller's Device Location, ATIS–0500039 (July 2, 2019), *https://access.atis.org/apps/group_public/document.php?document_id=48697* (*ATIS–0500039*)); Intrado Life & Safety, Inc. (Intrado) Comments at 3 & n.8, 4 (rec. July 11, 2022) (Intrado Comments) (first citing a 2018 Intrado study concluding that 12.96% out of a set of five million wireless calls were misrouted; and then finding at least 11% of calls in Palm Beach County, Florida in February/March 2022 were misrouted due to tower-based routing).

[10] Natisha Claypool, Assistant Dispatch Manager, Fayetteville Police Department (rec. July 11, 2022) (Fayetteville Police Department Comments) (stating that the jurisdiction has determined that ''roughly 30% or more of the 9–1–1 calls received in our county are misroutes due to calls hitting cellular towers that border our jurisdictions'').

[11] *Notice of Inquiry,* 33 FCC Rcd at 3239, 3240 through 41, paragraphs 2, 8. As the Commission has previously noted, a study in Snohomish County, Washington, found that a call transfer adds approximately 40 seconds to the total call time. *Id.* at 3239, paragraph 2 n.2 (citing Robert Thurston, GIS Technician, Snohomish County, Determining Routing of Wireless Sectors in a Multi PSAP 9–1–1 System (2018), *http://proceedings.esri.com/library/userconf/proc15/papers/19_248.pdf*).

[12] APCO Comments at 2 (''[I]t's possible that a misrouted call will introduce a delay of a minute or longer.''); NENA: The 9–1–1 Association (NENA) Comments at 4 (rec. July 11, 2022) (NENA Comments) (''[T]he general anecdotal consensus was that a call transfer typically takes 'about a minute.' ''); Peninsula Fiber Network Comments at 1 (rec. July 8, 2022) (Peninsula Fiber Network Comments) (''Each transfer takes between 15 to 90 seconds to set up and complete.'').

[13] For example, on June 4, 2020, 16-year-old Fitz Thomas drowned at Confluence Park on the Potomac River, which separates Loudoun County, Virginia, and Montgomery County, Maryland. Press Release, Office of the County Administrator, Public Affairs and Communications, Loudoun County Releases Significant Incident Review of Goose Creek Drowning at 1 (Aug. 31, 2020), *https://www.loudoun.gov/ArchiveCenter/ViewFile/Item/10062.* Due to the incident's proximity to the jurisdictional border of the Potomac River and the use of legacy E911 routing, both counties received wireless 911 calls routed from the park located on the Virginia side of the river. *Id.* at 2. Efforts to determine Thomas's actual location contributed to a delay in dispatching first responders. *Id.* On July 15, 2022, Ma Kaing was shot and killed by a stray bullet outside her home in the East Colfax neighborhood of Denver. Jennifer Kovaleski, *Stuck on the line: Cellphone calls routed to the wrong 911 center are costing life-saving seconds,* Denver7 (Nov. 18, 2022), *https://www.denver7.com/news/investigations/stuck-on-the-line-cellphone-calls-routed-to-the-wrong-911-center-are-costing-life-saving-seconds.* The news media reports that four calls from her family and neighbors were misrouted to a neighboring PSAP and required transfer; three callers hung up after waiting minutes on hold. *Id.*

[14] The news media has widely reported on such tragic occurrences. For example, in December 2014, dispatchers were unable to locate Shanell Anderson, who drowned after accidentally driving off the road and into a pond close to the line between Fulton and Cherokee Counties in Georgia. Brendan Keefe and Phillip Kish, *Lost on the Line: Why 911 is broken,* 11alive (Dec. 29, 2016), *https://www.11alive.com/article/news/local/lost-on-the-line-why-911-is-broken/85-225104578.* According to the news media, Shanell Anderson was able to call 911, but the call was picked up by a cell tower in Fulton County and routed to that county's PSAP, where critical minutes were lost while dispatchers sought to determine the county in which she was located (Cherokee County). *Id.* In another case in 2008, Olidia Kerr Day made a wireless 911 call before she was fatally shot in a murder-suicide in front of the Plantation, Florida police department. Sofia Santana, *Cell Phone 911 Calls Are Often Routed to the Wrong Call Centers,* Sun Sentinel (June 21, 2008), *https://www.sun-sentinel.com/sfl-flbsafe911calls0621sbjun21-story.html.* According to the news media, though she placed the call in Plantation, the call was routed to the 911 center in Sunrise, Florida, and had to be transferred to Plantation. *Id.*

[15] *Notice of Inquiry,* 33 FCC Rcd at 3246 through 51, paragraphs 17 through 33. The *Notice of Inquiry* stated that advances in location technology suggested it was possible to support initial call-routing based on a caller's actual location in many situations. *Id.* at 3240, paragraph 3. The Commission also noted that while many location-based routing methods were promising, uncertainty remained regarding their reliability, the time required to develop necessary standards, and the potential transition costs of implementing location-based routing on current wireless 911 systems. *Id.* at 3240, paragraph 4.

precise caller location information typically took too long to generate to be available for routing purposes. The Commission noted, however, that then-recent advances in location technology suggested it was feasible to pinpoint a 911 caller's location quickly enough to support an initial routing determination. The Commission found that many location-based routing methods were promising and sought comment on the ''technical and operational implications, limitations, deployments, and best common practices'' of location-based routing. The Commission also requested comment on the frequency of wireless 911 call misroutes, the impact of misroutes on public safety, and the implementation of location-based routing technologies, including location-based routing capabilities for jurisdictions that had deployed elements of NG911. In addition, the Commission requested specific comment on the findings and recommendations of a 2016 report on location-based routing released by CSRIC V (*CSRIC V LBR Report*).[16] The Commission also sought comment on the means available to facilitate improvements to 911 routing and reduce the likelihood of misrouted 911 calls, including the promotion of voluntary best practices, implementation of incentive-based mechanisms, or regulatory action, and on costs and benefits relating to location-based routing.

The Commission received 22 comments and 14 reply comments in response to the Notice of Inquiry.[17] The record reflected uncertainty about the capabilities of location-based routing at the time.[18] In particular, nationwide CMRS providers noted the lack of available handset-based solutions that could generate a fix within a short period of time [19] and the presumption that any feasible solution would require significant investments from PSAPs.[20]

Developments Since 2018

Since the comment period for the Notice of Inquiry closed over four years ago, several developments indicate that location-based routing has become a viable methodology for CMRS providers to route 911 calls and texts. These developments include studies on misroutes and location-based routing technology, increased deployment of device-based hybrid (DBH) location technologies on consumer handsets,[21] and voluntary implementation of location-based routing on CMRS provider networks. In 2018, CTIA announced that the nationwide wireless carriers planned to add DBH location technologies to their networks to improve 911 location accuracy. In 2019, the Alliance for Telecommunications Industry Solutions (ATIS) published two studies with new information on legacy E911 misroutes and the feasibility of location-based routing.[22] In those studies, ATIS concluded that ''location-based routing is technically feasible within the timing considerations recommended by CSRIC V'' and evaluated where ''sub-optimal routing'' occurred for a sample set of wireless emergency calls. In a 2019 *ex parte* filing in the instant docket, Apple Inc. (Apple) noted that it had made DBH location technology available on certain device models that would support carrier implementation of location-based routing.[23]

The three nationwide wireless carriers (AT&T, T-Mobile, and Verizon) now indicate that they have deployed or plan to deploy location-based routing to varying extents on their networks. T-Mobile launched location-based routing on its network in the states of Texas and Washington in 2020 and as of July 2022 was offering location-based routing to 770 PSAPs. AT&T completed the rollout of location-based routing on its network in June 2022 and uses location-based routing to deliver 911 calls and texts to nearly all PSAPs nationwide, whether they are legacy or NG911-capable and without any additional action from the receiving PSAP.[24] Verizon has indicated that it plans to start work in the first quarter of 2023 to enable location-based routing nationwide.[25]

In June 2022, the Commission released a public notice to refresh the record on location-based routing developments since the Notice of Inquiry. The Commission sought information on industry trends, the 2019 ATIS studies on misroutes and location-based routing, increased deployment of DBH, the use of location-based routing for text-to-911, and implementation of location-based routing on carrier networks. The Commission received 15 comments and 6 reply comments in response to the public notice. We discuss these comments below in the context of the proposals made in this *NPRM.*

[16] *Id.* at 3246 through 50, paragraphs 18 through 29. CSRIC V defined location-based routing as ''[a] system of rules to varying degrees of complexity dictating to where 9–1–1 calls from various locations are routed.'' *CSRIC V LBR Report* at 6 through 7.

[17] See Appendix C for a complete list of entities submitting comments and/or reply comments both to the p*ublic notice* and the *Notice of Inquiry.* Commenters to the *Notice of Inquiry* included, among others, national public safety entities, state and regional 911 entities, nationwide CMRS providers, emergency telecommunications service providers, a handset manufacturer, a technical standards organization, a public safety consulting firm, and concerned members of the public. The record in this proceeding may be viewed at: *https://www.fcc.gov/ecfs/search/search-filings/results?q=* (proceedings.name:(''18–64'')).

[18] Commenters to the *Notice of Inquiry* offered varying opinions about whether technologies were capable of location-based routing without delaying 911 calls. *E.g.,* AT&T Reply 11 through 12 (rec. June 28, 2018) (AT&T NOI Reply) (''Even the most promising of location-based technologies . . . have limits.''); Motorola Solutions, Inc. (Motorola) Comments at 2 (rec. May 7, 2018) (Motorola NOI Comments) (asserting that testing has confirmed that location-based wireless routing is faster and more accurate than legacy wireless routing).

[19] AT&T stated that although location-based routing solutions hold potential to reduce wireless 911 call misroutes, regulatory requirements were ''premature.'' AT&T NOI Reply at 3. AT&T asserted that instead, the Commission should ''encourage further study of potential handset-based solutions, which send location information directly to the routing element,'' and that ''[g]iven their superior speed, such solutions are preferable to network-based solutions''. *Id.; see also* Verizon Comments at 3 (rec. May 7, 2018) (Verizon NOI Comments) (''LBR is dependent on the handset's ability to deliver an accurate and timely fix which, for well-established reasons, is not feasible for every 911 call.''); T-Mobile Comments at 4 (rec. May 7, 2018) (T-Mobile NOI Comments) (''Even if a 'real-time' location fix could be obtained in a sufficiently short amount of time so as not to disrupt the need to route the call quickly, . . . leveraging any location fix for legacy PSAP call routing would require fundamental changes to the wireless carrier's legacy call flow logic.'').

[20] Verizon NOI Comments at 5 (''PSAP systems, not just wireless networks, may require a number of software programming and other changes. And PSAPs' and wireless providers' ability to handle LBR would require testing to ensure reliability.'').

[21] Device-based hybrid (DBH) location is an estimation method that typically utilizes either a selection or a combination of location methods available to the handset in an environment, including crowd-sourced Wi-Fi, A–GNSS, and possibly other handset-based sensors. ATIS, Enhancing Location-Based Routing of Emergency Calls, ATIS–0700042 at 2 (July 2019), *https://access.atis.org/apps/group_public/document.php?document_id=48218* (*ATIS–0700042*). It also includes an associated uncertainty estimate reflective of the quality of the returned location. *Id.*

[22] *ATIS–0700042; ATIS–0500039.* ATIS observed that calls that are ''sub-optimally routed'' tend to occur along PSAP boundaries, in areas with a dense concentration of PSAPs, around major water features, and along narrow strips of jurisdictional territory. *ATIS–0500039* at 12.

[23] Letter from Paul Margie, Counsel, Apple, to Marlene H. Dortch, Secretary, FCC, PS Docket No. 18–64 et al., at 2 (filed Sept. 24, 2019) (Apple *Ex Parte*). Apple also noted that it offers wireless carriers the option to enable location-based routing for iPhone models 6s and later running iOS 13 and Apple Watch devices running watch OS 6. *Id.*

[24] AT&T Comments at 4 (rec. July 11, 2022) (AT&T Comments). AT&T notes that a few PSAPs are using unique internal routing solutions and that the company is working to ensure that its implementation of location-based routing meets the needs of these PSAPs. *Id.* at 4 n.3.

[25] Noelle Phillips, *Verizon agrees to upgrade 911 call-routing in wake of complaints from Denver's East Colfax neighborhood,* Denver Post (Aug. 3, 2022), *https://www.denverpost.com/2022/08/03/verizon-911-call-routing-policy-change-east-colfax-ma-kaing/.* Verizon did not discuss plans to implement location-based routing in its comments to the instant docket.

A. Location Based Routing

1. Wireless 911 Voice Calls

Developments since the Notice of Inquiry and the record received in response to the public notice indicate that nationwide location-based routing is now feasible and has the potential to provide significant public safety benefits by reducing the number of misrouted calls to 911. Commenters confirm that continued reliance on cell tower-based routing results in a considerable number of 911 calls being misrouted [26] and that this is a significant problem for public safety.[27] NENA estimates that nationwide implementation of location-based routing would reduce misrouted wireless 911 calls by 85% from 23 million to 3.45 million per year. Other commenters agree that implementation of location-based routing can significantly mitigate misroutes and, as a result, save lives and property.

The record also indicates that carrier deployments of location-based routing have already had a positive impact. As noted above, two nationwide carriers, T-Mobile and AT&T, have already implemented location-based routing: as of July 2022, T-Mobile was offering location-based routing to 770 PSAPs,[28] while AT&T has implemented location-based routing throughout its network and is using it to deliver 911 calls and texts to nearly all PSAPs nationwide.[29] Commenters report that jurisdictions where carriers have implemented location-based routing now experience fewer misroutes, fewer transfers, and faster dispatch times. AT&T states that in trials and in subsequent deployment, its location-based routing solution has significantly improved call routing: AT&T estimates that it is able to route 80% of 911 calls on its network to the correct PSAP using location-based routing, and that approximately 10% of these calls would have been misrouted (and would have required a transfer) if it had used legacy E911 routing based on cell tower location.[30] The Texas 911 Entities state that the rollout of T-Mobile's location-based routing solution has had a ''noticeably positive impact'' on PSAPs experiencing misrouted calls and has resulted in fewer transfers for some PSAPs.[31] In 2020, T-Mobile announced that some areas where it implemented location-based routing experienced 40% fewer call transfers. Commenters' reported experiences align with CSRIC V's finding that location-based routing would reduce call transfers when a location fix is available within a few seconds of call origination.

The record further indicates that it is now technologically feasible for all CMRS providers to support location-based routing for a significant percentage of wireless 911 calls. In its 2019 feasibility study, ATIS concluded that location-based routing is technically feasible within the five-second window recommended by CSRIC V.[32] The feasibility of location-based routing has also significantly increased as a result of the widespread availability of DBH technologies to support 911 location. Android devices using Emergency Location Service (ELS) and iOS devices using Hybridized Emergency Location (HELO) are capable of generating high accuracy, low latency location information in time to support 911 call routing.[33] In response to the public notice released in 2022, several commenters note that these DBH location technologies are widely available on mobile devices and can be used for routing a high percentage of wireless 911 calls. This is a significant change from the comments received in response to the Notice of Inquiry, which indicated uncertainty regarding the availability of technology that would support location-based routing information.[34]

Based on the above, we propose to require that all CMRS providers (1) deploy technology that supports location-based routing and (2) use location-based routing to route all wireless 911 voice calls originating on IP-based networks, when timely and accurate information about the caller's location is available. When such information is not available in time for routing the call, we propose to allow CMRS providers to route 911 calls using the best available location information, which may include cell tower coordinates. We also propose to establish timeframes for compliance with these requirements and to define specific terms to clarify the obligations of regulated entities. We seek comment on these proposals.

Public safety commenters agree that early location-based routing implementations by CMRS providers have shown that the technology is technically feasible. Intrado states that AT&T's deployment of location-based routing can serve as a model for other CMRS providers. We seek comment on this analysis. For nationwide and non-nationwide carriers that have not

[26] *E.g.,* Intrado Comments at 3 n.8, 4 through 5 (first finding a 12.96% average rate of misroutes for a sample set of five million wireless calls in 2018; and then reporting that 20–50% of wireless calls may misroute along PSAP boundaries in Palm Beach County, Florida); NENA Comments at 2 (estimating 23 million 911 calls are misrouted annually); Fayetteville Police Department Comments (noting that as many as 30% of wireless 911 calls it receives are misroutes from neighboring jurisdictions); *see also ATIS–0500039* at 4 (estimating a 12% national average rate for sub-optimally routed wireless 911 calls in 2019).

[27] *E.g.,* APCO Comments at 2 (stating that there is a consensus among Emergency Communications Centers that ''misroutes are a problem''); The Boulder Regional Emergency Telephone Service Authority (BRETSA) Reply at 1 through 3 (rec. July 25, 2022) (BRETSA Reply) (calling misroutes ''problematic'' and detailing the difficulties of misroutes for PSAPs).

[28] *T-Mobile First to Roll Out Cutting-Edge 911 Capabilities* (Dec. 17, 2020), *https://www.t-mobile.com/news/network/tmobile-next-generation-911-location-based-routing;* T-Mobile Reply at 2 n.6 (rec. July 25, 2022) (T-Mobile Reply).

[29] AT&T Comments at 4. AT&T notes that a few PSAPs are using unique internal routing solutions and that the company is working to ensure that its implementation of location-based routing meets the needs of these PSAPs. *Id.* at 4 n.3.

[30] *Id.* at 4. Intrado further clarifies that AT&T's solution has been able to route 80% of all wireless 911 calls since early implementation in February 2022 using device location information with a small uncertainty range and high confidence level and that most calls using location-based routing route on device locations under 50 meters. Intrado Comments at 2, 9.

[31] The Texas 9–1–1 Alliance, the Texas Commission on State Emergency Communications, and the Municipal Emergency Communication Districts Association (Texas 911 Entities) Comments at 2, 4 (rec. July 11, 2022) (Texas 911 Entities Comments) (showing that average percentage of 911 call transfers for two out of three PSAPs in initial beta sites decreased by roughly 4 to 5% after T-Mobile implemented location-based routing; the remaining PSAP showed a slight increase in transfers of less than 1%).

[32] *See ATIS–0700042* at 22. CSRIC V noted that location information must be available to the Mobile Switching Center (MSC) in 5 seconds or less in order for a carrier to route the voice portion of a wireless 911 call no later than 6 seconds from call initiation. *CSRIC V LBR Report* at 8. CSRIC V determined that if location fixes are obtained in 5 seconds or less, location-based routing would allow for delivery to a jurisdictionally appropriate PSAP. *CSRIC V LBR Report* at 3.

[33] Apple *Ex Parte* at 2 (indicating that device-based hybrid location is available from certain devices during call set-up and that location-based routing can be enabled on models 6s and later running iOS 13 and Apple Watch devices running watch OS 6); Android, *Emergency Location Service—How It Works, https://www.android.com/safety/emergency-help/emergency-location-service/how-it-works/* (last visited Dec. 5, 2022) (''On average, [Android's Emergency Location Service (]ELS[)] is able to get a first location 3–4 seconds after the call has started.''); Android, *Emergency Location Service—Overview, https://www.android.com/safety/emergency-help/emergency-location-service/* (last visited Dec. 5, 2022) (''ELS works on over 99% of active Android devices running OS4.4 and up, with Google Play Services installed—no new hardware or activation required.'').

[34] AT&T NOI Reply at 3; Verizon NOI Comments at 3 (''LBR is dependent on the handset's ability to deliver an accurate and timely fix which, for well-established reasons, is not feasible for every 911 call.''); T-Mobile NOI Comments at 4 (''Even if a 'real-time' location fix could be obtained in a sufficiently short amount of time so as not to disrupt the need to route the call quickly, . . . leveraging any location fix for legacy PSAP call routing would require fundamental changes to the wireless carrier's legacy call flow logic.'').

implemented location-based routing across their entire networks, we seek comment on the feasibility and cost of network upgrades (including hardware, software, Geographic Information System (GIS), and service upgrades) and testing that would be required to implement location-based routing in their service areas by the proposed deadlines.

We tentatively conclude that a high percentage of consumer handsets currently in use on nationwide and non-nationwide networks are technically capable of supporting location-based routing using device-based location technology. We seek comment on this tentative conclusion. AT&T states that device-based location routing solutions do not require changes to the network core and are relatively easy to implement.[35] However, T-Mobile states that ''not every carrier is prepared to use DBH location estimates for routing today,'' [36] and Peninsula Fiber Network states that ''[o]ne major provider has a 99% failure rate in providing the caller's location within the 5 second window.'' We seek comment on whether there are technology or cost barriers that prevent some CMRS providers from supporting device-based location solutions.

Public safety entities and some technology providers urge the Commission to require all CMRS providers to support location-based routing.[37] For example, APCO states that location-based routing technology ''is available today, and the Commission should act quickly to require service providers to implement it.'' NENA states that the Commission should establish rules to implement location-based routing nationwide to reduce response times for millions of 911 calls and save lives. However, some CMRS providers urge us not to adopt requirements and instead to permit carriers to implement location-based routing voluntarily. We believe that requiring all CMRS providers to support location-based routing would generate substantial public safety benefits, whereas allowing CMRS providers to implement location-based routing voluntarily would result in inconsistent routing of calls to PSAPs and a higher risk of 911 misroutes for subscribers on CMRS networks that did not support location-based routing.[38] We seek comment on whether there are countervailing reasons to allow voluntary implementation of location-based routing by carriers rather than adopting a requirement.

We also seek comment on whether CMRS providers should be required to use location-based routing to deliver 911 calls to all PSAPs served by their networks, or whether the requirement should be triggered by PSAP request or limited to certain categories of PSAPs. T-Mobile and Verizon assert that not all PSAPs are currently interested in receiving calls routed using device location and that in some instances it could adversely impact PSAP operations. However, AT&T provides location-based routing to virtually all PSAPs on its network and asserts that it can do so without action by the PSAP. We seek comment on whether there have been instances in which carrier implementation of location-based routing has imposed costs or had an adverse impact on PSAPs or where public safety authorities have had ''significant issues with implementation.''

Some commenters contend that location-based routing should only be made available to PSAPs that have achieved some level of NG911 capability. Verizon supports location-based routing only for PSAPs that are operating in accordance with NG911 standards. T-Mobile states that it deploys NG911 and location-based routing ''where jurisdictions are ready,'' noting that it does so for PSAP operational awareness and awareness of situations ''where service-area boundaries require specific routing to achieve optimal routing improvements.'' CTIA argues that providers and PSAPs need flexibility to implement location-based routing in a manner that accounts for PSAP capabilities. However, AT&T has implemented location-based routing for both legacy and NG911 PSAPs across its network, with only very limited exceptions and without a requirement that PSAPs take any particular action to receive calls using location-based routing. In addition, the ATIS–0700042 standard supports location-based routing of 911 calls delivered to both Emergency Services internet Protocol Networks (ESInets) and legacy selective routers.

We seek comment on our tentative conclusion that location-based routing should be required for wireless 911 calling in legacy E911 jurisdictions as well as jurisdictions that have achieved partial or full NG911 capability. Although many PSAPs are connected to ESInets and some have become wholly or partially NG911-capable, approximately half of primary PSAPs in the United States are not yet connected to an ESInet.[39] Thus, limiting location-based routing to jurisdictions that are ESInet-connected or have developed some level of NG911 capability would deprive legacy PSAPs and the communities they serve of the benefits of location-based routing. We seek comment on whether the requirement for CMRS providers to support location-based routing should be conditioned on a determination that jurisdictions are ''ready'' to receive location-routed calls, and if so, what criteria should be used to make this determination.

Some commenters contend that location-based routing should only be required in jurisdictions with the highest incidence of misroutes. T-Mobile asserts that location-based routing would not improve emergency response in all jurisdictions and that the Commission should not require location-based routing where it would not improve emergency response. ATIS suggests that legacy E911 routing may be preferred for cell sectors ''which display a very low (or no) incidence of sub-optimal routing behavior'' and ''[i]n these cases, the potential time delay associated with LBR may not be

[35] AT&T NOI Reply at 10 (''Provided a device-based location solution can generate accurate location information within the necessary timeframe, implementing such a solution on the network would be relatively straight forward as it would not require changes to the network core.'').

[36] T-Mobile Comments at 6. *But see* T-Mobile Reply at 1 through 2 (''[T]here are commenters that assert that wireless carriers are not ready to offer location-based routing even though multiple carriers and their vendors confirm that they can, and do, offer location-based routing and are i3 compliant. Indeed, T-Mobile has deployed location-based routing in twenty-one states; it has also converted over 1,900 PSAPs in 24 states from TDM to NG911 SIP.'').

[37] In a separate docket, APCO also called for a rulemaking to require carriers to implement location-based routing in comments on a petition from NASNA regarding NG911. APCO Comments, PS Docket No. 21–479, 4 (rec. Jan. 19, 2022).

[38] For example, in Denver, Colorado, carriers have not uniformly implemented location-based routing. After 911 calls following the fatal shooting of Ma Kaing in the East Colfax neighborhood of Denver were misrouted to the city of Aurora, a news report indicated that although AT&T and T-Mobile had previously implemented location-based routing in Denver, Verizon initially declined to do so. Noelle Phillips, *911 calls from cellphones can be precisely pinpointed. One carrier won't install the technology in Colorado,* Denver Post (Aug. 1, 2022), *https://www.denverpost.com/2022/08/01/verizon-location-based-routing-denver-aurora/.* Verizon later agreed to ''start the work [on location-based routing] during the first quarter of 2023.'' Noelle Phillips, *Verizon agrees to upgrade 911 call-routing in wake of complaints from Denver's East Colfax neighborhood,* Denver Post (Aug. 3, 2022), *https://www.denverpost.com/2022/08/03/verizon-911-call-routing-policy-change-east-colfax-ma-kaing/.*

[39] The National Highway Traffic Safety Administration (NHTSA) National 911 Program reports a gradual increase in the number of PSAPs connected to an ESInet in the past few years. According to the National 911 Program's 2020 National 911 Progress Report, only 2,177 PSAPs in 47 states connect to an ESInet. National 911 Program, National 911 Progress Report: 2020 Data (Feb. 2022) at 64 *https://www.911.gov/projects/national-911-annual-report/* (National 911 Progress Report). For context, the total number of primary PSAPs is 4,627 based on 48 reporting states. *Id.* at 17.

justifiable.'' [40] We note, however, that AT&T has implemented location-based routing across all jurisdictions regardless of the prior frequency of misroutes, without a significant impact on call-routing time compared to legacy E911 routing.[41] We tentatively conclude that any potential time delay associated with location-based routing is likely to be negligible even for sectors that do not have frequent legacy E911 misroutes. In addition, CMRS providers or PSAPs may lack granular data on misroutes, making it difficult to identify which sectors have misroutes most frequently. We seek comment on whether attempting to limit location-based routing to sectors prone to misroutes would be less costly or provide any greater benefits than supporting location-based routing across all jurisdictions. How would the Commission determine which jurisdictions or sectors would benefit most from location-based routing, and what are the constraints on obtaining such information? Are there other approaches the Commission should consider for implementing location-based routing?

Compliance Timeframe. We propose to require nationwide CMRS providers to deploy and commence use of location-based routing for 911 voice calls within six months from the effective date of final rules on location-based routing. The three nationwide CMRS providers have already deployed or are actively working toward deploying location-based routing capabilities on their networks. The six-month implementation timeframe is intended to provide the nationwide providers adequate time to complete the implementation of location-based routing. We seek comment on this proposal and on whether a longer or shorter compliance timeframe should be considered for nationwide CMRS providers.

We propose to provide non-nationwide CMRS providers an additional year (*i.e.,* eighteen months from the effective date of final rules on location-based routing) to deploy and commence use of location-based routing for 911 voice calls. This would give non-nationwide providers additional time to take necessary steps to implement location-based routing on their networks. Additionally, we anticipate that location-based routing solutions will be more readily available to non-nationwide providers on an extended timeframe. We note that no non-nationwide providers submitted comments in response to the Notice of Inquiry or public notice, and we seek comment on whether a longer or shorter compliance period would be appropriate for such providers.

Calls Originating on IP-Based Networks. To reduce potential cost burdens for CMRS providers, we propose to require location-based routing for 911 calls originating on IP-based networks, but not for 911 calls originating on circuit-switched, time-division multiplex (TDM) networks. ATIS assumes for purposes of ATIS–0700042 that location-based routing is only supported on originating networks supporting Long Term Evolution (LTE) and beyond. Intrado asserts that 4G and 5G networks provide a ''much more supportive setting for LBR'' and notes that 4G LTE and newer networks no longer require call holding to implement location-based routing because the routing element has sufficient time to transmit and evaluate confidence and uncertainty information and to query the location server for PSAP routing instructions before the time to route. Nationwide CMRS providers are also in the process of retiring or have completed the retirement of TDM 2G and 3G networks,[42] and some non-nationwide providers have announced dates to sunset their 3G networks in 2022. In light of the technical obstacles and upcoming retirement of these networks, we tentatively conclude that requiring location-based routing for 911 calls originating on TDM-based networks would be unduly burdensome. Accordingly, we propose to require location-based routing only for calls originating on IP-based networks, *i.e.,* 4G LTE, 5G, and subsequent generations of IP-based networks. We seek comment on this proposal and on our analysis.

Default to Best Available Location Information. We propose to require that when location information does not meet one or both requirements for accuracy and timeliness under our rules, wireless providers shall route 911 calls based on the best available location information available at the time the call is routed, which may include cell tower coordinates. We agree with commenters who assert that there is a continued need for cell-sector based routing as a fallback method because accurate location information is not available to support call routing in all scenarios.[43] Our proposed requirement to default to best available location information would be consistent with the ATIS–0500039 report, which assumes that the fallback for location-based routing should be cell sector routing ''for cases wherein no position estimate is available in time to be used for [location-based routing] or the position estimates lack requisite accuracy.'' It also would be consistent with current CMRS provider deployments of location-based routing, which default to legacy E911 routing when location does not meet carriers' standards of accuracy and timely availability.[44] In addition, we agree with commenters who assert that CMRS providers should be able to route based on the best available location information at the time of routing. We believe that our proposal would allow carriers to take full advantage of the location information available at the time of routing while permitting them the flexibility to use other information, including cell tower coordinates, when precise location is not available in time. We seek comment on our proposal. We also seek comment on the percentage of calls that CMRS providers would continue to route using legacy E911 routing rather than location-based routing under our proposed rules.

Disclosure of Location-Based Routing Information. We seek comment on

[40] While BRETSA supports nationwide implementation of location-based routing, BRETSA would also support targeted implementation in areas of high misroutes, even if limited delay of 911 call routing and delivery would occur. BRETSA Reply at 3. BRETSA asserts that wireless providers should use PSAP jurisdictional boundaries when determining the location and orientation of new cell-sites and sectors, that providers should configure their systems to identify calls which are Phase I routed from sites and sectors with high misroutes, and that providers should indicate the percentage of calls misrouted from that location to PSAPs. *Id.* at 8 through 9.

[41] AT&T Comments at 3 through 4 (stating that latency for 95% of location-based routed calls was consistent with latency for legacy E911-routed calls).

[42] AT&T has phased out its 3G network. AT&T, *Get details on the 3G network shut down* (July 14, 2022), *https://www.att.com/support/article/wireless/KM1324171/.* Verizon announced it will finish shutting down its 3G network by December 31, 2022. Verizon, *CDMA [(Code-Division Multiple Access)] Network Retirement, https://www.verizon.com/support/knowledge-base-218813/* (last visited Nov. 29, 2022). T-Mobile announced that it finished shutting down Sprint's 3G CDMA network as of March 31, 2022, and Sprint's 4G LTE network as of June 30, 2022. *T-Mobile Network Evolution, https://www.t-mobile.com/support/coverage/t-mobile-network-evolution* (last visited Nov. 29, 2022). It also announced it shut down T-Mobile's 3G Universal Mobile Telecommunications System (UMTS) network as of July 1, 2022, but has not yet announced a shutdown date for its 2G network. *Id.*

[43] Intrado notes that AT&T's location-based routing solution successfully used location-based routing for 80% of 911 calls. Intrado Comments at 2.

[44] AT&T Comments at 4 (''When location was not available, the process defaults to using sector-based routing so that calls may be completed without excessive delay.''); T-Mobile Comments at 4 (''T-Mobile's policy is to route a 911 call based on the cell-sector location if a routable, non-Phase I location estimate is not generated quickly enough.'').

whether the proposed rules should require CMRS providers to provide information to PSAPs or state or local 911 authorities regarding the routing methodology used for each 911 call. NASNA states that ''it is important for the telecommunicator dispatching the call to know what type of location technology has been used to route a 911 call'' and that it is ''critical'' to provide the type of location technology CMRS providers used to derive the caller's location, such as ''specific LBR technology versus E–911,'' to the PSAP with each call. ATIS states that any method providing location-based routing must be transparent to the emergency services network and the PSAP.[45] NENA notes that there are already NG911 elements that partly meet NASNA's requirements, and that additional standards under development should meet them in full. Given the forthcoming development of additional standards by NENA, we do not propose to add specific disclosure requirements at this time, but we encourage state and local 911 authorities, service providers, and vendors to develop mechanisms to provide PSAPs with information on call routing methodology that could assist them in identifying the caller's location and dispatching emergency response. We also note that our proposed accuracy and timeliness criteria for location-based routing include confidence and uncertainty metrics to ensure that CMRS providers use the best available location information to route the call in each instance. We seek comment on this approach. If we were to adopt disclosure requirements, what information should be disclosed, what would be the public safety benefits, and would such benefits justify the cost to CMRS providers of making such disclosures to PSAPs?

2. Text-to-911

Texting to 911 has become an integral component of emergency response in many jurisdictions. Currently available data indicate that in calendar year 2020, over 3,000 PSAPs in the U.S. supported text-to-911 and that 11 states as well as the District of Columbia and Puerto Rico had jurisdiction-wide text-to-911 coverage.[46] Although the volume of 911 texts in these jurisdictions is typically much lower than the volume of 911 voice calls, it is equally important that all 911 texts as well as voice calls be routed to the appropriate PSAP responsible for dispatch of emergency response to the texting party's location. Therefore, for the same reasons set forth above with respect to 911 voice calls, we propose to require covered text providers to use location-based routing to route all 911 texts originating on IP-based networks, provided that the information used for routing meets the same requirements for accuracy and timeliness that would apply to 911 voice calls. We further propose that when location information for routing texts to 911 does not meet either one or both of these requirements, covered text providers would be required to route texts to 911 on the basis of the best available location information at time of routing. We seek comment on this proposal.

The record indicates that location-based routing for 911 texts is technically feasible and already in use by some providers. AT&T reports that it has used location-based routing for its text-to-911 service since 2016 and that it uses DBH location to route the majority of its text messages. The Massachusetts State 911 Department reports that two wireless carriers in the state provide location information to its NG911 network to route texts to the appropriate PSAP. We also note that no commenter has contended that location-based routing for 911 texts is not technically feasible or expressed opposition to using location-based routing for 911 texts as well as voice calls.

We seek comment on the technical feasibility of location-based routing for 911 texts and whether there are any considerations specific to 911 texting that would warrant adopting different location-based routing requirements from those applicable to 911 voice calls. If so, how should the requirements for text to 911 differ? Can providers use DBH to support location-based routing of both voice and text? Are there routing solutions besides DBH available to covered text providers to route 911 texts? We seek comment and specific data on the benefits of requiring covered text providers to implement location-based routing for texts originating on IP-based networks, as well as the costs involved in such a requirement.

We propose to require covered text providers to deploy and commence use of location-based routing for 911 texts within eighteen months from the effective date of final rules on location-based routing. This proposed implementation timeframe is intended to provide the diverse set of covered text providers, which includes nationwide and non-nationwide CMRS providers offering text service as well as other providers, adequate time to take necessary steps to complete the implementation of location-based routing on their networks. We seek comment on this proposed timeframe and on whether a longer or shorter compliance period should be considered.

3. Definitions

We propose to adopt a definition of ''location-based routing'' that requires routing based on the location of the calling device, as opposed to the location of network elements such as cell site or sector. We therefore propose to define ''location-based routing'' as ''the use of information on the location of a device, including but not limited to device-based location information, to deliver 911 calls and texts to point(s) designated by the authorized local or state entity to receive wireless 911 calls and texts, such as an Emergency Services internet Protocol Network (ESInet) or PSAP, or to an appropriate local emergency authority.'' We propose to define ''device-based location information'' as ''[i]nformation regarding the location of a device used to call or text 911 generated all or in part from on-device sensors and data sources.''

We seek comment on this proposed definition. Specifically, we seek comment on whether the proposed definition of ''device-based location information'' adequately encompasses current DBH location technologies, such as Apple's HELO and Android's ELS, as well as possible future location technologies that can determine the location of the calling device. We seek comment on whether we should include other specific location technologies as examples in our definition, such as Assisted-Global Navigation Satellite System (A–GNSS) or Wi-Fi.[47] We note

[45] *ATIS–0700042* at 16. ATIS states that ''the CMRS network may acquire a routable location and use it to route to the appropriate emergency services network. A NENA i3 ESRP may query for routing location and that routing location may be returned. However, when the PSAP queries for location to support dispatch (*i.e.,* [emergency dispatch]) it should receive the estimated location of the caller.'' *Id.*

[46] FCC, Thirteenth Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges at 79 through 83, paragraph 59 (2021), *https://www.fcc.gov/sites/default/files/13th-annual-911-fee-report-2021.pdf* (Thirteenth 911 Fee Report). Eleven states have indicated statewide text-to-911 capability in response to the Commission's annual 911 fee reporting questionnaire: Arizona, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, and Vermont. *Id.* at 8 through 10, 80, Tbl. 22 (first showing the total number of PSAPs per jurisdiction, and then showing how many PSAPs are text-to-911 capable per jurisdiction). Puerto Rico and the District of Columbia also indicate that they provide jurisdiction-wide text-to-911 services. *Id.*

[47] ATIS defines DBH as an ''estimation method that typically utilizes either a selection or a combination of location methods available to the

that the Commission also uses the term ''device-based location information'' in its existing rule on delivery of 911 text messages and intend that our proposed definition would also apply to that rule.

We also seek comment on our proposal to explicitly identify ESInets as an example of an end point that state or local 911 authorities can designate for delivery of calls where location-based routing is used. Because ESInets are an important component of NG911 networks, we believe it is appropriate to identify them as a potential delivery point. We also note that this proposed definition is not intended to modify CMRS providers' obligation under § 9.10 of the Commission's rules, which requires such providers to transmit all wireless 911 calls to a PSAP, designated statewide default answering point, or appropriate local emergency authority. Thus, under our proposed definition, state and local 911 authorities would retain the authority to specify the delivery point for location-routed calls, whether the delivery point is an ESInet, a legacy selective router, or some other designated facility. We seek comment on this proposal.

4. Timeliness and Accuracy of Location-Based Routing Information

We propose to require CMRS providers and covered text providers to use location-based routing for 911 calls and texts when they have location information that meets the following specifications for timeliness and accuracy: (i) the information must be available to the provider network at the time the call or text is routed, and (ii) the information must identify the caller's horizontal location within a radius of 165 meters at a confidence level of at least 90%. We discuss the timing and accuracy elements of the proposed rule below and seek comment on each.

Timeliness of Location-Based Routing Information. Location-based routing requires information about the caller's location to be available quickly enough to enable the call to be routed without delaying the normal call set-up process. For location-based routing of 911 voice calls to be feasible without delaying call set-up, caller location information would need to be made available to the CMRS provider's Mobile Switching Center (MSC) within five seconds or less of the call being dialed. At the time of the Notice of Inquiry, commenters questioned whether available technology could generate caller location information this quickly. However, the record indicates that significant technological advances have been made since then and that currently available technology is routinely capable of delivering caller location information in time to route the call without delay, and well within the five-second threshold identified by CSRIC V. Intrado states that 4G LTE and newer networks can obtain device-based location information, calculate confidence and uncertainty, and query the location server for PSAP routing instructions within the normal call set-up interval. Intrado further notes that AT&T's location-based routing solution provides location-based routing ''without any impact to the timeline or the call.'' [48] In a 2019 filing, Apple stated that HELO can normally generate and transmit device location information during call set-up. Google has stated that ELS can obtain a first location of Android devices 3–4 seconds after a call has been started.

Based on these developments, we propose to require CMRS and covered text providers to use location-based routing only if caller location information is available at the time that the provider would otherwise route the call (and if the information meets the proposed accuracy requirements in the rules). Our proposal is intended to avoid delay in transmitting 911 calls and texts because there would be no requirement to hold calls and texts for purposes of obtaining a routing fix. We seek comment on this proposal. For what percentage of calls and texts would caller location-based routing information be available at the time of routing, as contemplated by our proposal? Does the absence of any required holding time protect against the risk of delaying transmission of 911 calls and texts?

Accuracy of Location-Based Information. Location-based routing requires caller location information to be sufficiently accurate and reliable to support a routing decision that directs the call to the correct PSAP for the caller's location and avoids misrouting the call. The *CSRIC V LBR Report* recommends that wireless service providers that deliver 911 calls ''must have metrics and procedures in place to ensure that internal positioning methodologies used are reliable, consistent and performing at expected accuracy and quality requirements.'' ATIS notes that location-based routing solutions ''must consider uncertainty, in addition to the estimated location, in making the decision whether to use'' a location fix for routing purposes.[49]

We note that the location information used for routing a 911 call to the correct PSAP may not need to be as precise as the location information required under our location accuracy rules to support dispatch to the caller's location. For example, AT&T's location-based routing solution uses a horizontal accuracy metric of 165 meters and a 90% confidence threshold, *i.e.,* if device-based location information provided at call set-up establishes the caller's location within a 165-meter radius at a 90% confidence level, AT&T will use the information to route the call. While this is a less granular accuracy threshold than the 50-meter horizontal accuracy metric that CMRS providers must meet for dispatch purposes, Intrado reports that the 165 meter/90% confidence metric has enabled AT&T to use location-based routing for 80% of 911 calls on its network.

Consistent with these developments, we propose to require that CMRS and covered text providers use location-based routing if the location information available at the time of routing identifies the caller's horizontal location within a radius of 165 meters at a confidence level of at least 90%. These metrics are consistent with AT&T's implementation of location-based routing. In addition, our proposed confidence metric is consistent with ATIS' recommendation that uncertainty values for location-based routing ''be standardized to a 90% confidence for effective call handling.'' We seek comment on this proposal. As BRETSA notes, even where location-based routing is used, misroutes may still occur, *e.g.,* when a caller is very near a jurisdictional boundary. Do our proposed accuracy and confidence metrics strike the right balance in terms of maximizing the number of calls that will be successfully routed to the correct PSAP while minimizing the number of potential misroutes? If not, how should we modify those metrics, and what effect would such changes have on our goal to reduce misrouted calls and texts? In addition, for calls that fall outside the accuracy and confidence thresholds, should we provide a minimum standard or standards for the determining the best

handset in a given environment—including crowd-sourced Wireless Fidelity (Wi-Fi), Assisted-Global Navigation Satellite System (A–GNSS), and possibly other handset-based sensors. It also includes an associated uncertainty estimate reflective of the quality of the returned location.'' *ATIS–0700042* at 2.

[48] *See also* Peninsula Fiber Network Comments at 2 (''Most originating service providers can provide accurate location information in less than 5 seconds.'').

[49] *See also* T-Mobile Comments at 4 (cautioning that using low accuracy location information for location-based routing could lead to more call transfers).

available location information for routing the call?

Validation. Several commenters recommend that carriers validate location estimates for location-based routing against positioning information from other sources, such as the originating cell sector.[50] We seek comment on whether we should require validation of caller location information for purposes of location-based routing and, if so, what validation steps we should require CMRS and covered text providers to take. We intend for our proposed confidence and uncertainty requirements to ensure that CMRS providers and covered text providers use accurate device location for routing purposes when it is available. Considering these proposals, do commenters believe that additional validation steps are necessary? We also ask commenters to address the validation process, including what information CMRS providers and covered text providers should use to validate device-based hybrid location information.[51] Are there additional costs associated with validation and, if so, what are they? In addition, we seek comment on which parties should be responsible for validation, at what point in the network validation should occur, and whether requiring validation would introduce any delay.

B. Location-Based Routing of Calls and Texts to Next Generation 911 Networks

In the Notice of Inquiry and the public notice, the Commission sought comment on potential interdependencies between location-based routing and the transition to Next Generation 911. As the Commission observed in the Notice of Inquiry, NG911 call routing differs from legacy E911 call routing because NG911 architecture requires originating service providers to route calls to ESInets rather than to legacy selective routers, and calls are then routed over the ESInet to the appropriate PSAP.[52] In addition, NG911 differs from legacy E911 in that it is configured for originating service providers to deliver 911 calls and associated call routing information in IP-based format. Specifically, in NG911 call flow, the originating service provider uses Session Initiation Protocol (SIP) to embed routing information in the IP data packets that control call initiation and set-up and uses the SIP call routing information to route the call to the appropriate ESInet. Then, the ESInet operator directs the call to the appropriate PSAP by applying geospatial routing policies to the routing information embedded in the call.

In the public notice, we asked how the Commission could help to ensure that the delivery of location information to NG911-capable PSAPs is consistent with NG911 systems and architecture. In response, commenters generally support the end goal of having originating service providers deliver IP-formatted calls and SIP-based call routing information to NG911-capable PSAPs, and some nationwide CMRS providers state that they are already doing so.[53] Some commenters, including NENA, urge the Commission to require carriers to deliver calls and routing information in IP-based format to NG911-capable PSAPs that request it, arguing that this will speed the NG911 transition and reduce transition costs.

We propose to require CMRS and covered text providers to deliver 911 calls, texts, and associated routing information in IP-based format to NG911-capable PSAPs that request it. We seek comment on this proposal. We believe that such a requirement, combined with our proposed location-based routing requirements described above, would help to advance the NG911 transition in several ways. First, it would help to address operational and routing issues for jurisdictions that have implemented NG911. The Task Force on Optimal PSAP Architecture (TFOPA) report in 2016 concluded that a significant impediment to NG911 service was that originating service providers were not prepared to deliver 911 calls via IP technology with location information to NG911 service providers. Some 911 authorities contend that the use of legacy technology by originating service providers continues to be an obstacle to the ability of jurisdictions to transition to NG911.[54]

Second, requiring originating service providers to deliver IP-formatted calls and routing information to NG911-capable PSAPs would alleviate the burden on state and local 911 authorities of maintaining transitional gateways and other network elements to process and convert legacy calls. While some carriers are already delivering IP-based traffic voluntarily to NG911-capable PSAPs, so long as any providers continue to deliver 911 calls and routing information in legacy format, the state or local 911 authority must fund and operate transitional technology to receive the traffic in the ESInet and process it within the NG911 system. We seek comment on the degree to which funding and operating transitional facilities extend the timeline and add to the cost incurred by state and local 911 authorities to transition to NG911.

Third, the proposed IP-based delivery requirement would help jurisdictions realize additional public safety benefits available on NG911 networks, including enhanced policy routing functions, support for communication in multiple languages, and enhanced services to disabled communities. When NG911 systems have access to precise IP-formatted location information for 911 calls, they can use it to support geospatial routing and can more frequently update GIS data. IP-formatted data can also support policy routing that flexibly routes calls to PSAPs based on variables such as call volume, available telecommunicator resources, or the need for specialized response to particular emergencies. In addition, routing on NG911 networks can result in material time savings for telecommunicators. For example, the Massachusetts State 911 Department reports that using location-based routing on its NG911 network has resulted in a reduction of over a half million minutes per year in unwanted transfers.

We seek comment and specific data on the benefits that the public would

[50] Comtech Telecommunications Corp. (Comtech) Comments at 5 through 6 (rec. July 11, 2022) (Comtech Comments) (urging the Commission to ensure that DBH location information is only used to route 911 calls if checked against cell site-based location information); Verizon Comments at 4 (''For DBH-based routing, the handset location fix must be validated against the cell radius with sufficient accuracy, which will occur in many but not all cases.''). These comments are consistent with ATIS' recommendation on the matter. *ATIS–0500039* at 15.

[51] For example, Comtech urges the Commission to ensure that device-based hybrid location information is only used for routing if it has been checked against cell site-based location information. Comtech Comments at 5 through 6.

[52] *See Notice of Inquiry,* 33 FCC Rcd at 3251, paragraph 32. In a legacy E911 environment, CMRS providers route wireless calls using the pre-registered location of the tower and radio antennas through which the 911 call was placed. *Id.* In a fully implemented NG911 environment, CMRS providers deliver device location derived from a Location Information Server (LIS) to the ESInet, and the state or local 911 authority determines how to route a 911 call to the appropriate PSAP. *Id.*

[53] Verizon Comments at 2 (stating that Verizon ''has largely addressed the technical issues necessary to establish connectivity between its wireless network and i3-capable NG911 networks'' and incorporates DBH location into the SIP INVITE to an ESInet); T-Mobile Reply at 2 (stating that T-Mobile has ''converted over 1,900 PSAPs in 24 states from TDM to NG911 SIP''); AT&T Comments at 5 (describing how AT&T calls route to NG911 System Service Providers).

[54] In Massachusetts, the Massachusetts State 911 Department claims that lack of SIP on an end-to-end basis has created operational issues, as only one carrier has connected to the NG911 network via IP for voice calls. Massachusetts State 911 Department Comments at 2 through 3 (rec. July 8, 2022) (Massachusetts 911 Comments) (stating that lack of SIP has sometimes resulted in canceled and redelivered 911 calls, which generate an abandoned call and put the 911 caller further back in the queue).

derive from our proposals, as well as on the costs to nationwide and non-nationwide providers to deliver calls and texts in IP-based format when a state or local 911 authority has requested it. We also seek comment on what level of NG911 readiness PSAPs should have achieved in order to trigger the requirement for providers to begin delivering calls, texts, and location information in IP format. Should individual PSAPs be able to trigger the requirement or should readiness be established at a more aggregated level, *e.g.,* on an ESInet-by-ESInet or state-by-state basis?

Timing of IP Service Delivery. For delivery of IP-formatted calls, texts, and location information by nationwide CMRS and covered text providers, we propose an implementation timeline of six months from the effective date of the location-based routing requirement, or six months after a valid request by a state or local 911 authority, whichever is later. We also propose to provide non-nationwide CMRS providers an extra six months to accommodate these requests. We seek comment on these proposed timeframes for implementation. We also propose to allow 911 authorities and service providers to agree to alternate timeframes for delivery of IP-formatted calls and texts, provided that the CMRS provider or covered text provider notifies the Commission of the alternate timeframe within 30 days of the parties' agreement. We seek comment on this proposal.

Valid Request for IP Service. Because state or local 911 authorities would need to notify CMRS providers and covered text providers of their readiness to receive calls in NG911-compatible formats, we propose a framework for providing such notification. Consistent with our rules for text-to-911,[55] we propose to define a valid request as one made by a local or state entity that certifies that it (1) is technically ready to receive 911 calls and texts in the IP-based format requested, (2) is specifically authorized to accept calls and/or texts in the IP-based format requested, and (3) has provided notification to the CMRS provider or covered text provider via either a registry made available by the Commission or by written notification reasonably acceptable to the CMRS provider or covered text provider. We believe that this approach would minimize miscommunication between carriers and 911 authorities[56] and facilitate the timely delivery of IP-based service once state and local 911 authorities indicate their readiness. For purposes of determining whether a state or local 911 authority could be technically ready to receive calls and texts in an IP-based format, we seek comment on the elements that a state or local 911 authority would need to have in place before making a valid request.[57] In addition, we seek comment on whether we should require separate requests for IP-based call and text delivery.

To facilitate notification, we seek comment on whether the Commission should make available a registry or database that would allow state and local 911 authorities to notify CMRS providers and covered text providers of readiness to receive calls and texts in IP-based format with associated location information. Such a registry could simplify the request process for state and local 911 authorities as well as CMRS providers and covered text providers. State and local 911 authorities are already familiar with the process of requesting text-to-911 and RTT services via a similar process.[58] We seek comment on the granularity of such a registry, including whether to organize it by PSAP, state, ESInet, or other level of specificity. Should it be combined with our existing Master PSAP Registry and Text-to-911 Registry? If so, what features would be required in such a combined registry?

Timing Requirements for NG911 Routing. As previously noted, in NG911 architecture, device-based location information embedded in IP-formatted 911 calls is first used to route the call to an ESInet, and the ESInet operator then applies NG911 network routing policies to the embedded information to route the call to the appropriate PSAP. Some commenters express concern that delay in making device location information available to the ESInet operator could inhibit or prevent the full application of these routing functions within NG911 networks, thus depriving 911 authorities of the potential benefits of location-based routing in the NG911 environment. T-Mobile, however, asks the Commission not to impose mandates on carriers with respect to the use of location-based routing in NG911 systems, as such deployments rely on multi-stakeholder processes. We do not propose such mandates, but we seek comment on whether there are factors that could impact the length of time between the completion of the initial device location fix by an originating service provider and the availability of device location information to an NG911 network. Does our proposal to require delivery of IP-formatted calls and texts address commenters' concerns about making location information available in time for routing within NG911 networks?

Appropriate Requesting Entities. Under our proposed rule, the local or state entity with authority and responsibility to designate the point(s) to receive wireless 911 calls or texts would be the appropriate authority to request IP-based service from CMRS providers and covered text providers. However, statewide, regional, or county governmental entities may deploy shared resources such as an ESInet, and an ESInet may provide services for multiple PSAPs or public safety entities. There are also still many PSAPs serving a single jurisdiction managed by a city, county, or police or fire department. Should the proposed rule include PSAPs, appropriate local emergency authorities, state or local 911 authorities, and/or other specified authorities as entities that may initiate a valid request for IP-based service? We seek comment on the appropriate requesting entity or entities we should include in our rule given the varied governance of ESInet deployments.

C. Monitoring and Compliance

We seek comment on whether the Commission should implement any new data collections to assist in monitoring compliance with our proposed location-based routing rules. For example, should we require CMRS providers and/or covered text providers to provide performance data on location-based routing, such as relative percentages of calls or texts routed using location-based routing versus other routing methods such as cell tower location? Should reporting on routing be included as an additional component of the 911 live call data reports that CMRS providers already file pursuant to our

[55] *See* 47 CFR 9.10(q)(10)(iii) (defining a valid request for text-to-911 service).

[56] *See* Massachusetts 911 Comments at 2 through 3 (describing lack of support for IP connection by some carriers); T-Mobile Reply at 2 through 3 & n.3 (noting that multiple carriers are i3 compliant).

[57] As an example of possible readiness elements, we note that TFOPA created a ''NG9–1–1 Readiness Scorecard'' that categorizes components of NG911 implementation. TFOPA, Working Group 2: NG9–1–1 Readiness Scorecard at 17 through 21 (2016), *https://transition.fcc.gov/pshs/911/TFOPA/TFOPA_WG2_Supplemental_Report-120216.pdf.*

[58] *See* PSAP Text-to-911 Readiness and Certification Registry (Text-to-911 Registry), *https://www.fcc.gov/general/psap-text-911-readiness-and-certification-form#:~:text=the%20format%20requested.-,Text%2Dto%2D911%20Registry.,requested%20format%20within%20six%20months* (last visited Nov. 22, 2022).

wireless location accuracy rules?[59] If reporting would be helpful, what specific information should providers include and how frequently should we require them to report? Should we require CMRS and covered text providers to report information on misrouted 911 calls and texts? Would a separate data collection from NG911 service providers be helpful, as Peninsula Fiber Network suggests? If so, what information should the Commission seek in such a data collection? We also seek comment on measures the Commission could take to limit the burden of reporting on location-based routing. To what extent could the Commission limit the burden of any reporting requirements by providing increased flexibility for non-nationwide CMRS providers or businesses identified as small by the Small Business Administration?[60] As an alternative to reporting, should the Commission require providers to certify that they are in compliance with requirements for location-based routing and/or delivery of calls and texts in IP format?

Peninsula Fiber Network suggests that the Commission ''establish a reporting system where 9–1–1 system service providers and local agencies can report non-compliance information, and the Commission can levy forfeiture orders to the providers for non-compliance.'' To the extent Peninsula Fiber Network suggests establishment of a separate reporting system for location-based routing information, we do not believe such a reporting system is necessary. Public safety entities and members of the public seeking to report non-compliance with the proposed rules would be able to file informal complaints via the Public Safety and Homeland Security Bureau's Public Safety Support Center or the Commission's Consumer Complaint Center, or formal complaints under the Commission's enforcement rules.[61] We tentatively conclude that these existing mechanisms should be sufficient for addressing potential violations of the proposed location-based routing rules. We seek comment on this tentative conclusion.

D. Additional Proposals

Further Study. Some commenters assert that the Commission should facilitate additional study of various aspects of location-based routing,[62] and Comtech asserts that the problem of misrouted emergency wireless calls is not yet fully understood or sufficiently documented to justify regulatory changes. APCO, on the other hand, states that there is a general public safety consensus that misroutes are a problem and that the Commission should not delay action while waiting for additional data. As discussed above, we believe that misroutes resulting from legacy E911 routing are a well-documented occurrence and impact a significant percentage of 911 calls.[63] The record also indicates that nationwide location-based routing would reduce misrouted 911 calls and save 911 telecommunicators hundreds of thousands of hours a year. Therefore, we do not propose to postpone regulatory changes pending further study or documentation of misrouted emergency calls as Comtech advocates. We seek comment on this approach.

Additional Measures to Decrease Call Transfer Times. Some commenters recommend that the Commission encourage measures that would decrease call transfer times.[64] We encourage PSAPs and relevant state and local 911 authorities to pursue these additional capabilities, but at this time do not propose to undertake additional regulatory steps to do so. We seek comment on this approach.

E. Promoting Digital Equity and Inclusion

The Commission, as part of its continuing effort to advance digital equity for all,[65] including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations[66] and benefits, if any, that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility.

F. Summary of Benefits and Costs for Location-Based Routing

Benefits of Location-Based Routing. Any solution to the problem of misrouted 911 calls and texts, no matter how effective, must withstand the test of feasibility and functionality relative to cost. We therefore seek comment on whether the implementation of location-based routing for calls and texts can improve upon the speeds at which emergency personnel and services relying on a legacy 911 system can reach the caller, with a resulting improvement in the health and safety of the caller and preservation of property, and the magnitude of this presumed benefit. The record indicates that location-based routing may correct for a substantial percentage of calls that would otherwise be misrouted using legacy E911 routing,[67] thereby minimizing transfers

[59] Wireless location accuracy live call data reporting requirements may be found at 47 CFR 9.10(i)(3)(ii).

[60] For example, the Commission's requirements for live call data reporting provide a reduced reporting schedule for non-nationwide CMRS providers. *See* 47 CFR 9.10(i)(3)(ii)(D).

[61] The Public Safety Support Center is a web-based portal that enables PSAPs and other public safety entities to request support or information from the Public Safety and Homeland Security Bureau and to notify it of problems or issues impacting the provision of emergency services. *See Public Safety and Homeland Security Bureau Announces Opening of Public Safety Support Center,* public notice, 30 FCC Rcd 10639 (PSHSB 2015); FCC, *Public Safety Support Center, https://www.fcc.gov/general/public-safety-support-center* (last visited Nov. 29, 2022). The Consumer Complaint Center handles consumer inquiries and complaints, including consumer complaints about access to 911 emergency services. FCC, *Consumer Complaint Center, https://consumercomplaints.fcc.gov/hc/en-us* (last visited Nov. 29, 2022).

[62] T-Mobile Reply at 5 (asking the Commission to task the next iteration of the CSRIC with a refreshed study of location-based routing or encourage ATIS to undertake additional study of the technology); BRETSA Reply at 9 (asserting that further analysis should be completed to determine whether uncertainty and confidence levels can be correlated with the likelihood of calls being misrouted).

[63] *See, e.g., CSRIC V LBR Report* at 9; *ATIS–0500039* at 4 n.3 (one GMLC estimates that 12% of its wireless calls are misrouted); Intrado Comments at 3 n.8 (estimating that approximately 12.96% of a sample set of five million wireless calls were misrouted). Some jurisdictions report even higher numbers of misrouted calls. *See, e.g.,* Fayetteville Police Department Comments.

[64] *See* CTIA Reply at 5 through 6 (rec. July 25, 2022) (CTIA Reply) (urging the Commission to encourage PSAPs to pursue solutions to minimize call-transfer times). *See also* NENA Comments at 4 through 10 (suggesting the implementation of both standards-based and non-standards based solutions to decrease call transfer times); BRETSA Reply at 4 through 5 (recommending inter-CAD transfer capabilities and updating CAD systems with maps beyond PSAPs' jurisdictional boundaries).

[65] Section 1 of the Communications Act of 1934 as amended provides that the FCC ''regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.'' 47 U.S.C. 151.

[66] The term ''equity'' is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. *See* Exec. Order No. 13985, 86 FR 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021).

[67] *See* AT&T Comments at 4. Approximately 10% of all 911 wireless calls on AT&T's network would

and saving time required to transfer calls.

The potential benefits of location-based routing are very large. Our proposed rules are directed at eliminating the estimated 23 million misrouted 911 calls which occur annually.[68] Moreover, NENA, APCO, and Peninsula Fiber Network assert that a ''typical'' transfer takes about a minute.[69] Thus, by eliminating the need for transfer, the proposed rules would shorten response time for these calls. As discussed above, routing these calls accurately would reduce confusion, speed emergency response, and save lives and property. The Commission has previously relied on a study of emergency response incidents in Salt Lake City (Salt Lake City Study) to estimate the reduction in mortality attributable to measures that would decrease the total response time to a 911 call.[70] The Commission found that the Salt Lake City Study demonstrates that faster response time in response to a 911 call lowers mortality risk. The Salt Lake City Study shows a one-minute decrease in ambulance response times reduced the likelihood of 90-day mortality from approximately 6% to 5%, representing a 17% reduction in the total number of deaths.[71] Using this analysis, the Commission in the *Indoor Location Accuracy Fourth Report and Order* estimated that wireless location accuracy for purposes of dispatching first responders would save approximately 10,120 lives annually when fully implemented. We apply a comparable analysis here to estimate that implementation of location-based routing would save 13,837 lives annually.[72] Despite some implementation of location-based routing on CMRS provider networks, most of this life-saving benefit has not yet been realized because routing for most wireless calls is still heavily reliant on cell tower locations. Beyond saving lives, other benefits will also accrue, including better health outcomes, less property loss, and savings of PSAP resources. In all, we find these benefits to be sufficiently large to justify the costs the proposed rules will entail.

Estimating the dollar value of these benefits raises certain challenges. While we do not attempt to place a value on human life, regulators have estimated the value that consumers place on mortality risk reduction by their willingness to purchase safety features on cars and other products. The U.S. Department of Transportation (DOT) has created such an estimate, which concludes that consumers, as a group, show a willingness to pay $11.8 million to reduce risk sufficiently that one life would likely be saved.[73] Therefore, to reduce expected mortalities by 13,837, the DOT estimate of value would be 13,837 x $11.8 million or approximately $163 billion. This estimate is conservative. First, it excludes the value of reduced human suffering and property destruction occurring due to a delayed arrival of first responders. In addition, it does not include the benefits of location-based routing for text messages.

The record indicates that location-based routing solutions are expected to benefit PSAPs by resulting in time savings for telecommunicators.[74] In addition, the proposal to require service providers to deliver 911 calls, texts, and location information in IP-based format to NG911-capable PSAPs could enable

have been misrouted (and would have required a transfer) but instead are routed to the correct PSAP in the first instance as a result of AT&T's location-based routing solution. *Id.*

[68] *See* NENA Comments at 2 (estimating that of the approximately 240 million calls to 911 that are placed each year, 80% of all calls or approximately 192 million are placed on wireless devices, and that around 12% of wireless calls or 23 million are misrouted).

[69] This conforms with anecdotal evidence in the record that each transfer introduces about a minute of delay. APCO Comments at 2 (''[I]t's possible that a misrouted call will introduce a delay of a minute or longer.''); NENA Comments at 4 (''[T]he general anecdotal consensus was that a call transfer typically takes 'about a minute.' ''); Peninsula Fiber Network Comments at 1 (''[E]ach transfer takes between 15 to 90 seconds to set up and complete.'').

[70] *See Wireless E911 Location Accuracy Requirements,* PS Docket No. 07–114, Fourth Report and Order, 80 FR 11806 (March 4, 2015), 30 FCC Rcd 1259, 1317, paragraph 160 (2015) (*Indoor Location Accuracy Fourth Report and Order*), *corrected by* Erratum (PSHSB Mar. 3, 2015). The Commission has also relied on a 2002 Pennsylvania study of 911 calls to provide a basis for estimating the reduction in mortality attributable to faster 911 service. *Improving 911 Reliability and Continuity of Communications Networks, Including Broadband Technologies,* PS Docket Nos. 13–75 and 11–60, Report and Order, 79 FR 3123 (Jan. 17, 2014), 28 FCC Rcd 17476, 17501, paragraphs 74 through 75 (2013) (*Reliability Report and Order*); *see also* Susan Athey & Scott Stern, *The Impact of Information Technology on Emergency Health Care Outcomes,* 33(3) Rand J. Econ. 399 through 432 (2002), *https://pubmed.ncbi.nlm.nih.gov/12585298/* (assessing the impact of E911 on health outcomes using Pennsylvania ambulance and hospital records between 1194 and 1996 and showing that E911 reduces mortality and hospital costs).

[71] *See Wireless E911 Location Accuracy Requirements,* PS Docket No. 07–114, 79 FR 17820 (March 28, 2014), 29 FCC Rcd 2374, 2388 through 89, paragraph 7 (*Indoor Location Accuracy Third Further Notice*). The Salt Lake City study, which was cited in the *Indoor Location Accuracy Fourth Report and Order* and the *Indoor Location Accuracy Third Further Notice,* examined 73,706 emergency incidents during 2001 in the Salt Lake City area and found that, on average, a decrease in ambulance response times reduced the likelihood of 90-day mortality from approximately 6% to 5%, *i.e.,* a 17% reduction in the total number of deaths. *See* Wilde, Elizabeth Ty, ''Do Emergency Medical System Response Times Matter for Health Outcomes?,'' 22 Health Econ. 7, 790 through 806 at 794 (2013), *https://pubmed.ncbi.nlm.nih.gov/22700368/* (Salt Lake City Study); *Indoor Location Accuracy Fourth Report and Order,* 30 FCC Rcd at 1317, paragraph 160; *Indoor Location Accuracy Third Further Notice,* 29 FCC Rcd. at 2388 through 89, paragraph 7 & n.70. Because the regression in the Salt Lake City Study is linear, this result implies that a one-minute reduction in response time also saves lives at the same rate of 17%. *Indoor Location Accuracy Third Further Notice,* 29 FCC Rcd. at 2388, paragraph 7 n.70. In the Salt Lake City sample, the study suggested that a one-minute reduction in response times would have resulted in an annual saving of 746 lives. *Id.* at paragraph 7.

[72] The Salt Lake City Study estimated a mean 90-day mortality rate of 5.95% (4,386 mean number of deaths in the 90 days following the 911 call divided by 73,706 emergency incidents during the study period). Salt Lake City Study at 794. NENA estimates that 80% or more of the total calls to 911 annually are from wireless devices. NENA, 9–1–1 Statistics, *https://www.nena.org/page/911Statistics#:~:text=An%20estimated%20240%20million%20calls,more%20are%20from%20wireless%20devices* (last accessed Nov. 29, 2022). According to the National Association of State Emergency Medical Services Officials (NASEMSO), local Emergency Medical Services (EMS) agencies respond to nearly 28.5 million 911 dispatches each year. NASEMSO, *National Association of State EMS Officials releases stats on local agencies, 911 Calls* (April 10, 2020), *https://www.ems1.com/ambulance-service/articles/national-association-of-state-ems-officials-releases-stats-on-local-agencies-911-calls-LPQTHJrK2oIpxuR1/.* Assuming that 80% of these calls are from wireless devices yields an estimate of 22.8 million wireless calls for 911 dispatch annually. For purposes of this analysis, we estimate that 12% of the 22.8 million annual wireless calls for dispatch (or 2,736,000 calls) would be misrouted. *See* ATIS–0500039 at 4. We also estimate that location-based routing with a horizontal uncertainty value of 300 meters would resolve approximately 50% of these misroutes. *See id.* at 13. Accordingly, we estimate that 1,368,000 calls would avoid the need for a transfer due to a misroute, reducing the response time for these calls by one minute. Applying the original mortality rate of 5.95% to this set of calls yields an estimate of the original total mortality for calls in need of transfer due to a misroute, or 81,396 lives per year. Reducing the original total mortality (81,396 lives) by 17%, representing the expected benefits of a one minute reduction in response time, results in a revised mortality estimate of 67,559 lives. The difference between the original and revised mortalities (81,396 minus 67,559) yields the estimated number of lives saved annually due to implementation of location-based routing, or 13,837 lives.

[73] *See* U.S. Department of Transportation, *Departmental Guidance on Valuation of a Statistical Life in Economic Analysis (Mar. 4, 2022), https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis.*

[74] *E.g.,* NENA Comments at 4 (''NENA estimates over 200,000 hours per year of excess 9–1–1 professional labor is consumed due to call transfer events'' (emphasis omitted)). *See also* Texas 911 Entities at 2 through 4 (noting that the implementation of location-based routing has had a noticeably positive impact on PSAPs with misrouted 911 calls); Intrado Comments at 6 (recounting feedback from Palm Beach County, Florida, that PSAPs have experienced improvements in operations after location-based routing, including immediate access to granular device information).

state and local 911 authorities avoid the cost and inefficiency of maintaining legacy and NG911 systems simultaneously.[75] We therefore seek additional specificity on the time and cost savings to PSAPs and state and local 911 authorities under these proposed rules. We also seek comment on the reasonableness of the underlying assumptions in our above analysis of lives expected to be saved under the proposed rules. Further, we ask commenters to identify other benefits, such as a reduction in both human suffering and property damage, that have been or could be accrued from adoption of location-based routing or other provisions in our proposed rules.

Costs of Implementation. In order to determine whether the proposed requirements are reasonable, we must determine whether they are feasible and do not impose costs that exceed their benefits. Because three nationwide carriers are already providing location-based routing and IP-based service to PSAPs now, or plan to do so in the near future, we tentatively conclude that the proposed rules are feasible. We seek comment on this tentative conclusion. With respect to costs, the record does not currently contain detailed information on costs required for nationwide and non-nationwide CMRS providers and covered text providers to implement location-based routing and IP-based service delivery. We therefore seek comment on whether the implementation of location-based routing and IP-based service delivery as proposed under our rules would result in significant hardware, software, services, GIS, testing, or other costs to CMRS and covered text providers, NG911 services providers, or state and local 911 authorities. We seek comment on the amount of those costs and ask commenters to provide sufficiently detailed information to allow accurate cost calculations.

T-Mobile asserts that implementing location-based routing may involve procedural and technical complexities and that not all carriers are prepared to implement location-based routing on their networks using DBH location. We seek additional detailed information on whether the providers referenced by T-Mobile are unable to implement location-based routing, and if so, an explanation of why they are unable to do so. T-Mobile also notes that it worked closely with Operating System (OS)-based location providers to generate DBH location quickly for location-based routing. Do other carriers need to make similar investments or efforts in working with OS-based location providers? If yes, what would be the timeline and cost to do so? We seek additional detailed information on the costs for nationwide and non-nationwide carriers and covered text providers to implement the required software, hardware, and service upgrades to comply with our proposed rules. Where specifically would these upgrades need to occur on the end-to-end network, *e.g.,* on the device, on specific CMRS providers' network elements, or on specific 911 network elements? How many software, hardware, and service upgrades would be required for nationwide and non-nationwide carriers and covered text providers? How many work-hours would be necessary to implement these upgrades and what kind of workers would be required to implement these upgrades?

We are especially interested in cost data on existing deployments of location-based routing. We also seek information on planned or expended costs by CMRS providers and covered text providers that have voluntarily implemented or plan to implement location-based routing to any extent on their networks. To what extent would non-nationwide CMRS providers and covered text providers be able to leverage costs already incurred by nationwide CMRS providers, such as costs to develop and test location-based routing solutions, to reduce their own costs to comply with our proposed rules? Intrado maintains that CMRS providers would need to make ''appropriate investments'' and rigorously test location-based routing solutions before implementation, but that once these steps are taken ''there should be insignificant cost and administrative effort for nationwide deployment[.]'' Are costs to implement location-based routing significantly different for different network operators? If so, why? We seek comment on the details and the amount of these investments as well as the anticipated cost of testing location-based routing solutions. We also seek information on what equipment and software CMRS providers and covered text providers would need to test, how these tests would be performed, and CMRS providers' and covered text providers' plans for testing.

We also seek comment on whether there are differences for CMRS and covered text providers with respect to investments required to implement location-based routing when the receiving jurisdiction is legacy or NG911-capable, and, if so, a detailed explanation of costs associated with each scenario. Would the implementation of location-based routing require public safety investment? APCO comments that ''[l]ocation-based routing can and should be implemented without imposing additional costs on [PSAPs],'' and AT&T states that a PSAP ''does not need to take any action to receive 911 calls that utilize location-based routing when the wireless call originates on AT&T's network.'' However, T-Mobile appears to disagree with APCO's assertion that location-based routing should not impose costs on public safety, noting that ''the single most useful milestone for location-based routing would be widespread implementation of NG911,'' and only supports location-based routing for certain PSAPs.[76] What are the comparative costs of CMRS provider or covered text provider implementations of location-based routing for NG911-capable versus legacy jurisdictions? Are additional investments required for CMRS providers and covered text providers to implement location-based routing when the receiving jurisdiction has not implemented NG911 components? If so, what are these investments and what are their costs? If these investments are services from third-party service providers, are these services available for all CMRS providers and covered text providers?

We also seek comment on the specific costs to nationwide and non-nationwide CMRS providers and covered text providers to deliver IP-based 911 calls, texts, and SIP-formatted location information to requesting state and local 911 authorities within the specified timeframes under our proposed rules. What specific investments would be required for hardware, software, and services for CMRS providers and covered text providers to deliver IP-based service? Verizon states that it will formally launch end-to-end i3 call delivery during 2022. T-Mobile says it has converted over 1,900 PSAPs from TDM to SIP. Are other CMRS providers and covered text providers planning to implement IP-based delivery? Is there additional cost to requiring IP-based delivery within six months? Would a longer timeframe for IP-based delivery result in lower costs to CMRS and

[75] NENA Comments at 8 (''Routing in NG9–1–1 is more efficient and requires much less physical hardware. Many NG9–1–1 systems are forced to operate in a transitional environment. The 9–1–1 authority is forced to operate both an ESInet and a legacy E9–1–1 system that supports Selective Routers. NG9–1–1 transitional environments are very costly and inefficient.'').

[76] T-Mobile Reply at 2 through 3. In addition, T-Mobile has stated that it deploys location-based routing ''where jurisdictions are ready.'' *Id.* at 2.

covered text providers? What specific upgrades would be required to comply with the requirement to deliver IP-based service under our proposed rules, and what would such upgrades cost?

We seek information on the costs of nationwide and non-nationwide CMRS providers providing text service and other covered text providers to implement location-based routing for texts as described under our rules, including hardware, software, and service upgrade costs. AT&T states that it has already implemented nationwide location-based routing for texts. What costs would non-CMRS text providers incur to comply with our proposed rules? What costs would non-CMRS text providers incur for hardware, software, and service upgrades, as well as any other types of upgrades? What other types of costs, such as testing, would covered text providers incur?

In the absence of a detailed record on costs, we provide estimates below, and ask commenters to provide information to improve these estimates if necessary. To be conservative in our approach, we seek to provide upper-bound estimates, so that actual costs will be at or below these levels. First, we separate the costs into material costs and labor costs. T-Mobile states that it deployed location-based routing to some PSAPs and not others, so we rely on this statement in tentatively concluding that CMRS providers implement location-based routing at the PSAP level and CMRS providers incur material costs on a per-PSAP basis. We seek comment on this tentative conclusion. The record also suggests that material costs may require the use of additional software features [77] and changes to legacy components if the PSAP has not yet upgraded to NG911. There is little in the record to suggest what the average material cost of software features or component upgrades would be, so as a starting point, we set the total material costs for each CMRS provider at $10,000 per PSAP as an upper bound.[78] We ask commenters to provide cost information to inform our estimate of per-PSAP costs.

Our proposed upper bound on material costs for CMRS providers is then $10,000 per PSAP times the total number of CMRS providers communicating to PSAPs. AT&T states that it has already deployed location-based routing to its network, so our proposed rules will not impose any additional material costs on AT&T. The news media report that Verizon plans to implement location-based routing in the future, so it is unclear the extent to which Verizon plans to implement location-based routing on its network at this time. T-Mobile states that it has deployed location-based routing to 770 PSAPs and intends to deploy it to another 62, for a total of 832 PSAPS for which our proposed rules will impose no additional material costs.[79] There are approximately 5,728 PSAPs nationally, which would mean that T-Mobile may have to implement location-based routing for another 4,896 PSAPs. Staff analysis of Form 477 data suggests that when that when there is a fourth non-nationwide wireless provider in any particular location, it is usually the only one.[80] Thus an upper bound for the number of PSAPs non-nationwide wireless providers must upgrade would be the full national set of 5,728 PSAPs. Including the 4,896 PSAPs T-Mobile does not already plan to upgrade, our upper bound of PSAPs is 10,624, and the implied material cost upper bound is approximately $106 million.[81]

We propose to calculate labor costs in line with the *2016 Weather Alerts Order,*[82] the *2017 Blue Alerts Order,*[83] and the *2022 Comprehensible Alerts Order.*[84] The Office of Management and Budget approved an estimate of $25 per hour of labor cost for an EAS Participant to fill out the Commission online report form for EAS National Tests in 2011.[85] We find that the labor cost of employing software workers would be similar and adjust the labor cost upward to $35.25 to reflect inflation since 2011.[86] While some workers may be involved in physical labor to install equipment or run trials, they are likely to be compensated less than software workers, so assuming they are compensated at $35.25 would be an overestimate of their labor costs. AT&T reports that their rollout of location-based routing nationwide took two months, following several months of trials.[87] We therefore assume that a reasonable upper bound of the time to implement the upgrades with trials is 6 months (26 weeks) and workers have a forty hour work week, or 1040 hours per worker.[88] It is unclear how many workers are required to implement the upgrades, but we find 10 simultaneous workers at a time on average is a generous upper bound, resulting in 10,400 labor hours per CMRS provider. Multiplying this by the hourly labor cost of $35.25, the labor cost per CMRS provider is $366,600. Our proposed estimates of labor cost for the 58 non-nationwide CMRS providers [89] plus T-Mobile is then $366,600 × 59, or $21,629,400, which we round up to $22 million as a labor cost upper bound.[90]

The proposed upper bound of total material and labor costs we estimate is therefore $128 million, which is easily justified by the thousands of lives

[77] AT&T's implementation of location-based routing uses Intrado's ''Locate Before Route'' feature and ''implemented several timer changes in the GMLC housing AT&T [Location Information Server (LIS)].'' AT&T Comments at 2, 5.

[78] Estimate based on staff expertise in absence of a record on costs. This may be a very high estimate of costs as Intrado states that conditional on nationwide VoLTE there is ''insignificant cost and administrative effort'' to implement location-based routing. Intrado Comments at 10.

[79] T-Mobile states it deploys location-based routing and NG911 to ''jurisdictions when ready.'' Thus, it is a conservative overestimate to assume deployment at all deployments at PSAPs not yet completed or planned are induced by the Rulemaking. T-Mobile Reply at 2 & n.6.

[80] FCC, *Mobile Deployment Form 477 Data* (Jul. 29, 2022), *https://www.fcc.gov/mobile-deployment-form-477-data.*

[81] 5,728 PSAP upgrades for non-nationwide CMRS providers plus 4,896 PSAP upgrades for T-Mobile equals 10,624. Multiplying this figure by the cost per PSAP of $10,000 = $106,240,000.

[82] *Amendment of Part 11 of the Commission's Rules Regarding Emergency Alert System,* PS Docket No. 15–94, Report and Order, 81 FR 53039 (Aug. 11, 2016) (*Weather Alerts Order*).

[83] *Amendment of Part 11 of the Commission's Rules Regarding Emergency Alert System,* PS Docket No. 15–94, Report and Order, 83 FR 2557 (Jan. 18, 2018) (*Blue Alerts Order*).

[84] *Amendment of Part 11 of the Commission's Rules Regarding Emergency Alert System,* PS Docket No. 15–94, Report and Order, 87 FR 67808 (Nov. 10, 2022) (*Comprehensible Alerts Order*).

[85] *See* FCC, Public Information Collections Approved by the Office of Management and Budget (OMB), 76 FR 68756 through 01 (Nov. 7, 2011).

[86] The average hourly earnings of private employees increased 40.5% from November 2011 to October 2022, according to estimates provided by the Bureau of Labor Statistics. We therefore find a 41% increase in wages ($25 × 1.41 = $35.25) to be an appropriate adjustment from the OMB-approved labor cost from November 2011. Federal Reserve Bank of St. Louis, *Average Hourly Earnings of All Employees, Total Private (CES0500000003], https://fred.stlouisfed.org/series/CES0500000003* (last visited Nov. 29, 2022) (using statistics from the U.S. Bureau of Labor Statistics).

[87] The AT&T Snohomish County (Washington) trial occurred from October 2021 to January 2022 and the West Palm Beach County (Florida) trial occurred from February 2022 to March 2022. The rollout occurred from May 2022 to June 2022. AT&T Comments at 2 through 4.

[88] With available NG911, conversion to location-based routing would likely be much less work intensive because it would only require reconfiguration of the existing software rather that a full upgrade. We assume full upgrade to generate an upper bound on costs.

[89] The June 2021 Voice Telephone Services Report lists 61 wireless carriers in total. FCC Office of Economics and Analytics, Industry Analysis Division, Voice Telephone Services: Status as of June 30, 2021 at 10 (2022) at 10 & Tbl. 2, *https://www.fcc.gov/document/oea-releases-voice-telephone-services-report-june-2021.*

[90] We lack information in the record to pin down how the number of required workers would vary between T-Mobile and non-nationwide carriers. Non-nationwide carriers may require less work for upgrades because they have smaller networks, but may require more work because they have less specialized expertise on staff. T-Mobile may require less work because it has already deployed LBR to some PSAPs. We therefore tentatively assume a constant rate of workers for all carriers.

projected to be saved by location-based routing of 911 calls. Because our conservative estimate of benefits of the proposed rules is in the billions of dollars, the prospective benefits to be realized by the proposed rules will well exceed their cost even under the conservative upper-bound assumptions we make here. We seek comment on the reasonableness of the above methodology, assumptions, and estimates.

Procedural Matters

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *NPRM.* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines in the *NPRM.*

A. Need for, and Objectives of, the Proposed Rules

In the *NPRM,* we propose requirements for Commercial Mobile Radio Service (CMRS) providers and covered text providers to implement location-based routing for 911 calls and texts nationwide. In 2018, the Commission released a Notice of Inquiry that sought to determine the best way to avoid misrouted 911 calls.[91] We recently refreshed the record on location-based routing with a public notice that sought to update the record on developments since the release of the Notice of Inquiry, including technological improvements in location-based routing and the extent to which CMRS providers have deployed location-based routing in their networks. Developments since the Notice of Inquiry and comments in response to the public notice indicate that location-based routing is both feasible and reliable and that implementing it on a nationwide basis would provide significant public safety benefits. Based on the record, we determine that our proposed rule changes are necessary to reduce emergency response time because implementation of location-based routing will significantly reduce misrouted 911 calls and the delays associated with transferring misrouted calls from one public safety answering point (PSAP) to another. Consistent with our authority in the Communications Act of 1934, as amended, we propose to amend our rules to ensure that more people will receive better 911 service.

We propose rules in the *NPRM* that will require CMRS providers and covered text providers to implement location-based routing for 911 calls and texts nationwide, including calls and texts originating in both legacy and Next Generation 911 (NG911) jurisdictions. More specifically, we propose the following steps to advance location-based routing of wireless calls and texts:

- Require all Commercial Mobile Radio Service (CMRS) providers to (1) deploy technology that supports location-based routing on their internet Protocol (IP)-based networks (*i.e.,* 4G LTE, 5G, and subsequent generations of IP-based networks) and (2) use location-based routing to route all 911 voice calls originating on their IP-based networks when caller location information available during origination of the 911 call meets certain requirements for accuracy and timeliness. Nationwide CMRS providers would have six months from the effective date of final rules to meet these requirements. Non-nationwide CMRS providers would have an additional year (*i.e.,* eighteen months from the effective date of final rules) to meet the same requirements.
- Require covered text providers to (1) deploy technology that supports location-based routing and (2) use location-based routing to route all 911 texts originating on their IP-based networks when location information available during origination of the 911 text meets certain requirements for accuracy and timeliness. Covered text providers would have eighteen months from the effective date of final rules to meet these requirements.
- Establish baseline requirements with respect to the accuracy and timeliness of location information used for location-based routing. When location information does not meet one or both of these requirements, CMRS providers and covered text providers would be required to route 911 calls and texts based on the best available location information, which may include latitude/longitude coordinates of the cell tower.

To help ensure that public safety jurisdictions transitioning to NG911 can realize the benefits of location-based routing in an efficient and cost-effective manner, we also propose to:

- Require CMRS providers and covered text providers to deliver 911 calls, texts, associated routing information in IP format upon request of 911 authorities who have established the capability to accept NG911-compatible IP-based 911 communications. Nationwide CMRS providers and covered text providers would be subject to this requirement six months from the effective date of final rules on location-based routing or within six months of a valid request for IP-based service from a local or state public safety authority, whichever is later. Non-nationwide CMRS providers would have an additional six months to comply with this requirement.

We believe that the above proposals for location-based routing of 911 calls and texts will promote the safety of life and property by helping to ensure that those in need of emergency assistance can receive the help they need in a more timely manner.

B. Legal Basis

The proposed action is authorized under Sections 1, 2, 4(i), 10, 201, 214, 222, 251(e), 301, 302, 303, 307, 309, 316, and 332, of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 160, 201, 214, 222, 251(e), 301, 302, 303, 307, 309, 316, 332; the Wireless Communications and Public Safety Act of 1999, Public Law 106–81, 47 U.S.C. 615 note, 615, 615a, 615b; and Section 106 of the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 47 U.S.C. 615c.

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

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

Small Businesses, Small Organizations, Small Governmental Jurisdictions. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility

[91] *Notice of Inquiry,* 33 FCC Rcd at 3240 paragraph 6 (2018).

analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 32.5 million businesses.

Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.[92] Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.[93]

Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments[94] indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.[95] Of this number, there were 36,931 general purpose governments (county,[96] municipal, and town or township[97]) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts[98] with enrollment populations of less than 50,000.[99] Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''[100]

1. Telecommunications Service Providers

a. Wireless Telecommunications Providers

Pursuant to 47 CFR 9.10(a), the Commission's 911 service requirements are only applicable to ''CMRS providers, excluding mobile satellite service operators, to the extent that they: (1) Offer real-time, two way switched voice service that is interconnected with the public switched network; and (2) Use an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls. These requirements are applicable to entities that offer voice service to consumers by purchasing airtime or capacity at wholesale rates from CMRS licensees.''

Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

All Other Telecommunications. This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of internet services (*e.g.* dial-up ISPs) or voice over internet protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million.[101] Based on this data, the Commission estimates that the majority of ''All Other Telecommunications'' firms can be considered small.

Advanced Wireless Services (AWS)—(1710–1755 MHz and 2110–2155 MHz bands (AWS–1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS–2); 2155–2175 MHz band (AWS–3); 2000–2020 MHz and 2180–2200 MHz (AWS–4)). Spectrum is made available and licensed in these bands for the provision of various wireless communications services. Wireless Telecommunications

[92] The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C. 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. *See* Annual Electronic Filing Requirement for Small Exempt Organizations—Form 990–N (e-Postcard), ''Who must file,'' *https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard.* We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

[93] *See* Exempt Organizations Business Master File Extract (E.O. BMF), ''CSV Files by Region,'' *https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf.* The IRS Exempt Organization Business Master File (E.O. BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS E.O. BMF data for businesses for the tax year 2020 with revenue less than or equal to $50,000 for Region 1-Northeast Area (58,577), Region 2-Mid-Atlantic and Great Lakes Areas (175,272), and Region 3-Gulf Coast and Pacific Coast Areas (213,840) that includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

[94] The Census of Governments survey is conducted every five (5) years compiling data for years ending with ''2'' and ''7''. *See* Census of Governments, *https://www.census.gov/programs-surveys/cog/about.html.*

[95] *See* U.S. Census Bureau, 2017 Census of Governments—Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02], *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.* Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). *See also* tbl.2. CG1700ORG02 Table Notes_Local Governments by Type and State_ 2017.

[96] *See id.* at tbl.5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05], *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.* There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

[97] *See id.* at tbl.6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06], *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.* There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

[98] *See id.* at tbl.10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10], *https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.* There were 12,040 independent school districts with enrollment populations less than 50,000. *See also* tbl.4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes_ Special Purpose Local Governments by State_ Census Years 1942 to 2017.

[99] While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

[100] This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments—independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments—Organizations tbls.5, 6 & 10.

[101] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. We also note that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably, *see https://www.census.gov/glossary/#term_ReceiptsRevenueServices.*

Carriers (except Satellite) is the closest industry with a SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year.[102] Of this number, 2,837 firms employed fewer than 250 employees.[103] Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

According to Commission data as December 2021, there were approximately 4,472 active AWS licenses.[104] The Commission's small business size standards with respect to AWS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of AWS licenses, the Commission defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. Pursuant to these definitions, 57 winning bidders claiming status as small or very small businesses won 215 of 1,087 licenses. In the most recent auction of AWS licenses 15 of 37 bidders qualifying for status as small or very small businesses won licenses.

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

Competitive Local Exchange Carriers (LECs). Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers.[105] Wired Telecommunications Carriers is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees.[106] Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 3,956 providers that reported they were competitive local exchange service providers. Of these providers, the Commission estimates that 3,808 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

Incumbent Local Exchange Carriers (Incumbent LECs). Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees.[107] Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 1,227 providers that reported they were incumbent local exchange service providers. Of these providers, the Commission estimates that 929 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

Broadband Personal Communications Service. The broadband personal communications services (PCS) spectrum encompasses services in the 1850–1910 and 1930–1990 MHz bands. The closest industry with a SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (except Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees.[108] Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

Based on Commission data as of November 2021, there were approximately 5,060 active licenses in the Broadband PCS service.[109] The Commission's small business size standards with respect to Broadband PCS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. In auctions for these licenses, the Commission defined ''small business'' as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding

[102] *See* U.S. Census Bureau, *2017 Economic Census of the United States, Employment Size of Firms for the U.S.: 2017,* Table ID: EC1700SIZEEMPFIRM, NAICS Code 517312, *https://data.census.gov/cedsci/table?y=2017&n=517312&tid=ECNSIZE2017.EC1700SIZEEMPFIRM&hidePreview=false.*

[103] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[104] Based on a FCC Universal Licensing System search on December 10, 2021, *https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp.* Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = AD, AH, AT, AW; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

[105] Competitive Local Exchange Service Providers include the following types of providers: Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, Local Resellers, and Other Local Service Providers.

[106] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[107] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[108] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[109] Based on a FCC Universal Licensing System search on November 16, 2021, *https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp.* Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = CW; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

three years. Winning bidders claiming small business credits won Broadband PCS licenses in C, D, E, and F Blocks.

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

Narrowband Personal Communications Services. Narrowband Personal Communications Services *(Narrowband PCS)* are PCS services operating in the 901–902 MHz, 930–931 MHz, and 940–941 MHz bands. PCS services are radio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees.[110] Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

According to Commission data as of December 2021, there were approximately 4,211 active *Narrowband PCS* licenses.[111] The Commission's small business size standards with respect to *Narrowband PCS* involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of these licenses, the Commission defined a ''small business'' as an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is defined as an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. Pursuant to these definitions, 7 winning bidders claiming small and very small bidding credits won approximately 359 licenses. One of the winning bidders claiming a small business status classification in these *Narrowband PCS* license auctions had an active license as of December 2021.[112]

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

Offshore Radiotelephone Service. This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[113] Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to this service. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees.[114] Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small. Additionally, based on Commission data, as of December 2021, there was one licensee with an active license in this service.[115] However, since the Commission does not collect data on the number of employees for this service, at this time we are not able to estimate the number of licensees that would qualify as small under the SBA's small business size standard.

Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA small business size standard for this industry classifies businesses having 1,250 employees or less as small. U.S. Census Bureau data for 2017 show that there were 656 firms in this industry that operated for the entire year. Of this number, 624 firms had fewer than 250 employees.[116] Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

Rural Radiotelephone Service. Neither the Commission nor the SBA have developed a small business size standard specifically for small businesses providing Rural Radiotelephone Service. Rural Radiotelephone Service is radio service in which licensees are authorized to offer and provide radio telecommunication services for hire to subscribers in areas where it is not feasible to provide communication services by wire or other means. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System

[110] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[111] Based on a FCC Universal Licensing System search on December 10, 2021, *https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp.* Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = CN; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

[112] Based on a FCC Universal Licensing System search on December 10, 2021, *https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp.* Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = CN; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

[113] This service is governed by subpart I of part 22 of the Commission's Rules. *See* 47 CFR 22.1001–22.1037.

[114] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[115] Based on a FCC Universal Licensing System search on December 10, 2021, *https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp.* Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = CO; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

[116] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

(BETRS).[117] Wireless Telecommunications Carriers (*except* Satellite), is the closest applicable industry with a SBA small business size standard. The SBA small business size standard for Wireless Telecommunications Carriers (*except* Satellite) classifies firms having 1,500 or fewer employees as small. For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated for the entire year. Of this total, 2,837 firms employed fewer than 250 employees.[118] Thus under the SBA size standard, the Commission estimates that the majority of Rural Radiotelephone Services firm are small entities. Based on Commission data as of December 27, 2021, there were approximately 119 active licenses in the Rural Radiotelephone Service.[119] The Commission does not collect employment data from these entities holding these licenses and therefore we cannot estimate how many of these entities meet the SBA small business size standard.

Wireless Communications Services. Wireless Communications Services (WCS) can be used for a variety of fixed, mobile, radiolocation, and digital audio broadcasting satellite services. Wireless spectrum is made available and licensed for the provision of wireless communications services in several frequency bands subject to part 27 of the Commission's rules. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with an SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees.[120] Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

The Commission's small business size standards with respect to WCS involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in WCS. When bidding credits are adopted for the auction of licenses in WCS frequency bands, such credits may be available to several types of small businesses based average gross revenues (small, very small and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in the designated entities section in part 27 of the Commission's rules for the specific WCS frequency bands.[121]

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

Wireless Telecommunications Carriers (except Satellite). This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees.[122] Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 797 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 715 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable industry with an SBA small business size standard is Wireless Telecommunications Carriers (except Satellite). The size standard for this industry under SBA rules is that a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated for the entire year. Of this number, 2,837 firms employed fewer than 250 employees.[123] Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 407 providers that reported they were engaged in the provision of cellular, personal communications services, and specialized mobile radio services. Of these providers, the Commission estimates that 333 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

700 MHz Guard Band Licensees. The 700 MHz Guard Band encompasses spectrum in 746–747/776–777 MHz and 762–764/792–794 MHz frequency bands. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees.[124] Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

According to Commission data as of December 2021, there were approximately 224 active 700 MHz Guard Band licenses.[125] The

[117] BETRS is defined in 47 CFR 22.757, 22.759.

[118] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[119] Based on a FCC Universal Licensing System search on December 27, 2021. *https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp.* Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = CR; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

[120] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[121] The Designated entities sections in Subparts D through Q each contain the small business size standards adopted for the auction of the frequency band covered by that subpart.

[122] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[123] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[124] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[125] Based on a FCC Universal Licensing System search on December 14, 2021, *https://wireless2.fcc.gov/UlsApp/UlsSearch/*

Commission's small business size standards with respect to 700 MHz Guard Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Pursuant to these definitions, five winning bidders claiming one of the small business status classifications won 26 licenses, and one winning bidder claiming small business won two licenses. None of the winning bidders claiming a small business status classification in these 700 MHz Guard Band license auctions had an active license as of December 2021.[126]

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

Lower 700 MHz Band Licenses. The lower 700 MHz band encompasses spectrum in the 698–746 MHz frequency bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees.[127] Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

According to Commission data as of December 2021, there were approximately 2,824 active Lower 700 MHz Band licenses.[128] The Commission's small business size standards with respect to Lower 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For auctions of Lower 700 MHz Band licenses the Commission adopted criteria for three groups of small businesses. A very small business was defined as an entity that, together with its affiliates and controlling interests, has average annual gross revenues not exceeding $15 million for the preceding three years, a small business was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and an entrepreneur was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. In auctions for Lower 700 MHz Band licenses seventy-two winning bidders claiming a small business classification won 329 licenses, twenty-six winning bidders claiming a small business classification won 214 licenses, and three winning bidders claiming a small business classification won all five auctioned licenses.

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

Upper 700 MHz Band Licenses. The upper 700 MHz band encompasses spectrum in the 746–806 MHz bands. Upper 700 MHz D Block licenses are nationwide licenses associated with the 758–763 MHz and 788–793 MHz bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services.[129] Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of that number, 2,837 firms employed fewer than 250 employees.[130] Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

According to Commission data as of December 2021, there were approximately 152 active Upper 700

searchAdvanced.jsp. Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = WX; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

[126] Based on a FCC Universal Licensing System search on December 14, 2021, *https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp.* Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = WX; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

[127] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[128] Based on a FCC Universal Licensing System search on December 14, 2021, *https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp.* Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = WY, WZ; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

[129] *See* Federal Communications Commission, Economics and Analytics, Auctions, Auction 73: 700 MHz Band, Fact Sheet, Permissible Operations, *https://www.fcc.gov/auction/73/factsheet.* We note that in Auction 73, Upper 700 MHz Band C and D Blocks as well as Lower 700 MHz Band A, B, and E Blocks were auctioned.

[130] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

MHz Band licenses.[131] The Commission's small business size standards with respect to Upper 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Pursuant to these definitions, three winning bidders claiming very small business status won five of the twelve available licenses.

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

Wireless Resellers. Neither the Commission nor the SBA have developed a small business size standard specifically for Wireless Resellers. The closest industry with a SBA small business size standard is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications and they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under the SBA size standard for this industry, a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services during that year. Of that number, 1,375 firms operated with fewer than 250 employees.[132] Thus, for this industry under the SBA small business size standard, the majority of providers can be considered small entities.

b. Equipment Manufacturers

Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment. The SBA small business size standard for this industry classifies businesses having 1,250 employees or less as small. U.S. Census Bureau data for 2017 show that there were 656 firms in this industry that operated for the entire year. Of this number, 624 firms had fewer than 250 employees.[133] Thus, under the SBA size standard, the majority of firms in this industry can be considered small.

Semiconductor and Related Device Manufacturing. This industry comprises establishments primarily engaged in manufacturing semiconductors and related solid state devices. Examples of products made by these establishments are integrated circuits, memory chips, microprocessors, diodes, transistors, solar cells and other optoelectronic devices. The SBA small business size standard for this industry classifies entities having 1,250 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 729 firms in this industry that operated for the entire year. Of this total, 673 firms operated with fewer than 250 employees.[134] Thus under the SBA size standard, the majority of firms in this industry can be considered small.

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

The *NPRM* proposes and seeks comment on implementing new location-based routing requirements for 911 voice calls and text messages, that if adopted, may impose new or modified reporting or recordkeeping, and other compliance obligations on small entities. Some of our proposed requirements contain written notification and certification requirements that will be applicable to small entities. For example, in the *NPRM* we propose to require that not later than six months from the effective date of final rules on location-based routing, or within six months of a valid request for delivery of IP-formatted calls, texts, and location information by a local or state authority, whichever is later, CMRS providers and covered text providers must deliver 911 calls, texts, and associated routing information in IP-based format to NG911-capable PSAPs that request it. Non-nationwide providers would have an additional six months to comply with this requirement. CMRS and covered text providers and state or local 911 authorities would be allowed to agree to alternate timeframes for delivery of IP-formatted calls, texts, and associated routing information as long as the CMRS or covered text provider notifies the Commission of the alternate timeframe within 30 days of the parties' agreement.

Regarding CMRS or covered text providers' receipt of a ''valid request,'' the criteria we proposed to constitute a valid request includes certification from a requesting local or state entity that is technically ready to receive calls and/or texts in the IP-based format requested, that it is specifically authorized to accept calls and/or texts in the IP-based format requested, and that has provided notification to the CMRS or covered text providers via either a registry made available by the Commission or any other written notification reasonably acceptable to the CMRS provider or covered text provider.

In the *NPRM,* we seek comment on whether to implement any new data collections to assist in monitoring performance and compliance with the proposed location-based routing rules. For example, we ask: (1) whether to require CMRS providers or covered text providers to provide performance data on location-based routing, such as relative percentages of calls or texts routed using location-based routing versus other routing methods such as

[131] Based on a FCC Universal Licensing System search on December 14, 2021, *https://wireless2.fcc.gov/UlsApp/UlsSearch/searchAdvanced.jsp.* Search parameters: Service Group = All, ''Match only the following radio service(s)'', Radio Service = WP, WU; Authorization Type = All; Status = Active. We note that the number of active licenses does not equate to the number of licensees. A licensee can have one or more licenses.

[132] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[133] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[134] The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

cell tower location, (2) if so, whether to do so as part of their existing live call data reports or as a new and separate reporting process, and (3) if reporting would be helpful, what specific information should providers include and at what frequency should we require them to report it. We also seek information on whether the proposed rules should include requirements for disclosures to the PSAP or other state or local 911 authority in connection with location-based routing.

Our inquiry into the potential reporting obligations that may be necessary to complement our proposed location-based routing rules includes requesting comment on measures the Commission could take to limit the burden of reporting on location-based routing. In particular, we seek information on the extent that the Commission could limit the burden of any reporting requirements by providing increased flexibility for non-nationwide CMRS providers or businesses identified as small by the SBA. We also assess whether we need to adopt requirements and systems for reporting non-compliance with the proposed location-based routing rules. While we tentatively conclude that our existing mechanisms (which would allow public safety entities and members of the public seeking to report non-compliance with the proposed rules to file complaints via the Public Safety and Homeland Security Bureau's Public Safety Support Center or the Commission's Consumer Complaint Center) should be sufficient to address any potential violations, we seek comment on this tentative conclusion.

The record in this proceeding does not currently contain detailed information on the costs required for nationwide and non-nationwide carriers, covered text providers, and other parties to implement location-based routing and wireless IP-based service delivery. Therefore, at this time, the Commission is not in a position to determine whether implementation of location-based routing and IP-based service delivery as proposed in the *NPRM* would result in significant costs for small CMRS and covered text providers, NG911 services providers, or state and local 911 authorities, or require small entities to hire professionals to comply, if our proposals are adopted. To help the Commission more fully evaluate the cost of compliance, we seek additional detailed information on various cost issues implicated by our proposed rules.

Specifically, we have requested information on the costs for nationwide and non-nationwide CMRS providers and covered text providers to implement the required software, hardware, and service upgrades to comply with our proposed rules, and specifically where the required upgrades need to occur on the end-to-end network, *e.g.,* on the device, on specific CMRS providers' network elements, or on specific 911 network elements. We have also requested information on planned or expended costs by CMRS providers that have voluntarily implemented or plan to implement location-based routing to any extent on their networks, and to what extent would non-nationwide providers be able to leverage already incurred costs by nationwide CMRS providers, such as costs to develop and test location-based routing solutions, to reduce their own costs to comply with our proposed rules. Further, we inquire whether the costs to implement location-based routing are significantly different for different network operators, and if so, why, and we seek information on the details, and the amount of these investments, as well as the anticipated cost of testing location-based routing solutions. Additionally, we seek information on what equipment and software CMRS providers would need to test, how the testing would be performed, and what plans CMRS providers have for testing. We expect the information that we receive in response to our requested cost inquiries will to help the Commission identify and the evaluate compliance costs and burdens for small entities that may result from the proposals and inquiries we make in the *NPRM* to implement location-based routing.

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

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

The proposals in the *NPRM* are intended to be cost effective and minimally burdensome for small and other entities impacted by the rules. There are significant public safety benefits to be achieved from requiring all CMRS and covered text providers to implement location-based routing for 911 calls and texts originating on IP-based networks on a nationwide basis. The record indicates a substantial number of wireless 911 calls are misrouted, which is a significant problem for public safety.[135] The longer it takes for a 911 call or text to be properly routed, the longer it will take for the 911 caller to reach and receive the emergency services they may need. By taking action to require CMRS and covered text providers to implement location-based routing for 911 calls and texts originating on IP-based networks, the Commission can help save lives when individuals in need of emergency services place 911 calls using wireless devices.

In this proceeding the record suggests that in jurisdictions where CMRS providers have implemented location-based routing, PSAPs are experiencing fewer misroutes, fewer transfers, and faster dispatch times.[136] The record also indicates that nationwide implementations of location-based routing may be technically feasible for nationwide carriers, and high accuracy, low latency location information from consumer handsets is generally available to carriers for routing. Moreover, the National Emergency Number Association (NENA) estimates that universal implementation of location-based routing would reduce misrouted wireless calls by 85% from 23 million to 3.45 million per year. Public safety entities and some technology providers urge the Commission to require all CMRS providers to support location-based

[135] *See, e.g.,* Intrado Comments at 3, n.8 (citing a 12.96% average rate of misroutes for a sample set of five million wireless calls in 2018); NENA Comments at 3 (estimating 23 million 911 calls are misrouted annually); Intrado Comments at 4 through 5 (reporting that 20–50% of wireless calls may misroute along PSAP boundaries in Palm Beach County, Florida); Fayetteville Police Department Comments (noting that as many as 30% of wireless 911 calls it receives are misroutes from neighboring jurisdictions); *see also ATIS–0500039* at 4 (estimating a 12% national average rate for sub-optimally routed wireless 911 calls in 2019).

[136] *See* Texas 911 Entities Comments at 2, 4 (showing that average percentage of 911 call transfers for two out of three PSAPs in initial beta sites decreased by roughly 4 to 5% after T-Mobile implemented location-based routing; the remaining PSAP showed a slight increase in transfers of less than 1%); *see also* Intrado Comments at 5 through 6 (rec. July 11, 2022). In a pilot implementation in Palm Beach County, Florida, AT&T's location-based routing solution resulted in a better route for approximately 14% of calls, representing a routing correction for over 1,500 calls. *Id.*

routing.[137] It appears to be technologically feasible for CMRS providers to implement location-based routing for a significant percentage of wireless 911 calls. Below we discuss proposals in the *NPRM* which could minimize any significant economic impact on small entities and the alternatives we considered.

Location-Based Routing Requirements. To reduce potential cost burdens for small and other wireless providers, our location-based routing proposal would apply only to calls and texts originating on IP-based networks (*i.e.,* 4G LTE, 5G, and subsequent generations of IP-based networks). The record indicates that while nationwide CMRS providers are in the process of retiring or have completed the retirement of circuit-switched, time-division multiplex (TDM) 2G and 3G networks, and some non-nationwide providers have announced dates to sunset their 3G networks in 2022, the transition from these networks which are less compatible with location-based routing is not universally complete. In the *NPRM,* we therefore tentatively conclude that requiring location-based routing for 911 calls or texts originating on TDM-based networks would be unduly burdensome, especially for non-nationwide providers who would bear the greatest burden, even if given additional time to comply with such a requirement. Moreover, although we considered requiring location-based routing for all 911 calls, we ultimately proposed to require location-based routing only for 911 calls originating on IP-based networks, *i.e.,* 4G LTE, 5G, and subsequently deployed IP-based networks. The limited scope of this requirement will minimize some burdens and economic impact for small entities, particularly those that are non-nationwide providers.

Our proposed location-based routing rules provide flexibility to small and other entities to route 911 calls or texts based on best available location information, which may include cell tower coordinates or other information, when the location information available at time of routing does not meet either one or both of the requirements for accuracy and timeliness under our rules, rather than adopting a rigid location-based routing requirement. We recognize the continued need for cell-sector based routing, at least as a fallback method, because accurate device location information is not available in all scenarios. Further, our proposed requirement to default to best available location would be consistent with the *ATIS–0700042* standard for location-based routing, which assumes that the fallback for location-based routing should be cell sector routing for cases where no position estimate is available in time to be used for location-based routing or the position estimate lacks requisite accuracy, as well as with current CMRS provider deployments of location-based routing, which default to legacy E911 routing when location does not meet CMRS providers' standards of accuracy and timeliness.[138]

The Commission has also taken steps to minimize the economic impact of our proposed location-based routing requiring requirements on small and other entities, by proposing definitions relevant to the rules, that are consistent with industry standards and existing Commission definitions. For example, we propose to define ''location-based routing'' as ''use of information on a caller's location, including but not limited to device-based location information, to deliver 911 calls and texts to point(s) designated by the authorized local or state entity to receive wireless 911 calls and texts, such as an ESInet or PSAP, or to an appropriate local emergency authority.'' We also propose to define ''device-based location information'' as ''information regarding the location of a device used to call or text 911 generated all or in part from on-device sensors and data sources.'' Having definitions and requirements for location-based routing that are consistent with industry standards and existing Commission rules should lessen the chance that small entities and other providers will be burdened by conflicting requirements. To avoid such a conflict, in the *NPRM,* the Commission seeks comment on whether the proposed definition of ''device-based location information'' would adequately encompass current device-based hybrid (DBH) location technologies currently on the market, as well as possible future location technologies that can determine the location of the calling device. We also propose to interpret the definition of ''device-based location information'' to apply to our existing rule on delivery of 911 text messages, which includes that term.

We have also proposed baseline requirements involving the accuracy and timeliness of location information used for location-based routing which is consistent with industry standards. CMRS and covered text providers would use location-based routing only if the location information is available to the provider network at the time the call or text is routed and the information identifies the caller's horizontal location with a radius of 165 meters at a confidence level of at least 90%. These metrics are consistent with AT&T's implementation of location-based routing. In addition, our proposed confidence metric is consistent with ATIS' recommendation that uncertainty values for location-based routing ''be standardized to a 90% confidence for effective call handling.'' To minimize any significant economic impact on small entities and other impacted providers, when location information does not meet the baseline accuracy and timeliness requirements, CMRS and covered text providers would be required to route based on best available location information, which may include latitude/longitude coordinates of the cell tower, as mentioned in the section above.

Compliance Timelines. We provide flexibility in the proposed compliance timelines for implementation of the requirements that should reduce the economic burden for small entities. First, we propose different implementation deadlines for nationwide and non-nationwide CMRS providers to route all 911 voice calls originating on their IP-based networks using location-based routing, when available location information meets requirements for accuracy and timeliness. Nationwide providers would be required to implement the requirements no later than six months after the effective date of the final rules adopting location-based routing. Non-nationwide providers, which would include a substantial number of small entities, would be required to implement the requirements no later than eighteen months after the effective date of the final rules adopting location-based routing.

Next, when available location information meets requirements for accuracy and timeliness, we propose to require covered text providers to route all 911 texts originating on their IP-based networks using location-based routing, no later than eighteen months after the effective date of the final rules adopting location-based routing. We minimize any significant economic impact on small entities since this requirement is limited to operators of

[137] In a separate docket, APCO also called for a rulemaking to require carriers to implement location-based routing in comments on a petition from NASNA regarding NG911. APCO Comments, PS Docket No. 21–479, 4 (rec. Jan. 19, 2022).

[138] AT&T Comments at 4 (stating that ''[w]hen location was not available, the process defaults to using sector-based routing so that calls may be completed without excessive delay''); T-Mobile Comments at 4 (stating that ''T-Mobile's policy is to route a 911 call based on the cell-sector location if a routable, non-Phase I location estimate is not generated quickly enough'').

IP-based networks when certain requirements are met. In other words, small entities would not be required to comply with this requirement if they do not operate an IP-based network, or if the location information available on the IP-based network does not meet either one or both of the requirements for timeliness and accuracy, in which case, small entities may use the best available location information for routing.

Finally, for the requirements we propose to help ensure that jurisdictions transitioning to NG911 networks can realize the benefits of location-based routing in an efficient and cost-effective manner, we also propose different implementation deadlines for nationwide and non-nationwide CMRS providers and covered text providers. We propose to require nationwide CMRS providers and covered text providers to deliver IP-formatted 911 calls, texts, and associated routing information to the point(s) designated by state and local 911 authorities no later than six months from the effective date of the final rule or within six months of a valid request, whichever is later. For non-nationwide CMRS providers, we propose a deadline of no later than twelve months from the effective date of the final rule or within 12 months of a valid request, whichever is later. We also propose that local and state entities may enter into agreements with CMRS providers and covered text providers that establish an alternate timeframe for meeting these requirements. Regardless of whether a small entity is a nationwide or non-nationwide CMRS provider or covered text provider, the flexibility to negotiate an alternative timeframe which meets their business and financial needs is a significant step by the Commission that could minimize the economic impact for small entities.

Costs of Implementation. In the previous section, we discussed the absence of detailed information in the record on the costs for nationwide and non-nationwide CMRS and covered texts providers to implement the required software, hardware, and service upgrades to comply with our proposed rules. Having data on the costs and economic impact of the proposals to require implementation of located-based routing proposals and other matters discussed in the *NPRM* will allow the Commission to better evaluate options and alternatives to minimize the economic impact on small entities. Based on our request for specific and detailed cost implementation information, and for information on the extent that the Commission could limit the burden of any reporting requirements by providing increased flexibility for non-nationwide CMRS or covered text providers or businesses identified as small by the SBA, we expect to more fully consider the economic impact on small entities following our review of comments filed in response to the *NPRM,* and this IRFA. The Commission's evaluation of this information will shape the final alternatives it considers to minimize any significant economic impact that may occur on small entities, the final conclusions it reaches, and any final rules it promulgates in this proceeding.

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

None.

Ordering Clauses

Accordingly, *it is ordered,* pursuant to Sections 1, 2, 4(i), 10, 201, 214, 222, 251(e), 301, 302, 303, 307, 309, 316, and 332, of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 160, 201, 214, 222, 251(e), 301, 302, 303, 307, 309, 316, 332; the Wireless Communications and Public Safety Act of 1999, Public Law 106–81, 47 U.S.C. 615 note, 615, 615a, 615b; and Section 106 of the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 47 U.S.C. 615c, that this notice of proposed rulemaking *is adopted.*

It is further ordered that, pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415, 1.419, interested parties may file comments on the notice of proposed rulemaking on or before 30 days after publication in the **Federal Register**, and reply comments on or before 60 days after publication in the **Federal Register**.

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this notice of proposed rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 9

Communications, Communications common carriers, Communications equipment, internet, Radio, Telecommunications, Telephone.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 9 as follows:

PART 9—911 REQUIREMENTS

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

Authority: 47 U.S.C. 151–154, 152(a), 155(c), 157, 160, 201, 202, 208, 210, 214, 218, 219, 222, 225, 251(e), 255, 301, 302, 303, 307, 308, 309, 310, 316, 319, 332, 403, 405, 605, 610, 615, 615 note, 615a, 615b, 615c, 615a–1, 616, 620, 621, 623, 623 note, 721, and 1471, and Section 902 of Title IX, Division FF, Pub. L. 116–260, 134 Stat. 1182, unless otherwise noted.

■ 2. Amend § 9.3 by adding the definitions of ''Device-Based Location Information'' and ''Location-Based Routing'' to read as follows:

§ 9.3 Definitions.

* * * * *

Device-Based Location Information. Information regarding the location of a device used to call or text 911 generated all or in part from on-device sensors and data sources.

* * * * *

Location-Based Routing. The use of information on the location of a device, including but not limited to device-based location information, to deliver 911 calls and texts to point(s) designated by the authorized local or state entity to receive wireless 911 calls and texts, such as an Emergency Services Internet Protocol Network (ESInet) or PSAP, or to an appropriate local emergency authority.

* * * * *

■ 3. Amend § 9.10 by adding paragraph (s) to read as follows:

§ 9.10 911 Service.

* * * * *

(s) *Location-Based Routing Requirements.*

(1) By [six months from the effective date of this paragraph (s)(1)], nationwide CMRS providers shall deploy a technology that supports location-based routing on their networks nationwide. At that time, nationwide CMRS providers shall use location-based routing to route all wireless 911 calls originating on their Internet Protocol-based networks, provided that the information used for routing meets the requirements of paragraph (s)(4) of this section.

(2) By [eighteen months from the effective date of this paragraph (s)(2)],

non-nationwide CMRS providers shall deploy a technology that supports location-based routing on their networks throughout their service areas. At that time, non-nationwide CMRS providers shall use location-based routing to route all wireless 911 calls originating on their Internet Protocol-based networks, provided that the information used for routing meets the requirements of paragraph (s)(4) of this section.

(3) By [eighteen months from the effective date of this paragraph (s)(3)], covered text providers as defined in paragraph (q)(1) of this section shall deploy a technology that supports location-based routing. At that time, covered text providers shall use location-based routing to route all 911 texts originating on their Internet Protocol-based networks, provided that the information used for routing meets the requirements of paragraph (s)(4) of this section.

(4) Notwithstanding requirements for confidence and uncertainty described in paragraph (j) of this section, CMRS providers and covered text providers shall use location information that meets the following specifications for purposes of location-based routing under this paragraph (s):

(i) The information reports the horizontal location uncertainty level of the device within 165 meters at a confidence level of at least 90%; and

(ii) The information is available to the provider network at the time of routing the call or text.

(5) When information on a device's location does not meet either one or both the requirements in paragraph (s)(4) of this section or is otherwise unavailable in time for routing, CMRS providers and covered text providers shall route the 911 call or text based on the best available location information, which may include the latitude/longitude of the cell tower.

(6) By [six months from the effective date of this paragraph (s)(6)], or within 6 months of a valid request as defined in paragraph (s)(7) of this section for Internet Protocol-based service by the local or state entity that has the authority and responsibility to designate the point(s) to receive wireless 911 calls or texts, whichever is later:

(i) CMRS providers and covered text providers shall deliver calls and texts, including associated location information, in the requested Internet Protocol-based format to an Emergency Services Internet Protocol Network (ESInet) or other designated point(s).

(ii) Non-nationwide CMRS providers have an additional 6 months to comply with the requirements of this paragraph (s)(6).

(iii) Local and state entities may enter into agreements with CMRS providers and covered text providers that establish an alternate timeframe for meeting the requirements of paragraphs (i) or (ii) of this paragraph (s)(6). The CMRS provider or covered text provider must notify the Commission of the dates and terms of the alternate timeframe within 30 days of the parties' agreement.

(7) Valid request means that:

(i) The requesting local or state entity is, and certifies that it is, technically ready to receive 911 calls and/or texts in the Internet Protocol-based format requested;

(ii) The requesting local or state entity has been specifically authorized to accept 911 calls and/or texts in the Internet Protocol-based format requested; and

(iii) The requesting local or state entity has provided notification to the CMRS provider or covered text provider that it meets the requirements in paragraphs (s)(7)(i) and (ii) of this section. Registration by the requesting local or state entity in a database made available by the Commission in accordance with requirements established in connection therewith, or any other written notification reasonably acceptable to the CMRS provider or covered text provider, shall constitute sufficient notification for purposes of this paragraph (s)(7).

(8) Paragraphs (s)(6) and (s)(7) of this section contain information collection and recordkeeping requirements. Compliance will not be required until after approval by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing that compliance date and revising this paragraph accordingly.

[FR Doc. 2023–00519 Filed 1–13–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket Nos. 22–411, 22–271; FCC 22–95; FR ID 121634]

Expediting Initial Processing of Satellite and Earth Station Applications; Space Innovation

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on changes to our rules, policies, or practices to facilitate the acceptance for filing of satellite and earth station applications. We propose to revise a procedural rule to formally allow consideration of satellite applications and petitions that request waiver of the Table of Frequency Allocations to operate in a frequency band without an international allocation. We also seek comment on typical processing timeframes for satellite applications. This document will help Commission processing stay apace with the unprecedented number of innovative satellite applications in the new space age.

DATES: Comments are due March 3, 2023. Reply comments are due April 3, 2023.

ADDRESSES: You may submit comments, identified by IB Docket Nos. 22–411 and 22–271, by any of the following methods:

- *FCC Website: https://apps.fcc.gov/ecfs.* Follow the instructions for submitting comments.
- *People With Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Clay DeCell, 202–418–0803.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's notice of proposed rulemaking, FCC 22–95, adopted December 21, 2022, and released December 22, 2022. The full text is available online at *https://docs.fcc.gov/public/attachments/FCC-22-95A1.pdf.* The document is also available for inspection and copying during business hours in the FCC Reference Center, 45 L Street NE, Washington, DC 20554. To request materials in accessible formats for people with disabilities, send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Comment Filing Requirements

Interested parties may file comments and reply comments on or before the dates indicated in the **DATES** section above. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).

- *Electronic Filers.* Comments may be filed electronically using the internet by

accessing the ECFS: *https://apps.fcc.gov/ecfs.*

• *Paper Filers.* Parties who file by paper must include an original and one copy of each filing.

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

○ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

○ Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See* FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

• *People With Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), or to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.), send an email to *FCC504@fcc.gov* or call 202–418–0530 (voice) or 202–418–0432 (TTY).

Ex Parte Presentations

Pursuant to 47 CFR 1.1200(a), this proceeding will be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with 47 CFR 1.1206(b). In proceedings governed by 47 CFR 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Paperwork Reduction Act

This document does not contain proposed 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).

Synopsis

I. Introduction

1. The notice of proposed rulemaking, seeks comment on changes to the Commission's rules, policies, or practices to facilitate the acceptance for filing of satellite and earth station applications under 47 CFR part 25. We propose to revise a procedural rule to formally allow consideration of satellite applications and petitions that request waiver of the Table of Frequency Allocations to operate in a frequency band without an international allocation. We also seek comment on typical processing timeframes for satellite applications. This Notice will help Commission processing stay apace with the unprecedented number of innovative satellite applications in the new space age.

II. Background

2. The Commission's rules establish filing criteria for satellite and earth station applications submitted under 47 CFR part 25. An application that does not meet these criteria will be deemed unacceptable for filing and will be dismissed and returned to the applicant, with a brief statement identifying the omissions or discrepancies, unless the application requests a waiver of any conflicting rule or requirement or the Commission grants such a waiver on its own motion. A satellite application or petition that has been found defective and must be re-submitted will receive a later filing date under the Commission's first-come, first-served licensing process for geostationary-satellite orbit (GSO)-like satellite applications, or in some instances may result in an applicant missing the cut-off date of a processing round for non-geostationary satellite orbit (NGSO)-like satellite applications, both consequences that may negatively affect the ultimate spectrum sharing conditions of the satellite system. In general, a delay in acceptability for filing may result in a delay in action on the application. The Commission also adopted procedural safeguards against applications that are considered more likely to be speculative or intended to warehouse spectrum resources, including the prohibition on multiple NGSO-like applications or unbuilt NGSO system licenses in the same frequency band. Commission staff conducts an initial review of applications for acceptability for filing and compliance with procedural and substantive rules before they are placed on public notice for comment. Typical issues that prolong staff review and delay acceptance for filing include internal inconsistencies in the application, omission of information required by the rules, omission of waiver requests, missed filing deadlines, and novel issues being raised.

A. Acceptability for Filing

3. Under the rules, an application filed under 47 CFR part 25 is considered unacceptable for filing if:

(1) The application is defective with respect to completeness of answers to questions, informational showings, internal inconsistencies, execution, or other matters of a formal character;

(2) The application does not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements;

(3) The application requests authority to operate a satellite in a frequency band that is not allocated internationally for such operations under the Radio Regulations of the International Telecommunication Union (ITU), unless the application is a streamlined small space station application filed pursuant

to 47 CFR 25.122 or a streamlined small spacecraft application filed pursuant to 47 CFR 25.123; or

(4) The application is identical to a pending satellite application that was timely filed pursuant to the processing round procedure in 47 CFR 25.157 or the first-come, first-served processing procedure in 47 CFR 25.158.

4. Applications found defective under criteria (1) or (2) may be accepted for filing if the application requests a waiver, with supporting rationale, of any rule or requirement with which the application is in conflict or if the Commission grants such a waiver upon its own motion. Satellite applications found defective under criteria (3) or (4), under current rules, will not be considered.

5. Under our part 25 rules, the standard for determining whether an application is acceptable for filing is not ''letter perfection.'' The Commission may place on public notice applications with minor inaccuracies that are not material to the Commission's or the public's review. However, the rules require all applications under 47 CFR part 25 to be substantially complete when they are filed. As a practical matter, in some recent instances, staff has found it efficient to aid applicants to address discrepancies or omissions in their pending applications before placing them on public notice, resulting in fewer applications being dismissed prior to being accepted for filing.

B. Acceptability for Filing of Satellite Applications Not in Conformance With International Frequency Allocations

6. As noted above, unlike most application defects, an application requesting authority to operate a satellite in a frequency band that is not allocated internationally for such operation under the ITU Radio Regulations is deemed unacceptable for filing regardless of whether a waiver of the Table of Frequency Allocations is requested. When the Commission adopted this rule in 2003, it explained that it would dismiss satellite applications without prejudice as ''premature'' if the application is filed before the ITU adopts a necessary frequency allocation because it can take several years for the ITU to adopt a new allocation. Furthermore, the Commission reasoned that when an applicant files its application ''years before it will be possible to provide service,'' it is likely that the application may be a ''place holder.''

7. Drawing on more recent experience, the Commission has observed that, in the context of small satellites, there may be benefits associated with operations not consistent with the current International Table of Frequency Allocations in certain circumstances. Accordingly, in 2019 the Commission modified the acceptability for filing rule to provide an exception, so that streamlined small satellite applications requesting to operate in bands not allocated internationally, and which include an appropriate waiver request, can be considered on their merits without being deemed unacceptable for filing.

8. If a waiver is granted for satellite operations not in conformance with the International Table of Frequency Allocations, international provisions also apply. Specifically, Article 4.4 of the ITU Radio Regulations states that an administration shall not assign any frequency in derogation of the International Table of Frequency Allocations except on the express condition that the station shall not cause harmful interference to, and shall not claim protection from harmful interference caused by, a station operating in accordance with the provisions of the ITU Constitution, Convention and Radio Regulations. In addition, ITU Rule of Procedure 1.6 provides that an administration, prior to bringing into use any frequency assignment to a transmitting station operating under No. 4.4, shall determine: (a) that the intended use of the frequency assignment to the station under No. 4.4 will not cause harmful interference into the stations of other administrations operating in conformity with the Radio Regulations; and (b) what measures it would need to take in order to comply with the requirement to immediately eliminate harmful interference.

C. Limit on Unbuilt NGSO Systems

9. Another provision that may forestall or delay processing of NGSO applications is the limit on unbuilt NGSO systems. This rule prevents a party from applying for an additional NGSO-like satellite system license in a particular frequency band if that party already has an application for an NGSO-like satellite system license on file or a licensed-but-unbuilt NGSO-like satellite system in the band. The rule was adopted, in addition to bond and milestone requirements, as a means to restrain speculation without restricting applicants' business plans and to give licensees an incentive to turn in licenses for satellite systems that they do not intend to build.

D. Application Processing Timelines

10. In 2015, before the recent surge in applications for NGSO systems, the Commission noted the following expected processing periods for what it described as ''straightforward'' satellite applications that are not contested, barring any complication:

(1) applications for initial space station authorization or for modification of authorization will be placed on public notice within 45 days of receipt, and acted upon within 60 days after close of the comment period; and

(2) applications for special temporary authority (STA) for a space station will be placed on public notice within 14 days of receipt, if public notice is required, and acted upon within 30 days after close of the comment period. For space-station STA requests that do not require public notice, we expect to act within 30 days of receipt.

11. In 2016, the Satellite Division of the International Bureau announced the following expected processing times for straightforward, uncontested earth station applications, barring any complication:

(1) Applications for an initial earth station authorization or for a modification of authorization will be placed on public notice within 45 days of confirmation of receipt of payment, if not defective per 47 CFR 25.112, and acted upon within 60 days after close of the comment period.

(2) Applications for initial registration of receive-only earth stations or for a modification of registration will be placed on public notice within 30 days of confirmation of receipt of payment, if not defective per 47 CFR 25.112, and acted upon within 45 days after close of the comment period.

(3) Applications for special temporary authority for earth stations will be placed on public notice within 14 days of confirmation of receipt of payment, if not defective per 47 CFR 25.112 and if compliant with 47 CFR 25.120, and acted upon within 30 days after close of the comment period. For such requests that do not require notice to the public before action, if they are not defective per 47 CFR 25.112 and are compliant with 47 CFR 25.120, we expect to act within 30 days of receipt subject to confirmation of receipt of payment.

The Commission has not subsequently updated estimates on processing times, although the volume and complexity of applications has increased.

III. Discussion

12. As the Commission experiences increasing satellite licensing activity we must keep pace with demand and reassess our processes to identify opportunities for streamlining. We tentatively conclude that it is in the public interest to move quickly on

license application processing and specifically to begin building a public record on applications early in the process of evaluating them. In this respect, we note that placing an application on public notice as accepted for filing should not be seen as implying that the Commission has no questions regarding the application or that the application is being looked upon favorably for grant.

13. We propose one initial action to streamline the acceptability for filing of satellite applications. As the Commission concluded in the context of small satellites, we believe there are some cases in which a waiver of the Table of Frequency Allocations is warranted to permit operations not in conformance with current international allocations. These may, for example, be operations that can be conducted immediately on an unprotected and non-harmful interference basis and do not represent a ''placeholder'' for future service after a new international allocation is adopted. We believe waiver requests for satellite operations not in conformance with the International Table of Frequency Allocations, with sufficient supportive reasoning, should be considered on their merits rather than being automatically deemed unacceptable for filing as under current rules. Therefore, we propose to amend the acceptability criteria to place these waiver requests on an equal procedural footing with other requests for waiver of substantive rules, and allow them to be accepted for filing. We invite comment on this proposal, and on any alternatives.

14. In addition, we seek comment on whether to provide guidance, in a rule or otherwise, on the conditions under which a waiver of the International Table of Frequency Allocations is more likely. For example, we could specify that waiver applicants should provide a sufficient electromagnetic compatibility analysis to support a Commission finding that the intended use of the frequency assignment will not cause harmful interference to all other stations operating in conformance with the ITU Radio Regulations. We would indicate that the applicant must make a good-faith effort to demonstrate compatibility at the time of filing its application, with the understanding that it may need to supplement that showing in response to additional information about existing operations provided in the record by conforming spectrum users. We could also specify that an applicant should state its willingness to accept an assignment on a non-interference, unprotected basis. We could additionally indicate that waiver is more likely if there are ongoing, favorable studies and activities in the relevant ITU study group in support of a potential future allocation at a World Radiocommunication Conference. We seek comment on these proposals, and on whether there is other information applicants should submit in support of a waiver request, on other limitations that should be adopted, or alternative means to ensure that the Commission has a full record on which to evaluate requests for waiver of the Table of Frequency Allocations in these instances.

15. We also seek comment on whether the limit on unbuilt NGSO systems rule may be a hinderance to the acceptability of legitimate satellite applications and if so, whether it should be amended. For example, given that this rule was adopted in the context of processing rounds for NGSO applications, should we revise our rules such that it will not apply to NGSO applications that are granted outside of a processing round? Are there other ways in which the rules limiting unbuilt systems should be updated to reflect the current state of development of NGSO systems? Are the rationales underlying the rules equally relevant today? We seek comment generally on updates to our unbuilt NGSO systems rules. Should these rules be revised or eliminated altogether?

16. In the context of overall application processing under 47 CFR part 25, in recent years Commission staff have assisted applicants to correct certain omissions or inconsistencies in their applications that need to be corrected in order for an application to be deemed complete and acceptable for filing under our rules. We seek comment on this approach in several respects. Would it speed application review and ultimately encourage better-prepared applications if we instead dismiss applications containing internal inconsistencies or omissions under 47 CFR 25.112(a)(1)? These applications would be dismissed without prejudice to refiling. We note that in those cases where we do dismiss applications, our approach has been to issue a decision detailing the specific deficiencies in the application. We seek comment on the benefits and drawbacks of the alternative approaches. Alternatively, if we were to loosen the standards for acceptability for filing, would this result in a faster overall processing time for applications? For instance, how should we balance the speed of processing with the completeness and coherence of an application when it is placed on public notice for comment? Is there information that applicants should be able to correct or cure during the public notice period, and how would such an approach affect the ability of interested parties to review and comment on applications? Should we provide additional specificity in our acceptability for filing criteria? Given that internal inconsistencies and omissions are a source of delay in initial application processing, are there any part 25 application rules or application filing guidance that would assist applicants in overcoming this hurdle? For instance, if applicants were to submit relevant technical and other information in only one place in an application, would that reduce the risk of inconsistency? Would any such changes lower the reliability of information provided to the Commission? Is there any technical information currently required to be provided which is more likely to be overlooked or omitted from applications, and therefore delay their processing, that actually is not necessary for Commission or public evaluation of the application? Should certain inconsistencies, for example, in the description of frequency bands being requested, result in dismissal? Is there additional guidance or other assistance we should provide to applicants to avoid required information being omitted in their initial filings? Are there additional ways to reduce the number of errors, omissions, or inconsistencies in application filings, such as by incorporating additional completeness and compliance checks directly into the initial application process, or by introducing additional certifications in place of certain narrative information? Should applications omitting necessary waiver requests be dismissed? How well-supported should a waiver request need to be to overcome the acceptability for filing requirements, including waivers of filing deadlines or waivers that raise novel issues? Are there rules, policies, or practices for other licensing activities at the Commission that could helpfully be applied to satellite or earth station application processing? Are there ways in which we can better streamline inter-Bureau reviews in shared spectrum bands? Are there other areas where the Commission can streamline processing for initial or modification applications including the elimination of duplicative processing requirements, for example duplicative coordination requirements in satellite and earth station licensing? We also seek comment broadly on other process updates, rule changes, or policy reforms the Commission could adopt to help streamline application processing.

17. Finally, we invite comment on the anticipated processing times for straightforward, uncontested satellite and earth station applications noted above, which types of applications (including modification applications) the Commission should consider ''straightforward,'' and therefore fall under these guidelines, and whether, given the rapidly changing environment of operations in space and associated requests for Commission satellite authorizations, it would make sense to codify or otherwise better highlight our expected processing times for such applications. Or, given the pace of change in space activities and corresponding number of applications presenting unique or complex issues, would identification of a limited number of ''straightforward'' or ''routine'' applications result in improved processing times overall? Or would a more flexible approach to processing timeframes allow for the Commission to take into consideration other factors such as anticipated launch dates, and whether the request is an extension of a previously granted application?

18. Specifically regarding applications to add points of communication to existing earth station licenses, should these qualify as ''straightforward'' so long as the satellite system to be added is either U.S.-licensed or has been granted U.S. market access within the parameters requested in the earth station application and the applicant identifies either the satellite call sign or the earth station license(s) in which the satellite was granted market access? What steps can the Commission take to ensure applicants provide enough information regarding the requested satellite points of communication to facilitate its review, confirm that no additional market access is being sought for any non-U.S.-licensed point of communication, and otherwise expedite these types of applications? For any ''straightforward'' applications to add an earth station point of communication, would it be appropriate to automatically deem them granted 60 days after they are filed absent other Commission action? To address cases where an earth station applicant may wish to be licensed before it identifies any specific satellite points of communication, should we make any changes to our rules, policies, or practices to permit these cases?

19. Should we consider creating deadlines for certain satellite or earth station applications for making a determination about acceptability for filing, with the alternative being dismissal, and would this result in overall shorter processing times? If so, what deadline might be reasonable? Should the deadline vary depending on the type of application (*e.g.,* GSO, NGSO)? Should there be limitations on the applicability of this deadline—for example, where an operator requests operations not consistent with the International Table of Frequency Allocations, or where the application could involve initiation of a new NGSO processing round, or for contested applications? Would a deadline for making a determination potentially result in more dismissals of applications, since a decision would need to be made on the acceptability of an application within that specific timeframe? Should we adopt broader ''shot clocks'' for ultimate action on certain types of satellite or earth station applications?

20. We seek comment generally on these issues, and on any other guidance that may assist applicants and speed application processing.

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

IV. Initial Regulatory Flexibility Analysis

22. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice. We request written public comments on this IRFA. Commenters must identify their comments as responses to the IRFA and must file the comments by the deadlines provided on the first page of the Notice and as instructed above in paragraph 21. The Commission will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

23. The notice of proposed rulemaking (NPRM) seeks comment on ways to facilitate the acceptance for filing of satellite and earth station applications under 47 CFR part 25 to keep pace with growing demand for satellite services. The NPRM specifically inquires whether to change the acceptability rules regarding satellite applications that request to operate a service in a frequency band for which there is no international allocation, and whether to alter the limit of one unbuilt, non-geostationary system application or license in a particular frequency band.

B. Legal Basis

24. The proposed action is authorized under §§ 4(i), 7(a), 303, 308(b), and 316 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157(a), 303, 308(b), 316.

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

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

26. *Satellite Telecommunications.* This category comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $35 million or less in average annual receipts, under SBA rules. For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year. Of this total, 299 firms had annual receipts of less than $25 million. Consequently, we

estimate that the majority of satellite telecommunications providers are small entities.

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

27. The NPRM invites comment on potential changes to the acceptability for filing requirements for satellite and earth station applications in order to expedite their processing. Rule changes adopted as a result of this inquiry would be likely to decrease, or leave unaffected, the compliance requirements for small entities due to any streamlining of the Commission's application processing rules.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

28. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

29. The NPRM invites comment on ways to expedite and streamline the initial processing of satellite and earth station applications, which might also benefit small entities such as earth station operators.

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

30. None.

V. Ordering Clauses

31. *It is ordered,* pursuant to Sections 4(i), 7(a), 303, and 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157(a), 303, 308(b), that the notice of proposed rulemaking *is Adopted.*

32. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center will send a copy of the notice of proposed rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with § 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

List of Subjects in 47 CFR Part 25

Administrative practice and procedure, Satellites, Earth stations.

Federal Communications Commission.

Marlene Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 25 as follows:

PART 25—SATELLITE COMMUNICATIONS

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 310, 319, 332, 605, and 721, unless otherwise noted.

■ 2. Amend § 25.112 by removing and reserving paragraph (a)(3) and revising the introductory text of paragraph (b) to read as follows:

§ 25.112 Dismissal and return of applications.

* * * * *

(b) Applications for space station authority found defective under paragraph (a)(4) of this section will not be considered. Applications for authority found defective under paragraphs (a)(1) or (2) of this section may be accepted for filing if:

* * * * *

[FR Doc. 2023–00780 Filed 1–13–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 22–459; DA 22–1364; FR ID 123086]

Media Bureau Opens Docket and Seeks Comment for 2022 Quadrennial Review of Media Ownership Rules

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Media Bureau commences the 2022 Quadrennial Review of the Commission's media ownership rules and seeks comment on whether the rules remain necessary in the public interest as the result of competition.

DATES:

Comment Date: March 3, 2023. *Reply Comment Date:* March 20, 2023.

FOR FURTHER INFORMATION CONTACT: Ty Bream, Industry Analysis Division, Media Bureau, *Ty.Bream@fcc.gov,* (202) 418–0644.

SUPPLEMENTARY INFORMATION: This is a summary of the Media Bureau's Public Notice in MB Docket No. 22–459, DA 22–1364, that was released on December 22, 2022. The complete text of this document is available electronically via the search function on the FCC's Electronic Document Management System (EDOCS) web page at *https://apps.fcc.gov/edocs_public/* (*https://apps.fcc.gov/edocs_public/*). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* (mail to: *fcc504@fcc.gov*) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Synopsis

1. With this Public Notice, the Media Bureau commences the 2022 Quadrennial Review of the Commission's media ownership rules. Accordingly, the Bureau seeks comment, pursuant to the obligation under section 202(h) of the Telecommunications Act of 1996, on whether the media ownership rules remain ''necessary in the public interest as the result of competition.'' Although the Commission has not yet adopted final rules in the 2018 Quadrennial Review proceeding, we remain cognizant of the statutory obligation to review the broadcast ownership rules every four years. Just as the previous (2018) quadrennial review was initiated in December of 2018, we seek to commence this subsequent (2022) review before the end of the 2022 calendar year.

2. As the Commission has observed previously, the media marketplace can change dramatically in between its periodic regulatory reviews. Moreover, economic studies and data collection, which we welcome as part of this proceeding, may take significant time to complete. Therefore, we find it prudent to provide commenters with ample time and advance notice so they may begin undertaking such efforts, if they so choose, as soon as possible. Accordingly, the Media Bureau finds that initiating the 2022 Quadrennial Review despite the pendency of the 2018 Quadrennial Review is appropriate in this instance. The Commission similarly initiated the 2014 Quadrennial Review prior to completing the 2010 review. In that previous instance, the Commission incorporated the existing 2010 record into the 2014 review. Here, the Media Bureau is creating a new

docket for the Commission's future consideration of the 2022 proceeding.

3. *Background.* As stated, Section 202(h) of the Telecommunications Act of 1996 requires the Commission to review its media ownership rules every four years to determine whether they remain ''necessary in the public interest as the result of competition.'' On December 12, 2018, the Commission adopted a Notice of Proposed Rulemaking to initiate the 2018 Quadrennial Review proceeding and to seek comment on whether to retain, modify, or eliminate any of its media ownership rules. The three rules on which the Commission sought comment in the *2018 Quadrennial Review NPRM,* 84 FR 6741 (Feb. 28, 2019), are the Local Radio Ownership Rule (47 CFR 73.3555(a)), the Local Television Ownership Rule (47 CFR 73.3555(b)), and the Dual Network Rule (47 CFR 73.658(g)).

4. After the original comment period closed for the 2018 Quadrennial Review, a number of legal developments ensued that necessitated delaying Commission action on that proceeding. Specifically, several parties had sought judicial review of the *2010/2014 Quadrennial Review Order on Reconsideration,* 83 FR 755 (Jan. 8, 2018), which had concluded the 2010/2014 Quadrennial Review and adopted rule changes that then became the basis for comment in the subsequent 2018 Quadrennial Review. On September 23, 2019, in *Prometheus Radio Project* v. *FCC,* 939 F.3d 567 (3d Cir. 2019), the Third Circuit vacated and remanded the bulk of the Commission's actions in the *2010/2014 Quadrennial Review Order on Reconsideration.* Accordingly, on December 20, 2019, the Media Bureau issued an Order, 85 FR 5163 (Jan. 29, 2020), reinstating the rules as set forth in the *2010/2014 Quadrennial Review Order.* The Third Circuit's actions thus effectively called into question the rules under review in the 2018 Quadrennial Review until the status of the Commission's rule modifications and repeals in the *2010/2014 Quadrennial Review Order on Reconsideration* could be legally settled.

5. The Commission and broadcast industry petitioners filed separate Petitions for Writ of Certiorari before the Supreme Court, each asking the Supreme Court to review and overturn the Third Circuit's decision on different grounds. The Supreme Court ultimately reversed the Third Circuit's decision in *FCC* v. *Prometheus Radio Project,* 141 S. Ct. 1150, on April 1, 2021, in a unanimous decision. By then, however, nearly two years had passed since the original comment period closed for the 2018 Quadrennial Review.

6. On June 4, 2021, the Bureau released a public notice seeking to refresh the record in the 2018 Quadrennial Review proceeding. In that Public Notice, 86 FR 35089 (July 1, 2021), the Media Bureau sought any new and relevant information concerning the proceeding, including new empirical and statistical evidence, proposals, and detailed analysis. Additionally, the Bureau sought comment on how the media marketplace had evolved since early 2019 and whether new technological innovations had spurred noticeable trends or changed industry practices, as well as how any trends had impacted the manner in which consumers obtain local and national news and information. That proceeding remains pending.

7. *Discussion.* As with each new quadrennial review required by Congress, we start this proceeding to examine the media ownership rules in light of the media landscape of 2022 and beyond. Although they remain subject to the ongoing 2018 Quadrennial Review proceeding, the three rules currently in place and subject to this review are the Local Radio Ownership Rule and the Local Television Ownership Rule—which limit ownership by a single entity of broadcast radio or television stations in local markets respectively—and the Dual Network Rule, which effectively prohibits mergers among the Big Four broadcast television networks (ABC, CBS, Fox, and NBC). In the context of these three rules, as with prior reviews, we seek information regarding the media marketplace, including ongoing trends or developments (*e.g.,* consolidation, technological innovation, or the emergence of new video or audio options for consumers), that commenters find relevant to the Commission's review of its media ownership rules.

8. In addition, we note that the statutory directive of section 202(h) is explicitly tied to the public interest standard, in that it requires the Commission to determine whether the rules remain ''necessary in the public interest as the result of competition.'' Accordingly, we seek comment on the impact of the rules on the American public as consumers of media and the function and objectives of the rules as they relate to broadcasters' public interest obligations. Have the rules served, and do they continue to serve, consumers, particularly with respect to the Commission's longstanding policy goals of competition, localism, and diversity? If so, in what ways? Are there ways in which the rules have fallen short? Has the marketplace under our current rules delivered sufficient ''returns'' for consumers with respect to competition, localism, and diversity? How can the Commission measure or evaluate any ''returns'' that consumers have received as a result of those rules? Should the Commission adjust its analysis of the audio and video programming marketplace to account for fundamental changes in consumer behavior (*e.g.,* use of streaming alternatives)? Are there areas in which consumers rely uniquely on broadcast media? More generally, how should the Commission define or redefine the policy goals for the rules? Are there other policy goals, besides competition, localism, and diversity, that the Commission should consider in relation to the rules?

9. We further note that commenters in prior proceedings have encouraged the Commission to evaluate the effects of its rules on the ownership of broadcast stations by minorities and women. To this end, we seek comment on barriers to minority and female ownership of broadcast stations and areas in which commenters believe those barriers relate to, intersect with, or could be addressed by changes to the three ownership rules that are the subject of this proceeding. Specifically, we encourage commenters to identify concrete changes the Commission could or should make with respect to these or any additional ownership rules. We ask commenters to explain in detail or to demonstrate with legal analysis and empirical evidence how any such changes or additions would address concerns regarding minority and female ownership and how they could withstand legal scrutiny.

10. As always, commenters may provide any additional information regarding legal or economic factors, changes, or issues that the Commission should consider, evaluate, and/or address in the context of the 2022 Quadrennial Review. The record compiled in response to this Public Notice will help inform the Commission's next steps in the 2022 proceeding, such as any subsequent Notice of Proposed Rulemaking. In this regard, we reiterate the request from previous quadrennial reviews that commenters submit empirical evidence, data, and studies in support of their claims and positions wherever possible. We encourage commenters to draw any conclusions or connections between data and potential policy or rule changes as tightly and as explicitly as possible. In addition to identifying,

analyzing, and submitting existing data, commenters are encouraged to compile new data or to conduct further research that can be submitted to the Commission as part of the 2022 proceeding.

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

12. *Filing Comments and Replies.* All filings must be submitted in MB Docket No. 22–459. Interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

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

14. *Additional Information.* For additional information on this proceeding, please contact Ty Bream of the Media Bureau, Industry Analysis Division, *Ty.Bream@fcc.gov,* (202) 418–0644.

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

[FR Doc. 2023–00878 Filed 1–13–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–IA–2021–0099; FXIA16710900000–223–FF09A30000]

RIN 1018–BG66

Endangered and Threatened Wildlife and Plants; Revision to the Section 4(d) Rule for the African Elephant

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; extension of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are extending the comment period on our November 17, 2022, proposed rule to revise the rule for the African elephant (*Loxodonta africana*) promulgated under section 4(d) of the Endangered Species Act of 1973, as amended (ESA). We are extending the comment period for 60 days to give all interested parties an additional opportunity to comment. Comments previously submitted need not be resubmitted as they are already incorporated into the public record and will be fully considered in the proposed rule.

DATES: The comment period on the proposed rule that published November 17, 2022, at 87 FR 68975, is extended. We will accept comments received or postmarked on or before March 20, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date, and comments submitted by U.S. mail must be postmarked by that date to ensure consideration.

ADDRESSES: *Document availability:* The proposed rule and supporting documents, including the draft environmental assessment and economic analysis, are available at *https://www.regulations.gov* under Docket No. FWS–HQ–IA–2021–0099.

Written comments: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–HQ–IA–2021–0099, which is the docket number for this rulemaking. Then click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You

may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–IA–2021–0099, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Public Comments, below, for more information).

FOR FURTHER INFORMATION CONTACT: Mary Cogliano, Manager, Branch of Permits, Division of Management Authority; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS: IA; Falls Church, VA 22041; telephone 703–358–2104). Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

On November 17, 2022, we published a proposed rule (87 FR 68975) to revise the rule for the African elephant (*Loxodonta africana*) promulgated under section 4(d) of the Endangered Species Act of 1973, as amended (ESA). The proposed rule opened a 60-day comment period, ending January 17, 2023. We received requests to extend the public comment period. With this document, we are announcing an extension of the comment period an additional 60 days (see **DATES**, above) to allow the public further opportunity to provide comments on the proposed rule.

For a description of previous Federal actions concerning the African elephant and information on the types of comments that would be helpful to us in promulgating this rulemaking action, please refer to the November 17, 2022, proposed rule (87 FR 68975).

Public Comments

If you already submitted comments or information on the November 17, 2022 (87 FR 68975), proposed rule, please do not resubmit them. Any such comments are incorporated as part of the public record of the rulemaking proceeding, and we will fully consider them in the preparation of any final rule.

You may submit your comments and materials concerning this proposed rule by one of the methods listed under **ADDRESSES**. We will not accept comments sent by email or fax or to an address not listed under **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including your personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Signing Authority

Shannon Estenoz, Assistant Secretary for Fish and Wildlife and Parks, approved this action on January 4, 2023, for publication. On January 12, 2023, Shannon Estenoz authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of the Interior.

Maureen D. Foster,

Chief of Staff, Office of the Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2023–00858 Filed 1–13–23; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register

Vol. 88, No. 10

Tuesday, January 17, 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

USDA Equity Commission

AGENCY: USDA.

ACTION: Notice of public and virtual meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the United States Department of Agriculture (USDA) and the Federal Advisory Committee Act (FACA), that a public meeting of the USDA Equity Commission (EC or Commission), Subcommittee for Agriculture and the Rural Community Economic Development Subcommittee will convene to continue its work reviewing USDA programs, services, and policies for the purpose of making recommendations for how the Department can improve access and advance equity.

DATES: The EC meeting will be held on Tuesday, January 31 and Thursday, February 2, 2023, from 10:00 a.m. EST to 4:00 p.m. EST each day.

Meeting Agenda: The agenda items may include, but are not limited to, welcome and introductions; administrative matters; presentations by the Rural Community Economic Development and Agriculture Subcommittees; and deliberations and voting of recommendations to be included in an interim report. Please check the USDA Equity Commission website (*https://www.usda.gov/equity-commission*) for an agenda 24–48 hours prior to January 31st.

Register for the Meeting: The public is asked to pre-register for the meeting by visiting *https://www.usda.gov/equity-commission.* Your pre-registration must state: your name; organization or interest represented; if you are planning to give oral comments; and if you require special accommodations. USDA will also accept day-of registrations.

Oral Comments: The Commission is providing the public an opportunity to provide oral comments and will accommodate as many individuals and organizations as time permits. Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. ET, January 20, 2023, and may only register for one speaking slot. Participants who wish to make oral comments must also be available to attend a tech-check the day before the meeting. Instructions for registering and participating in the meeting can be found on *https://www.usda.gov/equity-commission. Written Comments:* Written public comments for consideration at the meeting will be accepted on or before 11:59 p.m. ET, January 20, 2023. Comments submitted after this date will be provided to the Equity Commission, but the Commission may not have adequate time to consider those comments prior to the meeting. The USDA Equity Commission strongly prefers comments be submitted electronically. However, written comments may also be submitted (*i.e.,* postmarked) via mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section by or before the deadline. Written comments will be accepted up to 15 days after the meeting.

Availability of Materials for the Meeting: All written public comments received by February 18, 2023, will be compiled into a file and available for member review and be included in the meeting minutes. Duplicate comments from multiple individuals will appear as one comment, with a notation that multiple copies of the comment were received. Please visit *https://www.usda.gov/equity-commission toviewtheagendaand/or* minutes from this meeting

FOR FURTHER INFORMATION CONTACT: Cecilia Hernandez, Designated Federal Officer, USDA Equity Commission, Office of the Deputy Secretary, 1400 Independence Avenue SW, Room 6006–S, Washington, DC 20250–0235; Phone: (202) 913–5907; Email: *Equitycommission@usda.gov.*

Individuals who use telecommunication devices for the deaf (TDD) may call the FCC Telecommunications Relay Service (TRS) at 7–1–1 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Commission and Subcommittee are authorized under section 1006(b)(3) of the American Rescue Plan Act of 2021, Public Law 117–2 (the Act) and operates in compliance with the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2.

On January 20, 2021, President Biden signed an Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government and committed to creating the USDA Equity Commission as part of his rural agenda and commitment to closing the racial wealth gap and addressing longstanding inequities in agriculture. Section 1006 of the American Rescue Plan directed USDA to create the Equity Commission and provided funds sufficient to ensure the Commission is well staffed and positioned to deliver on its charge.

The USDA Equity Commission will advise the Secretary of Agriculture and provide USDA with an analysis of how its programs, policies, systems, structures, and practices contribute to barriers to inclusion or access, systemic discrimination, or exacerbate or perpetuate racial, economic, health and social disparities and recommendations for action. The Agriculture Subcommittee reports to the Equity Commission and provides recommendations on issues of concern related to agriculture. The Rural Community Economic Development Subcommittee (RCED) will also report to the Equity Commission and will focus on issues related to rural community prosperity. The Equity Commission will deliver an interim report and provide actionable recommendations in spring 2023. A final report will be completed by end of year 2023.

Meeting Access: The public can participate via a zoom meeting link. Access information will be provided to registered individuals via email. Detailed information can be found at: *https://www.usda.gov/equity-commission.*

Meeting Accommodations: USDA is committed to making its electronic and information technologies accessible to individuals with disabilities by meeting or exceeding the requirements of section 508 of the Rehabilitation Act (29 U.S.C. 794d), as amended. If you need reasonable accommodations, please make requests in advance for reasonable accommodations through the meeting registration link on *https://www.usda.gov/equity-commission.* Determinations for reasonable accommodations will be made on a case-by-case basis.

Dated: January 9, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023–00540 Filed 1–13–23; 8:45 am]

BILLING CODE 3410–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by February 16, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Waivers Under Section 6(o) of the Food and Nutrition Act.

OMB Control Number: 0584–0479.

Summary of Collection: This is a renewal of an existing information collection. Section 824 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104–193 (PRWORA) establishes a time limit for the receipt of Supplemental Nutrition Assistance Program (SNAP) benefits for certain able-bodied adults who are not working. The provision authorizes the Secretary of Agriculture, upon a State agency's request, to waive the provision for any group of individuals if the Secretary determines ''that the areas in which the individuals reside has an unemployment rate of over 10 percent or does not have a sufficient number of jobs to provide employment for the individuals.''

Need and Use of the Information: As required in the statute, in order to receive a waiver, the State agency must submit sufficient supporting information so that the Secretary can make the required determination as to the area's unemployment rate or insufficiency of available jobs. This collection of information is necessary in order to obtain waivers of the SNAP ABAWD time limit.

Description of Respondents: State, local, or Tribal government.

Number of Respondents: 53.

Frequency of Responses: Reporting: on occasion, annually.

Total Burden Hours: 1,163.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–00681 Filed 1–13–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Office of Partnerships and Public Engagement

Advisory Committee on Minority Farmers

AGENCY: Office of Partnerships and Public Engagement, USDA.

ACTION: Notice of cancellation for the Advisory Committee for Minority Farmers public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), the Office of Partnerships and Public Engagement (OPPE) is announcing a cancellation of the Advisory Committee on Minority Farmers (ACMF) public meeting. The notice for the ACMF public meeting was published under FR Doc. 2022–28237 Filed 12–27–22. The meeting was scheduled for January 18–20, 2023. We will publish the new date once the meeting has been rescheduled. The OPPE is cancelling the in-person (face-to-face) meeting out of concern for the safety of the public due to adverse weather conditions. As a result, ample time was not allowed for the notice to be published in the **Federal Register** to cancel at least 15 days before the date of the meeting.

FOR FURTHER INFORMATION CONTACT: General information about the committee can also be found at *https://www.usda.gov/partnerships/advisory-committee-on-minority-farmers.* Any member of the public wishing to obtain information concerning this advisory committee may contact Mr. Eston Williams, Designated Federal Officer (DFO) via email *Eston.Williams@usda.gov* or call (202) 596–0226.

SUPPLEMENTARY INFORMATION: The Committee was established pursuant to section 14008 of the Food Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1651, 2008 (7 U.S.C. 2279), to ensure that socially disadvantaged farmers have equal access to USDA programs. The Secretary selected a diverse group of members representing a broad spectrum of persons chosen to recommend solutions to the challenges of minority farmers and ranchers, generally. The members also advise the Secretary on implementation of section 2501 of the Food, Agriculture, Conservation, and Trade Act of 1990 (the 2501 Program); maximizing the participation of minority farmers and ranchers in USDA programs; and civil rights activities within the Department relative to participants in its programs.

Dated: January 10, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023–00650 Filed 1–13–23; 8:45 am]

BILLING CODE 3412–88–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Maryland Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of planning meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the Maryland Advisory Committee to the Commission will convene by Zoom virtual platform and conference call on Tuesday, January 24, 2023, at 12:00 p.m. ET, for project planning.

DATES: Tuesday, January 24, 2023, at 12:00 p.m. ET.

Zoom Registration Link (video and audio): https://www.zoomgov.com/meeting/register/vJItdO6vqDMjE4eNP-rQIiuHsOuN5XspfO4; password, if needed: USCCR–MD.

If Phone Only: 1–551–285 1373; Meeting ID: 160 377 6899#.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski at 202–618–4158. Or *mwojnaroski@usccr.gov.*

SUPPLEMENTARY INFORMATION: The meeting is available to the public through the web link above. If joining only via phone, callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with conference details found through registering at the web link above. To request additional accommodations, please email *mwojnaroski@usccr.gov* at least 10 days prior to the meeting.

Members of the public are invited to make statements during the open comment period of the meeting or submit written comments. The comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be emailed to Melissa Wojnaroski at *mwojnaroski@usccr.gov.* Persons who desire additional information may contact Melissa Wojnaroski at *mwojnaroski@usccr.gov.*

Records and documents discussed during the meeting will be available for public viewing as they become available at *www.facadatabase.gov.* Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact Evelyn Bohor at *ebohor@usccr.gov.*

Agenda

Tuesday, January 24, 2023, at 12:00 p.m. ET

- Welcome and Rollcall
- Discussion: Project Planning
- Open Comment
- Adjournment

Dated: January 6, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–00426 Filed 1–13–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the New Mexico Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of virtual business meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the New Mexico Advisory Committee (Committee) will hold a series of virtual meetings via *ZoomGov* on the following dates and times for the purpose of debriefing testimony and planning future panels on education adequacy for Native American students.

DATES: These meetings will take place on:

- Thursday, February 16, 2023, from 11:00 a.m.–12:00 p.m. MT.
- Wednesday, March 15, 2023, from 11:00 a.m.–12:00 p.m. MT.

ADDRESSES:

Zoom Link:

- Thursday, February 16th: *https://www.zoomgov.com/meeting/register/vJIsc-CprTooGEIMVy-iCbPdjMisEaPuYU4.*
- Wednesday, March 15th: *https://www.zoomgov.com/meeting/register/vJItceCprzopH7RlJly4S2Sl0T4Pm3XY3NQ.*

FOR FURTHER INFORMATION CONTACT: Brooke Peery, Designated Federal Officer (DFO), at *bpeery@usccr.gov* or (202) 701–1376.

SUPPLEMENTARY INFORMATION: Members of the public may listen to the discussion. This meeting is available to the public through the public registration link listed above. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Regional Programs Unit Office, U.S. Commission on Civil Rights, 300 N. Los Angeles St., Suite 2010, Los Angeles, CA 90012 or emailed to Brooke Peery at *bpeery@usccr.gov.*

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available at: *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlGAAQ.*

Please click on the ''Meeting Details'' and ''Documents'' links. Persons interested in the work of this Committee are also directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit office at the above email or street address.

Agenda

I. Welcome and Roll Call
II. Approval of Minutes
III. Committee Discussion
IV. Public Comment
V. Adjournment

Dated: January 11, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–00706 Filed 1–13–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the District of Columbia Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the District of Columbia Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold project planning meetings. The purpose of these meetings is to plan, discuss and vote, as needed, on matters related to

the Committee's civil rights project. Generally, the meetings will last for approximately one-hour; however, 90 minutes have been set aside for the January 17 meeting.

DATES: Tuesday, January 17, at 12:00 p.m. (ET); Tuesday, February 21, at 12:00 p.m. (ET); Tuesday, March 21, at 12:00 p.m. (ET); Tuesday, April 18, at 12:00 p.m. (ET); and Tuesday, May 16, at 12:00 p.m. (ET).

ADDRESSES: Meetings will be held via Zoom.

Meeting Link (Audio/Visual): https://tinyurl.com/ypenrk33.

Join by Phone (Audio Only): 833–435–1820; Meeting ID: 160 142 7946.

FOR FURTHER INFORMATION CONTACT: Email Ivy Davis, Designated Federal Officer, at *ero@usccr.gov,* or call Sarah Villanueva, Program Specialist, at (206) 800–4892.

SUPPLEMENTARY INFORMATION: Members of the public can listen to these discussions. Committee meetings are available to the public through the above call-in number. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Individuals who are deaf, deafblind and hard of hearing may follow the proceedings by first calling the Federal Relay Service at 800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments via email. The comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed. The email subject line transmitting the written comments should state: Atten: DC and sent to this email address: *ero@usccr.gov.* Persons who desire additional information may email Ivy Davis at *ero@usccr.gov,* or call Sarah Villanueva @ (206) 800–4892.

Records generated from this meeting may, by appointment—contacting either staff person by email or phone—be inspected and reproduced at the Eastern Regional Programs, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, District of Columbia Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Eastern Regional Office at the above email address.

Agenda

I. Meeting Announcement—Roll Call
II. Welcome
III. Project Planning
IV. Other Business
V. Next Meeting
VI. Public Comments
VII. Adjourn

Dated: January 4, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–00224 Filed 1–13–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–4–2023]

Foreign-Trade Zone 84—Houston, Texas; Application for Reorganization (Expansion of Service Area) Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Port of Houston Authority, grantee of Foreign-Trade Zone 84, requesting authority to reorganize the zone to expand its service area under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the FTZ Board's standard 2,000-acre activation limit for a zone. The application was submitted pursuant to 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 January 11, 2023.

FTZ 84 was approved by the FTZ Board on July 15, 1983 (Board Order 214, 48 FR 34792, August 1, 1983), reorganized under the ASF on January 30, 2015 (Board Order 1964, 80 FR 7838–7839, February 12, 2015), and expanded under the ASF on February 28, 2018 (Board Order 2047, 83 FR 9479, March 6, 2018). The zone currently has a service area that includes Harris County, Texas.

The applicant is now requesting authority to expand the service area of the zone to include Waller County, Texas, as described in the application. If approved, the grantee would be able to serve sites throughout the expanded service area based on companies' needs for FTZ designation. The application indicates that the proposed expanded service area is adjacent to the Houston Customs and Border Protection Port of Entry.

In accordance with the FTZ Board's regulations, Camille Evans of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the FTZ Board.

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 March 20, 2023. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to April 3, 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 Camille Evans at *Camille.Evans@trade.gov.*

Dated: January 11, 2023.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2023–00735 Filed 1–13–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–203–2022]

Approval of Subzone Status; Jo-Ann Stores, LLC, Opelika, Alabama

On November 21, 2022, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the Montgomery Area Chamber of Commerce, grantee of FTZ 222, requesting subzone status subject to the existing activation limit of FTZ 222, on behalf of Jo-Ann Stores, LLC, in Opelika, Alabama.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (87 FR 72963, November 28, 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 222C was approved on January 11, 2023, subject to the FTZ Act and the Board's regulations, including section 400.13, and further subject to FTZ 222's 2,000-acre activation limit.

Dated: January 11, 2023.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2023–00734 Filed 1–13–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–1–2023]

Proposed Foreign-Trade Zone—Socorro, Texas Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the City of Socorro to establish a foreign-trade zone in Socorro, Texas, under the alternative site framework (ASF) adopted by the FTZ Board (15 CFR Sec. 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new ''subzones'' or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the FTZ Board's standard 2,000-acre activation limit for a zone project. 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 Board (15 CFR part 400). It was formally docketed on January 9, 2023. The applicant is authorized to make the proposal under Texas Business and Commerce Code, Title 15, Chapter 681, Foreign-Trade Zones.

The proposed zone would be the first zone for the Tornillo Customs and Border Protection (CBP) port of entry. The applicant's proposed service area under the ASF would be the City of Socorro. If approved, the applicant would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The application indicates that the proposed service area is within and adjacent to the Tornillo CBP port of entry.

The application indicates a need for zone services in Socorro, Texas. Several firms have indicated an interest in using zone procedures for warehousing/distribution activities for a variety of products. Specific production approvals are not being sought at this time. Such requests would be made to the FTZ Board on a case-by-case basis.

In accordance with the FTZ Board's regulations, Camille Evans and Christopher Wedderburn of the FTZ Staff are designated examiners to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the FTZ Board.

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 March 20, 2023. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to April 3, 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 Camille Evans and Christopher Wedderburn at *Camille.Evans@trade.gov* and *Chris.Wedderburn@trade.gov.*

Dated: January 10, 2023.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2023–00673 Filed 1–13–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Jose Daniel Medina, Calle Los Piros #72, Colonia Luis Donaldo Colosio, Nogales Sonora, MX; Order Denying Export Privileges

Washington, DC 20230

On February 22, 2019 in the U.S. District Court for the District of Arizona, Jose Daniel Medina (''Medina'') was convicted of violating 18 U.S.C. 554. Specifically, Medina was convicted of knowingly smuggling and attempting to smuggle from the United States to Mexico, one (1) Barrett model 50 BMG, and a .50 caliber rifle. As a result of his conviction, the Court sentenced Medina to 37 months in prison, with credit time served, three years supervised release, and a $100 special assessment.

Pursuant to Section 1760(e) of the Export Control Reform Act (''ECRA''),[1] the export privileges of any person who has been convicted of certain offenses, including, but not limited to, 18 U.S.C. 554, may be denied for a period of up to ten (10) years from the date of his/her conviction. 50 U.S.C. 4819(e). In addition, any Bureau of Industry and Security (''BIS'') licenses or other authorizations issued under ECRA, in which the person had an interest at the time of the conviction, may be revoked. *Id.*

BIS received notice of Medina's conviction for violating 18 U.S.C. 554. As provided in Section 766.25 of the Export Administration Regulations (''EAR'' or the ''Regulations''), BIS provided notice and opportunity for Medina to make a written submission to BIS. 15 CFR 766.25.[2] BIS has not received a written submission from Medina.

Based upon my review of the record and consultations with BIS's Office of Exporter Services, including its Director, and the facts available to BIS, I have decided to deny Medina's export privileges under the Regulations for a period of seven years from the date of Medina's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which Medina had an interest at the time of his conviction.[3]

Accordingly, it is hereby *ordered*:

First, from the date of this Order until February 22, 2026, Jose Daniel Medina, with a last known address of Calle Los Piros #72, Colonia Luis Donaldo Colosio, Nogales Sonora, MX, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not directly or indirectly participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be

[1] ECRA was enacted on August 13, 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, and as amended is codified at 50 U.S.C. 4801–4852.

[2] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2022).

[3] The Director, Office of Export Enforcement, is the authorizing official for issuance of denial orders pursuant to amendments to the Regulations (85 *FR* 73411, November 18, 2020).

exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, pursuant to Section 1760(e) of ECRA and Sections 766.23 and 766.25 of the Regulations, any other person, firm, corporation, or business organization related to Medina by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Medina may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Medina and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until February 22, 2026.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–00709 Filed 1–13–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Ge Song Tao (Ge), Block 3, Zijinyuan, No. 5 Muxuyuan Street, Nanjing, 210007 China; Order Denying Export Privileges

Washington, DC 20230

On July 14, 2021, in the U.S. District Court for the Middle District of Florida, Ge Song Tao (''Ge'') was convicted of violating 18 U.S.C. 371 and 18 U.S.C. 554(a). Specifically, Ge was convicted of conspiring to submit false export information through the federal government's Automated Export System and to export maritime raiding craft and engines to China fraudulently, and attempting to export that equipment fraudulently. As a result of his conviction, the Court sentenced Ge to 42 months of confinement, three years of supervised release, $50,000 criminal fine and $200 assessment.

Pursuant to Section 1760(e) of the Export Control Reform Act (''ECRA''),[1] the export privileges of any person who has been convicted of certain offenses, including, but not limited to, 18 U.S.C. 371 and 18 U.S.C. 554, may be denied for a period of up to ten (10) years from the date of his/her conviction. 50 U.S.C. 4819(e). In addition, any Bureau of Industry and Security (''BIS'') licenses or other authorizations issued under ECRA, in which the person had an interest at the time of the conviction, may be revoked. *Id.*

BIS received notice of Ge's conviction for violating 18 U.S.C. 371 and 18 U.S.C. 554. As provided in Section 766.25 of the Export Administration Regulations (''EAR'' or the ''Regulations''), BIS provided notice and opportunity for Ge to make a written submission to BIS. 15 CFR 766.25.[2] BIS has not received a written submission from Ge.

Based upon my review of the record and consultations with BIS's Office of Exporter Services, including its Director, and the facts available to BIS, I have decided to deny Ge's export privileges under the Regulations for a period of 10 years from the date of Ge's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which Ge had an interest at the time of his conviction.[3]

Accordingly, it is hereby *ordered*:

First, from the date of this Order until July 14, 2031, Ge Song Tao, with a last known address of Block 3, Zijinyuan, No. 5 Muxuyuan Street, Nanjing, 210007 China, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not directly or indirectly participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United

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[1] ECRA was enacted on August 13, 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, and as amended is codified at 50 U.S.C. 4801–4852.

[2] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2022).

[3] The Director, Office of Export Enforcement, is the authorizing official for issuance of denial orders pursuant to amendments to the Regulations (85 *FR* 73411, November 18, 2020).

States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, pursuant to Section 1760(e) of ECRA and Sections 766.23 and 766.25 of the Regulations, any other person, firm, corporation, or business organization related to Ge by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Ge may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Ge and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until July 14, 2031.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–00710 Filed 1–13–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Brett McGinnis, 54 North St. Andrews Drive, Ormond Beach, FL 32174; Order Denying Export Privileges

On September 16, 2021, in the U.S. District Court for the Southern District of Texas, Brett McGinnis (''McGinnis'') was convicted of violating 18 U.S.C. 554. Specifically, McGinnis was convicted of knowingly and willfully exporting and smuggling from the United States to Mexico, a Beretta Model 84, .380 caliber pistol; a Beretta, Model 92FS, .22LR caliber pistol; 2,451 rounds of .22 caliber ammunition; 1,500 rounds of Fiocchi .38 Super Caliber Ammunition, 500 rounds of Magtech .44 Caliber Ammunition; 440 rounds of TulAmmo 7.62 caliber Ammunition; 300 Rounds of G2 Research .380 Caliber Ammunition; 200 Rounds of G2 Research 9mm Ammunition; 200 Rounds of Hornady .270 Caliber Ammunition; 150 Rounds of Remington .45 Caliber Colt Ammunition; 120 Rounds of Remington .308 Caliber Ammunition; and various other firearms, firearms parts, and ammunition. As a result of his conviction, the Court sentenced McGinnis to 24 months in prison, three years supervised release, $100 special assessment, and a $10,000 fine.

Pursuant to section 1760(e) of the Export Control Reform Act (''ECRA''),[1] the export privileges of any person who has been convicted of certain offenses, including, but not limited to, 18 U.S.C. 554, may be denied for a period of up to ten (10) years from the date of his/her conviction. 50 U.S.C. 4819(e). In addition, any Bureau of Industry and Security (''BIS'') licenses or other authorizations issued under ECRA, in which the person had an interest at the time of the conviction, may be revoked. *Id.*

BIS received notice of McGinnis's conviction for violating 18 U.S.C. 554. As provided in section 766.25 of the Export Administration Regulations (''EAR'' or the ''Regulations''), BIS provided notice and opportunity for McGinnis to make a written submission to BIS. 15 CFR 766.25.[2] BIS has not received a written submission from McGinnis.

Based upon my review of the record and consultations with BIS's Office of Exporter Services, including its Director, and the facts available to BIS, I have decided to deny McGinnis's export privileges under the Regulations for a period of ten-years from the date of McGinnis's conviction. The Office of Exporter Services has also decided to revoke any BIS-issued licenses in which McGinnis had an interest at the time of his conviction.[3]

Accordingly, it is hereby *ordered*:

First, from the date of this Order until September 16, 2031, McGinnis, with a last known address of 54 North Street Andrews Drive, Ormond Beach, FL 32174, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not directly or indirectly participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person

[1] ECRA was enacted on August 13, 2018, as part of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, and as amended is codified at 50 U.S.C. 4801–4852.

[2] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2022).

[3] The Director, Office of Export Enforcement, is the authorizing official for issuance of denial orders pursuant to amendments to the Regulations (85 FR 73411, November 18, 2020).

acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, pursuant to section 1760(e) of ECRA and sections 766.23 and 766.25 of the Regulations, any other person, firm, corporation, or business organization related to McGinnis by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with part 756 of the Regulations, McGinnis may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to McGinnis and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until September 16, 2031.

John Sonderman,

Director, Office of Export Enforcement.

[FR Doc. 2023–00711 Filed 1–13–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–501]

Circular Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Amended Final Results of Antidumping Duty Administrative Review; 2020–2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) is amending its final results in the administrative review of the antidumping duty order on circular welded carbon steel standard pipe and tube products (pipe and tube products) from Turkey for the period May 1, 2020, through April 30, 2021, to correct a ministerial error.

DATES: Applicable January 17, 2023.

FOR FURTHER INFORMATION CONTACT: Magd Zalok, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4162.

SUPPLEMENTARY INFORMATION:

Background

On December 9, 2022, Commerce published the final results of the 2020–2021 administrative review of pipe and tube products from Turkey.[1] On December 7, 2022, Commerce granted interested parties in this administrative review the opportunity to provide comments on any ministerial errors found in the margin calculation for the final results, in accordance with 19 CFR 351.224(c)(2).[2] On December On December 12, 2022, Commerce received a timely filed allegation from Borusan Mannesmann Boru Sanayi ve Ticaret A.S. (Borusan Mannesmann) and Borusan Istikbal Ticaret T.A.S. (Istikbal) (collectively, Borusan), the respondent in this administrative review, alleging that Commerce made a ministerial error in the *Final Results* regarding its calculation of the final dumping margin.[3] We received ministerial error rebuttal comments from Wheatland Tube (Wheatland), a petitioner in this administrative review.[4] Based on our analysis of the allegation, we determine that we made a ministerial error and have made changes to the calculation of the weighted-average dumping margin for Borusan and for the non-individually examined respondents.[5]

Scope of the Order

The products covered by this order are welded carbon steel standard pipe and tube products with an outside diameter of 0.375 inches or more but not over 16 inches of any wall thickness, and are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the order is dispositive. These products, commonly referred to in the industry as standard pipe or tube, are produced to various ASTM specifications, most notably A–120, A–53, or A–135.

Ministerial Error

Section 751(h) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.224(f) define a ''ministerial error'' as an error ''in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.''

Borusan argues that Commerce incorrectly set the beginning date for the margin and home market calculation programs to the months of the period of review (POR), thereby, omitting certain reported U.S. sales that Borusan sold prior to the POR but entered the United States during the POR.[6] We agree with Borusan that Commerce made an unintentional error within the meaning of section 751(h) of the Act and 19 CFR 351.224(f) and, therefore, we have corrected the error by amending the

[1] *See Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020–2021,* 87 FR 75596 (December 9, 2022) (*Final Results*), and accompanying Issues and Decision Memorandum.

[2] *See* Commerce's Letter, ''2020–2021 Administrative Review of the Antidumping Duty Order on Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results Disclosure for Borusan,'' dated December 12, 2022.

[3] *See* Borusan's Letter, ''Circular Welded Carbon Steel Pipes and Tubes from Turkey, Case No. A–489–501: BMB Ministerial Error Allegation,'' dated December 12, 2022 (Ministerial Allegation).

[4] *See* Wheatland's Letter, ''Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Ministerial Error Rebuttal Comments,'' dated December 19, 2022.

[5] *See* Memorandum, ''Amended Final Results of the 2020–2021 Antidumping Duty Administrative Review on Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Allegation of Ministerial Error,'' dated concurrently with, and hereby adopted by, this notice (Ministerial Error Memorandum).

[6] *See* Ministerial Allegation.

Final Results pursuant to section 751(h) of the Act and 19 CFR 351.224(e).[7] Specifically, we corrected the beginning date in the margin and home market calculation programs to capture U.S. sales that were entered during, but sold prior to, the POR.[8]

For a complete discussion of the ministerial error allegation, as well as Commerce's analysis, *see* the accompanying Ministerial Error Memorandum.[9] The Ministerial Error Memorandum is on file electronically via ACCESS. ACCESS is available to registered users at *https://access.trade.gov.* As a result, the weighted-average dumping margin for Borusan changes from 15.56 percent to 12.80 percent. Furthermore, the rate for the companies not selected for individual examination, which is based on the margin calculated for Borusan, also changes from 15.56 percent to 12.80 percent.[10]

Amended Final Results of Review

Commerce determines that the following amended weighted-average dumping margins exist for the period May 1, 2020, through April 30, 2021:

Exporter/producer	Weighted-average dumping margin (percent)
Borusan Mannesmann Boru Sanayi ve Ticaret A.S./Borusan Istikbal Ticaret T.A.S	12.80
Rate Applicable to the Following Non-Selected Companies:	
Borusan Holding	12.80
Borusan Mannesmann Yatirim Holding	12.80
Kale Baglanti Teknolojileri San. ve Tic. A.S	12.80
Kale Baglann Teknolojileri San. Ve Tic. A.S	12.80
Noksel Celik Boru Sanayi A.S	12.80

Disclosure

We will disclose the calculation memorandum used in our analysis to parties to this segment of the proceeding within five days of the date of the publication of these amended final results pursuant to 19 CFR 351.224(b).

Assessment Rate

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these amended final results of the administrative review.

In accordance with 19 CFR 351.212(b)(1), we calculated importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of those sales. Where an importer-specific antidumping duties assessment rate is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), Commerce will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. Commerce's ''automatic assessment'' will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[11]

For the companies which were not selected for individual examination, we will instruct CBP to assess antidumping duties at an *ad valorem* assessment rate equal to the weighted-average dumping margins determined in these amended final results.

The amended final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the amended final results of this review and for future deposits of estimated duties, where applicable.[12] Consistent with its recent notice,[13] Commerce intends to issue appropriate assessment instructions directly to CBP no earlier than 35 days after the date of publication of the amended final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective retroactively for all shipments of subject merchandise that entered, or were withdrawn from warehouse, for consumption on or after December 9, 2022, the date of publication of the *Final Results* of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for respondents noted above will be equal to the weighted-average dumping margins established in the amended final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 14.74 percent, the all-others rate established in the less-than-fair-value investigation.[14] These cash deposit

[7] *See* Ministerial Error Memorandum.

[8] *Id.*

[9] *Id.*

[10] The rate applied to the non-selected companies is based on Borusan's dumping margin for the period May 1, 2020, through April 30, 2021, as no other company was selected for review. *See Final Results,* 87 FR at 75597.

[11] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[12] *See* section 751(a)(2)(C) of the Act.

[13] *See Notice of Discontinuation of Policy to Issue Liquidation Instructions After 15 Days in Applicable Antidumping and Countervailing Duty Administrative Proceedings,* 86 FR 3995 (January 15, 2021).

[14] *See Large Power Transformers from the Republic of Korea: Antidumping Duty Order,* 77 FR 53177 (August 31, 2012).

requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during the period of review. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties did occur and the subsequent assessment of doubled antidumping duties, and/or an increase in the amount of antidumping duties by the amount of the countervailing duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(h) and 777(i)(1) of the Act and 19 CFR 351.224(e).

Dated: January 10, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–00672 Filed 1–13–23; 8:45 am]

BILLING CODE 3510–DS–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, January 18, 2023—09:30 a.m.; and Wednesday, January 18, 2023—11:00 a.m. (See **MATTERS TO BE CONSIDERED** for each meeting).

PLACE: These meetings will be held remotely.

STATUS: Commission Meetings—Open to the Public.

MATTERS TO BE CONSIDERED:

Briefing Matters:

NPR: Safety Standard and Notification Requirements for Button Cell or Coin Batteries. All attendees should pre-register for the Commission meeting using the following link: *https://cpsc.webex.com/cpsc/onstage/g.php?MTID=e38e145c63710607cfd2304bdca14b25b* and

Supplemental NPR to Update 16 CFR part 1101. All attendees should pre-register for the Commission meeting using the following link: *https://cpsc.webex.com/cpsc/onstage/g.php?MTID=e164ef1d937c10571fc6773bcb98df5e3.*

After registering you will receive a confirmation email containing information about joining the meeting.

CONTACT PERSON FOR MORE INFORMATION: Alberta E. Mills, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, 301–504–7479 (Office) or 240–863–8938 (Cell).

Dated: January 11, 2023.

Alberta E. Mills,

Commission Secretary.

[FR Doc. 2023–00802 Filed 1–12–23; 11:15 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Prepare an Environmental Impact Statement for T–7A Recapitalization at Laughlin Air Force Base, Texas

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Notice of Intent.

SUMMARY: The Department of the Air Force (DAF) is issuing this Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) to assess the potential social, economic, and environmental impacts associated with T–7A Recapitalization at Laughlin Air Force Base (AFB), Texas. The EIS will analyze the potential impacts from introduction of T–7A aircraft and flight operations at Laughlin AFB and associated airspace; introduction of nighttime (between 10 p.m. and 7 a.m.) flight operations; changes to the number of personnel and dependents in the Laughlin AFB region; and construction and upgrade of operations, support, and maintenance facilities.

DATES: A public scoping period of 30 days will take place starting from the date of publication of this NOI in the **Federal Register**. Comments will be accepted at any time during the environmental impact analysis process; however, to ensure DAF has sufficient time to consider public scoping comments during preparation of the Draft EIS, please submit comments within the 30-day scoping period. The Draft EIS is anticipated in late 2023. The Final EIS and a decision on which alternative to implement is expected in early 2024.

DAF invites the public, stakeholders, and other interested parties to attend a remote public scoping meeting from 5:30 p.m. to 8 p.m. on 8 February 2023. A link to the remote public scoping meeting and telephone call-in number will be provided on the project website (*https://laughlin.t-7anepadocuments.com/*) at least 15 days before the meeting. Participants of the remote public scoping meeting will be instructed on how they may provide comments.

ADDRESSES: For EIS inquiries or requests for printed or digital copies of scoping materials please contact Mr. Nolan Swick by phone: (210) 925–3392. The project website (*https://laughlin.t-7anepadocuments.com/*) provides additional information on the EIS and can be used to submit scoping comments. Scoping comments may also be submitted via email to *nolan.swick@us.af.mil* or via postal mail to Mr. Nolan Swick, AFCEC/CZN; Attn: Laughlin AFB T–7A Recapitalization EIS; Headquarters AETC Public Affairs; 100 H East Street, Suite 4; Randolph AFB, TX 78150. Please submit inquiries or requests for printed or digital copies of the scoping materials via the email or postal address above. For printed material requests, the standard U.S. Postal Service shipping timeline will apply. Please consider the environment before requesting printed material.

SUPPLEMENTARY INFORMATION: DAF intends to prepare an EIS that will evaluate the potential impacts from its proposal to recapitalize the T–38C Talon flight training program at Laughlin AFB with T–7A Red Hawk aircraft. The proposal supports the Secretary of the Air Force's strategic basing decisions to recapitalize existing T–38C pilot training installations, and Laughlin AFB would be the third installation to be environmentally analyzed for possible recapitalization. The purpose of this proposal is to continue the T–7A recapitalization program to prepare pilots to operate more technologically advanced modern aircraft. Recapitalization is needed because the current training practices with the older T–38C aircraft do not adequately prepare pilots for the technological advancements of fourth and fifth generation aircraft.

Recapitalization entails introduction of T–7A aircraft and flight operations at Laughlin AFB to replace all T–38C aircraft assigned to the installation; introduction of nighttime (between 10 p.m. and 7 a.m.) flight operations; changes to the number of personnel and dependents in the Laughlin AFB region; and construction and upgrade of support and maintenance facilities. DAF is considering three alternatives to the Proposed Action and the No Action Alternative. For Alternative 1, Laughlin AFB would receive 63 T–7A aircraft and perform sufficient operations for sustaining pilot training while simultaneously phasing out the T–38C aircraft and phasing in the T–7A aircraft. Alternative 2 also would result in 63 T–7A aircraft being delivered to Laughlin AFB; however, T–7A operations would be performed at an intensity approximately 25 percent greater than Alternative 1 to cover a potential scenario in which DAF requires a surge or increase in pilot training operations above the current plan. For Alternative 3, Laughlin AFB would receive 79 T–7A aircraft to cover a potential scenario in which another military installation is unable to accept delivery of all their T–7A aircraft and some of those aircraft need to be permanently reassigned to Laughlin AFB. T–7A operations for Alternative 3 would be performed at an intensity identical to Alternative 2. The No Action Alternative would not implement T–7A recapitalization at Laughlin AFB.

DAF anticipates potential for the following notable environmental impacts from the Proposed Action: 1. Increased air emissions, particularly nitrogen oxides. 2. Increased noise from aircraft operations because the T–7A is inherently louder than the T–38C and the addition of nighttime operations may be bothersome to some residents. Increased noise could have a disproportionate impact on certain populations and impact off-installation land use compatibility. 3. Increased potential for bird/wildlife aircraft strike hazards. The EIS will model air emissions, noise levels, and the number of sleep and school disturbance events and compare to current conditions. DAF will also consult with appropriate resource agencies and Native American tribes to determine the potential for significant impacts. Consultation will be incorporated into the preparation of the EIS and will include, but not be limited to, consultation under Section 7 of the Endangered Species Act and consultation under Section 106 of the National Historic Preservation Act. Additional analysis will be provided in the Draft EIS.

Scoping and Agency Coordination: To effectively define the full range of issues to be evaluated in the EIS, DAF is soliciting comments from interested local, state, and federal elected officials and agencies, Tribes, as well as interested members of the public and others. Comments are requested on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment. Concurrent with the publication of this NOI, public scoping notices will be announced locally.

In accordance with DAF guidance, in-person public scoping meetings will not be held. Public scoping is being accomplished virtually. A remote public scoping meeting will be held via the project website at *https://laughlin.t-7anepadocuments.com/.* The scheduled date, time, and access information for the remote public scoping meeting will also be published in local media a minimum of 15 days prior to the meeting. The project website provides the remote public scoping meeting posters, presentation, an informational brochure, other meeting materials, and the capability for the public to provide public scoping comments. Scoping materials are also available in print at the Val Verde County Library at 300 Spring Street, Del Rio, Texas.

DAF also welcomes comments under Section 106 of the National Historic Preservation Act (36 Code of Federal Regulations 800) regarding the identification of or effects on historic properties. If you have comments or would like to become a consulting party in the Section 106 process, please visit the project website or contact Mr. Nolan Swick, AFCEC/CZN at the address above.

Tommy W. Lee,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2023–00714 Filed 1–13–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0013]

Agency Information Collection Activities; Comment Request; Presidential Cybersecurity Education Award

AGENCY: Office of Career, Technical, and Adult Education (OCTAE), 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 20, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0013. 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 Corinne Sauri, 202–245–6412.

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: Presidential Cybersecurity Education Award.

OMB Control Number: 1830–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 80.

Total Estimated Number of Annual Burden Hours: 80.

Abstract: The Executive Order on America's Cybersecurity Workforce (Executive Order 13870), signed on May 2, 2019, included a directive for the Secretary of Education, in consultation with the DAPHSCT and the National Science Foundation, to develop and implement, an annual Presidential Cybersecurity Education Award to be presented to one elementary and one secondary school educator per year who best instill skills, knowledge, and passion with respect to cybersecurity and cybersecurity-related subjects. This information collection request supports this executive order. This information collection was previously under OMB control number 1875–0292; the Department is now requesting a new OMB control number under 1830. There is no change from the previous form.

Dated: January 11, 2023.

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. 2023–00689 Filed 1–13–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0014]

Agency Information Collection Activities; Comment Request; Teacher Cancellation Low Income Directory

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before March 20, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0014. 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 Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Teacher Cancellation Low Income Directory.

OMB Control Number: 1845–0077.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 57.

Total Estimated Number of Annual Burden Hours: 6,840.

Abstract: The Higher Education Act of 1965, as amended, (HEA) allows for up to a one hundred percent cancellation of a Federal Perkins Loan and loan forgiveness of a Federal Family Education Loan and Direct Loan program loan if the graduate teaches full-time in an elementary or secondary school serving low-income students.

The Higher Education Act of 1965, as amended, (HEA) allows for up to a one hundred percent cancellation of a Federal Perkins Loan and loan forgiveness of a Federal Family Education Loan and Direct Loan program loan if the graduate teaches full-time in an elementary or secondary school serving low-income students.

The data collected for the development of the Teacher Cancellation Low Income Directory provides web-based access to a list of all elementary and secondary schools, and educational service agencies that serve a total enrollment of more than 30 percent low income students (as defined under title I, part A of the Elementary and Secondary Education Act of 1965, as amended). The Directory allows post-secondary institutions to determine whether or not a teacher, who received a Federal Perkins Loan, Direct Loan, or Federal Family Education Loan at their school, is eligible to receive loan cancellation or forgiveness or that a teacher who received a Teacher Education Assistance for College and Higher Education (TEACH) Grant is meeting the service obligation. This revision request updates the collection with an optional school type data element.

Dated: January 11, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–00720 Filed 1–13–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Eligibility Designations and Applications for Waiving Eligibility Requirements; Programs Under Parts A and F of Title III and Programs Under Title V of the Higher Education Act of 1965, as Amended (HEA)

AGENCY: Office of Postsecondary Education, Department of Education (Department).

ACTION: Notice.

SUMMARY: The Department announces the process for designation of eligible institutions and invites applications for waivers of eligibility requirements for fiscal year (FY) 2023, for the programs listed in **SUPPLEMENTARY INFORMATION**.

DATES:

Applications Available: January 17, 2023.

Deadline for Transmittal of Applications: February 27, 2023.

FOR FURTHER INFORMATION CONTACT: Jason Cottrell, Ph.D., Institutional Service, U.S. Department of Education, 400 Maryland Avenue SW, Room 2B127, Washington, DC 20202. Telephone: (202) 453–7530 or (202) 262–1833. Email: *Jason.Cottrell@ed.gov.*

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

SUPPLEMENTARY INFORMATION: The Department announces the process for designation of eligible institutions and invites applications for waivers of eligibility requirements for FY 2023 for the following programs:

1. Programs authorized under title III, part A of the HEA: Strengthening Institutions Program (Part A SIP), Alaska Native and Native Hawaiian-Serving Institutions (Part A ANNH), Predominantly Black Institutions (Part A PBI), Native American-Serving Nontribal Institutions (Part A NASNTI), and Asian American and Native American Pacific Islander-Serving Institutions (Part A AANAPISI).

2. Programs authorized under title III, part F of the HEA: Hispanic-Serving Institutions STEM and Articulation (Part F HSI STEM and Articulation), Predominantly Black Institutions (Part F PBI), Alaska Native and Native Hawaiian-Serving Institutions (Part F ANNH), Native American-Serving Nontribal Institutions (Part F NASNTI), and Asian American and Native American Pacific Islander-Serving Institutions (Part F AANAPISI).

3. Programs authorized under title V of the HEA: Developing Hispanic-Serving Institutions (HSI) and Promoting Postbaccalaureate Opportunities for Hispanic Americans (PPOHA).

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Programs: The Part A SIP, Part A ANNH, Part A PBI, Part A NASNTI, and Part A AANAPISI programs are authorized under title III, part A of the HEA. The Part F HSI STEM and Articulation, Part F PBI, Part F ANNH, Part F NASNTI, and Part F AANAPISI programs are authorized under title III, part F of the HEA. The HSI and PPOHA programs are authorized under title V of the HEA. Please note that certain programs addressed in this notice have the same or similar names as other programs that are authorized under a different statutory authority. For this reason, we specify the statutory authority as part of the acronym for certain programs.

Under the programs discussed above, institutions are eligible to apply for grants if they meet specific statutory and regulatory eligibility requirements. An institution of higher education that is designated as an eligible institution may also receive a waiver of certain non-Federal cost-sharing requirements for 1 year under the Federal Supplemental Educational Opportunity Grant (FSEOG) program authorized by title IV, part A of the HEA and the Federal Work-Study (FWS) program authorized by section 443 of the HEA. Qualified (eligible) institutions may receive the FSEOG and FWS waivers for 1 year even if they do not receive a grant under a title III or V grant program. An applicant that receives a grant from the Student Support Services (SSS) program that is authorized under section 402D of the HEA, 20 U.S.C. 1070a–14, may receive a waiver of the required non-Federal cost share for institutions for the duration of the grant. An applicant that receives a grant from the Undergraduate International Studies and Foreign Language (UISFL) program that is authorized under section 604 of the HEA, 20 U.S.C. 1124, may receive a waiver or reduction of the required non-Federal cost share for institutions for the duration of the grant.

Sections 312, 502, and 512 of the HEA, 34 CFR 607.2–607.5, and 34 CFR 606.2–606.5 include most of the basic eligibility requirements for grant programs authorized under titles III and V of the HEA. Sections 312(b)(1)(B) and 502(a)(2)(A) of the HEA provide that, to be eligible for these programs, an institution of higher education's average ''educational and general expenditures'' (E&G) per full-time equivalent (FTE) undergraduate student must be less than the average E&G expenditures per FTE undergraduate student of institutions that offer similar instruction in that year.

The National Center for Education Statistics (NCES) calculates Core Expenses per FTE of institutions, a statistic like E&G per FTE. Both E&G per FTE and Core Expenses per FTE are based on regular operational expenditures of institutions (excluding auxiliary enterprises, independent operations, and hospital expenses). They differ only in that E&G per FTE is based on fall undergraduate enrollment, while Core Expenses per FTE is based on 12-month undergraduate enrollment for the academic year.

To avoid inconsistency in the data submitted to, and produced by, the Department, for the purpose of sections 312(b)(1)(B) and 502(a)(2)(A) of the HEA, E&G per FTE is calculated using the same methodology as Core Expenses per FTE. Accordingly, the Department will apply the NCES methodology for calculating Core Expenses per FTE. Institutions requesting an eligibility exemption determination must use the Core Expenses per FTE data reported to NCES' Integrated Postsecondary Education Data System (IPEDS) for the most currently available academic year, in this case academic year 2020–2021.

Special Note: To qualify as an eligible institution under the grant programs listed in this notice, your institution must satisfy several criteria. For most of these programs, these criteria include those that relate to the enrollment of needy students and to the Core Expenses per FTE student count for a specified base year. The most recent data available in IPEDS for Core Expenses per FTE are for base year 2020–2021. To award FY 2023 grants in a timely manner, we will use these data to evaluate eligibility.

Accordingly, each institution interested in either applying for a new grant under the title III or V programs addressed in this notice, or requesting a waiver of the non-Federal cost share, must be designated as an eligible institution in FY 2023. Under the HEA, any institution interested in applying for a grant under any of these programs must first be designated as an eligible institution. *See* 34 CFR 606.5 and 607.5.

Note: Please be advised that final eligibility is program specific. Applicants should refer to the program in question for programmatic requirements. Further information regarding eligibility is set forth below.

Eligible Applicants: The eligibility requirements for the programs authorized under part A of title III of the HEA are in sections 312 and 317–320 of

the HEA (20 U.S.C. 1058, 1059d–1059g) and in 34 CFR 607.2–607.5. The regulations may be accessed at *www.ecfr.gov/cgi-bin/text-idx?SID=bc12bf5d685021e069cd1a15352b381a&mc=true&node=pt34.3.607&rgn=div5.* The eligibility requirements for the programs authorized by part F of title III of the HEA are in section 371 of the HEA (20 U.S.C. 1067q). There are currently no specific regulations for these programs.

The eligibility requirements for the title V HSI program are in part A of title V of the HEA and in 34 CFR 606.2–606.5. The regulations may be accessed at *www.ecfr.gov/cgi-bin/text-idx?SID=bc12bf5d685021e069cd1a15352b381a&mc=true&node=pt34.3.606&rgn=div5l.*

The requirements for the PPOHA program are in part B of title V of the HEA and in the notice of final requirements published in the **Federal Register** on July 27, 2010 (75 FR 44055), and in 34 CFR 606.2(a) and (b) and 606.3–606.5.

The Department has instituted a process known as the Eligibility Matrix (EM), under which we use information institutions submitted to IPEDS to determine which institutions meet the basic eligibility requirements for the programs authorized by title III or V of the HEA listed above. To make eligibility determinations for FY 2023, we use an institution's 2020–2021 enrollment and fiscal data. Beginning January 17, 2023, an institution will be able to review the Department's EM eligibility decision by checking the eligibility system linked through the Department's Institutional Service Eligibility website: *http://www2.ed.gov/about/offices/list/ope/idues/eligibility.html.* The direct link is *https://HEPIS.ed.gov/.*

The EM is a read-only worksheet that lists all potentially eligible postsecondary institutions. If the EM entry for your institution indicates your institution is eligible for a particular program grant, you will not need to apply for eligibility or submit a waiver request as described in this notice. Rather, if you choose to apply for the grant, you may print out the eligibility letter directly. If your institution intends to apply for a program grant for which your EM entry does not show your institution is eligible, you must submit the application discussed in this notice before the application deadline of February 27, 2023.

To check your institution's eligibility in the EM, go to *https://HEPIS.ed.gov/,* and log into the system using your email address and password. If you are not sure whether you have an account in the system, click the ''New User'' button. If you do not have an account, the system will walk you through setup. Note that it may take up to 5 business days to verify user identity and to complete new account setup, so please allow enough time to complete the application. If the Grant Eligibility Application (GEA) system is open for new applications, you may check your institution's eligibility status by clicking the ''View pre-Eligibility Information'' button. Your institution's eligibility information will display.

If the EM does not show that your institution is eligible for a program, or if your institution does not appear in the eligibility system, or if you disagree with the eligibility determination reflected in the eligibility system, you can apply for a waiver or reconsideration using the process described in this notice. The application process mirrors that used in previous years: choose the waiver option on the website at *https://HEPIS.ed.gov/* and submit your institution's application.

Please note that through this process, the Department does not certify, nor designate, an institution as a Historically Black College or University, Tribally Controlled College or University, Minority-Serving Institution, or Hispanic-Serving Institution. The Department's EM determination relates only to the institution's ability to apply for and receive grants under certain programs as discussed in this notice.

Note: Institutions that submit a waiver request for either the Core Expenses per FTE or the Needy Student requirement must submit the required documents and supporting data and evidence by the deadline. All reviews and decisions will be made approximately 2 weeks after the deadline.

Enrollment of Needy Students: As noted above, to qualify as an eligible institution under the grant programs listed in this notice, your institution must satisfy several criteria, including those that relate to the enrollment of needy students and to the Core Expenses per FTE student count for a specified base year.

As to the enrollment of needy students, for programs under titles III and V (excluding the PBI programs), an institution is considered to have an enrollment of needy students if it meets either of the following two criteria: (1) at least 50 percent of its degree-seeking students received financial assistance under the Federal Pell Grant, FSEOG, or FWS programs; or (2) the percentage of its undergraduate degree-seeking students who were enrolled on at least a half-time basis and received Federal Pell Grants exceeded the median percentage of undergraduate degree students who were enrolled on at least a half-time basis and received Federal Pell Grants at comparable institutions that offer similar instruction.

To qualify under the second criterion, an institution's Federal Pell Grant percentage for base year 2020–2021 must be more than the median for its category of comparable institutions provided in the 2020–2021 Median Pell Grant and Average Core Expenses per FTE Student Table in this notice. If your institution qualifies only under the first criterion, you must submit an application containing the data necessary to satisfy the first criterion (showing at least 50 percent of your degree-seeking students received financial assistance under one of several Federal student aid programs (the Federal Pell Grant, FSEOG, or FWS programs)), since these data are not available in IPEDS.

''Enrollment of Needy Students'' for purposes of the Part A PBI program is separately defined in section 318(b)(2) of the HEA, and for purposes of the Part F PBI program is defined in section 371(c)(3) of the HEA.

Core Expenses per FTE Student: For each of the following programs, an institution should compare its base year 2020–2021 Core Expenses per FTE student to the average Core Expenses per FTE student for its category of comparable institutions using the 2020–2021 Median Pell Grant and Average Core Expenses per FTE Student Table in this notice: Title III, Part A SIP; Part A ANNH; Part A PBI; Part A NASNTI; Part A AANAPISI; Title III, Part F HSI STEM and Articulation; Part F PBI; Part F ANNH; Part F NASNTI; Part F AANAPISI; Title V, Part A HSI; and Title V, Part B PPOHA. An institution satisfies this program eligibility requirement if its Core Expenses for the 2020–2021 base year are less than the average Core Expenses of its comparable institutional category.

Core Expenses are defined as the total expenses for the essential education activities of the institution. Core Expenses for public institutions reporting under the Governmental Accounting Standards Board (GASB) requirements include expenses for instruction, research, public service, academic support, student services, institutional support, operation and maintenance of plant, depreciation, scholarships and fellowships, interest, and other operating and non-operating expenses. Core Expenses for institutions reporting under the Financial Accounting Standards Board (FASB) standards (primarily private, not-for-profit, and for-profit institutions)

include expenses for instruction, research, public service, academic support, student services, institutional support, net grant aid to students, and other expenses. Core Expenses do not include Federal student aid for the purposes of eligibility. For both FASB and GASB institutions, Core Expenses do not include expenses for auxiliary enterprises (*e.g.,* bookstores, dormitories), hospitals, and independent operations.

The following table identifies base year 2020–2021 median Federal Pell Grant percentages and average Core Expenses per FTE student for the four categories of comparable institutions:

Type of institution	Base year 2020–2021 median Pell grant percentage	Base year 2020–2021 average core expenses per FTE student
2-year Public Institutions	31	$17,326
2-year Nonprofit Private Institutions	52	15,981
4-year Public Institutions	33	34,341
4-year Nonprofit Private Institutions	34	43,267

Waiver Information: Institutions that do not meet the needy student enrollment requirement or the Core Expenses per FTE requirement may apply to the Secretary for a waiver of these requirements, as described in sections 392 and 522 of the HEA, and in the implementing regulations at 34 CFR 606.3(b), 606.4(c) and (d), 607.3(b), and 607.4(c) and (d).

Institutions requesting a waiver of the needy student enrollment requirement or the Core Expenses per FTE requirement must include in their application detailed evidence supporting the waiver request, as described in the instructions for completing the application.

The regulations governing the Secretary's authority to grant a waiver of the needy student requirement refer to ''low-income'' students or families, at 34 CFR 606.3(b)(2) and (3) and 607.3(b)(2) and (3). The regulations at 34 CFR 606.3(c) and 607.3(c) define ''low-income'' as an amount that does not exceed 150 percent of the amount equal to the poverty level, as established by the U.S. Census Bureau.

For purposes of this waiver provision, the following table sets forth the low-income levels (at 150 percent) for various family sizes:

2021 ANNUAL LOW-INCOME LEVELS

Size of family unit	Family income for the 48 contiguous states, DC, and outlying jurisdictions	Family income for Alaska	Family income for Hawaii
1	$19,320	$24,135	$22,230
2	26,130	32,655	30,060
3	32,940	41,175	37,890
4	39,750	49,695	45,720
5	46,560	58,215	53,550
6	53,370	66,735	61,380
7	60,180	75,255	69,210
8	66,990	83,775	77,040

Note: We use the 2021 annual low-income levels because those are the amounts that apply to the family income reported by students enrolled for the fall 2020 semester. For family units with more than eight members, add the following amount for each additional family member: $6,810 for the contiguous 48 States, the District of Columbia, and outlying jurisdictions; $8,520 for Alaska; and $7,830 for Hawaii.

The figures shown under family income represent amounts equal to 150 percent of the family income levels established by the U.S. Census Bureau for determining poverty status. The poverty guidelines were published on February 1, 2021, in the **Federal Register** by the U.S. Department of Health and Human Services (86 FR 7732), with an effective date of January 13, 2021.

Information about ''metropolitan statistical areas'' referenced in 34 CFR 606.3(b)(4) and 607.3(b)(4) may be obtained at: *https://www.census.gov/programs-surveys/metro-micro/geographies/reference-maps.html.*

Electronic Submission of Waiver Applications: If your institution does not appear in the eligibility system as eligible for a program to which you seek to apply, you must apply for a waiver of the eligibility requirements. To request a waiver, you must upload a narrative at *https://HEPIS.ed.gov/.*

Exception to the Electronic Submission Requirement: We discourage paper applications, but if electronic submission is not possible (*e.g.,* you do not have access to the internet), you must provide a written statement that you intend to submit a paper application. This written statement must be postmarked no later than 2 weeks before the application deadline date (14 calendar days or, if the 14th calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday).

Please send this statement to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

If you submit a paper application, you must mail your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Attention: Jason Cottrell, 400 Maryland Avenue SW, Room 2B127, Washington, DC 20202.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

We will not consider applications postmarked after the application deadline date.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for certain title III programs in 34 CFR part 607, and for the HSI program in 34 CFR part 606. (e) The notice of final requirements for the PPOHA program published in the **Federal Register** on July 27, 2010 (75 FR 44055).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

Note: There are no program-specific regulations for the Part A PBI, Part A NASNTI, and Part A AANAPISI programs or any of the title III, part F programs. Also, the HEA has been amended since the Department last issued regulations for programs established under titles III and V of that statute. Accordingly, we encourage each potential applicant to read applicable sections of the HEA to fully understand all applicable program eligibility requirements.

II. Other Information

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, Braille, large print, audiotape, or compact disc, or other accessible format.

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

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

Nasser H. Paydar,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2023–00717 Filed 1–13–23; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2023–0014, SAN 10573; FRL 10573–01–OAR]

Clean Air Act Advisory Committee (CAAAC): Request for Nominations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Request for Nominations to the Clean Air Act Advisory Committee (CAAAC).

SUMMARY: The U.S. Environmental Protection Agency (EPA) invites nominations from a diverse range of qualified candidates to be considered for appointment to its Clean Air Act Advisory Committee (CAAAC). Vacancies are anticipated to be filled by August 2023. Sources in addition to this **Federal Register** Notice may also be utilized in the solicitation of nominees.

ADDRESSES: Submit nominations in writing to: Lorraine Reddick, Designated Federal Officer, Office of Air and Radiation, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

For further information or to email nominations, include in the subject line CAAAC Membership 2023 and send to *caaac@epa.gov.*

SUPPLEMENTARY INFORMATION: *Background:* Clean Air Act Advisory Committee provides advice, information and recommendations on policy and technical issues associated with implementation of the Clean Air Act (CAA) as requested by EPA. These issues include the development, implementation, and enforcement of programs required by the Act. The CAAAC will provide advice and recommendations on approaches for new and expanded programs including those using innovative technologies and policy mechanisms to achieve environmental improvements; the potential health, environmental and economic effects of CAA programs on the public, the regulated community, State and local governments, and other Federal agencies; the policy and technical contents of proposed major EPA rulemaking and guidance required by the Act in order to help effectively incorporate appropriate outside advice and information; and the integration of existing policies, regulations, standards, guidelines, and procedures into programs for implementing requirements of the Act.

The programs falling under the purview of the committee include, but are not limited to, those for meeting National Ambient Air Quality Standards, reducing emissions from vehicles and vehicle fuels, reducing air toxic emissions, permitting, carrying out compliance authorities, and CAA-related voluntary activities. Members are appointed by the EPA Administrator for two-year terms with the possibility of reappointment to additional term(s). The CAAAC usually meets approximately 2 times annually and the average workload for the members is approximately 5 to 10 hours per month.

Although EPA is unable to offer compensation or an honorarium for CAAAC members, they may receive travel and per diem allowances, according to applicable federal travel regulations.

EPA is seeking nominations from academia, industry, non-governmental/

environmental organizations, community organizations, state and local government agencies, tribal governments, unions, trade associations, utilities, and lawyers/consultants. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

Evaluation Criteria

The following criteria will be used to evaluate nominees:

- The background and experiences that would help members contribute to the diversity of perspectives on the committee (*e.g.,* geographic, economic, social, cultural, educational, and other considerations);
- Experience serving as an elected official;
- Experience serving as an appointed official for a state, county, city or tribe;
- Experience working on national level or on local government issues;
- Demonstrated experience with air quality policy issues;
- Executive management level experience with membership in broad-based networks;
- Excellent interpersonal, oral and written communication, and consensus-building skills.
- Ability to volunteer time to attend meetings 2–3 times a year, participate in teleconference meetings, attend listening sessions with the Administrator or other senior-level officials;
- Ability to work with others with varying perspectives to develop policy recommendations to the Administrator, and prepare reports and advice letters.

Nominations must include a resume and a short biography describing the professional and educational qualifications of the nominee, as well as the nominee's current business/home address, email address, and daytime telephone number. Interested candidates may self-nominate. All application items are due by March 30, 2023. Please note that EPA's policy is that, unless otherwise prescribed by statute, members generally are appointed to two-year terms. To help the Agency in evaluating the effectiveness of our outreach efforts, please also tell us how you learned of this opportunity.

Dated: January 11, 2023.

Lorraine Reddick,

Designated Federal Officer, Clean Air Act Advisory Committee, Office of Air and Radiation.

[FR Doc. 2023–00739 Filed 1–13–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0912; FR ID 122816]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act 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 collection. 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 PRA comments should be submitted on or before March 20, 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 contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0912.

Title: Sections 76.501, 76.503 and 76.504, Cable Attribution Rules.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business and other for-profit entities.

Number of Respondents and Responses: 40 respondents; 40 responses.

Estimated Time per Response: 1 to 4 hours.

Obligation to Respond: On occasion reporting requirements.

Total Annual Burden: 100 hours.

Total Annual Costs: No costs.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 4(i) and 613(f) of the Communications Act of 1934, as amended.

Needs and Uses: 47 CFR 76.501 Notes 2(f)(1) and 2(f)(3); 47 CFR 76.503 Note 2(b)(3); 47 CFR 76.504 Note 1(b)(1) requires parties with limited partnership interests, parties with interests in Registered Limited Liability Partnerships (''RLLPs''), or parties with interests in Limited Liability Companies (''LLCs'') attempting to insulate themselves from attribution to file a certification of ''non-involvement'' with the Commission. LLCs or RLLPs that submit the non-involvement certification are also required to submit a statement certifying that the relevant state authorization statute permits a partner/member to insulate itself in the manner required by our criteria.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–00649 Filed 1–13–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0652; OMB 3060–1174; FR ID 122814]

Information Collections 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 collection. 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 PRA comments should be submitted on or before March 20, 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 contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0652.

Title: Section 76.309, Customer Service Obligations; Section 76.1600, Electronic Delivery of Notices; Section 76.1602, Customer Service—General Information, Section 76.1603, Customer Service—Rate and Service Changes and 76.1619, Information and Subscriber Bills.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; State, Local or Tribal Government.

Number of Respondents and Responses: 4,210 respondents; 1,109,440 responses.

Estimated Time per Response: 0.0166 to 1 hour.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 4(i) and 632 of the Communications Act of 1934, as amended.

Total Annual Burden: 41,990 hours.

Total Annual Cost: No cost.

Needs and Uses: The Commission requires that the various disclosure and notifications contained in this collection as a means of consumer protection to ensure that subscribers and franchising authorities are aware of cable operators' business practices, current rates, rate changes for programming, service and equipment, and channel line-up changes. Permitting the use of email modernizes the Commission's rules regarding notices required to be provided by MVPDs.

OMB Control Number: 3060–1174.

Title: Section 73.503, Licensing requirements and service; Section 73.621, Noncommercial educational TV stations; Section 73.3527, Local public inspection file of noncommercial educational stations.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents and Responses: 2,200 respondents; 33,000 responses.

Estimated Time per Response: 0.5 hours.

Frequency of Response: Recordkeeping requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority which covers these information collections is contained in 47 U.S.C. 151, 154(i), 303, and 399B.

Total Annual Burden: 16,500 hours.

Total Annual Cost: No cost.

Needs and Uses: The information collection which are approved under this collection are as follows: Audience disclosure: The information collection requirements contained in 47 CFR 73.503(e)(1) require that a noncommercial educational FM broadcast station that interrupts regular programming to conduct fundraising activities on behalf of third-party non-profit organizations must air a disclosure during such activities clearly stating that the fundraiser is not for the benefit of the station itself and identifying the entity for which it is fundraising.

The information collection requirements contained in 47 CFR 73.621(f)(1) require that a noncommercial educational TV broadcast station that interrupts regular programming to conduct fundraising activities on behalf of third-party non-profit organizations must air a disclosure during such activities clearly stating that the fundraiser is not for the benefit of the station itself and identifying the entity for which it is fundraising. The audience disclosure must be aired at the beginning and the end of each fundraising program and at least once during each hour in which the program is on the air.

Retention of information on fundraising activities in local public inspection file: The information collection requirements contained in 47 CFR 73.3527(e)(14) require that each noncommercial educational FM broadcast station and noncommercial educational TV broadcast station that interrupts regular programming to conduct fundraising activities on behalf of a third-party non-profit organization must place in its local public inspection file, on a quarterly basis, the following information for each third-party fundraising program or activity: The date, time, and duration of the fundraiser; the type of fundraising activity; the name of the non-profit organization benefitted by the fundraiser; a brief description of the specific cause or project, if any, supported by the fundraiser; and, to the extent that the station participated in tallying or receiving any funds for the non-profit group, an approximation, to the nearest $10,000, of the total funds raised. The information for each calendar quarter is to be filed by the tenth day of the succeeding calendar quarter (*e.g.,* January 10 for the quarter October–December, April 10 for the quarter January–March, etc.).

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–00652 Filed 1–13–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1081; FR ID 122614]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. 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 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 Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before March 20, 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 contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

OMB Control Number: 3060–1081.

Title: Section 1.2002, 54.201, 54.202 Telecommunications Carriers Eligible for Universal Service Support.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 20 respondents; 20 responses.

Estimated Time per Response: 40 hours.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority is contained in sections 201(b), 214(e)(6), and 303(r) of the Communications Act of 1934, as amended, *47 U.S.C. 201(b), 214(e)(6), 303(r).*

Frequency of Response: Annual reporting requirement.

Total Annual Burden: 800 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature of Extent of Confidentiality: If respondents submit information which respondents believe is confidential, respondents may request confidential treatment of such information pursuant to section 0.459 of the Commission's rules, *47 CFR 0.459.*

Needs and Uses: Designation as an ETC makes a telecommunications carrier eligible to receive support from the universal service high-cost and low-income programs, which support the extension of telecommunications services to underserved rural communities. We note that information collections associated with the Lifeline-only ETC designations in section 54.202 are reflected in Control No. 3060–0819. In the absence of this information collection, the Commission's ability to fulfill its statutory obligation and to oversee the use of federal universal service funds and to combat waste, fraud, and abuse in the use of federal funds would be compromised. A petitioner seeking Commission designation as an ETC must: certify that it offers or intends to offer all services designated for support by the Commission pursuant to section 254(c) of the Act (which service must be offered on a common carriage basis). § 54.201(d)(1); certify that it offers or intends to offer the supported services (as defined in § 54.101, as ''voice telephony services'') either using its own facilities or a combination of its own facilities and resale of another carrier's services. § 54.201(d)(1); provide a description of how the petitioner advertises the availability of supported services and the charges therefor using media of general distribution. § 54.201(d)(2); submit a detailed description of the geographic service area for which the petitioner requests to be designated as an ETC. § 54.201(d)(1); certify that it will comply with the service requirements applicable to the support that it receives. § 54.202(a)(1)(i), submit a five-year plan that describes with specificity proposed improvements or upgrades to the applicant's network throughout its proposed service area, with estimates of the area and population that will be served as a result of the improvements. § 54.202(a)(1)(ii); demonstrate its ability to remain functional in emergency situations by showing that it: has a reasonable amount of back-up power to ensure functionality without an external power source; can reroute traffic around damaged facilities; can manage traffic spikes resulting from emergency situations. § 54.202(a)(2).

An ETC must also demonstrate that it will satisfy applicable consumer protection and service quality standards. A commitment by wireless applicants to comply with the Cellular Telecommunications and internet Association's Consumer Code for Wireless Service will satisfy this requirement. § 54.202(a)(3).

Section 1.2002(a)–(b), requires that before any ''new, modified, and/or renewed instrument of authorization from the Commission,'' including but not limited to an ETC designation, a carrier must certify that neither it, nor any party to the petition, is subject to a denial of benefits pursuant to the Anti-Drug Abuse Act of 1988. § 1.2002(a)–(b).

A carrier seeking ETC designation for any part of Tribal lands shall provide a copy of its petition to the affected tribal government and tribal regulatory authority, as applicable, at the time it files its petition with the Commission. In addition, the Commission will send any public notice seeking comment on any petition for designation as an ETC on Tribal lands, at the time it is released, to the affected tribal government and tribal regulatory authority, as applicable, by the most expeditious means available, § 54.202(c). This information collection addresses the burdens associated with these requirements.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–00643 Filed 1–13–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely

related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than February 16, 2023.

A. Federal Reserve Bank of Philadelphia (William Spaniel, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521. Comments can also be sent electronically to *Comments.applications@phil.frb.org:*

1. *FNCB Bancorp, Inc., Dunmore, Pennsylvania;* to acquire voting shares of Quaint Oak Bancorp Inc., and thereby indirectly acquire voting shares of Quaint Oak Bank, both of Southampton, Pennsylvania, and thereby engage in operating a savings association pursuant to § 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–00724 Filed 1–13–23; 8:45 am]

BILLING CODE P

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Notice of Board Meeting

DATES: January 24, 2023 at 10:00 a.m.

ADDRESSES: Telephonic. Dial-in (listen only) information: Number: 1–202–599–1426, Code: 655 473 40#; or via web: *https://teams.microsoft.com/l/meetup-join/19%3ameeting_ZWU2NDI3MmQtZWJiMS00MTcwLTk2NjctNTg3M2NhODllMDc3%40thread.v2/0?context=%7b%22Tid%22%3a%223f6323b7-e3fd-4f35-b43d-1a7afae5910d%22%2c%22Oid%22%3a%227c8d802c-5559-41ed-9868-8bfad5d44af9%22%7d.*

FOR FURTHER INFORMATION CONTACT: Kimberly Weaver, Director, Office of External Affairs, (202) 942–1640.

SUPPLEMENTARY INFORMATION:

Board Meeting Agenda

Open Session

1. Approval of the December 20, 2022 Board Meeting Minutes
2. Monthly Reports
   (a) Participant Activity Report
   (b) Legislative Report
3. Quarterly Reports
   (c) Budget Review
   (d) Audit Status
4. Quarterly Performance and Annual Investment Policy
5. Annual Expense Ratio Review
6. Federal Employee Viewpoint Survey (FEVS) Update
7. SECURE 2.0 Act Status Update

Closed Session

8. Information covered under 5 U.S.C. 552b (c)(9)(B).

(Authority: 5 U.S.C. 552b (e)(1))

Dated: January 10, 2023.

Dharmesh Vashee,

General Counsel, Federal Retirement Thrift Investment Board.

[FR Doc. 2023–00663 Filed 1–13–23; 8:45 am]

BILLING CODE 6760–01–P

FEDERAL TRADE COMMISSION

[File No. 211 0182]

Glass Container Non-Compete Restrictions; Analysis of Agreements Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before February 16, 2023.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: ''Glass Container Non-compete Restrictions; File No. 211 0182'' on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex Q), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Kathleen Clair (202–326–3435), Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 16, 2023. Write ''Glass Container Non-compete Restrictions; File No. 211 0182'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to protective actions in response to the COVID–19 pandemic and the agency's heightened security screening, postal mail addressed to the Commission will be delayed. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Glass Container Non-compete Restrictions; File No. 211 0182'' 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 Q), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *https://www.regulations.gov*—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *https://www.ftc.gov* to read this document and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before February 16, 2023. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Agreements Containing Consent Orders To Aid Public Comment

I. Introduction

The Federal Trade Commission has accepted, subject to final approval, two consent agreements with, respectively, Ardagh Group S.A., Ardagh Glass Inc., and Ardagh Glass Packaging Inc. (collectively, ''Ardagh'') and O–I Glass Inc. (''O–I''). Ardagh and O–I (collectively, ''the Manufacturers'') each manufacture and sell in the United States glass containers used for food and beverage packaging and employ workers at multiple facilities within the United States for this purpose. The consent agreements settle charges that the Manufacturers violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, through their use of post-employment covenants not to compete (''Non-Compete Restrictions''). A Non-Compete Restriction is a term that, after a worker has ceased working for an employer, restricts the worker's freedom to accept employment with a competing business, to form a competing business, or otherwise to compete with the employer. The complaints allege that each of these companies imposed Non-Compete Restrictions on employees across a variety of positions, including workers whose labor is an important input in the glass container manufacturing process. The complaints allege that this conduct has a tendency or likelihood to limit workers' mobility, to impede rivals' access to the restricted employees' labor, and thus to harm workers, consumers, competition, and the competitive process. As such, the complaints allege that each company has engaged in an unfair method of competition in violation of section 5 of the FTC Act. The proposed orders have been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the consent agreements and the comments received and will decide whether it should withdraw from the consent agreements and take appropriate action or make the proposed orders final. The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the complaints, the consent agreements, or the proposed orders, or to modify their terms in any way.

II. The Complaints

The complaints make the following allegations. The glass containers that Ardagh and O–I manufacture and sell are purchased primarily by companies that sell food, beer, non-alcoholic beverages, and wine and spirits. The glass container industry in the United States is highly concentrated and is characterized by substantial barriers to entry and expansion. Among these barriers, it is difficult to identify and employ personnel with skills and experience in glass container manufacturing.

Each of the Manufacturers has imposed Non-Compete Restrictions on employees across a variety of positions. These restrictions typically required that, for either one or two years following the conclusion of the worker's employment with the Manufacturer, the worker may not be employed by a competing business in the United States. At the outset of the Commission's investigation, over 700 employees of Ardagh and over 1,000 employees of O–I were subject to such restrictions, including employees who work with the glass container plants' furnaces and forming equipment and in other glass production, engineering, and quality assurance roles.

The complaints further allege that each company's use of the challenged Non-Compete Restrictions has the tendency or likely effect of harming competition, consumers, and workers, including by: (i) impeding the entry and expansion of rivals in the glass container industry, (ii) reducing employee mobility, and (iii) causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees.

III. Legal Analysis

Section 5 of the FTC Act prohibits ''unfair methods of competition.'' [1] Congress empowered the FTC to enforce section 5's prohibition on ''unfair methods of competition'' to ensure that the antitrust laws could adapt to changing circumstances and to address the full range of practices that may undermine competition and the competitive process.[2] The Commission

[1] 15 U.S.C. 45(a).

[2] *E.g., Atl. Refining Co.* v. *FTC,* 381 U.S. 357, 367 (1965) (''The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define the many and variable unfair practices which prevail in commerce.'') (internal citations and quotation

Continued

and federal courts have historically interpreted section 5 to prohibit conduct that is inconsistent with the policies or the spirit of the antitrust laws, even if that conduct would not violate the Sherman or Clayton Acts.[3]

The Commission's recent Section 5 Policy Statement describes the most significant general principles concerning whether conduct is an unfair method of competition.[4] A person violates section 5 by (1) engaging in a method of competition (2) that is unfair—*i.e.,* conduct that ''goes beyond competition on the merits.''[5] A method of competition is ''conduct undertaken by an actor in the marketplace'' that implicates competition, whether directly or indirectly.[6] Conduct is unfair if (a) it is ''coercive, exploitative, collusive, abusive, deceptive, predatory,'' ''involve[s] the use of economic power of a similar nature,'' or is ''otherwise restrictive and exclusionary,'' and (b) ''tend[s] to negatively affect competitive conditions'' for ''consumers, workers, or other market participants''—for example by impairing the opportunities of market participants, including potential entrants; interfering with the normal mechanisms of competition; limiting choice; reducing output; reducing innovation; or reducing competition between rivals.[7] The two parts of this test for unfairness ''are weighed according to a sliding scale'': where there is strong evidence for one part of the test, ''less may be necessary'' to satisfy the other part.[8] In appropriate circumstances, conduct may be condemned under section 5 without defining a relevant market, proving market power, or showing harm through a rule of reason analysis.[9]

In addition, the Commission may consider any asserted justifications for a particular practice.[10] Any such inquiry would focus on ''[t]he nature of the harm'' caused by the method of competition: ''the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind.''[11] Unlike ''a net efficiencies test or a numerical cost-benefit analysis,'' this analysis examines whether ''purported benefits of the practice'' redound to the benefit of other market participants rather than the respondent.[12] Established limits on defenses and justifications under the Sherman Act ''apply in the Section 5 context as well,'' including that the justifications must be cognizable, non-pretextual, and narrowly tailored.[13]

As described below, the factual allegations in the complaints would support concluding that each Respondent's use of the challenged Non-Compete Restrictions is an unfair method of competition under section 5. First, each Respondent's use of Non-Compete Restrictions is a method of competition. The challenged Non-Compete Restrictions are not mere ''condition[s] of the marketplace, not of the respondent's making.''[14] Rather, these are contract provisions that each Respondent required its employees to enter into, which, by their terms, restricted the employment options available to affected workers and therefore implicated competition for labor.

Second, each Respondent's use of the challenged Non-Compete Restrictions ''goes beyond competition on the merits''[15] because it is coercive, exploitative, exclusionary, and restrictive as these terms are used in the FTC Section 5 Policy Statement. Non-Compete Restrictions typically result from employers' outsized bargaining power compared to that of employees. And, by reducing workers' negotiating leverage vis-à-vis their current employers, Non-Compete Restrictions tend to impair workers' ability to negotiate for better pay and working conditions.[16] The complaints here also allege that the challenged Non-Compete Restrictions had a tendency or likely effect of impeding the entry and expansion of rivals, as discussed below. As such, they are exclusionary in a manner that violates the spirit and policies of the Sherman Act.[17] Finally, while competition on the merits ''may include, for example . . . attracting employees and workers through the offering of better employment terms,''[18] Non-Compete Restrictions, by contrast, create a legal impediment that restricts workers from leaving their employment even if they find more attractive employment terms elsewhere. For this reason, Non-Compete Restrictions have long been considered proper subjects for

marks omitted); *see also* Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act,* Commission File No. P221202 (Nov. 10, 2022) [hereinafter ''FTC Section 5 Policy Statement (2022)''], at 5 (''Congress struck an intentional balance when it enacted the FTC Act. It allowed the Commission to proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts, but it did not establish a private right of action under Section 5, and it limited the preclusive effects of the FTC's enforcement actions in private antitrust cases under the Sherman and Clayton Acts.'').

[3] *E.g., FTC* v. *Motion Picture Advert. Serv. Co.,* 344 U.S. 392, 394–95 (1953) (''The 'Unfair methods of competition', which are condemned by [Section] 5(a) of the [FTC] Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.'') (internal citations omitted); *Fashion Originators' Guild of Am.* v. *FTC,* 312 U.S. 457, 463 (1941) (Commission may ''suppress'' conduct whose ''purpose and practice . . . runs counter to the public policy declared in the Sherman and Clayton Acts''); *FTC* v. *Brown Shoe,* 384 U.S. 316, 321 (1966) (Commission's power reaches ''practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws''); *E.I. du Pont de Nemours & Co.* v. *FTC (Ethyl),* 729 F.2d 128, 136–37 (2d Cir. 1984) (Commission may bar ''conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit''); *see also FTC* v. *Ind. Fed'n of Dentists,* 476 U.S. 447, 454 (1986); *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 244 (1972); *FTC* v. *R.F. Keppel & Bros., Inc.,* 291 U.S. 304, 309–10 (1934).

[4] FTC Section 5 Policy Statement (2022), *supra* note 2.

[5] *Id.* at 8–10.

[6] *Id.* at 8.

[7] *Id.* 8–10.

[8] *Id.* at 9.

[9] *Id.* at 10.

[10] *Id.* at 10–12 (''There is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case, and some courts have declined to consider justifications altogether.'').

[11] *Id.* at 11.

[12] *Id.*

[13] *Id.* at 11–12.

[14] *See id.* at 8.

[15] *See id.* at 8.

[16] *See, e.g.,* Dep't of the Treasury, Report, *Non-compete Contracts: Economic Effects and Policy Implications* (Mar. 2016) at 10, *https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf* (''When workers are legally prevented from accepting competitors' offers, those workers have less leverage in wage negotiations [with their current employer.]''). The strength of a worker's negotiating position with their current employer is largely based on the suitability of their next-best alternative employer (*i.e.,* the alternative employer that would offer the employee the best combination of wages and working conditions, net of any switching costs). Competing employers who fall within the scope of a Non-Compete Agreement, typically employers in the same industry and geographic area—are often the strongest competitor to a worker's current employer for that worker's labor. Such employers typically place the highest value on the worker's industry-specific skills, and workers generally face lower switching costs when moving to such employers. *See, e.g.,* David J. Balan, *Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?* 15 (2021), *https://equitablegrowth.org/working-papers/labor-non-compete-agreements-tool-for-economic-efficiency-or-means-to-extract-value-from-workers/* (noting that workers often ''are barred by the non-compete from [switching to] the[ir] best available alternative jobs'').

[17] *See generally, e.g., ZF Meritor* v. *Easton Corp.,* 696 F.3d 254, 278–79 (3d Cir. 2012); *McWane, Inc.* v. *Fed. Trade Comm'n,* 783 F.3d 814, 835 (11th Cir. 2005); *Tampa Elec. Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 328 (1961); *Geneva Pharms. Tech. Corp.* v. *Barr Labs.,* 386 F.3d 485, 509 (2d Cir. 2004); *see also* FTC Section 5 Policy Statement (2022), at 8, 9, 12.

[18] FTC Section 5 Policy Statement (2022), *supra* note 2, at 8–9.

scrutiny under the nation's antitrust laws.[19]

Third, the factual allegations in the complaints support a finding that each Respondent's challenged conduct has the tendency or likely effect of negatively affecting competition in the U.S. glass container industry. Specifically, the complaints allege that (i) each of the Respondents required employees across a variety of positions, including salaried employees who work with the glass container plants' furnace and forming equipment and in other glass production engineering, and quality assurance roles, to refrain from working for competing glass manufacturing companies for at least one year after the conclusion of their employment, (ii) the ability to identify and employ personnel with skill and experience in glass container manufacturing is a substantial barrier to entry and expansion, and (iii) the challenged restrictions have a tendency or likely effect of impeding the entry and expansion of rivals.

Fourth, the factual allegations in the complaints support a finding that each Respondent's challenged conduct has the tendency or likely effect of negatively affecting competitive conditions affecting workers in the U.S. glass container industry. In well-functioning labor markets, workers compete to attract employers, and employers compete to attract workers. For example, workers may attract potential employers by offering different skills and experience levels. Employers may attract potential employees by offering higher wages, better hours, a more convenient job location, more autonomy, more benefits, or a different set of job responsibilities. Because factors beyond price (wages) are important to both workers and employers in the job context, labor markets are ''matching markets'' as opposed to ''commodity markets.''[20]

In general, in matching markets, higher-quality matches tend to result when both sides—here, workers and employers—have more options available to them.[21] Having more options on both sides could, for example, allow for matching workers with jobs in which their specific skills are more valued, the hours demanded better fit their availability, or their commutes are shorter and more efficient. Matches could also be better in that various employers' compensation packages, which differ in terms of pay and benefits, are coupled with employees who value those offerings more and will, for example, tend to stay at those jobs longer as a result. Competition for labor allows for job mobility and benefits workers by allowing them to accept new employment, create or join new businesses, negotiate better terms in their current jobs, and generally pursue career advancement as they see fit.[22]

By preventing workers and employers from freely choosing their preferred jobs and candidates, respectively, Non-Compete Restrictions tend to impede and undermine competition in labor markets.[23] Research suggests that Non-Compete Restrictions measurably reduce worker mobility,[24] lower workers' earnings,[25] and increase racial and gender wage gaps.[26] At the individual level, a Non-Compete Restriction can force a worker who wishes to leave a job into a difficult choice: stay in the current position despite being able to receive a better job elsewhere, take a position with a competitor at the risk of being found out and sued, or leave the industry entirely. In this way, Non-Compete Restrictions tend to leave workers with fewer and lower-quality competing job options,[27] thereby reducing workers' bargaining leverage with their current employers and resulting in lower wages, slower wage growth, and less favorable working conditions.[28]

Here, the complaints allege that the challenged Non-Compete Restrictions have the tendency or likely effect of reducing employee mobility and causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees.

Finally, as the complaints allege, any legitimate objectives of Respondents' use of the challenged Non-Compete Restrictions could be achieved through significantly less restrictive means, including, for example, by entering confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information. Indeed, each of the Respondents nullified the challenged Non-Compete Restrictions after learning of the Commission's investigation, apparently without incurring any notable impediment to their ability to achieve any legitimate business objectives.

IV. Proposed Orders

The proposed orders seek to remedy the Respondents' unfair methods of competition. Section II of each proposed order prohibits the Respondent from entering or attempting to enter, maintaining or attempting to maintain, or enforcing or attempting to enforce a Non-Compete Restriction with an Employee, or communicating to an Employee or a prospective or current employer of that Employee that the Employee is subject to a Non-Compete Restriction.[29] Paragraph IV.A requires the Respondent to take all steps necessary to void and nullify all existing Non-Compete Restrictions with Employees within 30 days after the date on which the proposed order is issued.[30]

The proposed orders also contain provisions designed to ensure compliance. Paragraph III.A of each proposed order requires the Respondent to provide written notice to Employees that have or recently had a Non-Compete Restriction that (i) the restriction is null and void, and (ii) the Employees may, after they stop working

[19] *See, e.g., U.S.* v. *Am. Tobacco Co.,* 221 U.S. 106 (1911); *Newburger, Loeb & Co., Inc.* v. *Gross,* 563 F.2d 1057, 1082 (2d Cir. 1977); *Bradford* v. *N.Y. Times Co.,* 501 F.2d 51 (2d Cir. 1974); *Golden* v. *Kentile Floors, Inc.,* 512 F.2d 838 (5th Cir. 1975); *U.S.* v. *Empire Gas Corp.,* 537 F.2d 296 (8th Cir. 1976); *Aydin Corp.* v. *Loral Corp.,* 718 F.2d 897 (9th Cir. 1983); *Consultants & Designers, Inc.* v. *Bulter Serv. Grp., Inc.,* 720 F.2d 1553 (11th Cir. 1983).

[20] *See generally* David H. Autor, *Wiring the Labor Market,* 15 J. of Econ. Perspectives 25–40 (2001); Enrico Moretti, *Local Labor Markets,* in 4b Handbook of Labor Economics 1237–1313 (2011).

[21] *See, e.g.,* Dep't of the Treasury, Report, *The State of Labor Market Competition* (Mar. 7, 2022) at 5–7, *https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf;* Dep't of the Treasury, Report, *Non-compete Contracts: Economic Effects and Policy Implications, supra* note 16, at 3–5, 22–23.

[22] *See, e.g.,* Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants As A Hybrid Form of Employment Law,* 155 U. Pa. L. Rev. 379, 407 (2006).

[23] *See, e.g.,* Dep't of the Treasury, Report, *The State of Labor Market Competition, supra* note 21, at 5–7.

[24] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (2020), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381;* Evan Starr, J.J. Prescott, & Norm Bishara, *The Behavioral Effects of (Unenforceable) Contracts,* 36 J. L., Econ., & Org. 633, 652 (2020); Evan Starr, Justin Frake, & Rajshree Agarwal, *Mobility Constraint Externalities,* 30 Org. Sci. 961, 963–65, 977 (2019); Matt Marx, Deborah Strumsky, & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment,* 55 Mgmt. Sci. 875, 884 (2009).

[25] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements,* 68 Mgmt. Sci. 143, 144 (2021); Johnson, Lavetti, & Lipsitz, *supra* note 24.

[26] Johnson, Lavetti, & Lipsitz, *supra* note 24.

[27] *See, e.g.,* Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 21–22 (Dec. 24, 2019), *https://ssrn.com/abstract=3040393.*

[28] *See, e.g.,* Johnson, Lavetti, & Lipsitz, *supra* note 24; David J. Balan, *Labor Practices Can be an Antitrust Problem Even When Labor Markets are Competitive,* CPI Antitrust Chronicle (May 2020) at 8.

[29] *See* Decision & Order ¶ II.

[30] *Id.* ¶ IV.A.

for Respondent, seek or accept jobs with any other company or person, run their own businesses, and compete with the Respondent.[31] Paragraph III.B requires Respondents to notify new Employees that they will not be subject to Non-Compete Restrictions by including a specified notice in the documentation provided to new Employees upon hire.[32]

Other paragraphs contain standard provisions regarding compliance reports, notice of changes in Respondents, and access for the FTC to documents and personnel.[33] The proposed orders' prohibitions apply only to Respondents' Employees within the United States, and the term of each proposed order is twenty years.[34]

By direction of the Commission, Commissioner Wilson dissenting.

April J. Tabor,

Secretary.

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya

Today the Commission announced actions against several companies and their executives for imposing noncompete restrictions on their workers. As noted in the complaints, the Commission finds that the use of noncompetes by these firms constituted an unfair method of competition and violated Section 5 of the FTC Act. I am deeply grateful to our talented staff in the Bureau of Competition for their thorough and lengthy efforts to investigate and resolve these matters. The relief secured through these actions will benefit both workers and competition. Though all three actions target the unlawful use of noncompetes, they also reveal the distinct grounds on which noncompetes can be found to violate Section 5.

The Commission's action against Prudential and its two owners alleged that the firm's use of noncompetes against the security guards it employed was coercive, exploitative, and tended to negatively affect competitive conditions. As stated in the complaint, Prudential required its 1,000+ security guards to sign noncompetes as a condition of employment, preventing them from working for a competitor within a 100-mile radius and for two years after departing. The security guards earned low wages, with many earning slightly above minimum wage, and received minimal training from Prudential. The company also included in its employees' contract a ''liquidated damages'' clause, which required that employees pay Prudential a $100,000 penalty for violating the noncompete. Although a Michigan state court held that these noncompetes were unreasonable and unenforceable,[1] Prudential continued to repeatedly impose them. It also sued both former employees who had departed for jobs with rivals as well as the rival firms themselves, ultimately blocking workers from switching to jobs with higher wages.

The FTC's order requires Prudential to terminate its noncompetes with all the security guards it had hired and to actively notify all employees that these noncompete clauses are now null and void. Notably, Prudential recently exited the security guard business and sold nearly all of its assets. Although the new owner of Prudential's assets does not use noncompetes, the relief that FTC has secured is critical for addressing the harmful effects of Prudential's practices. For one, Prudential's history of aggressive enforcement could be reasonably expected to chill former employees' efforts to work in the security business and to dissuade rivals from hiring them.[2] Workers earning minimum wage would be rational to avoid even the slightest risk of facing a $100,000 penalty and associated lawsuits, and there is no guarantee that Prudential's former employees would even know that Prudential had exited the market and that the new owner states it has no plans to enforce the prior noncompetes. The order also covers Prudential's former owners, Greg Wier and Matthew Keywell, as well as any future business that they control—ensuring that they cannot repeat their coercive and exploitative tactics.

The Commission's actions against Owens-Illinois and Ardagh, meanwhile, target noncompetes in the highly concentrated glass manufacturing sector. Three firms dominate nationally, and these incumbents imposed noncompete restrictions on, collectively, thousands of employees, including those working in key glass production, engineering, and quality assurance roles. As the FTC's complaint notes, these noncompetes locked up highly specialized workers, tending to impede the entry and expansion of rivals and tending to negatively affect competitive conditions in violation of Section 5. While I cannot disclose confidential information uncovered through this investigation, the noncompetes used by Owens-Illinois and Ardagh had the potential to deprive aspiring entrants of access to a critical talent pool, thereby impeding entry into a relatively consolidated industry that has experienced tight supply and unmet customer demand. Moreover, when a small number of dominant players engage in the same restrictive practices, the negative effects can compound. Section 5 of the FTC Act is uniquely designed to address this type of conduct, where the cumulative effect of parallel actions can in the aggregate tend to negatively affect competitive conditions.[3] The relief secured by the FTC prohibits the firms from imposing, attempting to impose, enforcing, or threatening to enforce a noncompete with covered workers. The firms must also provide written notice that the noncompetes are null and void.

My colleague Commissioner Wilson dissents from these actions, claiming that they mark a ''radical departure'' from precedent.[4] Respectfully, I disagree.[5] The Supreme Court has

[31] *Id.* ¶ III.A; App'x B.

[32] *Id.* ¶ III.B.

[33] *Id.* ¶¶ IV–VII.

[34] *Id.* ¶ IX.

[1] *Prudential Security, Inc.* v. *Pack,* No. 18–015809–CB (Mich. Cir. Ct. Dec. 13, 2018).

[2] In fact, there is considerable evidence that noncompetes hinder worker mobility even in states that do not enforce them. See, *e.g.,* Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts,* 36 J.L. Econ. Org. 633 (2020).

[3] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) [hereinafter ''Section 5 Policy Statement''], *https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.*

[4] Commissioner Wilson argues that our enforcement actions are in direct tension with a Seventh Circuit decision, *Snap-On Tools Corp.* v. *FTC,* 321 F.2d 825 (7th Cir. 1963). *Snap-On Tools* is distinguishable on several fronts, including the fact that it concerned noncompetes used in the business-to-business context, not those used by an employer to restrict its workers. Additionally, while the majority stated that it is ''not prepared to say that [the termination restriction] is a per se violation of the antitrust laws,'' *id.* at 837, the Commission did not argue for a per se rule and so the issue was not litigated. *Id.* at 830–31; *id.* at 839 (Hastings, C.J., dissenting).

[5] It is important not to conflate recent Commission practice, which held off on enforcing the full scope of Section 5, with longstanding legal precedent, which firmly affirms that Section 5 reaches beyond the Sherman and Clayton Acts. Reactivating Section 5 and ensuring that our approach is fully faithful to the legal authorities that Congress gave us is critical for promoting the rule of law and for ensuring the democratic legitimacy of our work. *See* Section 5 Policy Statement, *supra* note 2 (reviewing and citing over 80 cases where the Commission pled violations of standalone Section 5); Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (Nov. 10, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmtKhanSlaughterBedoyaStmt.pdf;* Remarks of Chair Lina M. Khan As Prepared for Delivery at Fordham Annual Conference on International Antitrust Law & Policy (Sept. 16, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.*

affirmed the Commission's authority to challenge ''inherently coercive'' practices like those alleged against Prudential.[6] And it is clear that the widespread use of noncompetes in a highly concentrated industry—to the point where labor mobility is so reduced that entry may be thwarted—tends to negatively affect competitive conditions in ways that Section 5 is designed to prevent.[7]

Today's actions should put companies and the executives that run them on notice that using noncompetes to restrain workers and restrict competition invites legal scrutiny. We will continue to use our legal authorities to protect all Americans, including by investigating and, where appropriate, challenging restrictive contractual terms that tend to negatively affect competitive conditions.

Dissenting Statement of Commissioner Christine S. Wilson

Today, the Commission announced that it has accepted, subject to final approval, consent agreements with two companies in the glass container industry. The consents resolve allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates section 5 of the FTC Act. These cases, which allege stand-alone violations of section 5, are among the first to employ the approach that the recently issued Section 5 Policy Statement [1] describes. For the reasons explained below, I dissent.

Context is important. Under current leadership, the Commission has demanded significant volumes of information from parties under investigation, but not all requested information is related to traditional competition analysis.[2] In addition, this Commission has declared its willingness to take losing cases to court.[3] When faced with the expense of complying with expansive demands for documents and other material, and the possibility of an enforcement action regardless of the merits, parties under investigation rationally may express a willingness to settle. Under these circumstances, staff's investigation typically is quite limited.

Noteworthy Aspects of the Complaints

There are several noteworthy aspects of the Complaints issued against O–I Glass and Ardagh. The first is the brevity of these documents; each Complaint runs three pages, with a large percentage of the text devoted to boilerplate language. Given how brief they are, it is not surprising that the complaints are woefully devoid of details that would support the Commission's allegations. In short, I have seen no evidence of anticompetitive effects that would give me reason to believe that respondents have violated section 5 of the FTC Act.

The second noteworthy aspect of these complaints is their omission of any allegations that the non-compete provisions at issue are unreasonable, a significant departure from hundreds of years of legal precedent. The first complaint alleges that O–I Glass entered into non-compete agreements with employees that prohibited them from working for competitors of O–I in the United States for one year following the conclusion of their employment with O–I.[4] And the second complaint alleges that Ardagh's contracts typically prohibited employees from performing the same or substantially similar services to those the employee performed for Ardagh for any glass container competitor of Ardagh in the United States, Canada, or Mexico for two years following the conclusion of their employment with Ardagh.[5]

Courts have long analyzed the temporal length, subject matter, and geographic scope of non-compete agreements to determine whether those agreements are unreasonable; when non-compete agreements are not found to be unreasonable, courts repeatedly have held that they do not violate the antitrust laws.[6] In the cases before us, the Commission makes no reasonableness assessment regarding the duration or scope of the non-compete clauses. Instead, it seems to treat the non-compete clauses as per se unlawful under Section 5 of the FTC Act. But the Seventh Circuit held that under Section 5, ''[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]'' [7] Notably, the Seventh Circuit further found that ''even if [the non-compete] restriction is unreasonable as to geographic scope,'' it was ''not prepared to say that it is a per se violation of the antitrust laws.'' [8]

A third noteworthy aspect of the complaints concerns the absence of allegations that the non-compete clauses in the O–I Glass and Ardagh contracts were enforced.[9] Absent efforts to enforce a non-compete provision, courts have been unwilling to find a violation of the antitrust laws.[10]

Fourth, the complaints assert that the non-compete clauses impede entry or expansion of rivals in the glass container industry, based on a claim that barriers to entry in the glass container industry include ''the ability to identify and employ personnel with skills and experience in glass container manufacturing.'' [11] But the Commission makes no factual allegations regarding the inability of any rival to enter or expand. Moreover, this asserted barrier to entry and expansion in the industry

[6] *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357 (1965); *FTC* v. *Texaco, Inc.,* 393 U.S. 223 (1968); *E.I. du Pont de Nemours & Co.* v. *FTC (Ethyl),* 729 F.2d 128 (2d Cir. 1984).

[7] *FTC* v. *Motion Picture Advert. Serv. Co.,* 344 U.S. 392 (1953); *Standard Oil Co. of Cal.* v. *United States,* 337 U.S. 293, 309 (1949).

[1] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.*

[2] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *There's Nothing New Under the Sun: Reviewing Our History to Foresee the Future,* Keynote Address at GCR Live Merger Control 8–9, Virtually and Brussels, Belgium (October 7, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1597798/gcr_merger_control_keynote_final.pdf.*

[3] *See* Lina M. Khan, Chair, Fed. Trade Comm'n, *How FTC Chair Lina Khan wants to modernize the watchdog agency,* Marketplace interview with Kimberly Adams, *https://www.marketplace.org/shows/marketplace-tech/how-ftc-chair-lina-khan-wants-to-modernize-the-watchdog-agency/,* (June 17, 2022) (''We always want to win the cases that we're bringing. That said, it's no secret that in certain areas, you know, there's still work to be done to fully explain to courts how our existing laws and existing authorities, which go back over 100 years, apply in new context. . . . And I think there can be a serious cost of inaction. So we really have a bias in favor of action.''); David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators,* New York Times, *https://www.nytimes.com/2022/12/07/technology/meta-vr-antitrust-ftc.html* (Dec. 7, 2022) (''In April, Ms. Khan said at a conference that if 'there's a law violation'' and agencies ''think that current law might make it difficult to reach, there's huge benefit to still trying.' She added that any courtroom losses would signal to Congress that lawmakers needed to update antitrust laws to better suit the modern economy. 'I'm certainly not somebody who thinks that success is marked by a 100 percent court record,' she said.'').

[4] O–I Glass, Inc. Complaint ¶ 7.

[5] Ardagh Group S.A. Complaint ¶ 7.

[6] *See United States* v. *Empire Gas Corp.,* 537 F.2d 296, 307–08 (8th Cir. 1976); *Lektro-Vend Corp.* v. *Vendo Co.,* 660 F.2d 255, 267 (7th Cir. 1981); *Newburger, Loeb & Co., Inc.* v. *Gross,* 563 F.2d 1057, 1081–83 (2d Cir. 1977); *Bradford* v. *New York Times Co.,* 501 F.2d 51, 57–59 (2d Cir. 1974).

[7] *Snap-On Tools Corp.* v. *Fed. Trade Comm'n,* 321 F.2d 825, 837 (7th Cir. 1963).

[8] *Id.*

[9] *Compare* O–I Glass, Inc. Complaint and Ardagh Group S.A. Complaint *with* Prudential Security, Inc. Complaint ¶¶ 18–21.

[10] *O-Regan* v. *Arbitration Forums, Inc.,* 121 F.3d 1060, 1065–66 (7th Cir. 1997) (''to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation.''); *Lektro-Vend Corp.* v. *Vendo Co.,* 660 F.2d at 267.

[11] O–I Glass, Inc. Complaint ¶ 6; Ardagh Group S.A. Complaint ¶ 6.

is newly alleged by the Commission; in 2013, the Commission challenged the proposed merger of Ardagh Group S.A. and Saint-Gobain Containers, Inc. following a lengthy and thorough investigation. The complaint described in detail the barriers to entry in the glass container industry but did not reference the difficulty of obtaining experienced employees.[12]

Continuing in this vein, the complaints here also assert that the non-compete provisions reduce employee mobility and ''caus[e] lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardships to employees.'' [13] But the complaints do not identify a relevant market for skilled labor as an input to glass container manufacturing, and fail to allege a market effect on wages or other terms of employment. Even the Analysis to Aid Public Comment relies only on academic literature that discusses the effects of non-competes, albeit not in the glass container industry.

Similarly, the complaints allege that more than 1,000 employees at O–I and more than 700 employees at Ardagh were subject to non-compete agreements when the Commission opened the investigation, and that some of those employees were essential to a rival's entry or expansion.[14] The allegations imply that, conversely, many employees that were subject to non-compete agreements did *not* have industry-specific skills.[15] Consider, for example, employees in the glass container industry who worked in the fields of human resources or accounting, with skills sets that are easily transferable across industries. If they were subject to non-competes following their departure from O–I or Ardagh, these employees easily could seek employment in other industries, including retailing and the services sector. It is implausible that precluding employees with easily transferable skill sets from working for rivals in glass container manufacturing would have an impact on competition in any appropriately defined relevant market.

Absent any evidence, the Commission adopts the approach of the Section 5 Policy Statement and baldly alleges that the use of non-compete agreements ''has a tendency or likely effect of harming competition, consumers, and workers,'' offering only a hypothesized outcome.

Business Justifications

The complaints improperly discount business justifications for the non-compete provisions. First, they allege in conclusory fashion that ''[a]ny legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information.'' [16] This assertion is unsubstantiated.

Second, the complaints do not address the business justification and procompetitive benefit of employer-provided training. The complaints allege that identifying and employing personnel with skills and experience in glass container manufacturing is a barrier to entry, which implies that employee training and experience is essential and that the desired training is not available from sources other than industry incumbents. Firm-provided training is an accepted and documented business justification for non-compete clauses; firms are less willing to invest in employee training if employees leave the firm after receiving training.[17] The complaints do not allege that there is a less restrictive alternative for non-compete provisions regarding firm-provided training. Moreover, it is ironic that the orders issued in these matters may lead to reduced firm-sponsored training, which may (1) reduce the available trained labor that would allow entry or expansion of competing firms and (2) harm the same employees at O–I Glass and Ardagh that the cases claim to help.

Although the complaints are dismissive of business justifications, the relief obtained implicitly acknowledges the existence of legitimate business justifications for non-compete clauses. Specifically, the Agreements Containing Consent Orders prohibit the use of non-compete clauses for covered employees, which are described by a list of positions in Appendix A. Careful review of those lists reveals that senior executives and employees involved in research and development are not included. Although not acknowledged in the Analysis to Aid Public Comment, the Commission here implicitly has credited at least some business justifications for non-compete clauses.

Concerns for Due Process

I am concerned whether the respondents had notice that their conduct would be viewed as unlawful. As noted above, the allegations here depart from a centuries-long line of precedent regarding the appropriate analysis of the legality of non-compete provisions, and conflict with a Seventh Circuit holding specific to section 5 of the FTC Act. The allegations are premised on the Section 5 Policy Statement issued in November 2022, which also represents a radical departure from precedent. But the complaints in these matters challenge conduct of O–I Glass and Ardagh that predates the November 2022 Section 5 Policy Statement. The Second Circuit explained in *Ethyl* that ''the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.'' [18] Given the state of the law for hundreds of years prior to this enforcement challenge, I believe notice was lacking.

[FR Doc. 2023–00695 Filed 1–13–23; 8:45 am]

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[12] The complaint in that merger challenge alleged that: ''Effective entry or expansion into the relevant markets would neither be timely, likely, or sufficient to counteract the Acquisition's likely anticompetitive effects. The barriers facing potential entrants include the large capital investment necessary to build a glass plant, the need to obtain environmental permits, the high fixed costs of operating a glass plant, existing long-term contracts that foreclose much of the market, the need for specific manufacturing knowledge that is not easily transferred from other industries, and the molding technologies and extensive mold libraries already in place at existing manufacturers.'' In the Matter of Ardagh Group S.A. and Saint-Gobain Containers, Inc., File No. 131–0087, *https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf* (2013) Complaint ¶ 42.

[13] O–I Glass, Inc. Complaint ¶ 8; Ardagh Group S.A. Complaint ¶ 8.

[14] O–I Glass, Inc. Complaint ¶ 7; Ardagh Group S.A. Complaint ¶ 7.

[15] *See also* O–I Glass, Inc. Decision and Order Appendix A and Ardagh Group S.A. Decision and Order Appendix A (listing positions for which the use of non-compete agreements is prohibited, which includes positions that have general skills).

[16] O–I Glass, Inc. Complaint ¶ 9; Ardagh Group S.A. Complaint ¶ 9.

[17] *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses,* 72 I.L.R, Rev 783, 796–97 (2019); Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?,* 57 J. Hum. Res. 689, 711 (2022).

[18] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984). *See also id.* at 136 (''Review by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied.'').

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers CMS–10108, CMS–10243, CMS–10275 and CMS–10062]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by March 20, 2023.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10108 Medicaid Managed Care and Supporting Regulations

CMS–10243 Testing Experience and Functional Tools (TEFT): Functional Assessment Standardized Items (FASI) Based on the CARE Tool

CMS–10275 The Home Health Care CAHPS® Survey (HHCAHPS)

CMS–10062 Collection of Diagnostic Data in the Abbreviated RAPS Format

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicaid Managed Care and Supporting Regulations; *Use:* Information collected includes information about managed care programs, grievances and appeals, enrollment broker contracts, and managed care organizational capacity to provide health care services. Medicaid enrollees use the information collected and reported to make informed choices regarding health care, including how to access health care services and the grievance and appeal system. States use the information collected and reported as part of its contracting process with managed care entities, as well as its compliance oversight role. We use the information collected and reported in an oversight role of state Medicaid managed care programs.

Among the proposed changes, this iteration: (1) adds burden for a new submission process, via online portal, for states to submit contracts to CMS and to note an omission from prior packages for the burden for states to submit their managed care plan contracts via email, and (2) adds burden to provide a reporting template for those states that implemented COVID–19 specific risk mitigation strategies to their managed care plan contracts. This template will ensure that states provide consistent and complete reporting of the outcomes of these risk mitigation strategies. *Form Number:* CMS–10108 (OMB control number: 0938–0920); *Frequency:* Occasionally; *Affected Public:* Private sector (business or other for-profit and not-for-profit institutions), and State, local or Tribal Government; *Number of Respondents:* 5,053; *Total Annual Responses:* 13,743,255; *Total Annual Hours:* 1,682,636. (For policy questions regarding this collection contact Amy Gentile at 410–786–3499.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Testing Experience and Functional Tools (TEFT): Functional Assessment Standardized Items (FASI) Based on the CARE Tool; *Use:* As part of the National Testing Experience and Functional Assessment Tools (TEFT) demonstration, CMS tested the use of functional assessment standardized items (FASI) among community-based long term services and supports (CB–LTSS) populations. The TEFT initiative built on the national efforts to create electronically exchangeable data across providers and the caregiving team to develop more person-centered services under the Medicare and Medicaid programs. After conclusion of the field test, states have begun implementing the related FASI performance measures and the FASI team continues to recruit additional states. While the team has not conducted data collection since the FASI field test in 2017, and that there are no concrete immediate plans to collect new data, new data collection to support measure re-endorsement activities due in 2025 will be needed. The data collection may also need to be

conducted sooner if significant changes are made to the measures' technical specifications, in the interim. Due to the uncertainty on when data collection may need to be done, an extension of the existing package and a subsequent revision would facilitate expedient resumption of the data collection and testing efforts, especially given the quick turnaround time for activities (such as National Quality Forum measure endorsement) which depend on the data collection.

FASI is based on a subset of the July 27, 2007 (72 FR 144) Continuity Assessment Record and Evaluation (CARE) items which are now included in post-acute setting Federal assessment forms for nursing facilities—Resident Assessment Instrument (RAI) Minimum Data Set (MDS), Inpatient Rehabilitation Facilities Patient Assessment Instrument (IRF–PAI), and Long Term Care Hospitals Continuity Assessment Record & Evaluation (CARE) Data Set (LCDS) to measure function in a standardized way. The FASI items include the standardized mobility and self-care items included in the MDS, IRF–PAI, and, LCDS as well as some additional mobility items appropriate to measuring independence in the community and personal preferences or goals items related to function. Also included are certain instrumental activities of daily living and some modified caregiver assistance items from the Home Health Outcome and Assessment Information Set (OASIS) tool. A few additional items to describe the populations' age, gender, and geographic area of residence are also included. Use of the same items to measure functional status in nursing facilities and community-based programs will help states report on their rebalancing efforts. Also, because these items will have electronic specifications developed by CMS, they can assist state efforts to develop exchangeable electronic data to follow the person across services and estimate total costs as well as measure functional status across time. The complete FASI set is included in this information collection request. *Form Number:* CMS–10243 (OMB control number: 0938–1037); *Frequency:* On occasion; *Affected Public:* Individuals and Households; *Number of Respondents:* 1,570; *Total Annual Responses:* 1,570; *Total Annual Hours:* 785. (For policy questions regarding this collection contact Kerry Lida at 410–786–4826.)

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* The Home Health Care CAHPS® Survey (HHCAHPS); *Use:* The national implementation of the Home Health Care CAHPS Survey is designed to collect ongoing data from samples of home health care patients who receive skilled services from Medicare-certified home health agencies. The survey is necessary because it fulfills the goal of transparency with the public about home health patient experiences.

The survey is used by Medicare-certified home health agencies to improve their internal quality assurance in the care that they provide in home health. The HHCAHPS survey is also used in a Medicare payment program. Medicare-certified home health agencies (HHAs) must contract with CMS-approved survey vendors that conduct the HHCAHPS on behalf of the HHAs to meet their requirements in the Home Health Quality Reporting Program. *Form Number:* CMS–10275 (OMB control number: 0938–1066); *Frequency:* Quarterly; *Affected Public:* Individuals and Households; *Number of Respondents:* 1,052,966; *Total Annual Responses:* 1,149,975; *Total Annual Hours:* 420,576. (For policy questions regarding this collection contact Lori Luria at 410–786–6684).

4. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Collection of Diagnostic Data in the Abbreviated RAPS Format from Medicare Advantage Organizations for Risk Adjusted Payments; *Use:* Under section 1894(d) of the Act, CMS must make prospective monthly capitated payments to PACE organizations in the same manner and from the same sources as payments to organizations under section 1853. Section 1894(e)(3)(A)(i) requires in part that PACE organizations collect data and make available to the Secretary reports necessary to monitor the cost, operation, and effectiveness of the PACE program.

CMS makes advance monthly per-enrollee payments to organizations, and is required to risk-adjust the payments based on predicted relative health care costs for each enrollee, as determined by enrollee-specific diagnoses and other factors, such as age. CMS has collected diagnosis data from organizations in two formats: (1) comprehensive data equivalent to Medicare fee-for-service claims data (often referred to as encounter data) and (2) data in an abbreviated format known as RAPS data, named for the Risk Adjustment Processing System (RAPS). The subject of this PRA package is collection of RAPS data. Encounter data collection is addressed in a separate PRA package which is approved under OMB control number 0938–1152.

Risk adjustment allows CMS to pay plans for the health risk of the beneficiaries they enroll, instead of paying an identical an average amount for each enrollee Medicare beneficiaries. By risk adjusting plan payments, CMS is able to make appropriate and accurate payments for enrollees with differences in expected costs. Risk adjustment is used to adjust bidding and payment based on the health status and demographic characteristics of an enrollee. Risk scores measure individual beneficiaries' relative risk and the risk scores are used to adjust payments for each beneficiary's expected expenditures. By risk adjusting plan bids, CMS is able to also use standardized bids as base payments to plans. *Form Number:* CMS–10062 (OMB control number: 0938–0878); *Frequency:* Quarterly; *Affected Public:* Private Sector, Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 284; *Total Annual Responses:* 80,235,720; *Total Annual Hours:* 2,674,524. (For policy questions regarding this collection contact Amanda Johnson at 410–786–4161.

Dated: January 11, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–00732 Filed 1–13–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[OMB No. 0970–0391]

Proposed Information Collection Activity; 2024 National Survey of Early Care and Education

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families (ACF), U. S. Department of Health and Human Services (HHS), is proposing a data collection activity as part of the 2024 National Survey of Early Care and Education to be conducted October 2023 through July 2024. The objective of the 2024 NSECE is to document the nation's use and availability of early care and education (ECE) services, building on the information collected in 2012 and

2019 to describe the ECE landscape in the U.S. The 2024 NSECE will collect information on families with children under age 13 years, on ECE providers that serve families with children from birth to 13 years in the U.S., and on the workforce providing these services.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act (PRA) of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing *OPREinfocollection@acf.hhs.gov.* Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The 2024 NSECE will consist of four coordinated nationally-representative surveys:

1. a survey of households with at least one resident child under the age of 13 (Household Interview),
2. a survey of individuals providing care for children under the age of 13 in a residential setting (Home-based Provider Interview) including individuals appearing on state and national lists of ECE providers (listed) and individuals not appearing on such lists (unlisted),
3. a survey of center-based ECE providers offering care for children aged 5 years and under, not yet in kindergarten, in a non-residential setting (Center-based Provider Interview), and
4. a survey conducted with individuals employed in center-based ECE programs working directly with children in classrooms serving children age 5 years and under, not yet in kindergarten (Workforce Interview).

The household, home-based provider, and center-based provider surveys will require a screener to determine eligibility for the specific survey.

The 2024 NSECE data collection efforts will provide urgently needed information about the use and supply of ECE available to families across all income levels, including providers serving low-income families of various racial, ethnic, language, and cultural backgrounds, in diverse geographic areas. The household data will include characteristics of households with children under age 13, such as parental employment status and schedules, preferences and choices of non-parental care, and other key factors that affect their need for and access to ECE. The provider data will include home-based or center-based ECE providers (*e.g.,* private, non-profit, Head Start-funded, state or local Pre-K, or based in public schools) that do or do not participate in the child care subsidy program, and are or are not regulated, registered, or otherwise appear in state or national lists. Accurate data on families with young children and the availability and characteristics of ECE providers are essential to assess the current and changing landscape of ECE since the 2019 NSECE data collection, and to provide insights to advance policy and initiatives in the ECE field. The two previous rounds of NSECE, collected in 2012 and 2019, produced critical data about providers of ECE services, the ECE workforce, and families' needs and use of child care throughout the U.S. that remain unmatched by other data sources available.

Respondents: Households with resident children under age 13, home-based ECE providers serving children under age 13 (listed and unlisted), center-based ECE providers serving children aged 5 and under (not yet in kindergarten), and classroom-assigned instructional staff (workforce) members working with children aged 5 and under (not yet in kindergarten) in center-based ECE programs.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Avg. burden per response (in hours)	Total/annual burden (in hours)
Household screener (screening only)	62,758	1	.1	6,276
Household Questionnaire (no screener)	10,000	1	1	10,000
Home-based Provider Screener (screening only, listed home-based providers)	2,064	1	.03	62
Home-based Provider Questionnaire including screener (listed home-based providers)	4,360	1	.67	2,921
Home-based Provider Questionnaire, including screener (unlisted home-based providers)	1,158	1	.33	382
Center-based Provider Screener (screening only)	10,050	1	.1	1,005
Center-based Provider Questionnaire, including screener	8,392	1	.75	6,294
Workforce (Classroom Staff) Questionnaire	7,418	1	.33	2,448

Estimated Total Annual Burden Hours: 29,388.

Comments: The Department specifically requests comments on (a) 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; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: Child Care and Development Block Grant Act of 1990 as amended by the CCDBG Act of 2014 (Pub. L. 113–186). Social Security Act 418 as extended by the Continuing Appropriations Act of 2017 and the TANF Extension Act of 2019. Section 3507 of the PRA of 1995, 44 U.S.C. Chapter 35.

John M. Sweet Jr.,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–00728 Filed 1–13–23; 8:45 am]

BILLING CODE 4184–23–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[OMB No. 0970–0160]

Proposed Information Collection Activity; Procedures for Requests From Tribal Lead Agencies To Use Child Care and Development Fund Funds for Construction or Major Renovation of Child Care Facilities

AGENCY: Office of Child Care, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families (ACF) is proposing to collect data for the Procedures for Requests from Tribal Lead Agencies to use Child Care and Development Fund (CCDF) Funds for Construction or Major Renovation of Child Care Facilities. This information collection was previously approved by the Office of Management and Budget. The Office of Child Care is proposing to reinstate the information collection with changes.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing *infocollection@acf.hhs.gov.* Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: 42 U.S.C. 9858m(c)(6) of the Child Care and Development Block Grant Act allows Tribal Lead Agencies to use CCDF grant awards for construction and renovation of child care facilities. A tribal grantee must first request and receive approval from ACF before using funds for construction or major renovation. To use CCDF funds awarded in a given fiscal year on construction or major renovation, a Tribal Lead Agency must submit an application prior to July 1 of that fiscal year. The application deadline applies to direct funded tribes and tribes with CCDF funds integrated into a 477 plan. This information collection contains the statutorily mandated uniform procedures for the solicitation and consideration of requests, protection of federal interest, and instructions for preparation of environmental assessments in conjunction with the National Environmental Policy Act.

Changes requested to the form clarify the process to align with ACF Real Property Guidance, update language regarding submission of the Standard Form (SF–429 cover page, include technical changes regarding the official title of Public Law 102–477 to reflect as the Indian Employment, Training and Related Services Consolidation Act of 2017, and include the correct contact for submission of SF–429 information and updated OMB circular references.

Respondents: Tribal Child Care Lead Agencies acting on behalf of tribal governments.

ANNUAL BURDEN ESTIMATES

Instrument	Type of burden	Total number of respondents	Total number of responses per respondent	Average burden hours per response	Total burden hours	Annual burden hours
Procedures for Requests from Tribal Lead Agencies to use CCDF Funds for Construction or Major Renovation of Child Care Facilities.	Reporting	75	2	5	750	250
	Recordkeeping			15	2,250	750

Estimated Total Annual Burden Hours: 1,000.

Comments: The Department specifically requests comments on (a) 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; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 42 U.S.C. 9858(c)(6).

John M. Sweet Jr.,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–00730 Filed 1–13–23; 8:45 am]

BILLING CODE 4184–81–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Home-Based Child Care Practices and Experiences Study (New Collection)

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families (ACF) Office of Planning, Research, and Evaluation (OPRE) is proposing a new primary data collection to examine the experiences, strengths, resources, and strategies used by home-based child care providers to serve and support equitable outcomes for children and families. The Home-Based Child Care Practices and Experiences study will explore the experiences of a particular group of home-based child care providers who are legally exempt from state licensing or other state regulations that apply to non-custodial care of children in the provider's own home; these providers are commonly referred to as family, friend, and neighbor providers.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing *OPREinfocollection@acf.hhs.gov.* Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The study will use semi-ethnographic, open-ended methods (including semi-structured interviews, and photo and audio journals) to generate rich information about the experiences of study respondents. The study will be conducted in four sites across the United States and will involve one round of data collection. Data collection will be conducted virtually and is planned to occur over a 5-month period. The study results are intended to inform future research and federal programs by contributing rich data on the ways family, friend, and neighbor providers think about and enact quality for children and families. The study will address substantial gaps in the existing evidence around ''why'' and ''how'' family, friend, and neighbor providers care for and educate children,

and it will provide the foundation for future research on home-based child care. Study findings can also inform efforts to better align quality improvement efforts with the aspects of quality that providers and families find the most important in these settings.

Respondents: Family, friend, and neighbor child care providers, family members of the children cared for by the providers, and community members who support the providers.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Average burden per response (in hours)	Total/annual burden (in hours)
1. Provider screener	120	1	0.33	40
2. Provider interview #1	60	1	1.5	90
3. Provider logistics call	60	1	1	60
4. Provider photo journals	60	8	0.10	48
5. Provider audio journals	60	8	0.15	72
6. Provider interview #2	60	1	1.5	90
7. Family member interview	120	1	1	120
8. Community member interview	60	1	0.5	30
9. Provider feedback focus group	20	1	1	20

Estimated Total Annual Burden Hours: 570.

Comments: The Department specifically requests comments on (a) 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; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) 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. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 42 U.S.C. 9858.

John M. Sweet Jr.,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–00712 Filed 1–13–23; 8:45 am]

BILLING CODE 4184–23–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; NIDDK KUH K12 Applications.

Date: March 31, 2023.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of Diabetes and Digestive and Kidney Diseases, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, National Institute of Diabetes and Digestive and Kidney Diseases, National Institutes of Health, Democracy II, 6707 Democracy Blvd., Bethesda, MD 20892, (301) 594–7799, *yangj@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 11, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00748 Filed 1–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Environmental Health Sciences Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend as well as those who 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 open session will also be videocast and can be accessed from the NIH Videocast website, *http://www.niehs.nih.gov/news/webcasts/index.cfm.*

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 Advisory Environmental Health Sciences Council (NAEHSC).

Date: February 21–22, 2023.

Open: February 21, 2023, 11:00 a.m. to 2:45 p.m.

Agenda: Discussion of program policies and issues/Council Discussion.

Place: NIEHS/National Institutes of Health, 111 TW Alexander Drive, Research Triangle Park, NC 27709.

Closed: February 21, 2023, 3:00 p.m. to 4:00 p.m.

Agenda: Review and Evaluate of Grant Applications.

Place: NIEHS/National Institutes of Health, 111 TW Alexander Drive, Research Triangle Park, NC 27709.

Open: February 22, 2023, 11:00 a.m. to 3:45 p.m.

Agenda: Discussion of program policies and issues/Council Discussion.

Place: NIEHS/National Institutes of Health, 111 TW Alexander Drive, Research Triangle Park, NC 27709.

Contact Person: David M Balshaw, BA, Ph.D., Acting Director and Chief, Division of Extramural Research and Training, National Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–27, Research Triangle Park, NC 27709, 984–287–3234, *balshaw@niehs.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Additional Health and Safety Guidance: Before attending a meeting at an NIH facility, it is important that visitors review the NIH COVID–19 Safety Plan at *https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/Pages/default.aspx* and the NIH testing and assessment web page at *https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/COVID-assessment-testing/Pages/visitor-testing-requirement.aspx* for information about requirements and procedures for entering NIH facilities, especially when COVID–19 community levels are medium or high. In addition, the Safer Federal Workforce website has FAQs for visitors at *https://www.saferfederalworkforce.gov/faq/visitors/*. Please note that if an individual has a COVID–19 diagnosis within 10 days of the meeting, that person must attend virtually. (For more information please read NIH's Requirements for Persons after Exposure at *https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/COVID-assessment-testing/Pages/persons-after-exposure.aspx* and What Happens When Someone Tests Positive at *https://ors.od.nih.gov/sr/dohs/safety/NIH-covid-19-safety-plan/COVID-assessment-testing/Pages/test-positive.aspx.* Anyone from the public can attend the open portion of the meeting virtually via the NIH Videocasting website (*http://videocast.nih.gov*). Please continue checking these websites, in addition to the committee website listed below, for the most up to date guidance as the meeting date approaches. Information is also available on the Institute's/Center's home page: *https://www.niehs.nih.gov/about/boards/naehsc/index.cfm* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: January 10, 2023.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00696 Filed 1–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; 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 of the Reproduction, Andrology, and Gynecology Study Section.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Reproduction, Andrology, and Gynecology Study Section.

Date: February 15, 2023.

Closed: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Eunice Kennedy Shriver National Institute, of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Room 2121C, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jagpreet Singh Nanda, Ph.D., Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health Bethesda, MD 20892, 301–451–4454, *jagpreet.nanda@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *https://www.nichd.nih.gov/about/org/der/srb,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.865, Research for Mothers and Children, National Institutes of Health, HHS)

Dated: January 10, 2023.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00694 Filed 1–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Early Phase Clinical Trials: Pharma/Device and K Awards.

Date: February 13, 2023.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Regina Dolan-Sewell, Ph.D., Scientific Review Officer, Division of

Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Bethesda, MD 20852, 240–796–6785, *regina.dolan-sewell@nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Understanding Suicide Risk and Protective Factors Among Black Youth.

Date: February 13, 2023.

Time: 12:30 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Serena Chu, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Bethesda, MD 20852, 301–500–5829, *serena.chu@nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Social Disconnection and Suicide Risk in Late Life.

Date: February 16, 2023.

Time: 12:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Bethesda, MD 20852, 301–435–1260, *jasenka.borzan@nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: January 10, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00667 Filed 1–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of The Director, National Institutes of Health; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Council of Councils, January 19, 2023, 10:15 a.m., to January 20, 2023, 2 p.m., which was published in the **Federal Register** on December 5, 2022, 87 FR 74432.

Meeting is being amended to change the meeting end times, for January 19, 2023, from 3:45 p.m. to 3:15 p.m., and January 20, 2023, from 2 p.m. to 1:45 p.m. The meeting is partially closed to the public.

Dated: January 10, 2023.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00700 Filed 1–13–23; 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 Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended; Notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function C Study Section.

Date: February 9–10, 2023.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD, 20814.

Contact Person: William A Greenberg, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4168, MSC 7806, Bethesda, MD 20892, (301) 435–1726, *greenbergwa@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Human Complex Mental Function Study Section.

Date: February 9–10, 2023.

Time: 10:00 a.m. to 7:00 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: Joanna Szczepanik, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1000D, Bethesda, MD 20892, (301) 827–2242, *szczepaj@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Bioengineering, Technology and Surgical Sciences Study Section.

Date: February 13–14, 2023.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Khalid Masood, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5120, MSC 7854, Bethesda, MD 20892, 301–435–2392 *masoodk@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Pathophysiology of Eye Disease—1 Study Section.

Date: February 13–14, 2023.

Time: 8:30 a.m. to 8:00 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: Afia Sultana, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4189, Bethesda, MD 20892, (301) 827–7083, *sultanaa@mail.nih.gov.*

Name of Committee: Biology of Development and Aging Integrated Review Group; Radiation Therapeutics and Biology Study Section.

Date: February 13–14, 2023.

Time: 9:00 a.m. to 9:00 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: Bo Hong, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7804, Bethesda, MD 20892, 301–996–6208, *hongb@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Child Psychopathology and Developmental Disabilities Study Section.

Date: February 13–14, 2023.

Time: 9:00 a.m. to 8:00 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: Karen Elizabeth Seymour, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1000–E, Bethesda, MD 20892, (301) 443–9485, *karen.seymour@nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Prokaryotic Cell and Molecular Biology Study Section.

Date: February 13–14, 2023.

Time: 10:00 a.m. to 8:00 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: Rebecca C Burgess, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 480–8034 *rebecca.burgess@nih.gov*.

(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: January 10, 2023.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00701 Filed 1–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 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; T Cells and Aging.

Date: February 16, 2023.

Time: 10:00 a.m. to 3:00 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: Sandhya Sanghi, Ph.D., Scientific Review Officer, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–2879, *sandhya.sanghi@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 10, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00736 Filed 1–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Secretary; 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 National Science Advisory Board for Biosecurity.

The meeting will be held as a virtual meeting and is open to the public. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting should notify the Contact Person listed below in advance of the meeting. The meeting will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

Name of Committee: National Science Advisory Board for Biosecurity.

Date: January 27, 2023.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: The National Science Advisory Board for Biosecurity (NSABB) meeting will include presentation, discussion, and possible finalization of the draft recommendations and findings from the NSABB Working Groups to Review and Evaluate Potential Pandemic Pathogen Care and Oversight (PC3O) Policy and U.S. Government Policies for the Oversight of Dual Use Research of Concern (DURC).

Place: National Institutes of Health, 6705 Rockledge Drive, Suite 630, Bethesda, MD 20892 (Virtual Meeting Link will be available at *https://osp.od.nih.gov/policies/national-science-advisory-board-for-biosecurity-nsabb#tab3/*).

Contact Person: Cari Young, ScM, Acting Director, Division of Biosafety, Biosecurity, and Emerging Biotechnology Policy, Office of Science Policy, Office of the Director, National Institutes of Health, 6705 Rockledge Drive, Suite 630, Bethesda, MD 20892, *SciencePolicy@od.nih.gov*.

This notice is being published less than 30 days prior to the meeting due to scheduling difficulties.

To sign up to make an oral public comment at the meeting, please send an email to the Contact Person listed above at least one business day prior to the meeting date. Once all time slots are filled, only written comments will be accepted. Any interested person may file written comments by forwarding the statement to the Contact Person listed on this notice at least one business day prior to the meeting date. The statement should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person. Other than name and contact information, please do not include any personally identifiable information or any information that you do not wish to make public. Proprietary, classified, confidential, or sensitive information should not be included in your comments. Please note that any written comments NIH receives may be posted unredacted to the Office of Science Policy website.

Information is also available on the NIH Office of Science Policy website: *https://osp.od.nih.gov/policies/national-science-advisory-board-for-biosecurity-nsabb#tab3/*, where an agenda, link to the webcast meeting, and any additional information for the meeting will be posted when available. Materials for this meeting will be posted prior to the meeting. Please check this website for updates.

Dated: January 10, 2023.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–00697 Filed 1–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2023–0001]

DHS Data Privacy and Integrity Advisory Committee

AGENCY: Privacy Office, Department of Homeland Security (DHS).

ACTION: Committee management; notice of Federal Advisory Committee meeting.

SUMMARY: The DHS Data Privacy and Integrity Advisory Committee will meet on Tuesday, January 31, 2023, via virtual conference. The meeting will be open to the public.

DATES: The DHS Data Privacy and Integrity Advisory Committee will meet on Tuesday, January 31, 2023, from 9 a.m. to 10:30 a.m. EDT. Please note that the virtual conference may end early if the Committee has completed its business.

ADDRESSES: The meeting will be held via a virtual forum (conference information will be posted on the Privacy Office website in advance of the meeting at *www.dhs.gov/privacy-advisory-committee*), or call (202) 343–1717, to obtain the information. For

information on services for individuals with disabilities, or to request special assistance during the meeting, please contact Sandra L. Taylor, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, as soon as possible.

To facilitate public participation, we invite public comment on the issues to be considered by the Committee as listed in the **SUPPLEMENTARY INFORMATION** section below. A public comment period will be held during the meeting, and speakers are requested to limit their comments to 3 minutes. If you would like to address the Committee at the meeting, we request that you register in advance by contacting Sandra L. Taylor at the address provided below. The names and affiliations of individuals who address the Committee will be included in the public record of the meeting. Please note that the public comment period may end before the time indicated, following the last call for comments. Advanced written comments or comments for the record, including persons who wish to submit comments and who are unable to participate or speak at the meeting, should be sent to Sandra L. Taylor, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, by January 24, 2023. All submissions must include the Docket Number (DHS–2023–0001) and may be submitted by any *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: PrivacyCommittee@hq.dhs.gov.* Include the Docket Number (DHS–2023–0001) in the subject line of the message.
- *Mail:* Sandra L. Taylor, Designated Federal Officer, Data Privacy and Integrity Advisory Committee, Department of Homeland Security, 2707 Martin Luther King, Jr. Avenue SE, Mail Stop 0655, Washington, DC 20598.

Instructions: All submissions must include the words ''Department of Homeland Security Data Privacy and Integrity Advisory Committee'' and the Docket Number (DHS–2023–0001). Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. You may wish to review the Privacy & Security Notice found via a link on the homepage of *www.regulations.gov.*

The DHS Privacy Office encourages you to register for the meeting in advance by contacting Sandra L. Taylor, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, at *PrivacyCommittee@hq.dhs.gov.* Advance registration is voluntary. The Privacy Act Statement below explains how DHS uses the registration information you may provide and how you may access or correct information retained by DHS, if any.

Docket: For access to the docket to read background documents or comments received by the DHS Data Privacy and Integrity Advisory Committee, go to *http://www.regulations.gov* and search for docket number DHS–2023–0001.

FOR FURTHER INFORMATION CONTACT: Sandra L. Taylor, Designated Federal Officer, DHS Data Privacy and Integrity Advisory Committee, Department of Homeland Security, 2707 Martin Luther King, Jr. Avenue SE, Mail Stop 0655, Washington, DC 20598, by telephone (202) 343–1717, or by email to *PrivacyCommittee@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act (FACA). The DHS Data Privacy and Integrity Advisory Committee provides advice at the request of the Secretary of Homeland Security and the DHS Chief Privacy Officer on programmatic, policy, operational, administrative, and technological issues within DHS that relate to personally identifiable information, as well as data integrity, transparency, information sharing, and other privacy-related matters. The Committee was established by the Secretary of Homeland Security under the authority of 6 U.S.C. 451.

Proposed Agenda

The Chief Privacy Officer will provide the Committee with an update on Privacy Office activities and discuss the Privacy Office's 2023 priorities. In addition, the Committee will receive an update from the Director of the Department's Center for Accelerating Operational Efficiency on privacy enhancing technologies. If you wish to submit written comments, you may do so in advance of the meeting by submitting them to Docket Number (DHS–2023–0001) at *www.regulations.gov* or by forwarding them to the Committee at the locations listed under the **ADDRESSES** section. The final agenda will be posted on or before January 23, 2023, on the Committee's website at *www.dhs.gov/dhs-data-privacy-and-integrity-advisory-committee-meeting-information.*

Privacy Act Statement: DHS's Use of Your Information

Authority: DHS requests that you voluntarily submit this information under its following authorities: The Federal Records Act, 44 U.S.C. 3101; the FACA, 5 U.S.C. appendix; and the Privacy Act of 1974, 5 U.S.C. 552a.

Principal Purposes: When you register to attend a DHS Data Privacy and Integrity Advisory Committee meeting, DHS collects your name, contact information, and the organization you represent, if any. We use this information to contact you for purposes related to the meeting, such as to confirm your registration, to advise you of any changes to the meeting, or to assure that we have sufficient materials to distribute to all attendees. We may also use the information you provide for public record purposes such as posting publicly available transcripts and meeting minutes.

Routine Uses and Sharing: In general, DHS will not use the information you provide for any purpose other than the Principal Purposes and will not share this information within or outside the agency. In certain circumstances, DHS may share this information on a case-by-case basis as required by law or as necessary for a specific purpose, as described in the DHS/ALL–002 Mailing and Other Lists System of Records Notice (November 25, 2008, 73 FR 71659).

Effects of Not Providing Information: You may choose not to provide the requested information or to provide only some of the information DHS requests. If you choose not to provide some or all of the requested information, DHS may not be able to contact you for purposes related to the meeting.

Accessing and Correcting Information: If you are unable to access or correct the information provided by using the method that you originally used to submit it, you may direct your request in writing to the DHS Deputy Chief FOIA Officer at *foia@hq.dhs.gov.* Additional instructions are available at *http://www.dhs.gov/foia* and in the DHS/ALL–002 Mailing and Other Lists System of Records referenced above.

Lynn Parker Dupree,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2023–00699 Filed 1–13–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Exemption for Exclusive Area Agreements at Certain Airports

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice.

SUMMARY: The Transportation Security Administration (TSA) has statutory authority to grant an exemption from a regulation if TSA determines the exemption is in the public interest. TSA is granting an exemption from an aviation security regulation to permit eligible airport operators to enter into Exclusive Area Agreements (EAA) with Amazon Air, subject to requirements set forth in the Exemption. Also, TSA is rescinding an exemption issued on July 26, 2021, that permitted three airports to enter into EAAs with Amazon Air, as they are now covered by this exemption.

DATES: This Exemption becomes effective on January 17, 2023 and remain in effect until modified or rescinded by TSA through a notice published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Eric Byczynski, Airport Security Programs, Aviation Division, Policy, Plans, and Engagement; *eric.byczynski@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Purpose

TSA's regulations provide that airport operators may enter into EAAs only with aircraft operators or foreign air carriers that have a security program under 49 CFR part 1544 or 1546, subject to TSA approval of an amendment to each airport operator's airport security program (ASP). *See* 49 CFR 1542.111. Amazon Air is not an aircraft operator or foreign air carrier, but conducts significant operations at airports on behalf of aircraft operators. In July 2021,[1] TSA determined it was in the public interest to grant an exemption to section 1542.111 to three airports to permit them to enter into EAAs with Amazon Air. That exemption applied to Cincinnati/Northern Kentucky International Airport (CVG), Baltimore/Washington International Thurgood Marshall Airport (BWI), and Chicago Rockford International Airport (RFD). TSA determined that the public interest was served because the EAAs would create operational and economic efficiencies for the airport operators and Amazon Air, to the economic benefit of the public and without detriment to security. The exemption permitted the airports to leverage significant private sector technologies with respect to access control and monitoring systems that enhance security and minimize insider threat. The exemption also facilitated the rapid hiring of significant numbers of new personnel to support Amazon Air's expanded presence at these locations, aiding the economy in the surrounding areas. Finally, under the exemption, TSA exercises direct regulatory oversight of Amazon Air concerning the security functions they perform under the EAAs.

As discussed below, TSA has determined that the Exemption should be issued for all airport operators that have an ASP as set forth in 49 CFR 1542.103(a)–(b), subject to TSA approval and the ability of the airport operators and Amazon Air to satisfy the requirements set forth in this Exemption.[2] Furthermore, this Notice rescinds the previous Exemption TSA published in 2021.

Background

Airport Security

TSA administers a comprehensive regulatory program to govern the security of aviation, including standards for domestic airport operators, domestic aircraft operators, and foreign air carriers. The security requirements for domestic airport operators are codified at 49 CFR part 1542 and include minimum standards for access control procedures, identification (ID) media, criminal history record checks (CHRCs) of airport workers, law enforcement support, training, contingency plans, TSA inspection authority, and incident management. These regulations require airport operators to conduct specified security measures in the secured area,[3] air operations area (AOA), and security identification display area (SIDA) of the airport. Part 1542 requires airports to develop and follow TSA-approved ASPs[4] that establish security procedures specific to each airport, and Security Directives, which apply to all airports.

TSA recognizes that, in certain circumstances, these security measures may be performed more effectively or efficiently by another TSA-regulated party such as an aircraft operator or foreign air carrier, operating on the airport. Therefore, under 49 CFR 1542.111, TSA may approve an amendment to an airport's ASP that permits the airport operator to execute a legally binding EAA with an aircraft operator[5] or foreign air carrier.[6] Under the EAA, the aircraft operator or foreign air carrier assumes responsibility from the airport operator for specified ASP security measures in all or specified portions of the secured area, AOA, or SIDA.[7] TSA requires the EAA to be in writing, and signed by the airport operator and the aircraft operator or foreign air carrier.[8] TSA also prescribes in detail the required contents of the EAA, including a description of the measures that become the responsibility of the aircraft operator or foreign air carrier.[9]

EAAs are an established part of TSA's regulatory structure for airport operators, and have been commonly used since 1978.[10] Currently, there are more than 70 EAAs in place between aircraft operators or foreign air carriers and domestic airport operators. A typical example for the use of an EAA is where an entire airport terminal is serviced exclusively by one aircraft operator. At these locations, TSA conducts standard compliance inspections, and may issue violations of the security standard set forth in the EAA against the aircraft operator or foreign air carrier that holds the EAA.

An ''authorized representative'' is a person who performs TSA-required security measures as an agent of a TSA-regulated party. Although the authorized representative may perform the measures, the TSA-regulated party remains responsible for completion, and TSA holds the TSA-regulated party primarily accountable through enforcement action of any violations. TSA may also hold the authorized representative accountable if it causes the regulated party's violation.[11]

Entities Subject to the Exemption

This Exemption applies to airport operators with a complete or supporting ASP as set forth in 49 CFR 1542.103(a) and (b), and Amazon Air. Amazon Air is a subsidiary of *Amazon.com*, Inc., an American multinational technology company based in Seattle, Washington engaged in e-commerce, cloud computing, digital streaming, artificial intelligence, and cargo shipping. Amazon reports that less than 20 percent of Amazon's cargo is shipped by air. Due in part, however, to the COVID–19 public health crisis and impact on the economy, cargo shipment has increased dramatically, with a corresponding relative increase in the total volume of air cargo. The increases are due, in part, to the COVID pandemic, the public's heightened

[1] *See* 86 FR 40072, Exemption for Exclusive Area Agreements at Certain Airports (July 26, 2021).

[2] Note that TSA will consider permitting other entities that are similarly situated to Amazon Air to enter into EAAs with airport operators.

[3] *See* 49 CFR 1540.5 for definitions of terms used throughout this exemption.

[4] *See* 49 CFR 1542.105(a).

[5] *See* 49 CFR part 1544.

[6] *See* 49 CFR part 1546.

[7] 49 CFR 1542.111(a).

[8] 49 CFR 1542.111(b).

[9] *Id.*

[10] *See* 43 FR 60792 (Dec. 28, 1978).

[11] *See* 49 CFR 1540.105.

reliance on online shopping for basic goods, and the Nation's need to move supplies quickly. Amazon Air estimates that these trends will not significantly diminish when the COVID pandemic subsides.

Amazon Air maintains operations at various domestic and international airports. Amazon Air owns air cargo aircraft, but does not operate the aircraft itself and is not an aircraft operator for purposes of TSA's regulations. Amazon Air leases the aircraft to certain aircraft operators holding TSA full all-cargo security programs.[12] Amazon Air then acts as an authorized representative for these full all-cargo aircraft operators [13] at certain airports.

As an authorized representative, Amazon Air performs security functions under TSA's Full All-Cargo Aircraft Operator Standard Security Program on behalf of the aircraft operators, including the responsibility for preventing access to both aircraft and the cargo bound for those aircraft, and providing the Ground Security Coordinator, the individual at the facility responsible for coordinating these security responsibilities. Amazon Air has also assumed security responsibility for performing cargo acceptance and chain of custody; cargo screening, buildup, and consolidation; recordkeeping; cargo training; aircraft searches; screening jump seaters [14] and their property; incident reporting; comparing jump seaters and individuals who have access to aircraft and cargo against watchlists; and participation in table top exercises.

To address the current and anticipated demand, Amazon Air is increasing use of its own employees for company services and operations, rather than contracting out for services. Thus, Amazon Air will quickly hire new employees as it expands its operations at regulated airports. Hiring surges can occur at all airports throughout the year due to seasonal changes, construction, or other matters. Most airports can plan ahead for these surges to ensure sufficient staffing in the airport badging offices to begin the vetting process and issue ID media to new employees. However, when a new or existing employer has a significant, sudden increase in employees, all airport vendors can be adversely affected by the strain this places on the airport badging system. It takes significant time to collect the biometric and biographic information needed to initiate CHRCs and security threat assessments (STAs), adjudicate CHRCs, and issue the ID media.

Amazon Air has represented to TSA that it has the capability and capacity to assume security responsibilities at other locations in addition to CVG, BWI, and RFI, including ensuring physical control of access points; adjudicating CHRCs for disqualifying offenses and submitting STAs for its employees; issuing ID media; and conducting ID media accountability audits. Amazon Air possesses sophisticated access control and monitoring systems that enhance security by significantly restricting access to cargo and aircraft. As a subsidiary of a profitable, private sector leader in technology, Amazon Air benefits from ample resources to purchase advanced equipment as needed, without regard to local government budget restrictions that many airports face. This factor provides a level of assurance that the security capability will remain consistent and substantial. Amazon Air's independent economic stability also provides a level of assurance that it will be able to quickly obtain any necessary expertise to carry out all of the EAA functions at additional locations going forward.

Authority and Determination

TSA may grant an exemption from a regulation if TSA determines that the exemption is in the public interest.[15] TSA finds this exemption to be in the public interest for several reasons. First, TSA has evaluated Amazon Air's security apparatus with respect to access control and monitoring, vetting and ID media issuance, and cargo management and movement, and determined it to be modern, strong, and resilient. Second, Amazon Air's significant personnel expansion at airports may strain the resources of airport operator and aircraft operator badging offices, adversely affecting other airport vendors and limiting new hire capability. Amazon Air's ability under an EAA to initiate the employee vetting functions that the airport authorities would otherwise be required to conduct will more efficiently manage volume as needed. This factor should reap economic benefits for the surrounding areas in terms of employment, and to other airport vendors who will not experience adverse effects from a sudden increase in airport ID media issuance. Moreover, extending the authorities under an EAA to Amazon Air at additional airport locations is consistent with Executive Order 13725 [16] to promote competition and reduce regulatory restrictions where possible. Finally, under an EAA, TSA will have direct oversight of Amazon Air's security activities, rather than indirectly through an aircraft operator, for which Amazon Air is an authorized representative. Given the scale of Amazon Air's commercial activities and physical infrastructure that must be secured at these airports, TSA compliance oversight will be more efficient and effective if conducted directly over Amazon Air.

Therefore, TSA has determined that it is in the public interest to grant eligible airport operators an exemption from the provision in 49 CFR 1542.111 that limits the persons with whom an airport operator may execute an EAA to aircraft operators and foreign air carriers. Under this Exemption and in accordance with the requirements set forth below, eligible airport operators may enter into an EAA with Amazon Air.

First, Amazon Air will assume responsibility for the vetting and identification media requirements that apply to individuals with unescorted access to the SIDA. These requirements include collecting and transmitting biographic and biometric information needed to conduct CHRCs, a check of government watchlists, and an immigration check. Also, Amazon Air will issue airport-approved ID media to the individuals who successfully complete the vetting process.

Second, at least 45 days prior to submitting the EAA/ASP amendment to the TSA Federal Security Director (FSD) at the airport for approval, the airport operator must notify the FSD and TSA's Assistant Administrator of Policy, Plans, and Engagement in writing, stating its interest in executing an EAA and requesting any documentation the parties must have to move forward with the EAA. Note that this 45-day notice provision is currently required when an airport operator seeks to amend its ASP. This 45-day notice will provide TSA sufficient time to evaluate the necessity and advisability of the EAA at that location.

Third, the airport operator and Amazon Air must first obtain all information from TSA that is necessary to execute the EAA prior to executing it. For instance, the parties must have the most recent EAA template issued by

[12] *See* 49 CFR 1544.101(h) for scope of a full all-cargo security program.

[13] These full all-cargo aircraft operators include Atlas Air, Air Transport International, ABX, Inc., and Sun Country Airlines.

[14] The term 'jump seater' refers to an off duty commercial pilot who is permitted to travel by using the jumpseat in the cockpit of a commercial aircraft operator.

[15] *See* 49 U.S.C. 114(q).

[16] *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy,* April 15, 2016.

TSA, an approved Alternative Measure on file regarding Amazon-issued ID media, and a temporary technical policy regarding STA submissions.

Exemption

1. This Exemption applies to airport operators regulated under 49 CFR 1542.103(a)–(b).

2. The Exemption takes effect on January 17, 2023.

3. For the duration of this Exemption, the eligible airport operators may apply for an amendment to their airport security program that permits the airport operator to enter into an EAA in accordance with 49 CFR 1542.111 with Amazon Air, notwithstanding that Amazon Air is not a TSA-regulated aircraft operator or foreign air carrier.

4. The airport operator must provide written notice of its intent to seek an EAA and ASP Amendment to the FSD and TSA's Assistant Administrator for Policy, Plans, and Engagement at least 45 days prior to submitting the EAA and ASP amendment.

5. The airport operator may not execute the EAA with Amazon Air until the airport operator and Amazon Air have received all information from TSA that is necessary to execute the EAA. Each airport operator seeking the EAA must receive an Alternative Measure that permits the airport operator to designate Amazon ID media as airport-approved. TSA may also require additional documentation to be on file as circumstances warrant.

6. The terms of the EAA replace requirements set forth in 49 CFR part 1542 so long as Amazon Air complies with the EAA.

7. The EAA must require Amazon Air to comply with all relevant Security Directives and Emergency Amendments issued by TSA.

8. Amazon Air may begin performing as an EAA-holder on the date on which TSA approves an amendment to the respective airport operator's airport security program implementing each executed EAA.

9. The Exemption will remain in effect while the airport operator's TSA-approved airport security program remains in effect. TSA may direct revisions to the ASP amendment and EAA for security reasons in accordance with 49 CFR 1542.105(c). TSA may rescind the ASP amendment and EAA, and may rescind or modify the Exemption, with regard to one or more of the covered airport operators, at any time.

Dated: January 10, 2023.

David P. Pekoske,

Administrator.

[FR Doc. 2023–00647 Filed 1–13–23; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX.23.ZQ00.F0804.00; OMB Control Number 1028–NEW]

Agency Information Collection Activities: User Testing of Graphics for USGS Aftershock Forecasts

AGENCY: U.S. Geological Survey (USGS), 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 to begin a new information collection.

DATES: Interested persons are invited to submit comments on or before March 20, 2023.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to 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 ICR, contact Sara McBride by email at *skmcbride@usgs.gov* or by telephone at 650–750–5270. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In accordance with the PRA (44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval. We may not conduct or sponsor, nor are you required to respond to, a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies 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.

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. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other 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: The USGS produces and releases forecasts for earthquake aftershocks following damaging earthquakes in an automated manner. Currently, these forecasts are communicated to the public and to specialist users in text and tabular formats. The aim of this project is to produce graphics and maps for aftershock forecasts that can better serve user needs. To ensure new forecast graphics serve user needs, we will conduct online user testing. In this information collection, we will anonymously ask users questions about a variety of graphical representations of the forecast. This will help identify how different graphics affect users' understanding and use of aftershock forecast information. The results of this user testing will improve the way the USGS communicates aftershock forecasts to the public.

Title of Collection: User testing of graphics for USGS aftershock forecasts.

OMB Control Number: 1028–NEW.

Form Number: None.

Type of Review: NEW.

Respondents/Affected Public: Individuals/Households.

Total Estimated Number of Annual Respondents: 400.

Total Estimated Number of Annual Responses: 400.

Estimated Completion Time per Response: 15 minutes.

Total Estimated Number of Annual Burden Hours: 100.

Respondent's Obligation: Voluntary.

Frequency of Collection: One-time, in an online survey.

Total Estimated Annual Nonhour Burden Cost: 0.

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*).

Shane Detweiler,

Assistant Center Director, Earthquake Science Center, U.S. Geological Survey.

[FR Doc. 2023–00670 Filed 1–13–23; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR957000.L1440000.BJ0000.212; BLM_OR_FRN_MO4500168865]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management (BLM), Oregon State Office, Portland, Oregon, 30 calendar days from the date of this publication.

DATES: Protests must be received by the BLM prior to the scheduled date of official filing, February 16, 2023.

ADDRESSES: A copy of the plats may be obtained from the Public Room at the Bureau of Land Management, Oregon State Office, 1220 SW 3rd Avenue, Portland, Oregon 97204, upon required payment. The plats may be viewed at this location at no cost.

FOR FURTHER INFORMATION CONTACT: Robert Femling, telephone: (503) 808–6633, email: *rfemling@blm.gov,* Branch of Geographic Sciences, Bureau of Land Management, 1220 SW 3rd Avenue, Portland, Oregon 97204. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 1–800–877–8339 to contact Mr. Femling during normal business hours. The service is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management, Oregon State Office, Portland, Oregon:

Willamette Meridian, Oregon

T. 19 S., R. 4 E., accepted December 6, 2022

T. 19 S., R. 16 E., accepted December 6, 2022

T. 2 S., R. 6 W., accepted December 6, 2022

T. 13 S., R. 12 E., accepted December 6, 2022

T. 3 S., R. 6 W., accepted December 6, 2022

T. 2 S., R. 5 W., accepted December 6, 2022

Willamette Meridian, Washington

T. 39 N, R. 26 E, accepted December 6, 2022

A person or party who wishes to protest one or more plats of survey identified above must file a written notice of protest with the Chief Cadastral Surveyor for Oregon/Washington, Bureau of Land Management. The notice of protest must identify the plat(s) of survey that the person or party wishes to protest. The notice of protest must be filed before the scheduled date of official filing for the plat(s) of survey being protested. Any notice of protest filed after the scheduled date of official filing will be untimely and will not be considered. A notice of protest is considered filed on the date it is received by the Chief Cadastral Surveyor for Oregon/Washington during regular business hours; if received after regular business hours, a notice of protest will be considered filed the next business day. A written statement of reasons in support of a protest, if not filed with the notice of protest, must be filed with the Chief Cadastral Surveyor for Oregon/Washington within 30 calendar days after the notice of protest is filed. If a notice of protest against a plat of survey is received prior to the scheduled date of official filing, the official filing of the plat of survey identified in the notice of protest will be stayed pending consideration of the protest. A plat of survey will not be officially filed until the next business day following dismissal or resolution of all protests of the plat.

Before including your address, phone number, email address, or other personal identifying information in a notice of protest or statement of reasons, you should be aware that the documents you submit—including your personal identifying information—may be made publicly available in their entirety at any time. While you can ask us to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 43 U.S.C., Chapter 3).

Robert Femling,

Chief Cadastral Surveyor of Oregon/Washington.

[FR Doc. 2023–00713 Filed 1–13–23; 8:45 am]

BILLING CODE 4310–33–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1334]

Certain Raised Garden Beds and Components Thereof; Notice of a Commission Determination Not To Review an Initial Determination Amending the Complaint and Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined not to review an initial determination (''ID'') (Order No. 8) of the presiding administrative law judge (''ALJ''), amending the complaint and notice of investigation to correct a respondent's name.

FOR FURTHER INFORMATION CONTACT: Benjamin S. Richards, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–5453. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*. For help accessing EDIS, please email *EDIS3Help@usitc.gov*. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 19, 2022. 87 FR 63527 (Oct. 19, 2022). The complaint, as supplemented and amended, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain raised garden beds and components thereof by reason of misappropriation of trade secrets and unfair competition, the threat or effect of which is to destroy or substantially injure a domestic industry. *Id.* The Commission's notice of investigation named as respondents Huizhou Green Giant Technology Co., Ltd., of Guangdong China; Utopban International Trading Co., Ltd., d/b/a Vegega of Rosemead, CA; Utopban Limited of Hong Kong; The Hydro Source Inc., d/b/a Forever Garden Beds of El Monte, CA; and VegHerb, LLC, d/b/a Frame It All of Cary, NC. *Id.* The complainant is Vego Garden, Inc. of Houston, TX (''Vego''). *Id.* The Office of Unfair Import Investigations is participating in the investigation. *Id.*

On December 13, 2022, the ALJ issued the subject ID, which granted Vego's unopposed motion to amend the complaint and notice of investigation to change the name of respondent The Hydro Source, Inc., d/b/a Forever Garden Beds to Forever Garden. The ID found that the change will not prejudice the rights of any parties to the investigation and reflects the true identity of the respondents involved in this investigation. No petitions for review of the ID were filed.

The Commission has determined not to review the subject ID.

The complaint and notice of investigation are hereby amended as follows: the name of respondent ''The Hydro Source Inc., d/b/a Forever Garden Beds'' is replaced with ''Forever Garden.''

The Commission vote for this determination took place on January 10, 2023.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: January 10, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023–00648 Filed 1–13–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1584 (Final)]

Barium Chloride From India; Termination of Investigation

AGENCY: United States International Trade Commission.

ACTION: Notice.

Background: On January 6, 2023, the Department of Commerce published notice in the **Federal Register** of a negative final determination of sales at less than fair value in connection with the subject investigation concerning India (88 FR 1050). Accordingly, the antidumping duty investigation concerning barium chloride from India (Investigation No. 731–TA–1584 (Final)) is terminated.

DATES: January 6, 2023.

FOR FURTHER INFORMATION CONTACT: Alejandro Orozco (202–205–3177), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. 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 (*https://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

Authority: This investigation is being terminated under authority of title VII of the Tariff Act of 1930 and pursuant to section 207.40(a) of the Commission's Rules of Practice and Procedure (19 CFR 207.40(a)). This notice is published pursuant to section 201.10 of the Commission's rules (19 CFR 201.10).

By order of the Commission.

Issued: January 11, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023–00731 Filed 1–13–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–23–003]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: January 18, 2023 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205–2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agendas for future meetings: none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. No. 731–TA–461 (Fifth Review)(Gray Portland Cement and Cement Clinker from Japan). The Commission currently is scheduled to complete and file its determinations and views of the Commission on January 26, 2023.
5. Outstanding action jackets: none.

CONTACT PERSON FOR MORE INFORMATION: Tyrell Burch, Management Analyst, 202–205–2595.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

By order of the Commission:

Issued: January 12, 2023.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2023–00887 Filed 1–12–23; 4:15 pm]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Nonmonetary Determination Activity Report.

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL) Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Nonmonetary Determination Activities Report.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by March 20, 2023.

ADDRESSES: A copy of this ICR with applicable supporting documentation,

including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free by contacting Kristen Santos by telephone at 617–788–0148 (this is not a toll-free number), TTY 1–877–889–5627 (this is not a toll-free number), or by email at *Santos.Kristen@dol.gov*.

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Room S–4524, 200 Constitution Avenue NW, Washington, DC 20210; by email: *Santos.Kristen@dol.gov;* or by fax: 202–693–3975.

FOR FURTHER INFORMATION CONTACT: Contact Candace Edens by telephone at 202–693–3195 (this is not a toll-free number) or by email at *Edens.Candace@dol.gov.*

SUPPLEMENTARY INFORMATION: DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the Office of Management and Budget (OMB) for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

The Secretary of Labor, under the Social Security Act, title III, section 302 (42 U.S.C. 502), funds the necessary cost of proper and efficient administration of each state Unemployment Insurance (UI) law. The ETA 207, Nonmonetary Determination Activities Report, contains state data on the number and types of issues that are adjudicated when UI claims are filed. It also has data on the number of disqualifications that are issued for reasons associated with a claimant's separation from employment and reasons related to a claimant's continuing eligibility for benefits.

These data are used by ETA's Office of Unemployment Insurance (OUI) to determine workload counts for the allocation of administrative funds, to analyze the ratio of disqualifications to determinations, and to examine and evaluate the program effect of nonmonetary activities. 42 U.S.C. 503(a)(6) of the Social Security Act authorizes this information collection.

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 it is approved by OMB under the PRA 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 1205–0150.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB 1205–0150.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, (*e.g.,* permitting electronic submission of responses).

Agency: DOL–ETA.

Type of Review: Extension Without Changes.

Title of Collection: Nonmonetary Determination Activities Report.

Form: ETA 207.

OMB Control Number: 1205–0150.

Affected Public: State Workforce Agencies.

Estimated Number of Respondents: 53.

Frequency: Quarterly.

Total Estimated Annual Responses: 424.

Estimated Average Time per Response: 4 hours per response.

Estimated Total Annual Burden Hours: 1,696.

Total Estimated Annual Other Cost Burden: $0.

Authority: 44 U.S.C. 3506(c)(2)(A).

Brent Parton,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2023–00677 Filed 1–13–23; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Benefits Timeliness and Quality Review System

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL) Employment and Training Administration (ETA) is soliciting comments concerning a proposed extension for the authority to conduct the information collection request (ICR) titled, ''Benefits Timeliness and Quality (BTQ) Review System.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by March 20, 2023.

ADDRESSES: A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free by contacting Kristen Santos by telephone at 617–788–0148 (this is not a toll-free number), TTY 1–877–889–5627 (this is not a toll-free number), or by email at *Santos.Kristen@dol.gov*.

Submit written comments about, or requests for a copy of this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Room S–4524, 200 Constitution Avenue NW, Washington, DC 20210; by email: *Santos.Kristen@dol.gov;* or by fax: 202–693–3975.

FOR FURTHER INFORMATION CONTACT: Candace Edens by telephone at 202–693–3195 (this is not a toll-free number) or by email at *Edens.Candace@dol.gov*.

Authority: 44 U.S.C. 3506(c)(2)(A).

SUPPLEMENTARY INFORMATION: DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public

and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the Office of Management and Budget (OMB) for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

The BTQ program collects information and analyzes data. The BTQ data measure the timeliness and quality of states' administrative actions and administrative decisions related to unemployment insurance benefit payments. The samples sizes for nonmonetary and appeals quarterly BTQ reviews are determined by total workload for the prior calendar year. When states workloads change, the number of cases they are required to review is subject to change. Therefore, adjustments are proposed to reclassify some states from large to small and others from small to large resulting in a change in burden for these specific states. Sections 303(a)(1) and (a)(6) of the Social Security Act (42 U.S.C. 503(a)(1) and 503(a)(6)) authorize this information collection.

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 it is approved by OMB under the PRA 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 Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB control number 1205–0359.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

DOL is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;
- Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, (*e.g.,* permitting electronic submission of responses).

Agency: DOL–ETA.

Type of Review: Revision.

Title of Collection: Benefits Timeliness and Quality Review System.

Forms: ETA–9050, ETA–9051, ETA–9052, ETA–9054, ETA–9055, ETA–9056, ETA–9057.

OMB Control Number: 1205–0359.

Affected Public: State Workforce Agencies.

Estimated Number of Respondents: 53.

Frequency: Monthly and Quarterly.

Total Estimated Annual Responses: 23,740.

Estimated Average Time per Response: Varies.

Estimated Total Annual Burden Hours: 36,612 hours.

Total Estimated Annual Other Cost Burden: $0.

Brent Parton,

Acting Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2023–00675 Filed 1–13–23; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0042]

TUV Rheinland of North America, Inc.: Grant of Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for TUV Rheinland of North America, Inc., as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on January 17, 2023.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor; telephone: (202) 693–2110; email: *robinson.kevin@dol.gov.* OSHA's web page includes information about the NRTL Program (see *http://www.osha.gov/dts/otpca/nrtl/index.html*).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition of TUV Rheinland of North America, Inc. (TUVRNA), as a NRTL. TUVRNA's expansion covers the addition of one test standard to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by NRTLs or applicant organizations for initial recognition, as well as for expansion or renewal of recognition, following requirements in appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the

application and provides the preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including TUVRNA, which details that NRTL's scope of recognition. These pages are available from the OSHA website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

TUVRNA submitted an application, dated February 22, 2022 (OSHA–2007–0042–0060), to expand recognition to include the addition of one test standard to the NRTL scope of recognition. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to this application.

OSHA published the preliminary notice announcing TUVRNA's expansion application in the **Federal Register** on November 22, 2022 (87 FR 71361). The agency requested comments by December 7, 2022, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant expansion of TUVRNA's scope of recognition.

To review copies of all public documents pertaining to TUVRNA's application, go to *www.regulations.gov* or contact the OSHA Docket Office. Docket No. OSHA–2007–0042 contains all materials in the record concerning TUVRNA's recognition. *Please note:* Due to the COVID–19 pandemic, the Docket Office is closed to the public at this time but can be contacted at (202) 693–2350 (TTY (877) 889–5627).

II. Final Decision and Order

OSHA staff examined TUVRNA's expansion application, their capability to meet the requirements of the test standard, and other pertinent information. Based on its review of this evidence, OSHA finds that TUVRNA meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the limitations and conditions listed below. OSHA, therefore, is proceeding with this final notice to grant TUVRNA's scope of recognition. OSHA limits the expansion of TUVRNA's recognition to testing and certification of products for demonstration of conformance to the test standard shown below in Table 1.

TABLE 1—APPROPRIATE TEST STANDARD FOR INCLUSION IN TUVRNA'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 2580	Standard for Batteries for Use in Electric Vehicles.

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, a NRTL's scope of recognition does not include these products.

A. Conditions

Recognition is contingent on continued compliance with 29 CFR 1910.7, including but not limited to, abiding by the following conditions of recognition:

1. TUVRNA must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as a NRTL, and provide details of the change(s);

2. TUVRNA must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and

3. TUVRNA must continue to meet the requirements for recognition, including all previously published conditions on TUVRNA's scope of recognition, in all areas for which it has recognition.

OSHA hereby expands the scope of recognition of TUVRNA, subject to the limitations and conditions specified above.

III. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW, Washington, DC 20210, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393, September 18, 2020) and 29 CFR 1910.7.

Signed at Washington, DC, on January 10, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–00678 Filed 1–13–23; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2006–0028]

Eurofins Electrical and Electronic Testing NA, Inc. a/k/a MET Laboratories, Inc.: Grant of Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for Eurofins Electronic Testing NA, Inc. a/k/a MET Laboratories, Inc., as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on January 17, 2023.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov*.

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration; telephone: (202) 693–2110; email: *robinson.kevin@dol.gov*. OSHA's web page includes information about the NRTL Program (see *http://www.osha.gov/dts/otpca/nrtl/index.html*).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition of Eurofins Electrical and Electronic Testing NA, Inc. a/k/a MET Laboratories, Inc. (MET), as a NRTL. MET's expansion covers the addition of two test standards to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified by 29 CFR 1910.7. Recognition is an

acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition and is not a delegation or grant of government authority. As a result of recognition, employers may use products properly approved by the NRTL to meet OSHA standards that require testing and certification of the products.

The agency processes applications by a NRTL for initial recognition, or for expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides the preliminary finding, and in the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL that details the scope of recognition. These pages are available from the agency's website at *http://www.osha.gov/dts/otpca/nrtl/index.html*.

MET submitted an application, dated September 3, 2021 (OSHA–2006–0028–0092), to expand the recognition to include two additional test standards. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to the application.

OSHA published the preliminary notice announcing MET's expansion application in the **Federal Register** on November 23, 2022 (87 FR 71684). The agency requested comments by December 8, 2022, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant expansion of MET's scope of recognition.

To obtain or review copies of all public documents pertaining to MET's application, go to *http://www.regulations.gov* or contact the OSHA Docket Office. Docket No. OSHA–2006–0028 contains all materials in the record concerning MET's recognition. *Please note:* Due to the COVID–19 pandemic, the Docket Office is closed to the public at this time but can be contacted at (202) 693–2350 (TTY ((877) 889–5627).

II. Final Decision and Order

OSHA staff examined MET's expansion application, the capability to meet the requirements of the test standard, and other pertinent information. Based on the review of this evidence, OSHA finds that MET meets the requirements of 29 CFR 1910.7 for expansion of the NRTL scope of recognition, subject to the limitation and conditions listed below. OSHA, therefore, is proceeding with this final notice to grant MET's scope of recognition. OSHA limits the expansion of MET's recognition to testing and certification of products for demonstration of conformance to the test standards listed in Table 1.

TABLE 1—LIST OF APPROPRIATE TEST STANDARDS FOR INCLUSION IN MET'S NRTL SCOPE OF RECOGNITION

Test Standard	Test standard title
UL 698A	Standard for Industrial Control Panels Related to Hazardous (Classified) Locations
UL 60079–31	Standard for Safety Explosive Atmospheres—Part 31: Equipment Dust Ignition Protection by Enclosure "t"

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, a NRTL's scope of recognition does not include these products.

The American National Standards Institute (ANSI) may approve the test standards listed above as American National Standards. However, for convenience, the use of the designation of the standards-developing organization for the standard as opposed to the ANSI designation may occur. Under the NRTL Program's policy (see OSHA Instruction CPL 01–00–004, Chapter 2, Section VIII), only standards determined to be appropriate test standards may be approved for NRTL recognition. Any NRTL recognized for a particular test standard may use either the proprietary version of the test standard or the ANSI version of that standard. Contact ANSI to determine whether a test standard is currently ANSI-approved.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, MET must abide by the following conditions of the recognition:

1. MET must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in their operations as a NRTL, and provide details of the change(s);
2. MET must meet all the terms of the NRTL recognition and comply with all OSHA policies pertaining to this recognition; and
3. MET must continue to meet the requirements for recognition, including all previously published conditions on MET's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of MET, subject to the limitations and conditions specified above.

III. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393, Sept. 18, 2020)), and 29 CFR 1910.7.

Signed at Washington, DC, on January 10, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–00676 Filed 1–13–23; 8:45 am]

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Copyright Royalty Board

[Docket No. 22–CRB–0013–AU (Education Media Foundation)]

Notice of Intent To Audit

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Royalty Judges announce receipt from SoundExchange, Inc., of a notice of intent to audit the 2019, 2020, and 2021 statements of account submitted by Education Media

Foundation's Noncommercial Webcaster service concerning royalty payments they made pursuant to two statutory licenses.

ADDRESSES: *Docket:* For access to the dockets to read background documents, go to eCRB at *https://app.crb.gov* and perform a case search for docket 22–CRB–0013–AU (Education Media Foundation).

FOR FURTHER INFORMATION CONTACT: Anita Brown, (202) 707–7658, *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: The Copyright Act grants to sound recordings copyright owners the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 114, which allows nonexempt noninteractive digital subscription services, eligible nonsubscription services, and preexisting satellite digital audio radio services to perform publicly sound recordings by means of digital audio transmissions. 17 U.S.C. 114(f). In addition, a statutory license in section 112 allows a service to make necessary ephemeral reproductions to facilitate digital transmission of the sound recording. 17 U.S.C. 112(e).

Licensees may operate under these licenses provided they pay the royalty fees and comply with the terms set by the Copyright Royalty Judges. The rates and terms for the section 112 and 114 licenses are codified in 37 CFR parts 380 and 382–84.

As one of the terms for these licenses, the Judges designated SoundExchange, Inc., (SoundExchange) as the Collective, *i.e.,* the organization charged with collecting the royalty payments and statements of account submitted by licensees, including those that operate commercial webcaster services, preexisting satellite digital audio radio services, new subscription services, and those that make ephemeral copies for transmission to business establishments. The Collective is also charged with distributing the royalties to the copyright owners and performers entitled to receive them under the section 112 and 114 licenses. *See* 37 CFR 380.4(d)(1), 382.5(d)(1), 383.4(a), 384.4(b)(1).

As the Collective, SoundExchange may, only once a year, conduct an audit of a licensee for any or all of the prior three calendar years to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. *See* 37 CFR 380.6(b), 382.7(b), 383.4(a) and 384.6(b).

On December 23, 2022, SoundExchange filed with the Judges a notice of intent to audit the statements of account submitted by Educational Media Foundation's Noncommercial Webcasters service for the years 2019, 2020, and 2021. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. *See* 37 CFR 380.6(c) 382.7(c), 383.4(a) and 384.6(c). This notice fulfills the Judges' publication obligation with respect to SoundExchange's December 23, 2022 notice of intent to audit Educational Media Foundation for the years 2019, 2020, and 2021.

Dated: January 10, 2023.

David P. Shaw,

Chief Copyright Royalty Judge.

[FR Doc. 2023–00640 Filed 1–13–23; 8:45 am]

BILLING CODE 1410–72–P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket No. 22–CRB–0009–AU (Stingray Group Inc.)]

Notice of Intent To Audit

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Royalty Judges announce receipt from SoundExchange, Inc., of a notice of intent to audit the 2019, 2020, and 2021 statements of account submitted by Stingray Group Inc.'s various services, including its Commercial Webcaster Service, New Subscription Service, and Business Establishment Service, concerning royalty payments they made pursuant to two statutory licenses.

ADDRESSES: *Docket:* For access to the dockets to read background documents, go to eCRB at *https://app.crb.gov* and perform a case search for docket 22–CRB–0009–AU (Stingray Group Inc.).

FOR FURTHER INFORMATION CONTACT: Anita Brown, (202) 707–7658, *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: The Copyright Act grants to sound recordings copyright owners the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 114, which allows nonexempt noninteractive digital subscription services, eligible nonsubscription services, and preexisting satellite digital audio radio services to perform publicly sound recordings by means of digital audio transmissions. 17 U.S.C. 114(f). In addition, a statutory license in section 112 allows a service to make necessary ephemeral reproductions to facilitate digital transmission of the sound recording. 17 U.S.C. 112(e).

Licensees may operate under these licenses provided they pay the royalty fees and comply with the terms set by the Copyright Royalty Judges. The rates and terms for the section 112 and 114 licenses are codified in 37 CFR parts 380 and 382–84.

As one of the terms for these licenses, the Judges designated SoundExchange, Inc., (SoundExchange) as the Collective, *i.e.,* the organization charged with collecting the royalty payments and statements of account submitted by licensees, including those that operate commercial webcaster services, preexisting satellite digital audio radio services, new subscription services, and those that make ephemeral copies for transmission to business establishments. The Collective is also charged with distributing the royalties to the copyright owners and performers entitled to receive them under the section 112 and 114 licenses. *See* 37 CFR 380.4(d)(1), 382.5(d)(1), 383.4(a), 384.4(b)(1).

As the Collective, SoundExchange may, only once a year, conduct an audit of a licensee for any or all of the prior three calendar years to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. *See* 37 CFR 380.6(b), 382.7(b), 383.4(a) and 384.6(b).

On December 22, 2022, SoundExchange filed with the Judges a notice of intent to audit the statements of account submitted by Stingray Group Inc.'s Commercial Webcaster Service, New Subscription Service, and Business Establishment Service, for the years 2019, 2020, and 2021. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. *See* 37 CFR 380.6(c) 382.7(c), 383.4(a) and 384.6(c). This notice fulfills the Judges' publication obligation with respect to SoundExchange's December 22, 2022 notice of intent to audit Stingray Group Inc for the years 2019, 2020, and 2021.

Dated: January 10, 2023.

David P. Shaw,

Chief Copyright Royalty Judge.

[FR Doc. 2023–00641 Filed 1–13–23; 8:45 am]

BILLING CODE 1410–72–P

LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket Nos. 22–CRB–0010–AU (Cox Radio Interactive), 22–CRB–0011–AU (Deseret Management Corporation), 22–CRB–0012–AU (Feed Media Inc)]

Notice of Intent To Audit

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Public notice.

SUMMARY: The Copyright Royalty Judges announce receipt from SoundExchange, Inc., of notices of intent to audit the 2019, 2020, and 2021 statements of account submitted by commercial webcasters Cox Radio Interactive, Deseret Management Corporation, and Feed Media, Inc. concerning royalty payments they made pursuant to two statutory licenses.

ADDRESSES: *Docket:* For access to the dockets to read background documents, go to eCRB at *https://app.crb.gov* and perform a case search for docket 22–CRB–0010–AU (Cox Radio Interactive), 22–CRB–0011–AU (Deseret Management Corporation) or 22–CRB–0012–AU (Feed Media, Inc).

FOR FURTHER INFORMATION CONTACT: Anita Brown, (202) 707–7658, *crb@loc.gov*.

SUPPLEMENTARY INFORMATION: The Copyright Act grants to sound recordings copyright owners the exclusive right to publicly perform sound recordings by means of certain digital audio transmissions, subject to limitations. Specifically, the right is limited by the statutory license in section 114, which allows nonexempt noninteractive digital subscription services, eligible nonsubscription services, and preexisting satellite digital audio radio services to perform publicly sound recordings by means of digital audio transmissions. 17 U.S.C. 114(f). In addition, a statutory license in section 112 allows a service to make necessary ephemeral reproductions to facilitate digital transmission of the sound recording. 17 U.S.C. 112(e).

Licensees may operate under these licenses provided they pay the royalty fees and comply with the terms set by the Copyright Royalty Judges. The rates and terms for the section 112 and 114 licenses are codified in 37 CFR parts 380 and 382 through 384.

As one of the terms for these licenses, the Judges designated SoundExchange, Inc., (SoundExchange) as the Collective, *i.e.,* the organization charged with collecting the royalty payments and statements of account submitted by licensees, including those that operate commercial webcaster services, preexisting satellite digital audio radio services, new subscription services, and those that make ephemeral copies for transmission to business establishments. The Collective is also charged with distributing the royalties to the copyright owners and performers entitled to receive them under the section 112 and 114 licenses. *See* 37 CFR 380.4(d)(1), 382.5(d)(1), 383.4(a), 384.4(b)(1).

As the Collective, SoundExchange may, only once a year, conduct an audit of a licensee for any or all of the prior three calendar years to verify royalty payments. SoundExchange must first file with the Judges a notice of intent to audit a licensee and deliver the notice to the licensee. *See* 37 CFR 380.6(b), 382.7(b), 383.4(a) and 384.6(b).

On December 22, 2022, SoundExchange filed with the Judges notices of intent to audit the statements of account submitted by commercial webcasters Cox Radio Interactive, Deseret Management Corporation, and Feed Media, Inc. for the years 2019, 2020, and 2021. The Judges must publish notice in the **Federal Register** within 30 days of receipt of a notice announcing the Collective's intent to conduct an audit. *See* 37 CFR 380.6(c) 382.7(c), 383.4(a) and 384.6(c). This notice fulfills the Judges' publication obligation with respect to SoundExchange's December 22, 2022 notices of intent to audit Cox Radio Interactive, Deseret Management Corporation, and Feed Media, Inc. for the years 2019, 2020, and 2021.

Dated: January 10, 2023.

David P. Shaw,

Chief Copyright Royalty Judge.

[FR Doc. 2023–00644 Filed 1–13–23; 8:45 am]

BILLING CODE 1410–72–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

Meeting of Humanities Panel

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: The National Endowment for the Humanities (NEH) will hold thirteen meetings, by videoconference, of the Humanities Panel, a federal advisory committee, during February 2023. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965.

DATES: See **SUPPLEMENTARY INFORMATION** for meeting dates. The meetings will open at 8:30 a.m. and will adjourn by 5 p.m. on the dates specified below.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *evoyatzis@neh.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. 10), notice is hereby given of the following meetings:

1. Date: February 15, 2023

This video meeting will discuss applications on the topic of American Studies, for the Public Scholars grant program, submitted to the Division of Research Programs.

2. Date: February 15, 2023

This video meeting will discuss applications on the topic of Arts, for the Public Scholars grant program, submitted to the Division of Research Programs.

3. Date: February 15, 2023

This video meeting will discuss applications on the topic of Biography, for the Public Scholars grant program, submitted to the Division of Research Programs.

4. Date: February 15, 2023

This video meeting will discuss applications on the topics of Film, Media, and Communications, for the Public Scholars grant program, submitted to the Division of Research Programs.

5. Date: February 15, 2023

This video meeting will discuss applications on the topic of History, for the Public Scholars grant program, submitted to the Division of Research Programs.

6. Date: February 15, 2023

This video meeting will discuss applications on the topics of History and Religion, for the Public Scholars grant program, submitted to the Division of Research Programs.

7. Date: February 15, 2023

This video meeting will discuss applications on the topics of Literature and Language, for the Public Scholars grant program, submitted to the Division of Research Programs.

8. Date: February 15, 2023

This video meeting will discuss applications on the topics of Philosophy, Politics, and Law, for the Public Scholars grant program, submitted to the Division of Research Programs.

9. Date: February 15, 2023

This video meeting will discuss applications on the topics of Science, Technology, Medicine, and the Environment, for the Public Scholars grant program, submitted to the Division of Research Programs.

10. Date: February 15, 2023

This video meeting will discuss applications on the topic of Social Sciences, for the Public Scholars grant program, submitted to the Division of Research Programs.

11. Date: February 15, 2023

This video meeting—the first of two on this date—will discuss applications on the topic of U.S. History, for Public Scholars grant program, submitted to the Division of Research Programs.

12. Date: February 15, 2023

This video meeting—the second of two on this date—will discuss applications on the topic of U.S. History, for the Public Scholars grant program, submitted to the Division of Research Programs.

13. Date: February 16, 2023

This video meeting will discuss applications for the National Digital Newspaper Program, submitted to the Division of Preservation and Access.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5, U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chair's Delegation of Authority to Close Advisory Committee Meetings dated April 15, 2016.

Dated: January 10, 2023.

Jessica Graves,

Legal Administrative Specialist, National Endowment for the Humanities.

[FR Doc. 2023–00637 Filed 1–13–23; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–255–LT–2, 50–155–LT–2, 72–007–LT, and 72–043–LT–2ASLBP No. 22–974–01–LT–BD01]

Entergy Nuclear Operations, Inc., Entergy Nuclear Palisades, LLC, HOLTEC International, and HOLTEC Decommissioning International, LLC (Palisades Nuclear Plant and Big Rock Point Site); Notice of Atomic Safety and Licensing Board Reconstitution

Pursuant to 10 CFR 2.313(c) and 2.321(b), the Atomic Safety and Licensing Board in the above-captioned *Palisades Nuclear Plant and Big Rock Point Site* proceeding is hereby reconstituted by designating Administrative Judge Michael M. Gibson to serve as Presiding Officer due to the unavailability of Administrative Judge Paul S. Ryerson.

All correspondence, documents, and other materials shall continue to be filed in accordance with the NRC E-filing rule. *See* 10 CFR 2.302.

Rockville, Maryland.

Dated: January 10, 2023.

Edward R. Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2023–00642 Filed 1–13–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–269, 50–270, and 50–287; NRC–2021–0146]

Notice of Intent To Conduct a Supplemental Scoping Process and Prepare a Draft Environmental Impact Statement; Duke Energy Carolinas, LLC; Oconee Nuclear Station, Units 1, 2, and 3

AGENCY: Nuclear Regulatory Commission.

ACTION: Subsequent license renewal environmental report supplement; intent to conduct a supplemental scoping process and prepare a draft environmental impact statement; extension of comment period.

SUMMARY: On December 19, 2022, the U.S. Nuclear Regulatory Commission (NRC) issued a **Federal Register** notice detailing its intent to conduct an additional limited scoping process to gather information necessary to prepare a supplement to its environmental impact statement (EIS) to evaluate the environmental impacts of subsequent license renewal (SLR) of Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55 for Oconee Nuclear Station (Oconee), Units 1, 2, and 3. The NRC is seeking public comment on the proper scope of the EIS supplement to be prepared for this action. The comment period was originally scheduled to close on January 18, 2023. The NRC has decided to extend the public scoping period to allow more time for members of the public to develop and submit their comments.

DATES: The due date of comments in the document published December 19, 2022 (87 FR 77643) is extended. Comments should be filed not later than 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.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*).

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0146. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–287–0624; email: *Stacy.Schumann@nrc.gov*. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email:* Comments may be submitted to the NRC electronically using the email address *OconeeEnvironmental@nrc.gov*.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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

FOR FURTHER INFORMATION CONTACT: Lance Rakovan, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2589; email: *Lance.Rakovan@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2021–0146 when contacting the NRC about the availability of information for this

action. You may obtain publicly available information related to this action using any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2021–0146.
- *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 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 (ET), Monday through Friday, except Federal holidays.
- *Public Library:* A copy of the ER Supplement is available for public review at the Oconee County Public Library, 300 E. South 2nd St, Seneca, SC 29678

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2021–0146 in your comment submission.

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

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

II. Discussion

On December 19, 2022, the NRC issued a **Federal Register** notice (87 FR 77643) detailing its intent to conduct an additional limited scoping process to gather information necessary to prepare a supplement to its EIS to evaluate the environmental impacts of SLR of Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55 for Oconee.

By letter dated June 7, 2021, Duke Energy Carolinas, LLC (Duke Energy, the applicant) submitted to the NRC an application for subsequent license renewal of Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55 for Oconee, Units 1, 2, and 3 (ADAMS Package Accession No. ML21158A193). Later, the NRC received Subsequent License Renewal—Appendix E Environmental Report Supplement 2 (ER Supplement), dated November 7, 2022 (ADAMS Accession No. ML22311A036), in response to NRC's Memorandum and Order, CLI–22–03 (February 24, 2022) (ADAMS Accession No. ML22055A554). The NRC staff intends to prepare a Draft Supplemental Environmental Impact Statement (DSEIS) for Oconee subsequent license renewal. The subsequent renewed operating licenses would authorize the applicant to operate Oconee for an additional 20 years beyond the period specified in each of the current licenses.

The NRC is conducting an additional limited scoping process to gather information necessary to prepare a supplement to its EIS to evaluate the environmental impacts of SLR of the operating licenses for Oconee. The NRC is seeking public comment on the proper scope of the EIS supplement to be prepared for this action.

The public comment period was originally scheduled to close on January 18, 2023. The NRC has decided to extend the public comment period until February 2, 2023, to allow more time for members of the public to submit their comments. Comments of Federal, State, and local agencies, Indian Tribes or other interested persons will be made available for public inspection when received.

Dated: January 11, 2023.

For the Nuclear Regulatory Commission.

John M. Moses,

Deputy Director, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Materials, Safety and Safeguards.

[FR Doc. 2023–00679 Filed 1–13–23; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Submission of Information Collection for OMB Review; Comment Request; Annual Financial and Actuarial Information Reporting

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval of information collection.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is requesting that the Office of Management and Budget (OMB) extend approval, without modifications, under the Paperwork Reduction Act, of a collection of information contained in its regulation on Annual Financial and Actuarial Information Reporting. This notice informs the public of PBGC's request and solicits public comment on the collection.

DATES: Comments must be submitted on or before February 16, 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. All comments received will be posted without change to PBGC's website, *http://www.pbgc.gov,* including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

A copy of the request will be posted on PBGC's website at *https://www.pbgc.gov/prac/laws-and-regulation/federal-register-notices-open-for-comment.* It may also be obtained without charge by writing to the Disclosure Division of the Office of the General Counsel of PBGC, 445 12th Street SW, Washington, DC 20024–2101; or, calling 202–229–4040 during normal business hours. If you are deaf or hard of hearing or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

FOR FURTHER INFORMATION CONTACT: Melissa Rifkin (*rifkin.melissa@pbgc.gov*), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101, 202–229–6563. If you are deaf or hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Section 4010 of the Employee Retirement Income Security Act of 1974 (ERISA) and PBGC's regulation on Annual Financial and Actuarial Information Reporting (29 CFR part 4010) require each member of a controlled group to submit financial and actuarial information to PBGC under certain circumstances. Section 4010 specifies that each controlled group member must provide PBGC with certain financial information, including audited (if available) or (if not) unaudited financial statements. Section 4010 also specifies that the controlled group must provide PBGC with certain actuarial information necessary to determine the liabilities and assets for all PBGC-covered plans.

PBGC's 4010 regulation specifies the items of identifying, financial, and actuarial information that filers must submit under section 4010, through PBGC's e-filing portal. Computer-assisted analysis of this information helps PBGC to anticipate possible major demands on the pension insurance system and to focus PBGC resources on situations that pose the greatest risks to that system. Because other sources of information are usually not as current as the section 4010 information and do not reflect a plan's termination liability, the section 4010 filing plays a major role in PBGC's ability to protect participant and premium-payer interests.

The collection of information has been approved under OMB control number 1212–0049 (expires March 31, 2023). On November 7, 2022, PBGC published in the **Federal Register** a notice at 87 FR 67078 informing the public of its intent to request an extension of this collection of information and solicited public comment. No comments were received. PBGC intends to request that OMB extend its approval, without modifications, for another 3 years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC estimates that 400 controlled groups will submit filings under part 4010 each year. The total estimated annual hourly and cost burdens of the information collection are 800 hours and $11,080,000.

Issued in Washington, DC, by

Stephanie Cibinic,

Deputy Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2023–00691 Filed 1–13–23; 8:45 am]

BILLING CODE 7709–02–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96623; File No. SR–CBOE–2022–062]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Rule 5.24

January 10, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 27, 2022, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 5.24(e).

(additions are *italicized;* deletions are [bracketed])

* * * * *

Rules of Cboe Exchange, Inc.

* * * * *

Rule 5.24. Disaster Recovery

(a)–(d) No change.

(e) *Loss of Trading Floor or Trading Pit.* If the Exchange trading floor *or a trading pit(s)* becomes inoperable and the Exchange does not make a virtual trading floor available in [a]*the impacted* class*(es)* pursuant to subparagraph (3) below, the Exchange will continue to operate *with respect to the impacted class(es)* in a screen-based only environment using a floorless configuration of the System that is operational while the trading floor *or trading pit(s)* facility is inoperable. The Exchange will operate using this configuration only until the Exchange's trading floor *or trading pit(s)* facility is operational. Open outcry trading *in the impacted classes* will not be available in the event the trading floor *or trading pit(s)* becomes inoperable, except as otherwise set forth in this paragraph (e) below and pursuant to Rule 5.26, as applicable.

(1) *Applicable Rules.* In the event that the trading floor *or a trading pit(s)* becomes inoperable, trading *in the impacted class(es)* will be conducted pursuant to all applicable System Rules, except that open outcry Rules will not be in force *for the impacted class(es),* including but not limited to the Rules (or applicable portions of the Rules) in Chapter 5, Section G, and as follows [(subparagraphs (A) through (C) will be effective until June 20, 2021)]:

(A) notwithstanding the introductory paragraphs of Rules 5.37 and 5.73, an order for the account of a Market-Maker with an appointment in the applicable class on the Exchange may be solicited for the Initiating Order submitted for execution against an Agency Order in any exclusively listed index option class into a simple AIM Auction pursuant to Rule 5.37 or a simple FLEX AIM Auction pursuant to Rule 5.73; *and*

[(B) with respect to complex orders in any exclusively listed index option class:

(1) notwithstanding Rule 5.4(b), the minimum increment for bids and offers on complex orders with any ratio equal to or greater than one-to-twenty-five (0.04) and equal to or less than twenty-five-to-one (25.00) is $0.01 or greater, which may be determined by the Exchange on a class-by-class basis, and the legs may be executed in $0.01 increments; and

(2) notwithstanding the definition of ''complex order'' in Rule 1.1, for purposes of Rule 5.33, the term ''complex order'' means a complex order with any ratio equal to or greater than one-to-twenty-five (0.04) and equal to or less than twenty-five-to-one (25.00); and]

([C]*B*) the contract volume a Market-Maker trades electronically *in an impacted class(es)* during a time period in which the Exchange operates *with respect to that class(es)* in a screen-based only environment will be excluded from determination of whether a Market-Maker executes more than 20% of its contract volume electronically in an appointed class during any calendar quarter, and thus is subject to the continuous electronic quoting obligation, as set forth in Rule 5.52(d).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

All non-trading rules of the Exchange will continue to apply.

* * * * *

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 5.24(e). Rule 5.24 describes which Trading Permit Holders (''TPHs'') are required to connect to the Exchange's backup systems as well as certain actions the Exchange may take as part of its business continuity plans so that it may maintain fair and orderly markets if unusual circumstances occurred that could impact the Exchange's ability to conduct business. This includes what actions the Exchange would take if its trading floor became inoperable. Specifically, Rule 5.24(e) states if the Exchange trading floor becomes inoperable, the Exchange will continue to operate in a screen-based only environment using a floorless configuration of the System that is operational while the trading floor facility is inoperable. The Exchange would operate using that configuration only until the Exchange's trading floor facility became operational. Open outcry trading would not be available in the event the trading floor becomes inoperable.[3] Rule 5.24(e)(1) also currently states in the event that the trading floor becomes inoperable, trading will be conducted pursuant to all applicable System Rules, except that open outcry Rules would not be in force, including but not limited to the Rules (or applicable portions) in Chapter 5, Section G,[4] and that all non-trading rules of the Exchange would continue to apply, except as set forth in Rule 5.24(e)(1)(A) through (C).

The Exchange proposes several changes to Rule 5.24(e). First, the Exchange amends paragraph (e) in various places to that it will apply if the trading floor or a specific trading pit(s) becomes inoperable. It is possible that only one or more trading pits may be inoperable while other trading pits are unimpacted (and thus operable). Permitting the Exchange to operate in a screen-based only environment with a floorless configuration with respect to only classes impacted by an event that causes only part of the trading floor to become inoperable will minimize the impact to the Exchange's market and trading participants. Amending Rule 5.24(e) apply on a class basis is consistent with the current Rule—for example, Rule 5.24(e) would apply if the Exchange does not make a virtual trading floor available in a class pursuant to Rule 5.24(e)(3).

Second, the proposed rule change deletes Rule 5.24(e)(1)(B). Subparagraph (1)(B) permitted, when the trading floor was inoperable, in exclusively listed index classes, complex orders with any ratio equal to or greater than one-to-twenty-five and equal to or less than twenty-five-to-one to be submitted for electronic execution and permitted the minimum increment for bids and offers on those complex orders to be $0.01 and the legs of those complex orders to be executed in $0.01 increments.[5] Currently, however, the Exchange permits electronic execution of complex orders of any ratio and their legs in penny increments. Therefore, the temporary rule for when the trading floor is inoperable in current subparagraph (1)(B) is moot and no longer necessary.[6]

Third, the proposed rule change deletes the parenthetical in Rule 5.24(e)(1). Pursuant to that parenthetical, the rule exceptions set forth in the subparagraphs of that Rule that would apply when the trading floor was inoperable would be effective only until June 20, 2021. This timeframe was tied to the Exchange's closing of its trading floor in 2020 in response to the COVID–19 pandemic.[7] However, the Exchange believes it is appropriate to permit these temporary rules to apply at any time the trading floor (or a trading pit) is inoperable to allow it to maintain fair and orderly markets and facilitate trading in as continuous manner as possible in the event extraordinary circumstances cause the trading floor to become inoperable. These two rule exceptions would apply only during times when the Exchange's trading floor, or a trading pit(s) as proposed, is inoperable and apply only to impacted classes (and subparagraph (e)(1)(A) would continue apply only to exclusively listed classes). The current Rules would continue to apply when normal conditions exist, and the Exchange offers both electronic and open outcry trading. All non-trading rules of the Exchange, including business conduct rules, would continue to apply.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[10] requirement that the rules of an exchange not be designed

[3] Pursuant to Rule 5.26, the Exchange may enter into a back-up trading arrangement with another exchange, which could allow the Exchange to use the facilities of a back-up exchange to conduct trading of certain of its products. The Exchange currently has no back-up trading arrangement in place with another exchange.

[4] Chapter 5, Section G of the Exchange's rulebook sets forth the rules and procedures for manual order handling and open outcry trading on the Exchange.

[5] *See* Rules 1.1(definition of complex order), 5.4(b), and 5.33(f)(1). The Exchange notes complex orders with ratios greater than three-to-one or less than one-to-three, whether submitted for execution electronically or in open outcry, are subject to separate priority requirements. These priority requirements would continue to apply in any class that operates in a screen-based only environment if its applicable trading pit is inoperable. *See* Rule 5.33(f)(2).

[6] The proposed rule change also amends current Rule 5.24(e)(1)(C) to become subparagraph (B) in light of the deletion of current subparagraph (B).

[7] *See* Securities Exchange Act Release No. 88386 (March 13, 2020), 85 FR 15823 (March 19, 2020).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *Id.*

to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change to permit the Exchange to operate in a screen-based only environment in a floorless configuration with respect to impacted classes if only part of the Exchange's trading floor is inoperable will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, if only part of the Exchange's trading floor is inoperable due to extraordinary circumstances, the Exchange believes it will allow continued execution opportunities for impacted classes while permitted unimpacted classes to trade in an uninterrupted manner.

The Exchange believes the removal of the temporary rule related to complex orders will protect the investors and the public interest, as the need for this temporary is moot and no longer necessary in the rules, as the Exchange currently permits complex orders with any ratio to be submitted for electronic execution in penny increments. Therefore, deletion of this provision from the Rules will reduce potential confusion for investors.

Finally, the Exchange believes the proposed rule change to permit the temporary rules set forth in proposed Rule 5.24(e)(1)(A) and (B) to be effective any time the Exchange's trading floor or a trading pit(s) (as proposed) is inoperable remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, because these Rules minimize any impact on liquidity that may otherwise occur when the trading floor (or a trading pit) is in operable. As set forth when adopted,[11] with respect to the provision to permit appointed Market-Makers to be solicited to trade against an Agency Order submitted into a simple AIM Auction (both for FLEX and non-FLEX Options in exclusively listed index option classes), the majority of liquidity provided to orders executed as part of an open outcry cross is provided by appointed Market-Makers. If this liquidity was not available to TPHs in an all-electronic environment, there would be significant risk that these orders may not receive full execution in a timely manner (or at all) and may trade at worse prices than would have otherwise been available on the trading floor. The Exchange believes this provision minimizes this risk and provide electronic execution and price improvement opportunities for these orders, similar to the opportunities that are generally available to them on the trading floor, which protects customers seeking execution of these orders. As set forth in the Rules, all TPHs may submit responses to AIM Auctions, all Agency Orders will continue to have an opportunity for price improvement, and priority customer orders will continue to have priority at each price level.

Additionally, the Exchange believes the provision to exclude volume executed during a time when the trading floor is inoperable from the determination of whether a Market-Maker is subject to continuous electronic quoting obligations promotes just and equitable principles of trade. If this volume were included in this determination, a Market-Maker not otherwise subject to these obligations may become subject to them for reasons outside of the Market-Maker's control. As a result, a Market-Maker may become subject to additional obligations that would not apply during normal circumstances. This provision has no impact on Market-Makers currently subject to continuous electronic quoting obligations, as once a Market-Maker becomes subject to that obligation, it remains subject to that obligation, even if it executes less than 20% of its contract volume electronically in a subsequent calendar quarter. This provision is solely intended to impact those Market-Makers who currently are not subject to continuous electronic quoting obligations. Without this provision, depending on the length of time the trading floor is inoperable, a Market-Maker that has not previously exceeded the 20% contract volume threshold and thus is not currently subject to continuous electronic quoting obligation could exceed that threshold for a calendar quarter, which would then subject it to a new obligation that was not in place when the trading floor was operable. The Exchange believes it would be unduly burdensome to impose obligations on a Market-Maker that are inconsistent with the Market-Maker's standard business practices as a result of extraordinary circumstances outside of the Market-Maker's control, particularly when the Exchange expects those circumstances to be temporary. The Exchange notes all Market-Makers must comply with the other obligations set forth in Rules 5.51 and 5.52, including the obligations related to size, two-sided quotes, and competitive quotes.

The Exchange believes the presence of these temporary rules were beneficial to liquidity and thus to investors during the three-month closure of the Exchange's trading floor in 2020 and observed no harm to investors as a result of these temporary rules. The Exchange believes it is appropriate for these two temporary rules to apply any time the trading floor or a trading pit is inoperable so that it may maintain fair and orderly markets with sufficient liquidity for investors in the event any extraordinary circumstances cause the Exchange to close its trading floor (or any part thereof).

The Exchange's Regulatory Division will continue its standard routine surveillance reviews for electronic trading as it does today and has put together a regulatory plan to surveil the additional changes being proposed when any class is operating in a screen-based only environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended as a competitive filing, but rather is proposed as part of its business continuity plans intended to allow it to maintain fair and orderly markets if unusual circumstances cause the Exchange's trading floor or a trading pit(s) to become inoperable. The Exchange believes the proposed rule change will not burden intramarket competition, as any closure of the trading floor (or trading pit) and resulting operation in a screen-based only environment in a floorless configuration for any class will apply in the same manner to all market participants, as all market participants would be able to submit orders for electronic execution only in impacted classes. Additionally, the Exchange believe the proposed rule change will not burden intermarket competition, as it applies solely to the operation of the Exchange's trading floor. Other than the two temporary rules (one of which applies only to exclusively listed classes), any trading in any class in a screen-based only environment would occur in the same manner as it does today. Permitting the Exchange to operate in a floorless configuration with respect to only impacted classes rather than the entire floor (and all classes) if some classes may continue to operate in hybrid environment will permit the Exchange to operate its market with as minimal interruption as possible in the event extraordinary circumstances cause only part of its trading floor to be inoperable.

[11] *See* Securities Exchange Act Release No. 88386 (March 13, 2020), 85 FR 15823 (March 19, 2020).

The Exchange does not believe the proposed rule change to permit the temporary provision related to AIM contra-parties to apply any time the Exchange's trading floor (or trading pit) is inoperable will impose any burden on intramarket competition, as it will permit all market participants to be solicited to participate in AIM transactions in exclusively listed index options. Additionally, the Exchange does not believe this proposed rule change will impose any burden on intermarket competition, as this provision would apply only to an exclusively listed index option(s) impacted by the trading floor or trading pit closure, which are available for trading solely on the Exchange. By limiting this provision to exclusively listed index options, the Exchange believes this will permit competition with other options exchange with respect to multi-listed options to continue in the same manner as it occurs during normal trading circumstances. The Exchange believes the proposed rule change is necessary and appropriate to allow it to provide trading in these products (which are only able to trade on the Exchange) in an uninterrupted manner to the extent practicable under any extraordinary circumstances (not just the ongoing pandemic).

The Exchange does not believe the proposed rule change to permit the temporary provision to exclude contract volume executed during a time when the trading floor is inoperable from the determination of whether a Market-Maker is subject to continuous quoting obligations at any time will not burden intramarket competition, as it will apply in the same manner to all Market-Makers. As noted above, this provision will have no impact on Market-Makers currently subject to continuous electronic quoting obligations, as those will continue to apply. This provision will prevent Market-Makers not currently subject to continuous electronic quoting obligations who could exceed the 20% threshold triggering those obligations solely because the trading floor was inoperable. The Exchange believes it would be unduly burdensome to subject a Market-Maker to additional obligations because of the unavailability of the Exchange facility where that Market-Maker conducts the vast majority of its business under normal trading circumstances. The Exchange believes this proposed rule change will not burden intermarket competition, as it applies solely to continuous electronic quoting obligations applicable to Market-Makers of the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [14] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange represents that one of its trading pits on the Exchange's trading floor recently experienced weather-related water damage, causing the Exchange to operate in a screen-based only environment with a floorless configuration in one class. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Exchange represents that waiver of the operative delay would permit the Exchange to operate in an uninterrupted manner as much as practicable if any extraordinary circumstance causes a part of the trading floor to become inoperable. The Commission notes that the Exchange represents that the Exchange operated all classes in a floorless configuration for approximately three months in 2020, with temporary rules applying to all classes as applicable and observed no negative impact on the market or market participants. Accordingly, the Commission hereby waives the operative delay and designates the proposal operative upon filing.[16]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2022–062 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE-*2022–062.* 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

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived the five-day prefiling requirement in this case.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2022–062 and should be submitted on or before February 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00655 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96628; File No. SR–EMERALD–2023–01]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by MIAX Emerald, LLC To Amend the Fee Schedule To Modify Certain Connectivity and Port Fees

January 10, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 9, 2023, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the ''Fee Schedule'') to amend its Fee Schedule (the ''Fee Schedule'') to amend certain connectivity and port fees.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as follows: (1) increase the fees for a 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection for Members[3] and non-Members; and (2) adopt a tiered-pricing structure for Limited Service MIAX Emerald Express Interface (''MEI'') Ports[4] available to Market Makers.[5] The Exchange last increased the fees for both 10Gb ULL fiber connections and Limited Service MEI Ports beginning with a series of filings on October 1, 2020 (with the final filing made on March 24, 2021).[6] Prior to that fee change, the Exchange provided Limited Service MEI Ports for $50 per port, after the first two Limited Service MEI Ports that are provided free of charge, and the Exchange incurred all the costs associated to provide those first two Limited Service MEI Ports since it commenced operations in March 2019. The Exchange then increased the fee by $50 to a modest $100 fee per Limited Service MEI Port and increased the fee for 10Gb ULL fiber connections from $6,000 to $10,000 per month.

Also, in that fee change, the Exchange adopted fees for providing five different types of ports for the first time. These ports were FIX Ports, MEI Ports, Clearing Trade Drop Ports, FIX Drop Copy Ports, and Purge Ports.[7] Again, the Exchange absorbed all costs associated with providing these ports since its launch in March 2019. As explained in that filing, expenditures, as well as research and development (''R&D'') in numerous areas resulted in a material increase in expense to the Exchange and were the primary drivers for that proposed fee change. In that filing, the Exchange allocated a total of $9.3 million in expenses to providing 10Gb ULL fiber connectivity, additional Limited Service MEI Ports, FIX Ports, MEI Ports, Clearing Trade Drop Ports, FIX Drop Copy Ports, and Purge Ports.[8]

Since the time of 2021 increase discussed above, the Exchange experienced ongoing increases in expenses, particularly internal expenses. As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $11,361,586 for providing 10Gb ULL connectivity and $1,779,066 for providing Limited Service MEI Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Limited

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] The MIAX Emerald Express Interface (''MEI'') is a connection to the MIAX Emerald System that enables Market Makers to submit simple and complex electronic quotes to MIAX Emerald. *See* the Definitions Section of the Fee Schedule.

[5] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[6] *See* Securities Exchange Act Release Nos. 91460 (April 1, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11); 90184 (October 14, 2020), 85 FR 66636 (October 20, 2020) (SR–EMERALD–2020–12); 90600 (December 8, 2020), 85 FR 80831 (December 14, 2020) (SR–EMERALD–2020–17); 91032 (February 1, 2021), 86 FR 8428 (February 5, 2021) (SR–EMERALD–2021–02); *and* 91200 (February 24, 2021), 86 FR 12221 (March 2, 2021) (SR–EMERALD–2021–07).

[7] *See id.* for a description of each of these ports.

[8] *Id.*

Service MEI Ports in order to recoup ongoing costs and increase in expenses set forth below in the Exchange's cost analysis.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision* [9] and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially different from it prior review process (hereinafter referred to as the ''Revised Review Process''). In the *Susquehanna Decision,* the D.C. Circuit Court stated that the Commission could not maintain a practice of ''unquestioning reliance'' on claims made by a self-regulatory organization (''SRO'') in the course of filing a rule or fee change with the Commission.[10] Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and Financial Markets Association* finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.[11] On that same day, the Commission issued an order remanding to various exchanges and national market system (''NMS'') plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the ''Remand Order'').[12] The Remand Order directed the exchanges to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [13] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[14] However, the Commission did extend the deadlines in the Remand Order ''so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court's mandate.'' [15] Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC (''BOX'') to establish connectivity fees (the ''BOX Order''), which significantly increased the level of information needed for the Commission to believe that an exchange's filing satisfied its obligations under the Act with respect to changing a fee.[16] Despite approving hundreds of access fee filings in the years prior to the BOX Order (described further below) utilizing a ''market-based'' test, the Commission changed course and disapproved BOX's proposal to begin charging connectivity at one-fourth the rate of competing exchanges' pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [17] In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [18] The Staff Guidance also states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [19]

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission's SIFMA Decision in *NASDAQ Stock Market, LLC* v. *SEC* [20] and remanded for further proceedings consistent with its opinion.[21] That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ.* The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision ''has now been vacated, the basis for the [Remand Order] has evaporated.'' [22] Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ* v. *SEC* that Exchange Act Section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.[23] The Commission further invited ''the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq* v. *SEC.*'' [24] Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg's request to withdraw their applications for review and dismissed the proceedings.[25]

As a result of the Commission's loss of the *NASDAQ* v. *SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to

[9] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[10] *Id.*

[11] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[12] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. 78k–1, 78s; *see also* Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

[13] *Id.* at page 2.

[14] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[15] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[16] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it ''historically applied a 'market-based' test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.'' *Id.* at page 16. Despite this admission, the Commission disapproved BOX's proposal to begin charging $5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing ''market-based'' fee filings from years prior).

[17] See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Staff Guidance'').

[18] *Id.*

[19] *Id.*

[20] *NASDAQ Stock Mkt., LLC* v. *SEC,* No 18–1324, --- Fed. App'x ----, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court's mandate was issued on August 6, 2020.

[21] *Nasdaq* v. *SEC,* 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court's mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act ''Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.'' *Id.* The court held that ''for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.'' *Id.* Thus, the court held that ''Section 19(d) is not an available means to challenge the fees at issue'' in the SIFMA Decision. *Id.*

[22] *Id.* at *2; see also *id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[23] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the ''Order Vacating Prior Order and Requesting Additional Briefs'').

[24] *Id.*

[25] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

enable us to perform our review.'' [26] As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings, particularly those submitted by new exchanges, to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the ''record'' or ''review'' earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission's related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (''non-legacy exchanges''), while favoring larger, incumbent, entrenched, legacy exchanges (''legacy exchanges'').[27] The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings [28] to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.[29] These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a ''market-based'' test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.,* non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as the Exchange, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.[30] By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish ''fee parity'' with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff's change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (''Cboe'') reported ''access and capacity fee'' revenue of $70,893,000 for 2020 [31] and $80,383,000 for 2021.[32] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020 [33] and $22,843,000 for 2021.[34] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020 [35] and $44,800,000 for 2021.[36] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020 [37] and $30,687,000 for 2021.[38] For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported $178,712,000 in ''access and capacity fees'' in 2021. NASDAQ Phlx,

[26] *See supra* note 12, at page 2.

[27] Commission Chair Gary Gensler recently reiterated the Commission's mandate to ensure competition in the equities markets. *See* ''Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots'', by Chair Gary Gensler, dated December 14, 2022 (stating ''[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and *enhance competition in the securities markets, including the equity markets*'' (*emphasis added*)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k–1), including ensuring ''fair competition among brokers and dealers, among exchange markets, and *between exchange markets* and markets other than exchange markets. . . .'' (*emphasis added*). *Id.* at note 1. *See also* Securities Acts Amendments of 1975, *available at https://www.govtrack.us/congress/bills/94/s249.*

[28] This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. *See The Nasdaq Stock Market, LLC* v. *SEC,* Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

[29] *See, e.g.,* Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

[30] The Exchange has filed, and subsequently withdrawn, various forms of this proposed fee numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

[31] According to Cboe's 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. *See* Cboe 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[32] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[33] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[34] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[35] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[36] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[37] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[38] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

LLC (''NASDAQ Phlx'') reported ''Trade Management Services'' revenue of $20,817,000 for 2019.[39] The Exchange notes it is unable to compare ''access fee'' revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the ''Trade Management Services'' line item was bundled into a much larger line item in PHLX's Form 1, simply titled ''Market services.'' [40]

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,[41] new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates), which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. While one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely guidance and ''is not a rule, regulation or statement of the . . . Commission . . . the Commission has neither approved nor disapproved its content. . .'',[42] this is not the reality experienced by exchanges such as MIAX Emerald. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite good-faith efforts by the Exchange to provide substantial amount of cost-related details. The Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[43] However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act [44] in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[45] to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity; [46] or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and place a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite

[39] According to PHLX, ''Trade Management Services'' includes ''a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX's] published fee schedules.'' *See* PHLX 2020 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf.*

[40] *See* PHLX Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.*

[41] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[42] *See supra* note 17, at note 1.

[43] *See* Securities Exchange Act Release Nos. 94889 (May 11, 2022), 87 FR 29928 (May 17, 2022) (SR–EMERALD–2022–19); 94718 (April 14, 2022), 87 FR 23633 (April 20, 2022) (SR–EMERALD–2022–15); 94717 (April 14, 2022), 87 FR 23648 (April 20, 2022) (SR–EMERALD–2022–13); 94260 (February 15, 2022), 87 FR 9695 (February 22, 2022) (SR–EMERALD–2022–05); 94257 (February 15, 2022), 87 FR 9678 (February 22, 2022) (SR–EMERALD–2022–04); 93772 (December 14, 2021), 86 FR 71965 (December 20, 2021) (SR–EMERALD–2021–43); 93776 (December 14, 2021), 86 FR 71983 (December 20, 2021) (SR–EMERALD–2021–42); 93188 (September 29, 2021), 86 FR 55052 (October 5, 2021) (SR–EMERALD–2021–31); (SR–EMERALD–2021–30) (withdrawn without being noticed by the Commission); 93166 (September 28, 2021), 86 FR 54760 (October 4, 2021) (SR–EMERALD–2021–29); 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR–EMERALD–2021–25); 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR–EMERALD–2021–23).

[44] 15 U.S.C. 78f(b)(4).

[45] To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

[46] In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. *See, e.g., CSA Staff Consultation Paper 21–401, Real-Time Market Data Fees, available at https://www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_Paper.pdf.*

significantly enhanced arguments and cost disclosures.[47]

Lastly, the Exchange notes that the Commission Staff has allowed similar fee increases by other exchanges to remain in effect by publishing those filings for comment and allowing the exchange to withdraw and re-file numerous times.[48] Recently, the Commission Staff has not afforded the Exchange the same flexibility.[49] This again is evidence that the Commission Staff is not treating non-transaction fee filings in a consistent manner and is holding exchanges to different levels of scrutiny in reviewing filings.

* * * * *

10Gb ULL Connectivity Fee Change

The Exchange proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks[50] via a 10Gb ULL fiber connection. Specifically, the Exchange proposes to amend Sections (5)(a)–(b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from $10,000 per month to $13,500 per month (''10Gb ULL Fee'').[51]

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Limited Service MEI Ports

Background

The Exchange also proposes to amend Section 5)(d) of the Fee Schedule to adopt a tiered-pricing structure for Limited Service MEI Ports available to Market Makers. The Exchange allocates two (2) Full Service MEI Ports[52] and two (2) Limited Service MEI Ports[53] per matching engine[54] to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports and Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports. Currently, Market Makers are assessed a $100 monthly fee for each Limited Service MEI Port for each matching engine above the first two Limited Service MEI Ports that are included for free.

Limited Service MEI Port Fee Changes

The Exchange now proposes to move from a flat monthly fee per Limited Service MEI Port for each matching engine to a tiered-pricing structure for Limited Service MEI Ports for each matching engine under which the monthly fee would vary depending on the number of Limited Service MEI Ports each Market Maker elects to purchase. Specifically, the Exchange will continue to provide the first and second Limited Service MEI Ports for each matching engine free of charge. For Limited Service MEI Ports, the Exchange proposes to adopt the following tiered-pricing structure: (i) the third and fourth Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $200 per port; (ii) the fifth and sixth Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $300 per port; and (iii) the seventh or more Limited Service MEI Ports will increase from the current monthly flat fee of $100 to $400 per port.[55] The Exchange believes a tiered-pricing structure will encourage Market Makers to be more efficient when determining how to connect to the Exchange. This should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient

[47] The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (*e.g.,* healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever-increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review,'' and to ensure a comparable review process with the Exchange's filing.

[48] *See, e.g.,* Securities Exchange Act Release Nos. 93937 (January 10, 2022), 87 FR 2466 (January 14, 2022) (SR–MEMX–2021–22); 94419 (March 15, 2022), 87 FR 16046 (March 21, 2022) (SR–MEMX–2022–02); SR–MEMX–2022–12 (withdrawn before being noticed); 94924 (May 16, 2022), 87 FR 31026 (May 20, 2022) (SR–MEMX–2022–13); 95299 (July 15, 2022), 87 FR 43563 (July 21, 2022) (SR–MEMX–2022–17); SR–MEMX–2022–24 (withdrawn before being noticed); 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); 94901 (May 12, 2022), 87 FR 30305 (May 18, 2022) (SR–MRX–2022–04); SR–MRX–2022–06 (withdrawn before being noticed); 95262 (July 12, 2022), 87 FR 42780 (July 18, 2022) (SR–MRX–2022–09); 95710 (September 8, 2022), 87 FR 56464 (September 14, 2022) (SR–MRX–2022–12); 96046 (October 12, 2022), 87 FR 63119 (October 18, 2022) (SR–MRX–2022–20); 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); *and* 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32).

[49] *See* Securities Exchange Act Release Nos. 94889 (May 11, 2022), 87 FR 29928 (May 17, 2022) (SR–EMERALD–2022–19); 94718 (April 14, 2022), 87 FR 23633 (April 20, 2022) (SR–EMERALD–2022–15).

[50] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[51] Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section (4)(c) of the Exchange's fee schedule. *See* Section (4)(c) of the Exchange's fee schedule *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_10192022.pdf* (providing that ''Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.'').

[52] The term ''Full Service MEI Ports'' means a port which provides Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX Emerald System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per Matching Engine. *See* the Definitions Section of the Fee Schedule.

[53] The term ''Limited Service MEI Ports'' means a port which provides Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX Emerald System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. *See* the Definitions Section of the Fee Schedule.

[54] The term ''Matching Engine'' means a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may be processed by one single Matching Engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. *See* the Definitions Section of the Fee Schedule.

[55] As noted in the Fee Schedule, Market Makers will continue to be limited to fourteen Limited Service MEI Ports per Matching Engine. The Exchange also proposes to make a ministerial clarifying change to remove the defined term ''Additional Limited Service MEI Ports'' as a result of moving to a tiered pricing structure where the first two Limited Service MEI Ports continue to be provided free of charge. The Exchange proposes to make a related change to add the term ''Limited Service MEI Ports'' after the word ''fourteen'' in the Fee Schedule.

capacity and headroom in the System[56] in accordance with its fair access requirements under Section 6(b)(5) of the Act.[57]

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, Market Makers who take the maximum amount of Limited Service MEI Ports account for approximately greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for approximately less than 1% of message traffic over the network. In the Exchange's experience, Market Makers who only utilize the two free Limited Service MEI Ports do not have a business need for the high performance network solutions required by Market Makers who take the maximum amount of Limited Service MEI Ports. The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 18 million quote messages per second. Based on November 2022 trading results, on an average day, the Exchange handles over approximately 6.9 billion quotes, and more than 146 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generate over 4 billion quotes, and Market Makers who utilize the two free Limited Service MEI Ports generate approximately 1.6 billion quotes. Also for November 2022, Market Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 1,264,703,600 quotes per day. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[58] Thus, as the number of connections a Market Maker has increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes no fee or lower fees for those Market Makers who receive fewer Limited Service MEI Ports since those Market Makers generally tend to send the least amount of orders and messages over those connections. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who take the most Limited Service MEI Ports pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, but is designed and maintained from a capacity standpoint to specifically handle the message rate and performance requirements of those Market Makers.

The Exchange proposes to increase its monthly Limited Service MEI Port fees to recover a portion of the costs associated with directly accessing the Exchange.

Implementation

The Exchange initially filed this proposal on December 30, 2022 as SR–EMERALD–2022–38. On January 9, 2023, the Exchange withdrew SR–EMERALD–2022–38 and resubmitted this proposal. The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[59] in general, and furthers the objectives of Section 6(b)(4) of the Act[60] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of Section 6(b)(5) of the Act[61] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order[62] and the Staff Guidance,[63] the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.''[64] The Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.''[65] In the Staff Guidance, the Commission

[56] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[57] *See* 15 U.S.C. 78f(b). The Exchange may offer access on terms that are not unfairly discriminatory among its Members, and ensure sufficient capacity and headroom in the System. The Exchange monitors the System's performance and makes adjustments to its System based on market conditions and Member demand.

[58] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[59] 15 U.S.C. 78f(b).

[60] 15 U.S.C. 78f(b)(4).

[61] 15 U.S.C. 78f(b)(5).

[62] *See supra* note 16.

[63] *See supra* note 17.

[64] *Id.*

[65] *Id.*

Staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, . . . , specific information, including quantitative information, should be provided to support that argument.'' [66]

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity and Limited Service MEI Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction relates fees to provide them with additional necessary revenue to better compete. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates). The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, while one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

[66] *Id.*

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange initially adopted a fee of $50 per port, after the first two Limited Service MEI Ports that are provided free of charge, and the Exchange incurred all the costs associated to provide those first two Limited Service MEI Ports since it commenced operations in March 2019. At that same time, the Exchange only charged $6,000 per month for each 10Gb ULL connection. As a new exchange entrant, the Exchange chose to offer connectivity and ports at very low fees to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.[67]

Later in 2020, as the Exchange's market share increased,[68] the Exchange then increased the fee by $50 to a modest $100 fee per Limited Service MEI Port and increased the fee for 10Gb ULL fiber connections from $6,000 to $10,000 per month.[69] The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . .'' [70]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its

[67] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (stating, ''[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX. . .''). *See also* Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR–MEMX–2020–10) (proposing to adopt the initial fee schedule and stating that ''[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application sessions.''). MEMX's market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. *See* Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32) *and* 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity). *See also, e.g.,* Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf* (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

[68] The Exchange experienced a monthly average trading volume of 3.43% for the month of October 2020. *See* Market at a Glance, *available at www.miaxoptions.com.*

[69] *See* Securities Exchange Act Release Nos. 91460 (April 1, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11); 90184 (October 14, 2020), 85 FR 66636 (October 20, 2020) (SR–EMERALD–2020–12); 90600 (December 8, 2020), 85 FR 80831 (December 14, 2020) (SR–EMERALD–2020–17); 91032 (February 1, 2021), 86 FR 8428 (February 5, 2021) (SR–EMERALD–2021–02); *and* 91200 (February 24, 2021), 86 FR 12221 (March 2, 2021) (SR–EMERALD–2021–07).

[70] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

broader forms that are most important to investors and listed companies.'' [71]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [72] As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' [73] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [74] In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.'' [75]

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that are closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the market data rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX Emerald (as proposed) (equity options market share of 2.88% for the month of November 2022) [76].	10Gb ULL connection	$13,500.
	Limited Service MEI Ports	1–2 ports: FREE (not changed in this proposal). 3–4 ports: $200 each. 5–6 ports: $300 each. 7 or more ports: $400 each.
NASDAQ [77] (equity options market share of 6.61% for the month of November 2022) [78].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	1–5 ports: $1,500 per port. 6–20 ports: $1,000 per port. 21 or more ports: $500 per port.
NASDAQ ISE LLC (''ISE'') [79] (equity options market share of 5.76% for the month of November 2022) [80].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	$1,100 per port.
NYSE American LLC (''NYSE American'') [81] (equity options market share of 6.41% for the month of November 2022) [82].	10Gb LX LCN connection	$22,000 per connection.
	Order/Quote Entry Port	Ports 1–40. $450 per port. Ports 41 and greater. $150 per port.
NASDAQ GEMX, LLC (''GEMX'') [83] (equity options market share of 1.79% for the month of November 2022) [84].	10Gb Ultra connection	$15,000 per connection.
	SQF Port	$1,250 per port.

The Exchange notes that, in regard to Limited Service MEI Ports, other exchanges charge on a per port basis and require firms to connect to multiple matching engines, thereby multiplying the cost to access their full market.[85]

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market participants may choose to become a member of one or more options exchanges based on the market participant's assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, the Exchange's affiliate, MIAX PEARL, LLC (''MIAX Pearl''), experienced a decrease in membership as the result of similar fees proposed herein. One MIAX Pearl Member notified MIAX Pearl that it will terminate their MIAX Pearl membership effective January 1, 2023, as a direct result of the proposed connectivity and port fee changes on MIAX Pearl.

It is not a requirement for market participants to become members of all options exchanges, in fact, certain market participants conduct an options business as a member of only one

[71] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[72] *See NetCoalition,* 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[73] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[74] *Id.*

[75] *See* Staff Guidance, *supra* note 17.

[76] *See supra* note 68.

[77] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[78] *See supra* note 68.

[79] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.

[80] *See supra* note 68.

[81] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[82] *See supra* note 68.

[83] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.

[84] *See supra* note 68.

[85] *See* Specialized Quote Interface Specification, Nasdaq PHLX, Nasdaq Options Market, Nasdaq BX Options, Version 6.5a, Section 2, Architecture (revised August 16, 2019), *available at http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/SQF6.5a-2019-Aug.pdf.* The Exchange notes that it is unclear whether the NASDAQ exchanges include connectivity to each matching engine for the single fee or charge per connection, per matching engine. *See also* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020). The Exchange notes that NYSE provides a link to an Excel file detailing the number of matching engines per options exchange, with Arca and Amex having 19 and 17 matching engines, respectively.

options market.[86] A very small number of market participants choose to become a member of all sixteen options exchanges. Most firms that actively trade on options markets are not currently Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Members or service bureaus, and only a Member may utilize a port.[87]

One other exchange recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAX, and BOX, 42 firms access only one of the three exchanges.[88] The Exchange and its affiliates, MIAX Pearl and MIAX, have a total of 47 members. Of those 47 total members, 35 are members of all three affiliated exchanges, four are members of only two (2) affiliated exchanges, and eight (8) are members of only one affiliated exchange. The Exchange also notes that no firm is a Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all options exchanges, let alone the Exchange and its two affiliates, and broker-dealers may elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the broker-dealer membership analysis of the options exchanges discussed above. As noted above, this is evidenced by the fact that one MIAX Pearl Member will terminate their MIAX Pearl membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl (which are similar to the changes proposed herein). Indeed, broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not ''lock'' a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at—or establish connectivity to—the Exchange.[89] If the Exchange is not at the NBBO, the Exchange will route an order to any away market that is at the NBBO to ensure that the order was executed at a superior price and prevent a trade-through.[90]

With respect to the submission of orders, Members may also choose not to purchase any connection at all from the Exchange, and instead rely on the port of a third party to submit an order. For example, a third-party broker-dealer Member of the Exchange may be utilized by a retail investor to submit orders into an Exchange. An institutional investor may utilize a broker-dealer, a service bureau,[91] or request sponsored access[92] through a member of an exchange in order to submit a trade directly to an options exchange.[93] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.,* fees based on the number of firms that connect to the Exchange indirectly via the third-party).[94] Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous

[86] BOX recently adopted an electronic market maker trading permit fee. *See* Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17). In that proposal, BOX stated that, ''. . . it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX].'' Also in 2022, MEMX established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee ''is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange'' and that ''neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.''

[87] Service Bureaus may obtain ports on behalf of Members.

[88] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX's observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

[89] *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), *available at https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.*

[90] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[91] Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

[92] Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[93] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[94] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at,* US Direct-Extranet Connection (nasdaqtrader.com); *and* Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); *and* 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

customers of their own.[95] Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 16 options markets. Accordingly, the Exchange believes that the proposed fees are fair and reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member, and is approved for membership by the Exchange, the Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become a Member of the Exchange, or, if it is a Member, to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services, the Exchange seeks to be especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and also carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[96] and Rule 19b–4 thereunder,[97] with respect to the types of information SROs should provide when filing fee changes, and Section 6(b) of the Act,[98] which requires, among other things, that exchange fees be reasonable and equitably allocated,[99] not designed to permit unfair discrimination,[100] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[101] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[102] The Exchange notes that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at $11,361,586 (or approximately $946,799 per month, rounded to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Limited Service MEI Ports at $1,799,066 (or approximately $148,255 per month, rounded to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its Users (both Members and non-Members [103]) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of $13,500 per month for each physical 10Gb ULL connection. The Exchange also proposes to modify its Fee Schedule to charge tiered rates for additional Limited Service MEI Ports.

In 2020, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[104] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers''). Next, the Exchange adopted an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical 1Gb and 10Gb ULL connectivity (62%), with smaller allocations to all ports (10%), and the remainder to the provision of transaction execution, membership services and market data services (28%). The allocation methodology was developed through conversations with senior management familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can

[95] The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

[96] 15 U.S.C. 78s(b)(1).

[97] 17 CFR 240.19b–4.

[98] 15 U.S.C. 78f(b).

[99] 15 U.S.C. 78f(b)(4).

[100] 15 U.S.C. 78f(b)(5).

[101] 15 U.S.C. 78f(b)(8).

[102] *See* Staff Guidance, *supra* note 17.

[103] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access Limited Service MEI Ports on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

[104] The Exchange frequently updates it Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange's most recent Cost Analysis was conducted ahead of this filing.

potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity, only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange, many Members (but not all) consume market data from the Exchange in order to trade on the Exchange, and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals.

Through the Exchange's extensive updated Cost Analysis, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the cost drivers to provide 10Gb ULL connectivity and Limited Service MEI Port services, including both physical 10Gb connections and Limited Service MEI Ports, result in an aggregate monthly cost of approximately $1,095,054 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Limited Service MEI Ports by 12 months, then adding both numbers together), as further detailed below.

Costs Related To Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 28.1% of its overall Human Resources cost to offering physical connectivity).

Cost drivers	Annual cost [105]	Monthly cost [106]	% of all
Human Resources	$3,520,856	$293,405	28
Connectivity (external fees, cabling, switches, etc.)	71,675	5,973	61.9
Internet Services, including External Market Data	373,249	31,104	84.8
Data Center	752,545	62,712	61.9
Hardware and Software Maintenance and Licenses	666,208	55,517	50.9
Depreciation	1,929,118	160,760	63.8
Allocated Shared Expenses	4,047,935	337,328	51.3
Total	11,361,586	946,799	42.8

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity.

Human Resources

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange's network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity) and for which the Exchange allocated a percentage of 42.4% of each employee's time. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security and finance personnel), for which the Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who do support functions related to providing physical connectivity) and then applied a smaller allocation to such employees (less than 20%). The Exchange notes that it has 184 employees and each department leader has direct knowledge of the time spent by those spent by each employee with respect to the various tasks necessary to operate the Exchange. The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing physical connectivity. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity and Internet Services

The Connectivity cost includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity line-item is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with

[105] The Annual Cost includes figures rounded to the nearest dollar.

[106] The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity and content service providers for connectivity and data feeds for the entire U.S. options industry, as well as content, connectivity, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity and content service providers to connect to other national securities exchanges, the Options Price Reporting Authority (''OPRA''), and to receive market data from other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity and market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data providers, or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity and content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (61.9%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity of participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange included External Market Data fees to the provision of 10Gb ULL connectivity as such market data is necessary here to offer certain services related to such connectivity, such as certain risk checks that are performed prior to execution, and checking for other conditions (*e.g.,* re-pricing of orders to avoid lock or crossed markets, trading collars). This allocation was included as part of the Internet Services cost described above. Thus, as market data from other exchanges is consumed at the matching engine level, (to which 10Gb ULL connectivity provides access to) in order to validate orders before additional entering the matching engine or being executed, the Exchange believes it is reasonable to allocate a small amount of such costs to 10Gb ULL connectivity.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.

Monthly Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. As noted above, the Exchange allocated 63.8% of all depreciation costs to providing physical 10Gb ULL connectivity. The Exchange notes, however, that it did not allocate depreciation costs for any depreciated software necessary to operate the Exchange to physical connectivity, as such software does not impact the provision of physical connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall physical connectivity costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide physical connectivity. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange notes that the cost of paying directors to serve on its Board of Directors is also included in the Exchange's general shared expenses.[107] The Exchange notes that the 51.3% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Limited Service MEI Ports based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), Limited Service MEI Ports do not require as many broad or indirect resources as other Core Services. The total monthly cost for 10Gb ULL connectivity of $946,799 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (102), to arrive at a cost of approximately $9,282 per month, per physical 10Gb ULL connection.

Costs Related To Offering Limited Service MEI Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Limited Service MEO Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 5.9% of its overall Human Resources cost to offering Limited Service MEI Ports).

[107] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

Cost drivers	Annual cost [108]	Monthly cost [109]	% of all
Human Resources	$737,784	$61,482	5.9
Connectivity (external fees, cabling, switches, etc.)	3,713	309	3.2
Internet Services	14,102	1,175	3.2
Data Center	55,686	4,641	4.6
Hardware and Software Maintenance and Licenses	41,951	3,496	3.2
Depreciation	112,694	9,391	3.7
Allocated Shared Expenses	813,136	67,761	10.3
Total	1,779,066	148,255	6.7

Human Resources

With respect to Limited Service MEI Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Limited Service MEI Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). The estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Limited Service MEI Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Limited Service MEI Ports and maintaining performance thereof. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing Limited Service MEI Ports and maintaining performance thereof. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity and Internet Services

The Connectivity cost includes external fees paid to connect to other exchanges, cabling and switches, as described above. For purposes of Limited Service MEI Ports, the Exchange also includes a portion of its costs related to External Market Data, as described below.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment as well as related costs (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange included External Market Data fees to the provision of Limited Service MEI Ports as such market data is necessary to offer certain services related to such sessions, such as validating orders on entry against the national best bid and national best offer and checking for other conditions (*e.g.,* whether a symbol is halted). This allocation was included as part of the Internet Services cost described above.[110] Thus, as market data from other Exchanges is consumed at the Limited Service MEI Port level in order to validate orders before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to Limited Service MEI Ports.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

Monthly Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 3.7% of all depreciation costs to providing Limited Service MEI Ports. In contrast to physical connectivity, described above, the Exchange did allocate depreciation costs for depreciated software necessary to operate the Exchange to Limited Service MEI Ports because such software is related to the provision of such connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall Limited Service MEI Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide Limited Service MEI Ports. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 11% of the overall cost for directors was allocated to providing Limited Service MEI Ports. The Exchange notes that the 10.3% allocation of general shared expenses for Limited Service MEI Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Limited Service MEI Ports have several areas where certain tangible costs are heavily weighted

[108] *See supra* note 105 (describing rounding of Annual Costs).

[109] *See supra* note 106 (describing rounding of Monthly Costs based on Annual Costs).

[110] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

towards providing such service (*e.g.,* Data Centers, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange. The total monthly cost of $148,255 was divided by the number of chargeable Limited Service MEI Ports (excluding the two free Limited Service MEI Ports per matching engine that each Member receives) the Exchange maintained at the time that proposed pricing was determined (706), to arrive at a cost of approximately $210 per month, per charged Limited Service MEI Port.

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Limited Service MEI Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42.4%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 8.0% to Limited Service MEI Ports and the remaining 49.6% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 19.8% for 10Gb ULL connectivity or 19.9% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (5% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Limited Service MEI Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Limited Service MEI Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 28.1% of its personnel costs to providing physical connections and 5.9% of its personnel costs to providing Limited Service MEI Ports, for a total allocation of 34% Human Resources expense to provide these specific connectivity services. In turn, the Exchange allocated the remaining 66% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Limited Service MEI Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 67.5% of the Exchange's overall depreciation and amortization expense to connectivity services (63.8% attributed to 10Gb ULL physical connections and 3.7% to Limited Service MEI Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 32.5%) toward the cost of providing transaction services, membership services, other port services and market data

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Limited Service MEI Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. As such, the Exchange believes that its costs will remain relatively similar in future years. It is possible however that such costs will either decrease or increase. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases.

However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange would propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Projected Revenue

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services;

without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services at $11,361,586. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $16,524,000. This represents a modest profit of 31% when compared to the cost of providing 10Gb ULL connectivity services. The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services at $1,779,066. Based on current Limited Service MEI Port services usage, the Exchange would generate annual revenue of approximately $2,809,200. This represents a modest profit of 37% when compared to the cost of providing Limited Service MEI Port services. Even if the Exchange earns those amounts or incrementally more, the Exchange believes the proposed fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total expense of the Exchange associated with providing 10Gb ULL connectivity and Limited Service MEI Port services versus the total projected revenue of the Exchange associated with network 10Gb ULL connectivity and Limited Service MEI Port services.

* * * * *

The Exchange has operated at a cumulative net annual loss since it launched operations in 2019.[111] The Exchange has operated at a net loss due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as connectivity, at lower rates than other options exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange should not now be penalized for seeking to raise its fees in light of necessary technology changes and its increased costs after offering such products as discounted prices. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Limited Service MEI Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 10Gb ULL connectivity and Limited Service MEI Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity actually produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Limited Service MEI Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange does not believe it should be penalized for such success. The Exchange, like other exchanges, is, after all, a for-profit business, which provides economic value to its Members. To the extent the Exchange has mispriced and experiences a net loss in clients, the Exchange could experience a net reduction in revenue. While the Exchange believes in transparency around costs and potential revenue, the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted.

Further, the proposal reflects the Exchange's efforts to control its costs, which the Exchange does on an ongoing basis as a matter of good business practice. A potential profit margin should not be judged alone based on its size, but is also indicative of costs management and whether the ultimate fee reflects the value of the services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive where on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of

[111] The Exchange has incurred a cumulative loss of $9 million since its inception in 2019. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 29, 2022, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001164.pdf.*

message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.[112] Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

Limited Service MEI Ports

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity alternatives, as the users of the Limited Service MEI Ports consume the most bandwidth and resources of the network. Specifically, like above for the 10Gb ULL connectivity, the Exchange notes that the Market Makers who take the maximum amount of Limited Service MEI Ports account for approximately greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for approximately less than 1% of message traffic over the network. In the Exchange's experience, Market Makers who only utilize the two free Limited Service MEI Ports do not have a business need for the high performance network solutions required by Market Makers who take the maximum amount of Limited Service MEI Ports. The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 18 million quote messages per second. Based on November 2022 trading results, on an average day, the Exchange handles over approximately 6.9 billion quotes, and more than 146 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generate over 4 billion quotes, and Market Makers who utilize the two free Limited Service MEI Ports generate approximately 1.6 billion quotes. Also for November 2022, Market Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 1,264,703,600 quotes per day. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[113] Thus, as the number of connections a Market Maker has increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes no fee or lower fees for those Market Makers who receive fewer Limited Service MEI Ports since those Market Makers generally tend to send the least amount of orders and messages over those connections. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who take the most Limited Service MEI Ports pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, but is designed and maintained from a capacity standpoint to specifically handle the message rate and performance requirements of those Market Makers.

To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. Billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[114] Thus, as the number of connections a Market Maker has increases, the related pull on Exchange resources also increases. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Limited Service MEI Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange operated at a cumulative net annual loss since its

[112] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[113] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[114] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

launch in 2019 [115] due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry, which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Limited Service MEI Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one MIAX Pearl Member will terminate their MIAX Pearl membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAX Pearl. The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to connect to all options exchanges. There is no reason to believe that our proposed price increase will harm another exchange's ability to compete. There are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. There is also a range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. Market participants are free to choose which exchange or reseller to use to satisfy their business needs. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[116] and Rule

[115] *See supra* note 111.

[116] 15 U.S.C. 78s(b)(3)(A)(ii).

19b–4(f)(2)[117] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EMERALD–2023–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–EMERALD–2023–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EMERALD–2023–01 and should be submitted on or before February 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[118]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00659 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

[117] 17 CFR 240.19b–4(f)(2).

[118] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96634; File No. SR–ICEEU–2022–027]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change Relating to the Capital Replenishment Plan

January 11, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 29, 2022, ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I, II and III below, which Items have been prepared primarily by ICE Clear Europe. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') proposes to adopt a new Capital Replenishment Plan to document certain tools, procedures and arrangements to replenish its financial resources in the event of Clearing Member default and in the event of losses not caused by Clearing Member default.[3]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Capitalized terms used but not defined herein have the meanings specified in the Capital Replenishment Plan or, if not defined therein, the ICE Clear Europe Clearing Rules.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe 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

(a) Purpose

ICE Clear Europe is proposing to adopt a new Capital Replenishment Plan (the ''Plan'') to document certain tools, procedures and arrangements that the Clearing House may use to replenish its capital, when necessary. The Plan[4] would address replenishment of both ICE Clear Europe's own resources contribution to its guaranty funds and capital required under applicable law, including the capital requirement under EMIR as incorporated into UK law following the Brexit transition (the ''EMIR capital requirement'').[5] The Plan would recognize that a need to replenish capital may arise because of a Clearing Member default, the occurrence of sudden extraordinary one-off losses, net losses resulting from custody or investment risks, or from recurring losses which may arise from general business risks.[6]

The Plan would set out the overall purposes of the Plan and the Clearing House's overall approach to capital management and maintaining capital resources. The Plan is intended, among other purposes, to set out for senior management, the audit committee and the Board actions they may consider to replenish capital and to identify stakeholders and their respective responsibilities with respect to ICE Clear Europe's continued compliance with relevant laws and regulations

[4] The Plan would consolidate and replace a pre-existing capital requirement framework and related practices.

[5] Commission Delegated Regulation (EU) No. 152/2013 of 19 December 2012 supplementing Regulation (EU) No. 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on capital requirements for central counterparties, as on-shored into UK law following the end of the Brexit transition period.

[6] The Plan would also serve as a recovery tool and would be part of ICE Clear Europe's overall Recovery Plan.

covering regulatory capital. This Plan takes into account both the minimum legal capital requirements, including under the EMIR capital requirement, as well as a higher target capital requirement (which includes a voluntary capital contribution as well as a notification buffer). The replenishment tools and actions under the Plan have been developed so as to prioritize replenishing the legal capital requirement first. Replenishment of additional capital to the target amount can be addressed once the legal requirement has been restored, (or at the same time at the discretion of the Board, resources permitting).

The Plan outlines the general steps the Clearing House would expect to take to replenish capital, including (1) first assessing and using available accumulated financial resources, (2) then looking to use reasonably calculated forecasts as to future profits, (3) if those resources are insufficient to restore capital to the legal requirement, by seeking resources from its parent company in the ICE group, and (4) thereafter, with the approval of its parent and subject to the rights of existing shareholders, by seeking additional capital from third parties. ICE Clear Europe may also bypass the first two steps outlined above and immediately request capital from its parent company.

The Plan also states that overall accountability for the plan lies with the Finance Director, President, and the Board. The Plan would be subject to annual review, and capital replenishment would be included in the annual default management test schedule. The Plan would identify specific internal control and governance responsibilities for the Finance Director, President, the Board and Board Risk Committee relating to monitoring capital compliance and replenishment. The Finance Director would be responsible for monitoring ICE Clear Europe's compliance with the applicable regulatory capital requirements, reporting capital adequacy internally and to regulators, escalating matters relating to capital adequacy to the President where appropriate, and contributing to the development of plans to increase and/or replenish Eligible Capital as required for ICE Clear Europe to continue to meet its regulatory capital requirements. The President would be responsible for ensuring ICE Clear Europe meets its capital adequacy obligations under relevant laws and regulations. The Board Risk Committee would be responsible for reviewing and recommending to the Board the principles underlying the capital planning process, as well as the Plan, itself, and the Board itself would be responsible for approving the principles and the Plan. The Board would also be responsible for holding the President accountable for demonstrating adherence to ICE Clear Europe's capital policies and for reviewing and approving any capital transactions.

The Plan would also address the determination of the target capital amount in excess of the legal minimum capital requirement. ICE Clear Europe seeks to maintain excess capital above the threshold at which notification would be required to the Bank of England (which is generally 10% above the required capital level). In addition, ICE Clear Europe endeavors to maintain additional capital, on a voluntary basis, approximately equal to an additional 10% of the required capital level plus the 10% buffer referenced above.

The Plan would also provide further detail as to the use of the capital replenishment tools referenced above in different default loss and non-default loss scenarios and related actions to be taken for each tool, including as to the key individuals and departments involved and approvals required, the estimated timing for various actions, relevant documentation requirements, the procedure for determination of the relevant amount of additional resources to be sought or applied from the relevant sources, and the process for consultation with Clearing Members and regulators, among other matters. Annexes to the Plan also set out relevant templates for documentation.

(b) Statutory Basis

ICE Clear Europe believes that the proposed adoption of the Capital Replenishment Plan is consistent with the requirements of section 17A of the Act [7] and the regulations thereunder applicable to it. In particular, section 17A(b)(3)(F) of the Act [8] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest. The Capital Replenishment Plan is intended to document procedures for replenishing capital, for both the own resources contribution to the guaranty funds and the EMIR capital requirements for the Clearing House. As a part of the broader Recovery Plan, the proposed Capital Replenishment Plan will facilitate the continued operation of the Clearing House following a significant loss from one or more Clearing Member defaults or a non-default loss (including investment or custodial losses and losses from general business risk) by replenishing needed financial resources. The Plan would address replenishment to both the minimum legal capital requirement and the higher target level intended to provide additional resources as an operating buffer. The amendments thus are consistent with the continued prompt and accurate clearance and settlement of securities transactions and derivatives transactions and the safeguarding of securities and funds in the custody or control of the Clearing House or for which it is responsible, following a significant default or non-default loss. The amendments thus also enhance the protection of investors and the public interest in the continued sound operation of the Clearing House, consistent with the requirements of section 17A(b)(3)(F) of the Act.[9]

The Capital Replenishment Plan is also consistent with relevant provisions of Rule 17Ad–22. Rule 17Ad–22(e)(3)(ii) [10] provides that the ''covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonable designed to, as applicable [. . .] maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody and other risks that arise in or are borne by the covered clearing agency, which . . . includes plans for the recovery or orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.'' As discussed above, the Plan serves as a part of the broader Recovery Plan and is intended to document tools, arrangements and procedures for replenishing capital when needed as a result of default losses or non-default losses, including losses from general business risk. The Plan further sets out the roles and functions of the Board, ICE Clear Europe management and other internal personnel and committees in taking such steps to replenish financial resources. In ICE Clear Europe's view, the implementation of the Capital Replenishment Plan is therefore

[7] 15 U.S.C. 78q–1.

[8] 15 U.S.C. 78q–1(b)(3)(F).

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 17 CFR 240.17Ad–22(e)(3)(ii).

consistent with the requirements of Rule 17Ad–22(e)(3)(ii).[11]

Rule 17Ad–22(e)(2)[12] provides that the ''covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonable designed to, as applicable [. . .] provide for governance arrangements'' that ''are clear and transparent''[13] and ''specify clear and direct lines of responsibility''.[14] The Plan identifies responsibilities of key ICE Clear Europe personnel, the Board and other stakeholders with respect to ongoing compliance with capital requirements and for capital replenishment when necessary. The Plan also provides for annual review by ICE Clear Europe's President, Finance Director, and Board to ensure that it remains up-to-date and is reviewed in accordance with the Clearing House's internal governance processes. In ICE Clear Europe's view, the documents are therefore consistent with the requirements of Rule 17Ad–22(e)(2).[15]

In addition, the Plan is consistent with the requirements of Rule 17Ad–22(e)(15),[16] which states that a clearing agency shall ''identify, monitor, and manage, the covered clearing agency's general business risk and hold sufficient liquid net assets funded by equity to cover potential general business losses . . .'' by ''[m]aintaining a viable plan, approved by the board of directors and updated at least annually, for raising additional equity should its equity fall close to or below the amount required under paragraph (e)(15)(ii) of this section.''[17] As stated above, the Plan has been approved by the ICE Clear Europe Board of Directors, would be reviewed and updated annually, and would outline the tools available to restore additional capital if needed. Specifically, the Plan serves as a part of the broader Recovery Plan and is intended to document tools, arrangements and procedures for replenishing capital when needed, including as a result of losses from general business risk. The capital restoration levels detailed in the Plan are based on the Clearing House's legal capital requirements and its own target capital level. These are designed to exceed the amount required under Rule 17Ad–22(e)(15)(ii).[18] As a result, it is ICE Clear Europe's view that the Plan is consistent with Rule 17Ad–22(e)(15).[19]

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed Capital Replenishment Plan is intended to facilitate replenishment of capital when necessary as a result of a clearing member default, the occurrence of sudden extraordinary one-off losses, any net losses incurred resulting from custody or investment risks, or from recurring losses which may arise from general business risks. The Plan will not affect the rights or obligations of Clearing Members, and is designed to facilitate continued operation of the Clearing House following a loss. ICE Clear Europe does not believe that the proposal would adversely affect the ability of Clearing Members or other market participants generally to access clearing services. Further, ICE Clear Europe believes that the Plan would not otherwise affect competition among Clearing Members, adversely affect the market for clearing services, or limit market participants' choices for obtaining clearing services. Accordingly, ICE Clear Europe does not believe that the amendments would impose any impact or burden on competition that is not appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change

Written comments relating to the proposed amendment has not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any comments received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–ICEEU–2022–027 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–ICEEU–2022–027. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/clear-europe/regulation.*

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–ICEEU–2022–027

[11] 17 CFR 240.17Ad–22(e)(3)(ii).
[12] 17 CFR 240.17Ad–22(e)(2).
[13] 17 CFR 240.17Ad–22(e)(2)(i).
[14] 17 CFR 240.17Ad–22(e)(2)(v).
[15] 17 CFR 240.17Ad–22(e)(2).
[16] 17 CFR 240.17Ad–22(e)(15).
[17] 17 CFR 240.17Ad–22(e)(15)(iii).
[18] 17 CFR 240.17Ad–22(e)(15)(ii).
[19] 17 CFR 240.17Ad–22(e)(15).

and should be submitted on or before February 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00774 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96631; File No. SR–PEARL–2022–61]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Equities Fee Schedule To Modify Certain Connectivity and Port Fees

January 10, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 30, 2022, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the fee schedule (the ''Fee Schedule'') applicable to MIAX Pearl Equities, an equities trading facility of the Exchange, to amend certain connectivity and port fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to amend fees for: (1) the 1 gigabit (''Gb'') and 10Gb ultra-low latency (''ULL'') fiber connections for Equity Members[3] and non-Members; (2) the Financial Information Exchange (''FIX'') Ports,[4] and the MIAX Express Orders Interface (''MEO'') Ports.[5] The Exchange adopted connectivity and port fees in September 2020,[6] and has not changed those fees since they were adopted. Since that time, the Exchange experienced ongoing increases in expenses, particularly internal expenses. As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $18,331,650 for providing 1Gb and 10Gb ULL connectivity combined and $3,951,993 for providing FIX and MEO Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity and port services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision*[7] and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially different from it prior review process (hereinafter referred to as the ''Revised Review Process''). In the *Susquehanna Decision,* the D.C. Circuit Court stated that the Commission could not maintain a practice of ''unquestioning reliance'' on claims made by a self-regulatory organization (''SRO'') in the course of filing a rule or fee change with the Commission.[8] Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and Financial Markets Association* finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.[9] On that same day, the Commission issued an order remanding to various exchanges and national market system (''NMS'') plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the ''Remand Order'').[10] The Remand Order directed the exchanges to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.''[11] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[12] However, the Commission did extend the deadlines in the Remand Order ''so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court's mandate.''[13] Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Equity Member'' means a Member authorized by the Exchange to transact business on MIAX PEARL Equities. *See* Exchange Rule 1901.

[4] ''FIX Order Interface'' or ''FOI'' means the Financial Information Exchange interface for certain order types as set forth in Exchange Rule 2614. *See* the Definitions section of the Fee Schedule.

[5] Each MEO interface will have one Full Service Port (''FSP'') and one Purge Port. ''Full Service Port'' or ''FSP'' means an MEO port that supports all MEO order input message types. *See* the Definitions section of the Fee Schedule.

[6] *See* Securities Exchange Act Release No. 90651 (December 11, 2020), 85 FR 81971 (December 17, 2020) (SR–PEARL–2020–33).

[7] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[8] *Id.*

[9] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[10] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. 78k–1, 78s; *see also* Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

[11] *Id.* at page 2.

[12] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[13] Order Denying Reconsideration, 2019 WL 2022819, at *13.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC (''BOX'') to establish connectivity fees (the ''BOX Order''), which significantly increased the level of information needed for the Commission to believe that an exchange's filing satisfied its obligations under the Act with respect to changing a fee.[14] Despite approving hundreds of access fee filings in the years prior to the BOX Order (described further below) utilizing a ''market-based'' test, the Commission changed course and disapproved BOX's proposal to begin charging connectivity at one-fourth the rate of competing exchanges' pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [15] In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [16] The Staff Guidance also states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [17]

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission's SIFMA Decision in *NASDAQ Stock Market, LLC* v. *SEC* [18] and remanded for further proceedings consistent with its opinion.[19] That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ.* The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision ''has now been vacated, the basis for the [Remand Order] has evaporated.'' [20] Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ* v. *SEC* that Exchange Act Section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.[21] The Commission further invited ''the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq* v. *SEC.*'' [22] Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg's request to withdraw their applications for review and dismissed the proceedings.[23]

As a result of the Commission's loss of the *NASDAQ* vs. *SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [24] As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings, particularly those submitted by new exchanges, to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the ''record'' or ''review'' earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission's related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (''non-legacy exchanges''), while favoring larger, incumbent, entrenched, legacy exchanges (''legacy exchanges'').[25] The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings [26]

[14] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it ''historically applied a 'market-based' test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.'' *Id.* at page 16. Despite this admission, the Commission disapproved BOX's proposal to begin charging $5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing ''market-based'' fee filings from years prior).

[15] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), *available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees (the ''Staff Guidance'').*

[16] *Id.*

[17] *Id.*

[18] *NASDAQ Stock Mkt., LLC* v. *SEC,* No 18–1324, ---Fed. App'x ---, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court's mandate was issued on August 6, 2020.

[19] *Nasdaq* v. *SEC,* 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court's mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act ''Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.'' *Id.* The court held that ''for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.'' *Id.* Thus, the court held that ''Section 19(d) is not an available means to challenge the fees at issue'' in the SIFMA Decision. *Id.*

[20] *Id.* at *2; see also *id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[21] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the ''Order Vacating Prior Order and Requesting Additional Briefs'').

[22] *Id.*

[23] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[24] *See supra* note 21, at page 2.

[25] Commission Chair Gary Gensler recently reiterated the Commission's mandate to ensure competition in the equities markets. *See* ''Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots'', by Chair Gary Gensler, dated December 14, 2022 (stating ''[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and *enhance competition in the securities markets, including the equity markets*'' (*emphasis added*)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k–1), including ensuring ''fair competition among brokers and dealers, among exchange markets, and *between exchange markets* and markets other than exchange markets. . . .'' (*emphasis added*). *Id.* at note 1. *See also* Securities Acts Amendments of 1975, *available at https://www.govtrack.us/congress/bills/94/s249.*

[26] This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. *See The Nasdaq Stock Market, LLC* v. *SEC,* Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation

to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.[27] These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a ''market-based'' test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.,* non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as the Exchange, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.[28] By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish ''fee parity'' with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase.

The Commission Staff's change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (''Cboe'') reported ''access and capacity fee'' revenue of $70,893,000 for 2020[29] and $80,383,000 for 2021.[30] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020[31] and $22,843,000 for 2021.[32] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020[33] and $44,800,000 for 2021.[34] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020[35] and $30,687,000 for 2021.[36] For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported $178,712,000 in ''access and capacity fees'' in 2021. NASDAQ Phlx, LLC (''NASDAQ Phlx'') reported ''Trade Management Services'' revenue of $20,817,000 for 2019.[37] The Exchange notes it is unable to compare ''access fee'' revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the ''Trade Management Services'' line item was bundled into a much larger line item in PHLX's Form 1, simply titled ''Market services.''[38]

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,[39] new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates), which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. While one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely guidance and ''is not a rule, regulation or statement of the . . . Commission . . . the Commission has neither approved nor disapproved its content . . .'',[40] this is not the reality experienced by exchanges such as MIAX Pearl. As such, non-legacy

was that the 400 rule flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

[27] *See, e.g.,* Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

[28] For example, the options exchange affiliates of MIAX Pearl Equities, Miami International Securities Exchange, LLC (''MIAX''), MIAX Pearl, and MIAX Emerald, LLC (''MIAX Emerald''), have filed, and subsequently withdrawn, various forms of connectivity and port fee changes seven (7) times since August 2021. Each of the proposals contained hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

[29] According to Cboe's 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. *See* Cboe 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[30] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[31] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[32] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[33] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[34] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[35] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[36] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[37] According to PHLX, ''Trade Management Services'' includes ''a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX's] published fee schedules.'' *See* PHLX 2020 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf.*

[38] *See* PHLX Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.*

[39] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[40] *See supra* note 15, at note 1.

exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite good-faith efforts by the Exchange to provide substantial amount of cost-related details. For example, the options facility of MIAX Pearl has attempted to increase similar fees using a cost-based justification numerous times, having submitted over six filings.[41] However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act[42] in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[43] to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity;[44] or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and place a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.[45]

Lastly, the Exchange notes that the Commission Staff has allowed similar fee increases by other exchanges to remain in effect by publishing those filings for comment and allowing the exchange to withdraw and re-file numerous times.[46] Recently, the Commission Staff has not afforded the Exchange the same flexibility.[47] This again is evidence that the Commission Staff is not treating non-transaction fee filings in a consistent manner and is holding exchanges to different levels of scrutiny in reviewing filings.

* * * * *

1Gb and 10Gb ULL Connectivity Fee Change

Sections (2a) and (b) of the Fee Schedule describe network connectivity fees for the 1Gb ULL and 10Gb ULL fiber connections, which are charged to both Equity Members and non-Members for connectivity to the Exchange's primary and secondary facilities. The Exchange offers its Equity Members the ability to connect to the Exchange in order to transmit orders to and receive information from the Exchange. Equity Members can also choose to connect to the Exchange indirectly through physical connectivity maintained by a third-party extranet. Extranet physical connections may provide access to one or multiple Equity Members on a single connection. The number of physical

[41] *See, e.g.,* Securities Exchange Act Release Nos. 92798 (August 27, 2021), 86 FR 49360 (September 2, 2021) (SR–PEARL–2021–33); 92644 (August 11, 2021), 86 FR 46055 (August 17, 2021) (SR–PEARL–2021–36); 93162 (September 28, 2021), 86 FR 54739 (October 4, 2021) (SR–PEARL–2021–45); 93556 (November 10, 2021), 86 FR 64235 (November 17, 2021) (SR–PEARL–2021–53); 93774 (December 14, 2021), 86 FR 71952 (December 20, 2021) (SR–PEARL–2021–57); 93894 (January 4, 2022), 87 FR 1203 (January 10, 2022) (SR–PEARL–2021–58); 94258 (February 15, 2022), 87 FR 9659 (February 22, 2022) (SR–PEARL–2022–03); 94286 (February 18, 2022), 87 FR 10860 (February 25, 2022) (SR–PEARL–2022–04); 94721 (April 14, 2022), 87 FR 23573 (April 20, 2022) (SR–PEARL–2022–11); 94722 (April 14, 2022), 87 FR 23660 (April 20, 2022) (SR–PEARL–2022–12); 94888 (May 11, 2022), 87 FR 29892 (May 17, 2022) (SR–PEARL–2022–18).

[42] 15 U.S.C. 78f(b)(4).

[43] To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

[44] In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. *See, e.g., CSA Staff Consultation Paper 21–401, Real-Time Market Data Fees, available at https://www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_Paper.pdf.*

[45] The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (*e.g.,* healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever-increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review,'' and to ensure a comparable review process with the Exchange's filing.

[46] *See, e.g.,* Securities Exchange Act Release Nos. 93937 (January 10, 2022), 87 FR 2466 (January 14, 2022) (SR–MEMX–2021–22); 94419 (March 15, 2022), 87 FR 16046 (March 21, 2022) (SR–MEMX–2022–02); SR–MEMX–2022–12 (withdrawn before being noticed); 94924 (May 16, 2022), 87 FR 31026 (May 20, 2022) (SR–MEMX–2022–13); 95299 (July 15, 2022), 87 FR 43563 (July 21, 2022) (SR–MEMX–2022–17); SR–MEMX–2022–24 (withdrawn before being noticed); 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); 94901 (May 12, 2022), 87 FR 30305 (May 18, 2022) (SR–MRX–2022–04); SR–MRX–2022–06 (withdrawn before being noticed); 95262 (July 12, 2022), 87 FR 42780 (July 18, 2022) (SR–MRX–2022–09); 95710 (September 8, 2022), 87 FR 56464 (September 14, 2022) (SR–MRX–2022–12); 96046 (October 12, 2022), 87 FR 63119 (October 18, 2022) (SR–MRX–2022–20); 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); *and* 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32).

[47] Securities Exchange Act Release Nos. 94721 (April 14, 2022), 87 FR 23573 (April 20, 2022) (SR–PEARL–2022–11) *and* 94722 (April 14, 2022), 87 FR 23660 (April 20, 2022) (SR–PEARL–2022–12).

connections assigned to each User[48] as of November 30, 2022, ranges from one to eleven, depending on the scope and scale of the Equity Member's trading activity on the Exchange as determined by the Equity Member, including the Equity Member's determination of the need for redundant connectivity. The Exchange notes that 40% of its Equity Members do not maintain a physical connection directly with the Exchange in the Primary Data Center (though many such Equity Members have connectivity through a third-party provider) and another 46% have either one or two physical ports to connect to the Exchange in the Primary Data Center. Thus, only a limited number of Equity Members, 14%, maintain three or more physical ports to connect to the Exchange in the Primary Data Center.

In order to cover the continuous increase in aggregate costs of providing physical connectivity to Equity Members and non-Equity Members and make a modest profit, as described below, the Exchange proposes to amend the monthly connectivity fees as follows: (a) increase the 1Gb ULL connection from $1,000 to $2,500; and (b) increase the 10Gb ULL connection from $3,500 to $8,000.[49]

FIX and MEO Ports

Similar to other exchanges, the Exchange offers its Equity Members application sessions, also known as ports, for order entry and receipt of trade execution reports and order messages. Equity Members can also choose to connect to the Exchange indirectly through a session maintained by a third-party service bureau. Service bureau sessions may provide access to one or multiple Equity Members on a single session. The number of sessions assigned to each User as of November 30, 2022, ranges from one to more than 100, depending on the scope and scale of the Equity Member's trading activity on the Exchange (either through a direct connection or through a service bureau) as determined by the Equity Member. For example, by using multiple sessions, Equity Members can segregate order flow from different internal desks, business lines, or customers. The Exchange does not impose any minimum or maximum requirements for how many application sessions an Equity Member or service bureau can maintain, and does not propose to impose any minimum or maximum session requirements for its Equity Members or their service bureaus.

Section (2d), Port Fees, of the Fee Schedule describes fees for access and services used by Equity Members and non-Members. The Exchange provides the following types of ports: (i) FIX Ports, which allow Equity Members to send orders and other messages using the FIX protocol; and (ii) MEO Ports, which allow Equity Members order entry capabilities to all Exchange matching engines.

The Exchange operates a primary and secondary data center as well as a disaster recovery center. Each Port provides access to all Exchange data centers for a single fee. The Exchange currently provides the first twenty-five (25) FIX and MEO Ports free of charge and absorbed all associated costs since the launch of MIAX Pearl Equities. The Exchange charges the following separate monthly fees for FIX and MEO Ports: $450 for ports 26–50, $400 for ports 51–75, $350 for ports 76–100, and $300 for ports 101 and higher. The Exchange now proposes to provide the first five (5) FIX or MEO Ports free of charge, then charge a flat rate of $450 per port for port six (6) and above.[50]

Implementation

This proposed fee changes will be effective January 1, 2023.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[51] in general, and furthers the objectives of Section 6(b)(4) of the Act[52] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Equity Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of Section 6(b)(5) of the Act[53] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order[54] and the Staff Guidance,[55] the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.''[56] The Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.''[57] In the Staff Guidance, the Commission Staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable

[48] The term ''User'' shall mean any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Exchange Rule 2602. *See* Exchange Rule 1901.

[49] The Exchange notes that while its proposed fee of $8,000 per 10Gb ULL connection is higher than MEMX's $6,000 monthly fee for its xNet Physical Connection, MEMX does not offer any other physical connectivity, such as a 1Gb connection, for a lower fee. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26). *See* MEMX Fee Schedule, Connectivity and Application Sessions, *available at https://info.memxtrading.com/fee-schedule/* (last visited December 28, 2022).

[50] The Exchange notes that the proposed fee of $450 per port equals the amount charged by MEMX for MEMX's application sessions (order entry and drop copy ports), but MEMX does not offer any ports free of charge. *See* MEMX Fee Schedule, Connectivity and Application Sessions, *available at https://info.memxtrading.com/fee-schedule/* (last visited December 28, 2022). *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26). Unlike MEMX and other exchanges, the Exchange also continues to provide FXD Ports (*i.e.,* Drop Copy Ports) free of charge.

[51] 15 U.S.C. 78f(b).

[52] 15 U.S.C. 78f(b)(4).

[53] 15 U.S.C. 78f(b)(5).

[54] *See supra* note 14.

[55] *See supra* note 15.

[56] *Id.*

[57] *Id.*

because it will permit recovery of the SRO's costs, . . . , specific information, including quantitative information, should be provided to support that argument.'' [58]

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 1Gb and10Gb ULL connectivity as well as FIX and MEO Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction relates fees to provide them with additional necessary revenue to better compete. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates). The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Equity Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, while one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

[58] *Id.*

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange commenced operations in September 2020 and adopted its initial fee schedule, with 1Gb ULL connectivity set at $1,000, 10Gb ULL connectivity fees set at $3,500, and provided the first twenty-five (25) FIX and MEO Ports for free.[59] As a new exchange entrant, the Exchange chose to offer such services at a discounted rate or free of charge to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.[60]

The Exchange has not amended any of its non-transaction fees since its launch in September 2022. The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [61]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [62]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [63] As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair,

[59] *See* supra note 6.

[60] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (stating, ''[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX . . .''). *See also* Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR–MEMX–2020–10) (proposing to adopt the initial fee schedule and stating that ''[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application sessions.''). MEMX's market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. *See* Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32) *and* 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity). *See also, e.g.,* Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf* (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

[61] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[62] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[63] *See NetCoalition,* 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' [64] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [65] In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.'' [66]

The Exchange believes the competing exchanges' connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that are closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other exchanges with similar market share. Each of the market data rates in place at competing exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX Pearl Equities (as proposed) (market share of 1.02% for the month of November 2022) [67].	1Gb ULL connection	$2,500.
	10Gb ULL connection	$8,000.
	FIX and MEO Ports	Ports 1–5: FREE. Ports 6 or more: $450 per port.
	FXD Ports (*i.e.,* Drop Copy Ports.	FREE.
MEMX [68] (market share of 3.05% for the month of November 2022) [69].	1Gb connection	Not available.
	xNet Physical connection	$6,000 per connection.
	Order Entry Ports	$450 per port.
	Drop Copy Ports	$450 per port.
NASDAQ PSX LLC (''PSX'') [70] (market share of 0.70% for the month of November 2022) [71].	1Gb connection	$2,500 per connection (plus $1,500 installation fee).
	10Gb connection	$7,500 per connection (plus $1,500 installation fee).
	Order Entry Ports	$400 per port.
	Drop Copy Ports	$400 per port.
NASDAQ BX LLC (''BX'') [72] (market share of 0.60% for the month of November 2022) [73].	1Gb Ultra connection	$2,500 per connection (plus $1,500 installation fee).
	10Gb Ultra connection	$15,000 (plus $1,500 installation fee).
	Order Entry Ports	$500 per port.
	Drop Copy Ports	$500 per port.

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available equity exchanges. Market participants may choose to become a member of one or more equities exchanges based on the market participant's assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, one Member of MIAX Pearl's options facility informed the Exchange that that Member will terminate their membership effective January 1, 2023 as a direct result of the proposed fee changes to the Exchange's options fee schedule.

It is not a requirement for market participants to become members of all equities exchanges, in fact, certain market participants conduct an equities business as a member of only one market.[74] A very small number of market participants choose to become a member of all sixteen (16) equities exchanges. Most firms that actively trade on equities markets are not currently Equity Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Equity Members or service bureaus, and only an Equity Member may utilize a port.[75]

BOX recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAX, and BOX, 42 firms access

[64] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[65] *Id.*

[66] *See* Staff Guidance, *supra* note 15.

[67] *See* Market at a Glance, *available at https://www.miaxoptions.com/.*

[68] *See* MEMX Fee Schedule, Connectivity and Application Sessions, *available at https://info.memxtrading.com/fee-schedule/.*

[69] *See supra note 67.*

[70] *See* PSX Pricing Schedule, *available at https://www.nasdaqtrader.com/Trader.aspx?id=PSX_Pricing; and* PSX Rules, General 8: Connectivity, Section 2, Direct Connectivity.

[71] *See supra note 67.*

[72] *See* BX Pricing Schedule, *available at https://www.nasdaqtrader.com/Trader.aspx?id=bx_pricing; and* BX Rules, General 8: Connectivity, Section 2, Direct Connectivity.

[73] *See supra* note 67.

[74] BOX recently adopted an electronic market maker trading permit fee. *See* Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17). In that proposal, BOX stated that, ''. . . it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX].'' Also in 2022, MEMX established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee ''is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange'' and that ''neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.''

[75] Service Bureaus may obtain ports on behalf of Equity Members.

only one of the three exchanges.[76] For equities, the Exchange currently has 45 Equity Members. Also, MEMX noted in a January 2022 filing that it had only 66 members, and, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 142 members, Cboe BZX has 140 members, and Investors Exchange LLC (''IEX'') has 133 members.[77] For options, the Exchange and its affiliates, MIAX and MIAX Emerald, have a total of 47 members. Of those 47 total members, 35 are members of all three affiliated exchanges, four (4) are members of only two (2) affiliated exchanges, and eight (8) are members of only one affiliated exchange. The Exchange believes that significant differences in membership numbers describes by the Exchange, BOX, and MEMX demonstrate that firms can, and do, select which exchanges they wish to access, and, accordingly, exchanges must take competitive considerations into account when setting fees for such access. The Exchange also notes that no firm is an Equity Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all exchanges, let alone the Exchange and its affiliates, and broker-dealers may elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every equities exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the broker-dealer membership analysis of exchanges discussed above. Indeed, broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in equities securities; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not ''lock'' a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become an Equity Member at—or establish connectivity to—the Exchange.[78] If the Exchange is not at the NBBO, the Exchange will route an order to any away market that is at the NBBO to ensure that the order was executed at a superior price and prevent a trade-through.[79]

With respect to the submission of orders, Equity Members may also choose not to purchase any connection at all from the Exchange, and instead rely on the port of a third party to submit an order. For example, a third-party broker-dealer Equity Member of the Exchange may be utilized by a retail investor to submit orders into an Exchange. An institutional investor may utilize a broker-dealer, a service bureau,[80] or request sponsored access [81] through a member of an exchange in order to submit a trade directly to an equities exchange.[82] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Equity Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.,* fees based on the number of firms that connect to the Exchange indirectly via the third-party).[83] Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.[84] Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 15 equities markets. Accordingly, the Exchange believes that the proposed fees are fair and reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Equity Members and secure access to its environment. To properly regulate its Equity Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Equity Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be an Equity Member, and is approved for membership by the Exchange, the Equity Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become an Equity Member of the Exchange, or, if it is an Equity Member, to purchase connectivity beyond the one

[76] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17).

[77] *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19).

[78] *See* 17 CFR 242.611.

[79] Members may elect to not route their orders by utilizing the Do Not Route or Post Only order type instructions. *See* Exchange Rule 2614(c)(1) and (2).

[80] Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be an Equity Member. Some Equity Members utilize a Service Bureau for connectivity and that Service Bureau may not be an Equity Member. Some market participants utilize a Service Bureau who is an Equity Member to submit orders.

[81] Sponsored Access is an arrangement whereby an Equity Member permits its customers to enter orders into an exchange's system that bypass the Equity Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[82] This may include utilizing a floor broker and submitting the trade to an equities trading floor.

[83] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at,* US Direct-Extranet Connection (nasdaqtrader.com); *and* Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); *and* 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[84] The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

connection that is necessary to quote or submit orders on the Exchange. Equity Members may freely choose to rely on one or many connections, depending on their business model.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services, the Exchange seeks to be especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and also carefully and transparently assessing the impact on Equity Members—both generally and in relation to other Equity Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Equity Members and competition among Equity Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[85] and Rule 19b–4 thereunder,[86] with respect to the types of information SROs should provide when filing fee changes, and Section 6(b) of the Act,[87] which requires, among other things, that exchange fees be reasonable and equitably allocated,[88] not designed to permit unfair discrimination,[89] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[90] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[91] The Exchange notes that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 1Gb and 10Gb ULL connectivity to the Exchange at $18,331,650 combined ($17,726,799 for 10Gb ULL connectivity and $604,851 for 1Gb connectivity) (or approximately $1,527,637 per month for combined connectivity costs, rounded to the nearest dollar when dividing the combined annual cost by 12 months). The Exchange also recently calculated its aggregate annual costs for providing FIX and MEO Ports at $3,951,993 combined ($911,998 for FIX Ports and $3,039,995 for MEO Ports) (or approximately $329,333 per month for combined FIX and MEO Port costs, rounded to the nearest dollar when dividing the combined annual cost by 12 months). In order to cover a portion of the aggregate costs of providing connectivity to its Users (both Equity Members and non-Equity Members[92]) going forward, as described below, the Exchange proposes to modify its Fee Schedule as described above.

In 2020, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[93] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers''). Next, the Exchange adopted an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (62%), with smaller allocations to FIX Ports (1.2%) and MEO Ports (3.8%), and the remainder to the provision of transaction execution, membership services and market data services (33%). The allocation methodology was developed through conversations with senior management familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity, only Equity Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange, many Equity Members (but not all) consume market data from the Exchange in order to trade on the Exchange, and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals.

Through the Exchange's extensive updated Cost Analysis, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense

[85] 15 U.S.C. 78s(b)(1).

[86] 17 CFR 240.19b–4.

[87] 15 U.S.C. 78f(b).

[88] 15 U.S.C. 78f(b)(4).

[89] 15 U.S.C. 78f(b)(5).

[90] 15 U.S.C. 78f(b)(8).

[91] *See* Staff Guidance, *supra* note 15.

[92] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access application sessions on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

[93] The Exchange frequently updates it Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange's most recent Cost Analysis was conducted ahead of this filing.

relates to the provision of connectivity services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the cost drivers to provide 1Gb and10Gb ULL connectivity, as well as FIX and MEO Ports, result in an aggregate combined monthly cost of $1,856,970, as further detailed below.

Costs Related To Offering Physical 1Gb and 10Gb ULL Connectivity

The following charts detail the individual line-item costs considered by the Exchange to be related to offering physical dedicated 1Gb and 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 47.6% of its overall Human Resources cost to offering physical 1Gb and 10Gb ULL connectivity.

10Gb ULL CONNECTIVITY

Cost drivers	Annual cost [94]	Monthly cost [95]	% of all
Human Resources	$5,936,741	$494,728	46.1
Connectivity (external fees, cabling, switches, etc.)	69,451	5,788	60
Internet Services, including Internet Services	1,818,808	151,567	72.5
Data Center	1,052,797	87,733	60
Hardware and Software Maintenance and Licenses	642,112	53,509	58
Depreciation	3,448,206	287,351	73.6
Allocated Shared Expenses	4,758,684	396,557	48.6
Total	17,726,799	1,477,233	54

1Gb ULL CONNECTIVITY

Cost drivers	Annual cost [96]	Monthly cost [97]	% of all
Human Resources	$202,566	$16,880	1.6
Connectivity (external fees, cabling, switches, etc.)	2,370	197	2.0
Internet Services, including External Market Data	62,059	5,172	2.5
Data Center	35,922	2,993	2.0
Hardware and Software Maintenance and Licenses	21,909	1,826	2.0
Depreciation	117,655	9,805	2.5
Allocated Shared Expenses	162,370	13,531	1.7
Total	604,851	50,404	1.8

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 1Gb and 10Gb ULL connectivity.

Human Resources

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange's network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity) and for which the Exchange allocated percentages of 58% for 10Gb ULL connectivity and 2.0% for 1Gb connectivity of each employee's time. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security and finance personnel), for which the Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who do support functions related to providing physical connectivity) and then applied a smaller allocation to such employees (less than 37%). The Exchange notes that it has 184 employees and each department leader has direct knowledge of the time spent by those spent by each employee with respect to the various tasks necessary to operate the Exchange. The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing physical connectivity. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity and Internet Services

The Connectivity cost includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the

[94] The Annual Cost includes figures rounded to the nearest dollar.

[95] The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

[96] *See supra* note 94.

[97] *See supra* note 95.

Exchange. The Connectivity line-item is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity and content service providers for connectivity and data feeds for the entire U.S. equities industry, as well as content, connectivity, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 1Gb and 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity and content service providers to connect to other national securities exchanges, the NASDAQ UTP and CTA/CQ Plans, and to receive market data from other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity and market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data providers, or the NASDAQ UTP and CTA/CQ Plans and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity and content service provider expense and recoups that expense, in part, by charging for 1Gb and 10Gb ULL connectivity.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (62%) to physical 1Gb and 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity of participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange included External Market Data fees to the provision of physical connectivity as such market data is necessary here to offer certain services related to such connectivity, such as certain risk checks that are performed prior to execution, and checking for other conditions (*e.g.,* limit order price protection, trading collars). This allocation was included as part of the internet Services cost described above. Thus, as market data from other Exchanges is consumed at the matching engine level, (to which physical connectivity provides access to) in order to validate orders before additional entering the matching engine or being executed, the Exchange believes it is reasonable to allocate a small amount of such costs to 10Gb ULL connectivity.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.

Monthly Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. As noted above, the Exchange allocated 73.6% of all depreciation costs to providing physical 10Gb ULL connectivity and 2.5% of all depreciation costs to providing 1Gb connectivity. The Exchange notes, however, that it did not allocate depreciation costs for any depreciated software necessary to operate the Exchange to physical connectivity, as such software does not impact the provision of physical connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall physical connectivity costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide physical connectivity. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange notes that the cost of paying directors to serve on its Board of Directors is also included in the Exchange's general shared expenses.[98] The Exchange notes that the 50% allocation of general shared expenses for physical connectivity is higher than that allocated to general shared expenses for FIX and MEO Ports based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), FIX and MEO Ports do not require as many broad or indirect resources as other Core Services. The total monthly cost for 10Gb ULL connectivity of $1,477,233 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (90), to arrive at a cost of approximately $16,414 per month, per physical 10Gb ULL connection. The total monthly cost for 1Gb connectivity of $50,404 was divided by the number of physical 1Gb connections the Exchange maintained at the time that proposed pricing was determined (8), to arrive at a cost of approximately $6,301 per month, per physical 1Gb connection.

Costs Related To Offering FIX and MEO Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering FIX and MEO Ports as well as the

[98] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 22.4% of its overall Human Resources cost to offering FIX and MEO Ports).

FIX PORTS

Cost drivers	Annual cost [99]	Monthly cost [100]	% of all
Human Resources	$665,726	$55,476	5.2
Connectivity (external fees, cabling, switches, etc.)	535	45	0.5
Internet Services, including External Market Data	11,574	965	0.5
Data Center	20,262	1,689	1.2
Hardware and Software Maintenance and Licenses	5,108	426	0.5
Depreciation	92,114	7,676	2.0
Allocated Shared Expenses	116,679	9,723	1.2
Total	911,998	76,000	2.8

MEO PORTS

Cost drivers	Annual cost [101]	Monthly cost [102]	% of all
Human Resources	$2,219,088	$184,924	17.2
Connectivity (external fees, cabling, switches, etc.)	1,782	149	1.5
Internet Services, including External Market Data	38,582	3,215	1.5
Data Center	67,538	5,628	3.8
Hardware and Software Maintenance and Licenses	17,026	1,419	1.5
Depreciation	307,048	25,587	6.6
Allocated Shared Expenses	388,931	32,411	4.0
Total	3,039,995	253,333	9.3

Human Resources

With respect to FIX and MEO Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing FIX and MEO Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). The estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing application sessions and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing application sessions and maintaining performance thereof. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing application sessions and maintaining performance thereof. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity and Internet Services

The Connectivity cost includes external fees paid to connect to other exchanges, cabling and switches, as described above. For purposes of FIX and MEO Ports, the Exchange also includes a portion of its costs related to External Market Data, as described below.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment as well as related costs (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange included External Market Data fees to the provision of application sessions as such market data is also necessary here (in addition to physical connectivity) to offer certain services related to such sessions, such as validating orders on entry against the national best bid and national best offer and checking for other conditions (*e.g.,* whether a symbol is halted or subject to a short sale circuit breaker). This allocation was included as part of the internet Services cost described above.[103] Thus, as market data from other Exchanges is consumed at the application session level in order to validate orders before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to application sessions.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

[99] *See supra* note 94 (describing rounding of Annual Costs).

[100] *See supra* note 95 (describing rounding of Monthly Costs based on annual costs).

[101] *See supra* note 94 (describing rounding of Annual Costs).

[102] *See supra* note 95 (describing rounding of Monthly Costs based on annual costs).

[103] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

Monthly Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 8.6% of all depreciation costs to providing FIX and MEO Ports. In contrast to physical connectivity, described above, the Exchange did allocate depreciation costs for depreciated software necessary to operate the Exchange to FIX and MEO Ports because such software is related to the provision of such connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall FIX and MEO Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide application sessions. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 20% of the overall cost for directors was allocated to providing FIX and MEO Ports. The Exchange notes that the 5.2% allocation of general shared expenses for FIX and MEO Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While FIX and MEO Ports have several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), 1Gb and 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange. The total monthly cost for FIX Ports of $76,000 was divided by the number of FIX Ports the Exchange maintained at the time that proposed pricing was determined (142), to arrive at a cost of approximately $535 per month, per FIX Port (rounded to the nearest dollar when dividing the approximate monthly cost by the number of FIX Ports). The total monthly cost for MEO Ports of $253,333 was divided by the number of MEO Ports the Exchange maintained at the time that proposed pricing was determined (336), to arrive at a cost of approximately $754 per month, per MEO Port (rounded to the nearest dollar when dividing the approximate monthly cost by the number of MEO Ports).

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or FIX and MEO Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (60%) to 1Gb and 10Gb ULL connectivity given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 25% to FIX and MEO Ports and the remaining 15% was allocated to transactions and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 37% for 1Gb and 10Gb ULL connectivity of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (less than 21%) across a wider range of personnel groups in order to allocate Human Resources costs to providing FIX and MEO Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain FIX and MEO Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 47.6% of its personnel costs to providing physical connections and 22.4% of its personnel costs to providing FIX and MEO Ports, for a total allocation of 70% Human Resources expense to provide these specific connectivity services. In turn, the Exchange allocated the remaining 30% of its Human Resources expense to membership (less than 1%) and transactions and market data (9.5%). Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and FIX and MEO Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Equity Members and non-Equity Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 85% of the Exchange's overall depreciation and amortization expense to connectivity services (76.185% attributed to 1Gb and 10Gb ULL physical connections and 8.6% to FIX and MEO Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 15%) toward the cost of providing transaction services, membership services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or FIX and MEO Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the

anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. As such, the Exchange believes that its costs will remain relatively similar in future years. It is possible however that such costs will either decrease or increase. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases.

However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange would propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, we believe that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Projected Revenue

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

- The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services at $17,726,799. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $9,144,000. This represents a negative margin when compared to the cost of providing 10Gb ULL connectivity services.
- The Exchange's Cost Analysis estimates the annual cost to provide 1Gb connectivity services at $604,851. Based on current 1Gb connectivity services usage, the Exchange would generate annual revenue of approximately $312,000. This represents a negative margin when compared to the cost of providing 1Gb connectivity services.
- The Exchange's Cost Analysis estimates the annual cost to provide FIX Port services at $911,998. Based on current FIX Port services usage, the Exchange would generate annual revenue of approximately $388,800. This represents a negative margin when compared to the cost of providing FIX Port services.
- The Exchange's Cost Analysis estimates the annual cost to provide MEO Port services at $3,039,995. Based on current MEO Port services usage, the Exchange would generate annual revenue of approximately $1,296,000. This represents a negative margin when compared to the cost of providing MEO Port services.

Even if the Exchange earns those amounts or incrementally more, the Exchange believes the proposed fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total expense of the Exchange associated with providing 1Gb and 10Gb ULL connectivity and FIX and MEO Port services versus the total projected revenue of the Exchange associated with those services. In fact, the Exchange will generate negative margins on those connectivity and port services even with the proposed fees.

* * * * *

MIAX Pearl Equities has operated at a cumulative net annual loss since it launched operations in 2020.[104] The Exchange has operated at a net loss due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as connectivity, at lower rates than other exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange should not now be penalized for seeking to raise its fees in light of necessary technology changes and its increased costs after offering such products as discounted prices. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 1Gb and 10Gb ULL connectivity as well as FIX and MEO Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 1Gb and 10Gb ULL connectivity as well as FIX and MEO Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity actually produces the revenue estimated. As a competitor in the hyper-competitive exchange

[104] The Exchange has incurred a cumulative loss of $79 million since its inception in 2020. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 28, 2021, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000461.pdf.*

environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 1Gb and 10Gb ULL connectivity as well as FIX and MEO Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 1Gb and 10Gb ULL connectivity as well as FIX and MEO Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients, the Exchange does not believe it should be penalized for such success. The Exchange, like other exchanges, is, after all, a for-profit business, which provides economic value to its Members. To the extent the Exchange has mispriced and experiences a net loss in clients, the Exchange could experience a net reduction in revenue. While the Exchange believes in transparency around costs and potential revenue, the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted.

Further, the proposal reflects the Exchange's efforts to control its costs, which the Exchange does on an ongoing basis as a matter of good business practice. A potential profit margin should not be judged alone based on its size, but is also indicative of costs management and whether the ultimate fee reflects the value of the services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive where on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

1Gb and 10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct equities markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.[105] Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

FIX and MEO Ports

To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. Billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[106] Thus, as the number of connections an Equity Member has increases, the related pull on Exchange resources also increases. The Exchange sought to design the proposed pricing structure to set the amount of the fees to relate to the number of connections a firm purchases, while continuing to provide the first five (5) ports for free. The more connections purchased by an Equity Member likely results in greater expenditure of Exchange resources and increased cost to the Exchange. The Exchange further believes that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory because, for the flat fee, the Exchange provides each Equity Member their first five (5) ports for free, unlike other equity exchanges referenced above.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 1Gb and10Gb ULL connectivity as well as FIX and MEO Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2020[107] due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any

[105] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[106] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[107] *See supra* note 104.

fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the industry, which resulted in lower initial revenues. Examples of this are 1Gb and 10Gb ULL connectivity as well as FIX and MEO Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other equity exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 1Gb or 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. The proposed fees would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Equity Members, non-Equity Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, market participants are not forced to connect to all exchanges. There is no reason to believe that our proposed price increase will harm another exchange's ability to compete. There are other markets of which market participants may connect to trade equities at higher rates than the Exchange's. There is also a range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. Market participants are free to choose which exchange or reseller to use to satisfy their business needs. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[108] and Rule 19b–4(f)(2) [109] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule

[108] 15 U.S.C. 78s(b)(3)(A)(ii).

[109] 17 CFR 240.19b–4(f)(2).

change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2022–61 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2022–61. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2022–61 and should be submitted on or before February 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[110]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00661 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

[110] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Thursday, January 19, 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: January 12, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–00869 Filed 1–12–23; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34801; File No. 812–15412]

Cadre Horizon Fund, Inc., et al.

January 10, 2023.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 18(a)(2), 18(c) and 18(i) of the Act, pursuant to sections 6(c) and 23(c) of the Act for certain exemptions from rule 23c–3 under the Act, and pursuant to section 17(d) of the Act and rule 17d–1 under the Act.

Summary of Application: Applicants request an order to permit certain registered closed-end management investment companies to issue multiple classes of shares and to impose asset-based service and distribution fees, and early withdrawal charges.

Applicants: Cadre Horizon Fund, Inc., CCV, LLC, and RealCadre LLC.

Filing Dates: The application was filed on November 29, 2022.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on, February 6, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any fact bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Benjamin Wells, *bwells@stblaw.com.*

FOR FURTHER INFORMATION CONTACT: Jennifer O. Palmer, Senior Counsel, or Terri G. Jordan, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' application, dated November 29, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00639 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96621; File No. SR–NSCC–2022–009]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Adopt Intraday Volatility Charge and Eliminate Intraday Backtesting Charge

January 10, 2023.

On July 7, 2022, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–NSCC–2022–009 (the ''Proposed Rule Change'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The Proposed Rule Change was published for comment in the **Federal Register** on July 20, 2022,[3] and the Commission has received comments regarding the changes proposed in the Proposed Rule Change.[4]

On September 1, 2022, pursuant to Section 19(b)(2) of the Act,[5] the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.[6] On October 14, 2022, the Commission instituted proceedings, pursuant to Section 19(b)(2)(B) of the Act,[7] to determine whether to approve or disapprove the Proposed Rule Change.[8]

Section 19(b)(2) of the Act [9] provides that proceedings to determine whether to approve or disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination.[10] The 180th day after publication of the Notice in the **Federal Register** is January 16, 2023.

The Commission is extending the period for Commission action on the Proposed Rule Change. The Commission finds that it is appropriate to designate a longer period within which to take action on the Proposed Rule Change so that the Commission has sufficient time to consider the issues raised by the Proposed Rule Change and to take action on the Proposed Rule Change. Accordingly, pursuant to Section 19(b)(2)(B)(ii)(II) of the Act,[11] the Commission designates March 17, 2023, as the date by which the Commission should either approve or disapprove the Proposed Rule Change SR–NSCC–2022–009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00653 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 95286 (July 14, 2022), 87 FR 43355 (July 20, 2022) (File No. SR–NSCC–2022–009) (''Notice'').

[4] Comments are available at *https://www.sec.gov/comments/sr-nscc-2022-009/srnscc2022009.htm.*

[5] 15 U.S.C. 78s(b)(2).

[6] Securities Exchange Act Release No. 95650 (Sept. 1, 2022), 87 FR 55054 (Sept. 8, 2022) (SR–NSCC–2022–009).

[7] 15 U.S.C. 78s(b)(2)(B).

[8] Securities Exchange Act Release No. 96088 (Oct. 14, 2022), 87 FR 63845 (Oct. 20, 2022) (File No. SR–NSCC–2022–009).

[9] 15 U.S.C. 78s(b)(2).

[10] 15 U.S.C. 78s(b)(2)(B)(ii)(II).

[11] *Id.*

[12] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96625; File No. SR–EMERALD–2022–37]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Increase Fees for the ToM Market Data Product and Establish Fees for the cToM Market Data Product

January 10, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 28, 2022, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange''), filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend its fees for two market data products by (i) amending the fees for MIAX Emerald Top of Market (''ToM''); and (ii) establishing fees for MIAX Emerald Complex Top of Market (''cToM'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fees for two market data products by (i) amending the fees for ToM; and (ii) establishing fees for cToM. The proposed fees will be effective January 1, 2023.

The Exchange previously filed several proposals to adopt fees for cToM.[3] The Exchange notes that these prior proposals included an analysis of the costs underlying the compilation and dissemination of the proposed cToM fees. As described more fully below, this filing provides an updated cost analysis that now includes ToM and focuses solely on costs related to the provision of ToM and cToM (''Cost Analysis''). The proposed fees are intended to cover the Exchange's cost of compiling and disseminating ToM and cToM with a reasonable mark-up over those costs. Before setting forth the additional details regarding the proposal as well as the updated Cost Analysis conducted by the Exchange, immediately below is a description of the proposed fees.

Proposed Market Data Pricing

The Exchange offers ToM and cToM to subscribers. The Exchange notes that there is no requirement that any Member[4] or market participant subscribe to ToM or cToM or any other data feed offered by the Exchange. Instead, a Member may choose to maintain subscriptions to ToM or cToM based on their business model. The proposed fees will not apply differently based upon the size or type of firm, but rather based upon the subscriptions a firm has to ToM or cToM and their use thereof, which are based upon factors deemed relevant by each firm. The proposed pricing for ToM and cToM is set forth below.

ToM

ToM is an Exchange-only market data feed that contains top of book quotations based on options orders[5] and quotes[6] entered into the System[7] and resting on the Exchange's Simple Order Book[8] as well as administrative messages.[9] The Exchange currently charges Internal Distributors[10] $1,250 per month and External Distributors $1,750 per month for ToM. The Exchange does not currently charge, nor does it now propose to charge any additional fees based on a subscriber's use of the ToM and cToM data feeds, *e.g.,* displayed versus non-displayed use, redistribution fees, or any individual per user fees. As discussed more fully below, the Exchange recently calculated its annual aggregate costs for producing ToM to subscribers to be $317,753, or $26,479 per month (rounded to the nearest dollar when dividing the annual cost by 12 months). The Exchange proposes to amend Section 6)a) of the Fee Schedule to now charge Internal Distributors $2,000 per month and External Distributors $3,000 per month for ToM in an effort to cover the Exchange's increasing costs with compiling and producing ToM to market participants as evidenced by the Exchange's Cost Analysis detailed below.

cToM

The Exchange previously adopted rules governing the trading of Complex Orders[11] on the MIAX Emerald System in 2018,[12] ahead of the Exchange's planned launch, which took place on March 1, 2019. Shortly thereafter, the Exchange adopted the market data product, cToM, and expressly waived fees for cToM to incentivize market participants to subscribe.[13] cToM was provided free of charge for four years and the Exchange absorbed all costs associated with compiling and disseminating cToM during that entire time. As discussed more fully below, the Exchange recently calculated its annual aggregate costs for producing cToM to subscribers to be $347,543, or $28,962 per month (rounded to the nearest dollar when dividing the annual cost by 12 months). The Exchange now proposes to amend Section 6)a) of the Fee Schedule to establish fees for cToM in order to recoup its ongoing costs going forward.

In summary, cToM provides subscribers with the same information as ToM as it relates to the Strategy Book,[14] *i.e.,* the Exchange's best bid and offer for a complex strategy, with aggregate size, based on displayable orders in the complex strategy on the Exchange. However, cToM provides subscribers with the following additional information that is not included in ToM: (i) the identification of the complex strategies currently trading on the Exchange; (ii) complex strategy last sale information; and (iii) the status of securities underlying the complex strategy (*e.g.,* halted, open, or resumed). cToM is therefore a distinct market data product from ToM in that it includes additional information that is not available to subscribers that receive only ToM. ToM subscribers are not required to subscribe to cToM, and cToM subscribers are not required to subscribe to ToM.

cToM Proposed Fees

The Exchange proposes to amend Section 6)a) of the Fee Schedule to charge Internal Distributors $2,000 per month and External Distributors $3,000 per month for the cToM data feed. The proposed fees are identical to the fees that the Exchange proposes to charge for ToM. The Exchange does not propose to adopt redistribution fees for the cToM data feed. However, the recipient of cToM data would be required to become a data subscriber and would be subject

[3] *See* Securities Exchange Act Release Nos. 92358 (July 9, 2021), 86 FR 37361 (July 15, 2021) (SR–EMERALD–2021–21); SR–EMERLAD–2021–32 (withdrawn without being noticed by the Commission); 93427 (October 26, 2021), 86 FR 60310 (November 1, 2021) (SR–EMERALD–2021–34); 93811 (December 17, 2021), 86 FR 73051 (December 23, 2021) (SR–EMERALD–2021–44); 94263 (February 15, 2022), 87 FR 9766 (February 22, 2022) (SR–EMERALD–2022–06); 94715 (April 14, 2022), 87 FR 23674 (April 20, 2022) (SR–EMERALD–2022–14); 94892 (May 11, 2022), 87 FR 29963 (May 17, 2022) (SR–EMERALD–2022–18).

[4] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[5] The term ''order'' means a firm commitment to buy or sell option contracts. *See* Exchange Rule 100.

[6] The term ''quote'' or ''quotation'' means a bid or offer entered by a Market Maker that is firm and may update the Market Maker's previous quote, if any. The Rules of the Exchange provide for the use of different types of quotes, including Standard quotes and eQuotes, as more fully described in Rule 517. A Market Maker may, at times, choose to have multiple types of quotes active in an individual option. *See* Exchange Rule 100.

[7] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[8] The term ''Simple Order Book'' means ''the Exchange's regular electronic book of orders and quotes.'' *See* Exchange Rule 518(a)(15).

[9] *See* Fee Schedule, Section 6)a).

[10] A ''Distributor'' of MIAX data is any entity that receives a feed or file of data either directly from MIAX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All Distributors are required to execute a MIAX Distributor Agreement. *See* Fee Schedule, Section 6)a).

[11] *See* Exchange Rule 518(a)(5) for the definition of Complex Orders.

[12] *See* Securities Exchange Act Release Nos. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (In the Matter of the Application of MIAX EMERALD, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission); *and* 85345 (March 18, 2019), 84 FR 10848 (March 22, 2019) (SR–EMERALD–2019–13) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 518, Complex Orders).

[13] *See* Securities Exchange Act Release No. 85207 (February 27, 2019), 84 FR 7963 (March 5, 2019) (SR–EMERALD–2019–09) (providing a complete description of the cToM data feed).

[14] The ''Strategy Book'' is the Exchange's electronic book of complex orders and complex quotes. *See* Exchange Rule 518(a)(17).

to the applicable data subscriber fees. The Exchange also does not propose to charge any additional fees based on a subscriber's use of the cToM data feed, *e.g.,* displayed versus non-displayed use, and does not propose to impose any individual per user fees.

As it does today for ToM, the Exchange proposes to assess cToM fees to Internal and External Distributors in each month the Distributor is credentialed to use cToM in the production environment. Also, as the Exchange does today for ToM, market data fees for cToM will be reduced for new Distributors for the first month during which they subscribe to cToM, based on the number of trading days that have been held during the month prior to the date on which that subscriber has been credentialed to use cToM in the production environment. New cToM Distributors will be assessed a pro-rata percentage of the fees listed in the table in Section 6)a) of the Fee Schedule, which is the percentage of the number of trading days remaining in the affected calendar month as of the date on which they have been credentialed to use cToM in the production environment, divided by the total number of trading days in the affected calendar month.

The Exchange also proposes to amend the paragraph below the table of fees for ToM and cToM in Section 6)a) of the Fee Schedule to make a minor, non-substantive correction by deleting the phrase ''(as applicable)'' in the first sentence following the table of fees for ToM and cToM. The purpose of this proposed change is to remove unnecessary text from the Fee Schedule.

cToM Content Is Available From Alternative Sources

cToM is not the exclusive source for Complex Order information from the Exchange. It is a business decision of market participants whether to subscribe to cToM or not. Market participants that choose not to subscribe to cToM can derive much, if not all, of the same information from other Exchange sources, including, for example, the MIAX Emerald Order Feed (''MOR'').[15] The following cToM information is included in MOR: the Exchange's best bid and offer for a complex strategy, with aggregate size, based on displayable orders in the complex strategy on the Exchange; the identification of the complex strategies currently trading on the Exchange; and the status of securities underlying the complex strategy (*e.g.,* halted, open, or resumed). In addition to MOR, complex strategy last sale information can be derived from ToM. Specifically, market participants may deduce that last sale information for multiple trades in related options series with the same timestamps disseminated via ToM are likely part of a Complex Order transaction and last sale.

Additional Discussion—cToM Background

In the six years since the Exchange adopted Complex Order functionality, the Exchange has grown its monthly complex market share from 0% to 3.03% of the total electronic complex non-index volume executed on exchanges offering electronic complex functionality for the month of November 2022.[16] During that same period, the Exchange has had a steady increase in the number of cToM subscribers. Until the Exchange initially filed to adopt cToM fees in July of 2021, the Exchange did not charge fees for cToM data provided by the Exchange.

The objective of this approach was to eliminate any fee-based barriers for Members when the Exchange launched with Complex Order functionality in 2019, which the Exchange believes has been helpful in its ability to attract order flow as a new exchange. As discussed more fully below, the Exchange recently calculated its annual aggregate costs for providing cToM at approximately $347,543. In order to establish fees that are designed to recover the aggregate costs of providing cToM plus a reasonable mark-up, the Exchange is proposing to modify its Fee Schedule, as described above. In addition to the Cost Analysis, described below, the Exchange believes that its proposed approach to market data fees is reasonable based on a comparison to competitors.

Additional Discussion—Comparison With Other Exchanges

ToM

The proposed fees for ToM are comparable to the fees currently in place for the options exchanges, particularly Nasdaq ISE, LLC (''ISE'').[17] In November 2022, the Exchange had 3.11% market share of equity options volume; for that same month, ISE had 6.19% market share of equity options volume.[18] The Exchange's proposed fees for ToM are equal to, and for Internal Distributors, lower than, the rates data recipients pay for comparable data feeds from ISE. The Exchange notes that other competitors maintain fees applicable to market data that are considerably higher than those proposed by the Exchange, including NYSE Arca, Inc. (''NYSE Arca'').[19] However, the Exchange has focused its comparison on ISE because it is the closest market in terms of market share and offers market data at prices lower than several other incumbent exchanges. The fees for the Nasdaq ISE Top Quote Feed, which like ToM, includes top of book, trades, and security status messages, consists of an internal distributor access fee of $3,000 per month (50% higher than the Exchange's proposed rate), and an external distributor access fee of $3,000 per month (equal to the Exchange's proposed rate).[20] ISE's overall charge to receive the Nasdaq ISE Top Quote Feed may be even higher than the Exchange's proposed rates because ISE charges additional per controlled device fees that can cause the distribution fee to reach up to $5,000 per month.[21] The Exchange's proposed rates do not include additional fees.

cToM

The proposed fees for cToM are comparable to the fees currently in place for competing options exchanges, particularly NYSE American, LLC

[15] *See* MIAX website, Market Data & Offerings, *available at https://www.miaxoptions.com/market-data-offerings* (last visited December 20, 2022). In general, MOR provides real-time ultra-low latency updates on the following information: new Simple Orders added to the MIAX Emerald Order Book; updates to Simple Orders resting on the MIAX Emerald Order Book; new Complex Orders added to the Strategy Book (*i.e.,* the book of Complex Orders); updates to Complex Orders resting on the Strategy Book; MIAX Emerald listed series updates; MIAX Emerald Complex Strategy definitions; the state of the MIAX Emerald System; and MIAX Emerald's underlying trading state.

[16] The Exchange notes that it receives complex market data for all U.S. options exchanges that offer complex functionality from direct feeds from The Options Price Reporting Authority (''OPRA'').

[17] *See* ISE Options 7 Pricing Schedule, Section 10, H., *available at https://listingcenter.nasdaq.com/rulebook/ise/rules/ISE%20Options%207* (assessing Professional internal and external distributors $3,000 per month, plus $20 per month per controlled device for ISE's Top Quote Feed).

[18] *See* Market at a Glance, U.S. Options Market Volume Summary, *available at https://www.miaxoptions.com/* (last visited December 20, 2022).

[19] Fees for the NYSE Arca Options Top Feed, which is the comparable product to ToM, are $3,000 per month for access (internal use) and an additional $2,000 per month for redistribution (external distribution), compared to the Exchange's proposed fees of $2,000 and $3,000 for Internal and External Distributors, respectively. In addition, for its NYSE Arca Options Top Feed, NYSE Arca charges for three different categories of non-display usage, and user fees, both of which the Exchange does not propose to charge, causing the overall cost of NYSE Arca Options Top Feed to far exceed the Exchange's proposed rates. *See* NYSE Acra Options Proprietary Market Data Fees, *available at: https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Options_Proprietary_Data_Fee_Schedule.pdf.*

[20] *See supra* note 17.

[21] *Id.*

(''NYSE American'').[22] As noted above, for the month of November 2022, the Exchange had 3.11% of the total equity options market share and 3.03% of the total electronic complex non-index volume executed on exchanges offering electronic complex functionality. For that same month, NYSE American had 6.93% of the total equity options market share and 6.35% of the total electronic complex non-index volume.[23] The Exchange proposes fees for cToM that are comparable to the rates data recipients pay for comparable data feeds from NYSE American. The Exchange has focused its comparison on NYSE American because it is the closest market in terms of market share. The fees for the NYSE American Options Complex, which, like cToM, includes top of book, trades, and security status messages for complex orders, consists of an internal distributor access fee of $1,500 per month (slightly lower than the Exchange's proposed rate), and an external distributor access fee of $1,000 per month (resulting in a total external distribution fee of $2,500 per month).[24] However, NYSE American's overall charge to receive NYSE American Options Complex data may be even higher than the Exchange's proposed rates because NYSE American charges additional non-displayed usage fees (each are $1,000 per month and a subscriber may pay multiple non-displayed usage fees), per user fees ($20 per month for professional users and $1.00 per month for non-professional users), and multiple data feed fees ($200 per month), all of which the Exchange does not propose to charge. These additional charges by NYSE American can cause the total cost to receive NYSE American Complex data to far exceed the rates that the Exchange proposes to charge.

Additional Discussion—Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs. Accordingly, in proposing to charge fees for market data, the Exchange seeks to be especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and also carefully and transparently assessing the impact on Members—both generally and in relation to other Members—to ensure the fees will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange does not believe it needs to otherwise address questions about market competition in the context of this filing because the proposed fees are so clearly consistent with the Act based on its Cost Analysis. The Exchange also believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[25] and Rule 19b–4 thereunder,[26] with respect to the types of information self-regulatory organizations (''SROs'') should provide when filing fee changes, and Section 6(b) of the Act,[27] which requires, among other things, that exchange fees be reasonable and equitably allocated,[28] not designed to permit unfair discrimination,[29] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[30] This rule change proposal addresses those requirements, and the analysis and data in this section are designed to clearly and comprehensively show how they are met.[31]

As noted above, the Exchange has conducted and recently updated a study of its aggregate costs to produce the ToM and cToM data feeds—the Cost Analysis.[32] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transactions, market data, membership services, physical connectivity, and ports (which provide order entry, cancellation and modification functionality, risk functionality, ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (collectively, ''Cost Drivers''). Next, the Exchange adopted an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (61.9% of total expense amount allocated), with smaller allocations to additional Limited Service MEI Ports (8.8%), and the remainder to the provision of membership services, transaction execution and market data services (29.3%). The allocation methodology was developed through conversations with senior management familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each Cost Driver to each core service, resulting in the cost allocations described below.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction, access, membership, regulatory, and market data fees. Accordingly, the Exchange generally must cover its expenses from these four primary sources of revenue.

Through the Exchange's extensive Cost Analysis, which was again recently updated to focus solely on the provision of ToM and cToM data feeds, the Exchange analyzed nearly every

[22] *See* NYSE American Options Proprietary Market Data Fees, *available at https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Options_Market_Data_Fee_Schedule.pdf.*

[23] *See* supra note 16.

[24] *Id.*

[25] 15 U.S.C. 78s(b)(1).

[26] 17 CFR 240.19b–4.

[27] 15 U.S.C. 78f(b).

[28] 15 U.S.C. 78f(b)(4).

[29] 15 U.S.C. 78f(b)(5).

[30] 15 U.S.C. 78f(b)(8).

[31] In 2019, Commission staff published guidance suggesting the types of information that SROs may use to demonstrate that their fee filings comply with the standards of the Exchange Act (''Fee Guidance''). While the Exchange understands that the Fee Guidance does not create new legal obligations on SROs, the Fee Guidance is consistent with the Exchange's view about the type and level of transparency that exchanges should meet to demonstrate compliance with their existing obligations when they seek to charge new fees. *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019) *available at https://www.sec.gov/tm/staff-guidancesro-rule-filings-fees.*

[32] The Exchange notes that its Cost Analysis is based on that conducted by MEMX, LLC (''MEMX''). *See* Securities Exchange Act Release Nos. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); *and* 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32). The Exchange notes that the percentage allocations and cost levels are based on the Exchange's 2023 estimated budget and may differ from those provided by MEMX for a number of reasons, including the Exchange's ability to allocate costs among multiple exchanges while MEMX allocates cost to a single exchange.

expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of ToM and cToM data feeds, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of ToM and cToM data feeds, and thus bears a relationship that is, ''in nature and closeness,'' directly related to ToM and cToM data feeds. Based on its analysis, the Exchange calculated its aggregate annual costs for providing the ToM and cToM data feeds to be $665,296. This results in an estimated monthly cost for providing ToM and cToM data feeds of $55,441 (rounded to the nearest dollar when dividing the aggregate annual cost by 12 months). In order to cover operating costs and earn a reasonable profit on its market data, the Exchange has determined it necessary to charge fees for its proprietary data products, and, as such, the Exchange is proposing to modify its Fee Schedule, as set forth above. With the proposed fee changes, the Exchange anticipates annual revenue for ToM and cToM to be $804,000 (or $67,000 per month combined).

Costs Related To Offering ToM and cToM Data Feeds

The following chart details the individual line-item (annual) costs considered by the Exchange to be related to offering the ToM and cToM data feeds to its Members and other customers, as well as the percentage of the Exchange's overall costs that such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 2.8% of its overall Human Resources cost to offering ToM and cToM data feeds).

Cost drivers	Costs	% of all
Human Resources	$354,553	2.8
Network Infrastructure (fiber connectivity)	9,428	1.7
Data Center	20,630	1.7
Hardware and Software Maintenance & Licenses	22,202	1.7
Depreciation	21,167	0.7
Allocated Shared Expenses	237,316	3.0
Total	665,296	2.5

Human Resources

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include directly providing services necessary to offer the ToM and cToM data feeds, including performance thereof, as well as personnel with ancillary functions related to establishing and providing such services (such as information security and finance personnel). The Exchange notes that it has approximately 184 employees (excluding employees at non-options exchange subsidiaries of Miami International Holdings, Inc. (''MIH''), the holding company of the Exchange and its affiliates, MIAX Pearl and MIAX), and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing the ToM and cToM data feeds, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing the ToM and cToM data feeds. The Exchange notes that senior level executives were allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing the ToM and cToM data feeds. The Exchange's cost allocation for employees who perform work in support of generating and disseminating the ToM and cToM data feeds arrive at a full time equivalent (''FTE'') of 1.2 FTEs. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Network Infrastructure

The Network Infrastructure cost includes cabling and switches required to generate and disseminate the ToM and cToM data feeds. The Network Infrastructure cost was narrowly estimated by focusing on the servers used at the Exchange's primary and back-up data centers specifically for the ToM and cToM data feeds. Further, as certain servers are only partially utilized to generate and disseminate the ToM and cToM data feeds, only the percentage of such servers devoted to generating and disseminating the ToM and cToM data feeds was included (*i.e.,* the capacity of such servers allocated to the ToM and cToM data feeds).[33]

Data Center

The Exchange does not own the primary data center or the secondary data center, but instead leases space in data centers operated by third parties where the Exchange houses servers, switches and related equipment. Data Center costs include an allocation of the costs the Exchange incurs to provide the ToM and cToM data feeds in the third-party data centers where the Exchange maintains its equipment, as well as related costs. As the Data Center costs are primarily for space, power, and cooling of servers, the Exchange allocated 1.7% to the applicable Data Center costs for the ToM and cToM data feeds. The Exchange believes it is reasonable to apply the same proportionate percentage of Data Center costs to that of Network Infrastructure.

Hardware and Software Maintenance and Licenses

Hardware and Software Maintenance and Licenses includes those licenses used to operate and monitor physical assets necessary to offer the ToM and cToM data feeds. Because the hardware and software license fees are correlated to the servers used by the Exchange, the Exchange again applied an allocation of 1.7% of its costs for Hardware and Software Maintenance and Licenses to the ToM and cToM data feeds.

[33] The Exchange understands that the Investors Exchange, Inc. (''IEX'') and MEMX both allocated a percentage of their servers to the production and dissemination of market data to support proposed market data fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945, at page 21949 (April 13, 2022) (SR–IEX–2022–02). *See also supra* note 32. The Exchange does not have insight into either MEMX's or IEX's technology infrastructure or what their determinations were based on. However, the Exchange reviewed its own technology infrastructure and believes based on its design, it is more appropriate for the Exchange to allocate a portion of its network infrastructure cost to market data based on a percentage of overall cost, not on a per server basis.

Depreciation

The vast majority of the hardware and software the Exchange uses with respect to its operations, including the software used to generate and disseminate the ToM and cToM data feeds has been developed in-house and the cost of such development is depreciated over time. Accordingly, the Exchange included Depreciation costs related to depreciated hardware and software used to generate and disseminate the ToM and cToM data feeds. The Exchange also included in the Depreciation costs certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to the ToM and cToM data feeds in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to depreciation related to the ToM and cToM data feeds.

Allocated Shared Expenses

Finally, certain general shared expenses were allocated to the ToM and cToM data feeds. However, contrary to its prior cost analysis, rather than taking the whole amount of general shared expenses and applying an allocated percentage, the Exchange has narrowly selected specific general shared expenses relevant to the cToM data feed. The costs included in general shared expenses allocated to the ToM and cToM data feeds include office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The cost of paying individuals to serve on the Exchange's Board of Directors or any committee was not allocated to providing ToM and cToM data feeds.

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core service and did not double-count any expenses. Instead, as described above, the Exchange identified and allocated applicable Cost Drivers across its core services and used the same approach to analyzing costs to form the basis of separate proposals to amend fees for connectivity and port services [34] and this filing proposing fees for ToM and cToM. Thus, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams. The proposed fees for ToM and cToM data feeds are designed to permit the Exchange to cover the costs allocated to providing cToM data with a mark-up that the Exchange believes is modest (approximately 17%), which the Exchange believes is fair and reasonable after taking into account the costs related to creating, generating, and disseminating the ToM and cToM data feeds and the fact that the Exchange will need to fund future expenditures (increased costs, improvements, etc.). The Exchange also reiterates that prior to July of 2021, the month in which it first proposed to adopt fees for cToM, the Exchange has not previously charged any fees for cToM and its allocation of costs to cToM was part of a holistic allocation that also allocated costs to other core services without double-counting any expenses.

The Exchange like other exchanges is, after all, a for-profit business. Accordingly, while the Exchange believes in transparency around costs and potential margins, as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the information should be used solely to confirm that an Exchange is not earning supra-competitive profits, and the Exchange believes the Cost Analysis and related projections demonstrate this fact.

As a general matter, the Exchange believes that its costs will remain relatively similar in future years. It is possible, however, that such costs will either decrease or increase. To the extent the Exchange sees growth in use of ToM and cToM data feeds it will receive additional revenue to offset future cost increases. However, if use of ToM and cToM data feeds is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs.

Similarly, the Exchange expects that it would propose to decrease fees in the event that revenue materially exceeds current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and expects that it would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Implementation

The proposed rule change will be effective beginning January 1, 2023.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) [35] of the Act in general, and furthers the objectives of Section 6(b)(4) [36] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. Additionally, the Exchange believes that the proposed fees are consistent with the objectives of Section 6(b)(5) [37] of the Act in that they are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to a free and open market and national market system, and, in general, to protect investors and the public interest, and, particularly, are not designed to

[34] The Exchange notes that it has not filed the connectivity and port filings at the time of this filing but plans to do so with an effective date of January 1, 2023, which the Exchange previously announced and socialized with market participants. *See* MIAX Exchange Group Alert, ''MIAX Options, Pearl Options and Emerald Options Exchanges—January 1, 2023 Non-Transaction Fee Changes,'' issued December 9, 2022, *available at https://www.miaxoptions.com/alerts/2022/12/09/miax-options-pearl-options-and-emerald-options-exchanges-january-1-2023-non-0.*

[35] 15 U.S.C. 78f.

[36] 15 U.S.C. 78f(b)(4).

[37] 15 U.S.C. 78f(b)(5).

permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange notes prior to addressing the specific reasons the Exchange believes the proposed fees and fee structure are reasonable, equitably allocated and not unreasonably discriminatory, that the proposed fees are consistent with the fee amounts charged by competing U.S. securities exchanges. For this reason, the Exchange believes that the proposed fees are consistent with the Act generally, and Section 6(b)(5) [38] of the Act in particular.

As noted above, in the four years since the Exchange launched operations with Complex Order functionality, the Exchange has grown its monthly complex market share from 0% to 3.03% of the total electronic complex non-index volume executed on U.S. options exchanges offering complex functionality for the month of November 2022.[39] One of the primary objectives of the Exchange is to provide competition and to reduce fixed costs imposed upon the industry. Consistent with this objective, the Exchange believes that this proposal reflects a simple, competitive, reasonable, and equitable pricing structure.

Reasonableness

Overall. With regard to reasonableness, the Exchange understands that the Commission has traditionally taken a market-based approach to examine whether the SRO making the fee proposal was subject to significant competitive forces in setting the terms of the proposal. The Exchange understands that in general the analysis considers whether the SRO has demonstrated in its filing that (i) there are reasonable substitutes for the product or service; (ii) ''platform'' competition constrains the ability to set the fee; and/or (iii) revenue and cost analysis shows the fee would not result in the SRO taking supra-competitive profits. If the SRO demonstrates that the fee is subject to significant competitive forces, the Exchange understands that in general the analysis will next consider whether there is any substantial countervailing basis to suggest the fee's terms fail to meet one or more standards under the Exchange Act. The Exchange further understands that if the filing fails to demonstrate that the fee is constrained by competitive forces, the SRO must provide a substantial basis, other than competition, to show that it is consistent with the Exchange Act, which may include production of relevant revenue and cost data pertaining to the product or service.

The Exchange has not determined its proposed overall market data fees based on assumptions about market competition, instead relying upon a cost-plus model to determine a reasonable fee structure that is informed by the Exchange's understanding of different uses of the products by different types of participants. In this context, the Exchange believes the proposed fees overall are fair and reasonable as a form of cost recovery plus the possibility of a reasonable return for the Exchange's aggregate costs of offering the ToM and cToM data feeds. The Exchange believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup some or all of Exchange's annual costs of providing ToM and cToM data with a reasonable mark-up. As discussed in the Purpose section, the Exchange estimates this fee filing will result in annual revenue of approximately $804,000, representing a potential mark-up of just 17% over the cost of providing ToM and cToM data. Accordingly, the Exchange believes that this fee methodology is reasonable because it allows the Exchange to recoup some or all of its expenses for providing the ToM and cToM data products (with any additional revenue representing no more than what the Exchange believes to be a reasonable rate of return). The Exchange also believes that the proposed fees are reasonable because they are generally less than the fees charged by competing options exchanges for comparable market data products, notwithstanding that the competing exchanges may have different system architectures that may result in different cost structures for the provision of market data.

The Exchange believes the proposed fees for the ToM and cToM data feeds are reasonable when compared to fees for comparable products, compared to which the Exchange's proposed fees are generally lower, as well as other comparable data feeds priced significantly higher than the Exchange's proposed fees for the ToM and cToM data feeds.[40]

Internal Distribution Fees. The Exchange believes that it is reasonable to charge fees to access the ToM and cToM data feeds for Internal Distribution because of the value of such data to subscribers in their profit-generating activities. The Exchange also believes that the proposed monthly Internal Distribution fee for cToM is reasonable as it is similar to the amount charged by at least one other exchange of comparable size for comparable data products, and lower than the fees charged by other exchange for comparable data products.[41]

External Distribution Fees. The Exchange believes that it is reasonable to charge External Distribution fees for the ToM and cToM data feeds because vendors receive value from redistributing the data in their business products provided to their customers. The Exchange believes that charging External Distribution fees is reasonable because the vendors that would be charged such fees profit by re-transmitting the Exchange's market data to their customers. These fees would be charged only once per month to each vendor account that redistributes any ToM and cToM data feeds, regardless of the number of customers to which that vendor redistributes the data.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the ToM and cToM data feeds are reasonable.

Equitable Allocation

Overall. The Exchange believes that its proposed fees are reasonable, fair, and equitable, and not unfairly discriminatory because they are designed to align fees with services provided. The Exchange believes the proposed fees for the ToM and cToM data feeds are allocated fairly and equitably among the various categories of users of the feeds, and any differences among categories of users are justified and appropriate.

The Exchange believes that the proposed fees are equitably allocated because they will apply uniformly to all data recipients that choose to subscribe to the ToM and cToM data feeds. Any subscriber or vendor that chooses to subscribe to the ToM and cToM data feeds is subject to the same Fee Schedule, regardless of what type of business they operate, and the decision to subscribe to one or more ToM and cToM data feeds is based on objective differences in usage of ToM and cToM data feeds among different Members, which are still ultimately in the control of any particular Member. The Exchange believes the proposed pricing of the ToM and cToM data feeds is equitably allocated because it is based, in part, upon the amount of information contained in each data feed and the value of that information to market participants.

Internal Distribution Fees. The Exchange believes the proposed

[38] 15 U.S.C. 78f(b)(5).

[39] *See supra* note 16.

[40] *See supra* notes 17, 19, and 22, and accompanying text.

[41] *See, e.g., supra* notes 17, 19, and 22.

monthly fees for Internal Distribution of the ToM and cToM data feeds are equitably allocated because they would be charged on an equal basis to all data recipients that receive the ToM and cToM data feeds for internal distribution, regardless of what type of business they operate.

External Distribution Fees. The Exchange believes the proposed monthly fees for External Distribution of the ToM and cToM data feeds are equitably allocated because they would be charged on an equal basis to all data recipients that receive the ToM and cToM data feeds that choose to redistribute the feeds externally, regardless of what business they operate. The Exchange also believes that the proposed monthly fees for External Distribution are equitably allocated when compared to lower proposed fees for Internal Distribution because data recipients that are externally distributing ToM and cToM data feeds are able to monetize such distribution and spread such costs amongst multiple third party data recipients, whereas the Internal Distribution fee is applicable to use by a single data recipient (and its affiliates).

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess Internal Distributors fees that are less than the fees assessed for External Distributors for subscriptions to the ToM and cToM data feeds because Internal Distributors have limited, restricted usage rights to the market data, as compared to External Distributors, which have more expansive usage rights. All Members and non-Members that decide to receive any market data feed of the Exchange (or its affiliates, MIAX PEARL, LLC and Miami International Securities Exchange, LLC), must first execute, among other things, the MIAX Exchange Group Exchange Data Agreement (the ''Exchange Data Agreement'').[42] Pursuant to the Exchange Data Agreement, Internal Distributors are restricted to the ''internal use'' of any market data they receive. This means that Internal Distributors may only distribute the Exchange's market data to the recipient's officers and employees and its affiliates.[43]External Distributors may distribute the Exchange's market data to persons who are not officers, employees or affiliates of the External Distributor,[44] and may charge their own fees for the redistribution of such market data. External Distributors may monetize their receipt of the ToM and cToM data feeds by charging their customers fees for receipt of the Exchange's cToM data. Internal Distributors do not have the same ability to monetize the Exchange's ToM and cToM data feeds. Accordingly, the Exchange believes it is fair, reasonable and not unfairly discriminatory to assess External Distributors a higher fee for the Exchange's ToM and cToM data feeds as External Distributors have greater usage rights to commercialize such market data and can adjust their own fee structures if necessary.

The Exchange also utilizes more resources to support External Distributors versus Internal Distributors, as External Distributors have reporting and monitoring obligations that Internal Distributors do not have, thus requiring additional time and effort of Exchange staff. For example, External Distributors have monthly reporting requirements under the Exchange's Market Data Policies.[45] Exchange staff must then, in turn, process and review information reported by External Distributors to ensure the External Distributors are redistributing cToM data in compliance with the Exchange's Market Data Agreement and Policies.

The Exchange believes the proposed cToM fees are equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst subscribers for similar services, depending on whether the subscriber is an Internal or External Distributor. Moreover, the decision as to whether or not to purchase market data is entirely optional to all market participants. Potential purchasers are not required to purchase the market data, and the Exchange is not required to make the market data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if market participants decide not to subscribe to the data feed, firms can discontinue their use of the cToM data.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the ToM and cToM data feeds are equitably allocated.

The Proposed Fees Are Not Unfairly Discriminatory

The Exchange believes the proposed fees for the ToM and cToM data feeds are not unfairly discriminatory because any differences in the application of the fees are based on meaningful distinctions between customers, and those meaningful distinctions are not unfairly discriminatory between customers.

Overall. The Exchange believes that the proposed fees are not unfairly discriminatory because they would apply to all data recipients that choose to subscribe to the same ToM and cToM data feeds. Any vendor or subscriber that chooses to subscribe to the ToM and cToM data feeds is subject to the same Fee Schedule, regardless of what type of business they operate. In sum, each vendor or subscriber has the ability to choose the best business solution for itself. The Exchange does not believe it is unfairly discriminatory to base pricing upon the amount of information contained in each data feed and the value of that information to market participants.

Internal Distribution Fees. The Exchange believes the proposed monthly fees for Internal Distribution of the ToM and cToM data feeds are not unfairly discriminatory because they would be charged on an equal basis to all data recipients that receive the same ToM and cToM data feeds for internal distribution, regardless of what type of business they operate.

External Distribution Fees. The Exchange believes the proposed monthly fees for redistributing the ToM and cToM data feeds are not unfairly discriminatory because they would be charged on an equal basis to all data recipients that receive the same ToM and cToM data feeds that choose to redistribute the feed(s) externally. The Exchange also believes that having higher monthly fees for External Distribution than Internal Distribution is not unfairly discriminatory because data recipients that are externally distributing ToM and cToM data feeds are able to monetize such distribution and spread such costs amongst multiple third party data recipients, whereas the Internal Distribution fee is applicable to use by a single data recipient (and its affiliates).

For all of the foregoing reasons, the Exchange believes that the proposed fees for the Exchange Data Feeds are not unfairly discriminatory.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[46] the Exchange does not believe that the proposed rule change would impose any burden on competition that

[42] *See* Exchange Data Agreement, *available at https://miaxweb2.pairsite.com/sites/default/files/page-files/MIAX_Exchange_Group_Data_Agreement_09032020.pdf.*

[43] *See id.*

[44] *See id.*

[45] *See* Section 6 of the Exchange's Market Data Policies, *available at https://www.miaxoptions.com/sites/default/files/page-files/MIAX_Exchange_Group_Market_Data_Policies_07202021.pdf.*

[46] 15 U.S.C. 78f(b)(8).

is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange does not believe that the proposed fees place certain market participants at a relative disadvantage to other market participants because, as noted above, the proposed fees are associated with usage of the data feed by each market participant based on whether the market participant internally or externally distributes the Exchange data, which are still ultimately in the control of any particular Member, and such fees do not impose a barrier to entry to smaller participants. Accordingly, the proposed fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed fees reflects the types of data consumed by various market participants and their usage thereof.

Inter-Market Competition

The Exchange does not believe the proposed fees place an undue burden on competition on other SROs that is not necessary or appropriate. In particular, market participants are not forced to subscribe to either data feed, as described above. Additionally, other exchanges have similar market data fees with comparable rates in place for their participants.[47] The proposed fees are based on actual costs and are designed to enable the Exchange to recoup its applicable costs with the possibility of a reasonable profit on its investment as described in the Purpose and Statutory Basis sections. Competing exchanges are free to adopt comparable fee structures subject to the Commission's rule filing process. Allowing the Exchange, or any new market entrant, to waive fees (as the Exchange did for cToM) for a period of time to allow it to become established encourages market entry and thereby ultimately promotes competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[48] and Rule 19b–4(f)(2)[49] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–EMERALD–2022–37 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–EMERALD–2022–37. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EMERALD–2022–37 and should be submitted on or before February 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[50]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00657 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

[47] *See supra* notes 17, 19, and 22, and accompanying text.

[48] 15 U.S.C. 78s(b)(3)(A)(ii).

[49] 17 CFR 240.19b–4(f)(2).

[50] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–498, OMB Control No. 3235–0556

Submission for OMB Review; Comment Request; Extension: Rule 15b11–1/Form BD–N

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 15b11–1 (17 CFR 240.15b11–1) under the Securities Exchange Act of 1934 (''Exchange Act'') (15 U.S.C. 78a *et seq.*) and Form BD–N (17 CFR 249.501b).

Rule 15b11–1 provides that a broker or dealer may register by notice pursuant to section 15(b)(11)(A) of the Exchange Act (15 U.S.C. 78*o*(b)(11)(A)) if it: (1) is registered with the Commodity Futures Trading Commission as a futures commission merchant or an introducing broker, as those terms are defined in the Commodity Exchange Act (7 U.S.C. 1, *et seq.*); (2) is a member of the National Futures Association or another national securities association registered under section 15A(k) of the Exchange Act (15 U.S.C. 78*o*-3(k)); and (3) is not required to register as a broker or dealer in connection with transactions in securities other than security futures

products. The rule also requires a broker or dealer registering by notice to do so by filing Form BD–N in accordance with the instructions to the form. In addition, the rule provides that if the information provided by filing the form is or becomes inaccurate for any reason, the broker or dealer shall promptly file an amendment on the form correcting such information.

The Commission staff estimates that the total annual reporting burden associated with Rule 15b11–1 and Form BD–N is approximately three hours, based on an average of zero initial notice registrations per year that each take approximately 30 minutes to complete, for zero hours, plus an average of eleven amendments per year that each take approximately fifteen minutes to complete, for 2.75 hours, rounded up to three hours, for a total of three hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent by February 16, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: January 9, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00666 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96622; File No. SR–NYSE–2023–01]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Price List

January 10, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on January 3, 2023, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to (1) extend a fee waiver for new firm application fees for applicants seeking only to obtain a bond trading license (''BTL'') for 2023; and (2) waive the BTL fee for 2023. The Exchange proposes to implement the fee changes effective January 3, 2023. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to (1) extend a fee waiver for new firm application fees for applicants seeking only to obtain a BTL for 2023; and (2) waive the BTL fee for 2023.[4] The Exchange proposes to implement the fee changes effective January 3, 2023.

The Exchange currently charges a New Firm Fee ranging from $2,000 to $4,000, depending on the type of firm, which is charged per application for any broker-dealer that applies to be approved as an Exchange member organization. The Exchange proposes to amend the Price List to waive the New Firm Fee for 2023 for new member organization applicants that are seeking only to obtain a BTL and not trade equities at the Exchange. The proposed waiver of the New Firm Fee would be available only to applicants seeking approval as a new member organization, including carrying firms, introducing firms, or non-public organizations, which would be seeking to obtain a BTL at the Exchange and not trade equities. Further, if a new firm that is approved as a member organization and has had the New Firm Fee waived converts a BTL to a full trading license within one year of approval, the New Firm Fee would be charged in full retroactively. The Exchange believes that charging the New Firm Fee retroactively within a year of approval is appropriate because it would discourage applicants to claim that they are applying for a BTL solely to avoid New Firm Fees.

Additionally, the Exchange currently charges a BTL fee of $1,000 per year. The Exchange proposes to amend the Price List to waive the BTL fee for 2023 for all member organizations.

The Exchange believes that the proposed fee changes would provide increased incentives for bond trading firms that are not currently Exchange member organizations to apply for

[4] The Exchange initially filed to adopt the fee waiver and waive the BTL fee in 2015. *See* Securities Exchange Act Release No. 74031 (January 12, 2015), 80 FR 2462 (January 16, 2015) (SR–NYSE–2014–78). The Exchange has filed to extend the fee waiver and waive the BTL fee for each calendar year since 2017. *See* Securities Exchange Act Release Nos. 79710 (December 29, 2016), 82 FR 1395 (January 5, 2017) (SR–NYSE–2016–89); 82418 (December 28, 2017), 83 FR 568 (January 4, 2018) (SR–NYSE–2017–70); 84899 (December 20, 2018), 83 FR 67395 (December 28, 2018) (SR–NYSE–2018–65); 87952 (January 13, 2020), 85 FR 3089 (January 17, 2020) (SR–NYSE–2019–73); 90891 (January 11, 2021), 86 FR 4147 (January 15, 2021) (SR–NYSE–2021–03); and 93992 (January 18, 2022), 87 FR 3635 (January 24, 2022) (SR–NYSE–2022–01).

Exchange membership and a BTL. The Exchange believes that having more member organizations trading on the Exchange's bond platform would benefit investors through the additional display of liquidity and increased execution opportunities in Exchange-traded bonds at the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[6] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that it is reasonable to waive the New Firm Fee and the annual BTL fee for 2023 to provide an incentive for bond trading firms to apply for Exchange membership and a BTL. The Exchange believes that providing an incentive for bond trading firms that are not currently Exchange member organizations to apply for membership and a BTL would encourage market participants to become members of the Exchange and bring additional liquidity to a transparent bond market. To the extent the existing New Firm Fees or the BTL fee serves as a disincentive for bond trading firms to become Exchange member organizations, the Exchange believes that the proposed fee change could expand the number of firms eligible to trade bonds on the Exchange. The Exchange believes creating incentives for bond trading firms to trade bonds on the Exchange protects investors and the public interest by increasing the competition and liquidity on a transparent market for bond trading. The proposed waiver of the New Firm Fee and BTL fee is equitable and not unfairly discriminatory because it would be offered to all market participants that wish to trade at the Exchange the narrower class of debt securities only.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[7] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Debt securities typically trade in a decentralized over-the-counter (''OTC'') dealer market that is less liquid and transparent than the equities markets. The Exchange believes that the proposed change would increase competition with these OTC venues by reducing the cost of being approved as and operating as an Exchange member organization that solely trades bonds at the Exchange, which the Exchange believes will enhance market quality through the additional display of liquidity and increased execution opportunities in Exchange-traded bonds at the Exchange.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues that are not transparent. In such an environment, the Exchange must continually review, and consider adjusting its fees and rebates to remain competitive with other exchanges as well as with alternative trading systems and other venues that are not required to comply with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed change will impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)[8] of the Act and paragraph (f) 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–NYSE–2023–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2023–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2023–01 and should be submitted on or before February 7, 2023.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4), (5).

[7] 15 U.S.C. 78f(b)(8).

[8] 15 U.S.C. 78s(b)(3)(A).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00654 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96626; File No. SR–MIAX–2022–49]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Increase Fees for the ToM Market Data Product and Establish Fees for the cToM Market Data Product

January 10, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 28, 2022, Miami International Securities Exchange, LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend its fees for two market data products by (i) amending the fees for MIAX Top of Market (''ToM''); and (ii) establishing fees for MIAX Complex Top of Market (''cToM'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fees for two market data products by (i) amending the fees for ToM; and (ii) establishing fees for cToM. The proposed fees will be effective January 1, 2023.

The Exchange previously filed several proposals to adopt fees for cToM.[3] The Exchange notes that these prior proposals included an analysis of the costs underlying the compilation and dissemination of the proposed cToM fees. As described more fully below, this filing provides an updated cost analysis that now includes ToM and focuses solely on costs related to the provision of ToM and cToM (''Cost Analysis''). The proposed fees are intended to cover the Exchange's cost of compiling and disseminating ToM and cToM with a reasonable mark-up over those costs. Before setting forth the additional details regarding the proposal as well as the updated Cost Analysis conducted by the Exchange, immediately below is a description of the proposed fees

Proposed Market Data Pricing

The Exchange offers ToM and cToM to subscribers. The Exchange notes that there is no requirement that any Member[4] or market participant subscribe to ToM or cToM or any other data feed offered by the Exchange. Instead, a Member may choose to maintain subscriptions to ToM or cToM based on their business model. The proposed fees will not apply differently based upon the size or type of firm, but rather based upon the subscriptions a firm has to ToM or cToM and their use thereof, which are based upon factors deemed relevant by each firm. The proposed pricing for ToM and cToM is set forth below.

ToM

ToM is an Exchange-only market data feed that contains top of book quotations based on options orders[5] and quotes[6] entered into the System[7] and resting on the Exchange's Simple Order Book[8] as well as administrative messages.[9] The Exchange currently charges Internal Distributors[10] $1,250 per month and External Distributors $1,750 per month for ToM. The Exchange does not currently charge, nor does it now propose to charge any additional fees based on a subscriber's use of the ToM and cToM data feeds, *e.g.,* displayed versus non-displayed use, redistribution fees, or any individual per user fees. As discussed more fully below, the Exchange recently calculated its annual aggregate costs for producing ToM to subscribers to be $371,817, or approximately $30,985 per month (rounded to the nearest dollar when dividing the annual cost by 12 months). The Exchange proposes to amend Section 6)a) of the Fee Schedule to now charge Internal Distributors $2,000 per month and External Distributors $3,000 per month for ToM in an effort to cover the Exchange's increasing costs with compiling and producing ToM to market participants as evidenced by the Exchange's Cost Analysis detailed below.

cToM

The Exchange previously adopted rules governing the trading of Complex Orders[11] on the System in 2016.[12] At

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 92359 (July 9, 2021), 86 FR 37393 (July 15, 2021) (SR–MIAX–2021–28); SR–MIAX–2021–44 (withdrawn without being noticed by the Commission); 93426 (October 26, 2021), 86 FR 60314 (November 1, 2021) (SR–MIAX–2021–50); 93808 (December 17, 2021), 86 FR 73011 (December 23, 2021) (SR–MIAX–2021–62); 94262 (February 15, 2022), 87 FR 9733 (February 22, 2022) (SR–MIAX–2022–10); 94716 (April 14, 2022), 87 FR 23616 (April 20, 2022); 94893 (May 11, 2022), 87 FR 29914 (May 17, 2022) (SR–MIAX–2022–19).

[4] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[5] The term ''order'' means a firm commitment to buy or sell option contracts. *See* Exchange Rule 100.

[6] The term ''quote'' or ''quotation'' means a bid or offer entered by a Market Maker that is firm and may update the Market Maker's previous quote, if any. The Rules of the Exchange provide for the use of different types of quotes, including Standard quotes and eQuotes, as more fully described in Rule 517. A Market Maker may, at times, choose to have multiple types of quotes active in an individual option. *See* Exchange Rule 100.

[7] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[8] The term ''Simple Order Book'' means ''the Exchange's regular electronic book of orders and quotes.'' *See* Exchange Rule 518(a)(15).

[9] *See* Fee Schedule, Section 6)a).

[10] A ''Distributor'' of MIAX data is any entity that receives a feed or file of data either directly from MIAX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All Distributors are required to execute a MIAX Distributor Agreement. *See* Fee Schedule, Section 6)a).

[11] *See* Exchange Rule 518(a)(5) for the definition of Complex Orders.

[12] *See* Securities Exchange Act Release No. 79072 (October 7, 2016), 81 FR 71131 (October 14, 2016)

Continued

that time, the Exchange also adopted cToM and expressly waived fees for cToM to incentivize market participants to subscribe.[13] cToM was provided free of charge for six years and the Exchange absorbed all costs associated with compiling and disseminating cToM during that entire time. As discussed more fully below, the Exchange recently calculated its annual aggregate costs for producing cToM to subscribers to be $278,863, or approximately $23,239 per month (rounded to the nearest dollar when dividing the annual cost by 12 months). The Exchange now proposes to amend Section 6)a) of the Fee Schedule to establish fees for cToM in order to recoup its ongoing costs going forward.

In summary, cToM provides subscribers with the same information as ToM as it relates to the Strategy Book,[14] *i.e.,* the Exchange's best bid and offer for a complex strategy, with aggregate size, based on displayable orders in the complex strategy on the Exchange. However, cToM provides subscribers with the following additional information that is not included in ToM: (i) the identification of the complex strategies currently trading on the Exchange; (ii) complex strategy last sale information; and (iii) the status of securities underlying the complex strategy (*e.g.,* halted, open, or resumed). cToM is therefore a distinct market data product from ToM in that it includes additional information that is not available to subscribers that receive only ToM. ToM subscribers are not required to subscribe to cToM, and cToM subscribers are not required to subscribe to ToM.

ToM Proposed Fees

The Exchange proposes to amend Section 6)a) of the Fee Schedule to charge Internal Distributors $2,000 per month and External Distributors $3,000 per month for the cToM data feed. The proposed fees are identical to the fees that the Exchange proposes to charge for ToM. The Exchange does not propose to adopt redistribution fees for the cToM data feed. However, the recipient of cToM data would be required to become a data subscriber and would be subject to the applicable data subscriber fees. The Exchange also does not propose to charge any additional fees based on a subscriber's use of the cToM data feed, *e.g.,* displayed versus non-displayed use, and does not propose to impose any individual per user fees.

As it does today for ToM, the Exchange proposes to assess cToM fees to Internal and External Distributors in each month the Distributor is credentialed to use cToM in the production environment. Also, as the Exchange does today for ToM, market data fees for cToM will be reduced for new Distributors for the first month during which they subscribe to cToM, based on the number of trading days that have been held during the month prior to the date on which that subscriber has been credentialed to use cToM in the production environment. New cToM Distributors will be assessed a pro-rata percentage of the fees listed in the table in Section 6)a) of the Fee Schedule, which is the percentage of the number of trading days remaining in the affected calendar month as of the date on which they have been credentialed to use cToM in the production environment, divided by the total number of trading days in the affected calendar month.

The Exchange also proposes to amend the paragraph below the table of fees for ToM and cToM in Section 6)a) of the Fee Schedule to make a minor, non-substantive correction by deleting the phrase ''(as applicable)'' in the first sentence following the table of fees for ToM and cToM. The purpose of this proposed change is to remove unnecessary text from the Fee Schedule.

cToM Content Is Available From Alternative Sources

cToM is not the exclusive source for Complex Order information from the Exchange. It is a business decision of market participants whether to subscribe to cToM or not. Market participants that choose not to subscribe to cToM can derive much, if not all, of the same information from other Exchange sources, including, for example, the MIAX Order Feed (''MOR'').[15] The following cToM information is included in MOR: the Exchange's best bid and offer for a complex strategy, with aggregate size, based on displayable orders in the complex strategy on the Exchange; the identification of the complex strategies currently trading on the Exchange; and the status of securities underlying the complex strategy (*e.g.,* halted, open, or resumed). In addition to MOR, complex strategy last sale information can be derived from ToM. Specifically, market participants may deduce that last sale information for multiple trades in related options series with the same timestamps disseminated via ToM are likely part of a Complex Order transaction and last sale.

Additional Discussion—cToM Background

In the six years since the Exchange adopted Complex Order functionality, the Exchange has grown its monthly complex market share from 0% to 10.86% of the total electronic complex non-index volume executed on exchanges offering electronic complex functionality for the month of November 2022.[16] During that same period, the Exchange has had a steady increase in the number of cToM subscribers. Until the Exchange initially filed to adopt cToM fees in July of 2021, the Exchange did not charge fees for cToM data provided by the Exchange. The objective of this approach was to eliminate any fee-based barriers for Members when the Exchange launched Complex Order functionality in 2016, which the Exchange believes has been helpful in its ability to attract order flow as a relatively new exchange. As discussed more fully below, the Exchange recently calculated its annual aggregate costs for providing cToM at approximately $278,863. In order to establish fees that are designed to recover the aggregate costs of providing cToM plus a reasonable mark-up, the Exchange is proposing to modify its Fee Schedule, as described above. In addition to the Cost Analysis, described below, the Exchange believes that its proposed approach to market data fees is reasonable based on a comparison to competitors.

Additional Discussion—Comparison With Other Exchanges

ToM

The proposed fees for ToM are comparable to the fees currently in place for the options exchanges, particularly Nasdaq ISE, LLC (''ISE'').[17]

(SR–MIAX–2016–26) (Order Approving a Proposed Rule Change to Adopt New Rules to Govern the Trading of Complex Orders).

[13] *See* Securities Exchange Act Release No. 79146 (October 24, 2016), 81 FR 75171 (October 28, 2016) (SR–MIAX–2016–36) (providing a complete description of the cToM data feed).

[14] The ''Strategy Book'' is the Exchange's electronic book of complex orders and complex quotes. *See* Exchange Rule 518(a)(17).

[15] *See* MIAX website, Market Data & Offerings, *available at https://www.miaxoptions.com/market-data-offerings* (last visited December 20, 2022). In general, MOR provides real-time ultra-low latency updates on the following information: new Simple Orders added to the MIAX Order Book; updates to Simple Orders resting on the MIAX Order Book; new Complex Orders added to the Strategy Book (*i.e.,* the book of Complex Orders); updates to Complex Orders resting on the Strategy Book; MIAX listed series updates; MIAX Complex Strategy definitions; the state of the MIAX System; and MIAX's underlying trading state.

[16] The Exchange notes that it receives complex market data for all U.S. options exchanges that offer complex functionality from direct feeds from The Options Price Reporting Authority (''OPRA'').

[17] *See* ISE Options 7 Pricing Schedule, Section 10, H., *available at https://listingcenter.nasdaq.com/*

In November 2022, the Exchange had 6.10% market share of equity options volume; for that same month, ISE had 6.19% market share of equity options volume.[18] The Exchange's proposed fees for ToM are equal to, and for Internal Distributors, lower than, the rates data recipients pay for comparable data feeds from ISE. The Exchange notes that other competitors maintain fees applicable to market data that are considerably higher than those proposed by the Exchange, including NYSE Arca, Inc. (''NYSE Arca'').[19] However, the Exchange has focused its comparison on ISE because it is the closest market in terms of market share and offers market data at prices lower than several other incumbent exchanges. The fees for the Nasdaq ISE Top Quote Feed, which like ToM, includes top of book, trades, and security status messages, consists of an internal distributor access fee of $3,000 per month (50% higher than the Exchange's proposed rate), and an external distributor access fee of $3,000 per month (equal to the Exchange's proposed rate).[20] ISE's overall charge to receive the Nasdaq ISE Top Quote Feed may be even higher than the Exchange's proposed rates because ISE charges additional per controlled device fees that can cause the distribution fee to reach up to $5,000 per month.[21] The Exchange's proposed rates do not include additional fees.

cToM

The proposed fees for cToM are comparable to the fees currently in place for competing options exchanges, particularly NYSE American, LLC (''NYSE American'').[22] As noted above, for the month of November 2022, the Exchange had 6.10% of the total equity options market share and 10.86% of the total electronic complex non-index volume executed on exchanges offering electronic complex functionality. For that same month, NYSE American had 6.93% of the total equity options market share and 6.35% of the total electronic complex non-index volume.[23] The Exchange proposes fees for cToM that are comparable to the rates data recipients pay for comparable data feeds from NYSE American. The Exchange has focused its comparison on NYSE American because it is the closest market in terms of market share. The fees for the NYSE American Options Complex, which, like cToM, includes top of book, trades, and security status messages for complex orders, consists of an internal distributor access fee of $1,500 per month (slightly lower than the Exchange's proposed rate), and an external distributor access fee of $1,000 per month (resulting in a total external distribution fee of $2,500 per month).[24] However, NYSE American's overall charge to receive NYSE American Options Complex data may be even higher than the Exchange's proposed rates because NYSE American charges additional non-displayed usage fees (each are $1,000 per month and a subscriber may pay multiple non-displayed usage fees), per user fees ($20 per month for professional users and $1.00 per month for non-professional users), and multiple data feed fees ($200 per month), all of which the Exchange does not propose to charge. These additional charges by NYSE American can cause the total cost to receive NYSE American Complex data to far exceed the rates that the Exchange proposes to charge.

Additional Discussion—Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs. Accordingly, in proposing to charge fees for market data, the Exchange seeks to be especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and also carefully and transparently assessing the impact on Members—both generally and in relation to other Members—to ensure the fees will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange does not believe it needs to otherwise address questions about market competition in the context of this filing because the proposed fees are so clearly consistent with the Act based on its Cost Analysis. The Exchange also believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[25] and Rule 19b–4 thereunder,[26] with respect to the types of information self-regulatory organizations (''SROs'') should provide when filing fee changes, and Section 6(b) of the Act,[27] which requires, among other things, that exchange fees be reasonable and equitably allocated,[28] not designed to permit unfair discrimination,[29] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[30] This rule change proposal addresses those requirements, and the analysis and data in this section are designed to clearly and comprehensively show how they are met.[31]

As noted above, the Exchange has conducted and recently updated a study of its aggregate costs to produce the ToM and cToM data feeds—the Cost Analysis.[32] The Cost Analysis required

rulebook/ise/rules/ISE%20Options%207 (assessing Professional internal and external distributors $3,000 per month, plus $20 per month per controlled device for ISE's Top Quote Feed).

[18] *See* Market at a Glance, U.S. Options Market Volume Summary, *available at https://www.miaxoptions.com/* (last visited December 20, 2022).

[19] Fees for the NYSE Arca Options Top Feed, which is the comparable product to ToM, are $3,000 per month for access (internal use) and an additional $2,000 per month for redistribution (external distribution), compared to the Exchange's proposed fees of $2,000 and $3,000 for Internal and External Distributors, respectively. In addition, for its NYSE Arca Options Top Feed, NYSE Arca charges for three different categories of non-display usage, and user fees, both of which the Exchange does not propose to charge, causing the overall cost of NYSE Arca Options Top Feed to far exceed the Exchange's proposed rates. *See* NYSE Acra Options Proprietary Market Data Fees, *available at: https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Options_Proprietary_Data_Fee_Schedule.pdf.*

[20] *See supra* note 17.

[21] *Id.*

[22] *See* NYSE American Options Proprietary Market Data Fees, *available at https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Options_Market_Data_Fee_Schedule.pdf.*

[23] *See* supra note 16.

[24] *Id.*

[25] 15 U.S.C. 78s(b)(1).

[26] 17 CFR 240.19b-4.

[27] 15 U.S.C. 78f(b).

[28] 15 U.S.C. 78f(b)(4).

[29] 15 U.S.C. 78f(b)(5).

[30] 15 U.S.C. 78f(b)(8).

[31] In 2019, Commission staff published guidance suggesting the types of information that SROs may use to demonstrate that their fee filings comply with the standards of the Exchange Act (''Fee Guidance''). While the Exchange understands that the Fee Guidance does not create new legal obligations on SROs, the Fee Guidance is consistent with the Exchange's view about the type and level of transparency that exchanges should meet to demonstrate compliance with their existing obligations when they seek to charge new fees. *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019) *available at https://www.sec.gov/tm/staff-guidancesro-rule-filings-fees.*

[32] The Exchange notes that its Cost Analysis is based on that conducted by MEMX, LLC (''MEMX''). *See* Securities Exchange Act Release Nos. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); *and* 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32). The Exchange notes that the percentage allocations and cost levels are based on the Exchange's 2023 estimated budget and may differ from those provided by MEMX for a

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a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transactions, market data, membership services, physical connectivity, and ports (which provide order entry, cancellation and modification functionality, risk functionality, ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (collectively, ''Cost Drivers''). Next, the Exchange adopted an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (60.6% of total expense amount allocated), with smaller allocations to additional Limited Service MEI Ports (13.3%), and the remainder to the provision of membership services, transaction execution and market data services (26.1%). The allocation methodology was developed through conversations with senior management familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each Cost Driver to each core service, resulting in the cost allocations described below.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction, access, membership, regulatory, and market data fees. Accordingly, the Exchange generally must cover its expenses from these four primary sources of revenue.

Through the Exchange's extensive Cost Analysis, which was again recently updated to focus solely on the provision of ToM and cToM data feeds, the Exchange analyzed nearly every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of ToM and cToM data feeds, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of ToM and cToM data feeds, and thus bears a relationship that is, ''in nature and closeness,'' directly related to ToM and cToM data feeds. Based on its analysis, the Exchange calculated its aggregate annual costs for providing the ToM and cToM data feeds to be $650,680. This results in an estimated monthly cost for providing ToM and cToM data feeds of $54,223 (rounded to the nearest dollar when dividing the aggregate annual cost by 12 months). In order to cover operating costs and earn a reasonable profit on its market data, the Exchange has determined it is necessary to charge fees for its proprietary data products, and, as such, the Exchange is proposing to modify its Fee Schedule, as set forth above. With the proposed fee changes, the Exchange anticipates annual revenue for ToM and cToM to be $840,000 (or $70,000 per month combined).

Costs Related To Offering ToM and cToM Data Feeds

The following chart details the individual line-item (annual) costs considered by the Exchange to be related to offering the ToM and cToM data feeds to its Members and other customers, as well as the percentage of the Exchange's overall costs that such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 2.4% of its overall Human Resources cost to offering ToM and cToM data feeds).

Cost drivers	Costs $	Percent of all
Human Resources	367,278	2.4
Network Infrastructure (fiber connectivity)	1,695	1.5
Data Center	17,371	1.5
Hardware and Software Maintenance & Licenses	21,375	1.5
Depreciation	34,091	0.9
Allocated Shared Expenses	208,870	2.6
Total	650,680	2.1

Human Resources

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include directly providing services necessary to offer the ToM and cToM data feeds, including performance thereof, as well as personnel with ancillary functions related to establishing and providing such services (such as information security and finance personnel). The Exchange notes that it has approximately 184 employees (excluding employees at non-options exchange subsidiaries of Miami International Holdings, Inc. (''MIH''), the holding company of the Exchange and its affiliates, MIAX Pearl and MIAX Emerald), and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing the ToM and cToM data feeds, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing the ToM and cToM data feeds. The Exchange notes that senior level executives were allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing the ToM and cToM data feeds. The Exchange's cost allocation for employees who perform work in support of generating and disseminating the ToM and cToM data feeds arrive at a full time equivalent (''FTE'') of 1.2 FTEs. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

number of reasons, including the Exchange's ability to allocate costs among multiple exchanges while MEMX allocates cost to a single exchange.

Network Infrastructure

The Network Infrastructure cost includes cabling and switches required to generate and disseminate the ToM and cToM data feeds. The Network Infrastructure cost was narrowly estimated by focusing on the servers used at the Exchange's primary and back-up data centers specifically for the ToM and cToM data feeds. Further, as certain servers are only partially utilized to generate and disseminate the ToM and cToM data feeds, only the percentage of such servers devoted to generating and disseminating the ToM and cToM data feeds was included (*i.e.,* the capacity of such servers allocated to the ToM and cToM data feeds).[33]

Data Center

The Exchange does not own the primary data center or the secondary data center, but instead leases space in data centers operated by third parties where the Exchange houses servers, switches and related equipment. Data Center costs include an allocation of the costs the Exchange incurs to provide the ToM and cToM data feeds in the third-party data centers where the Exchange maintains its equipment, as well as related costs. As the Data Center costs are primarily for space, power, and cooling of servers, the Exchange allocated 1.5% to the applicable Data Center costs for the ToM and cToM data feeds. The Exchange believes it is reasonable to apply the same proportionate percentage of Data Center costs to that of Network Infrastructure.

Hardware and Software Maintenance and Licenses

Hardware and Software Maintenance and Licenses includes those licenses used to operate and monitor physical assets necessary to offer the ToM and cToM data feeds. Because the hardware and software license fees are correlated to the servers used by the Exchange, the Exchange again applied an allocation of 0.5% of its costs for Hardware and Software Maintenance and Licenses to the ToM and cToM data feeds.

Depreciation

The vast majority of the hardware and software the Exchange uses with respect to its operations, including the software used to generate and disseminate the ToM and cToM data feeds has been developed in-house and the cost of such development is depreciated over time. Accordingly, the Exchange included Depreciation costs related to depreciated hardware and software used to generate and disseminate the ToM and cToM data feeds. The Exchange also included in the Depreciation costs certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to the ToM and cToM data feeds in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to depreciation related to the ToM and cToM data feeds.

Allocated Shared Expenses

Finally, certain general shared expenses were allocated to the ToM and cToM data feeds. However, contrary to its prior cost analysis, rather than taking the whole amount of general shared expenses and applying an allocated percentage, the Exchange has narrowly selected specific general shared expenses relevant to the cToM data feed. The costs included in general shared expenses allocated to the ToM and cToM data feeds include office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The cost of paying individuals to serve on the Exchange's Board of Directors or any committee was not allocated to providing ToM and cToM data feeds.

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core service and did not double-count any expenses. Instead, as described above, the Exchange identified and allocated applicable Cost Drivers across its core services and used the same approach to analyzing costs to form the basis of separate proposals to amend fees for connectivity and port services[34] and this filing proposing fees for ToM and cToM. Thus, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams. The proposed fees for ToM and cToM data feeds are designed to permit the Exchange to cover the costs allocated to providing cToM data with a mark-up that the Exchange believes is modest (approximately 23%), which the Exchange believes is fair and reasonable after taking into account the costs related to creating, generating, and disseminating the ToM and cToM data feeds and the fact that the Exchange will need to fund future expenditures (increased costs, improvements, etc.). The Exchange also reiterates that prior to July of 2021, the month in which it first proposed to adopt fees for cToM, the Exchange has not previously charged any fees for cToM and its allocation of costs to cToM was part of a holistic allocation that also allocated costs to other core services without double-counting any expenses.

The Exchange like other exchanges is, after all, a for-profit business. Accordingly, while the Exchange believes in transparency around costs and potential margins, as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the information should be used solely to confirm that an Exchange is not earning supra-competitive profits, and the Exchange believes the Cost Analysis and related projections demonstrate this fact.

As a general matter, the Exchange believes that its costs will remain relatively similar in future years. It is possible, however, that such costs will either decrease or increase. To the extent the Exchange sees growth in use of ToM and cToM data feeds it will receive additional revenue to offset future cost increases. However, if use of ToM and cToM data feeds is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to

[33] The Exchange understands that the Investors Exchange, Inc. (''IEX'') and MEMX both allocated a percentage of their servers to the production and dissemination of market data to support proposed market data fees. See Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945, at page 21949 (April 13, 2022) (SR–IEX–2022–02). *See also supra* note 32. The Exchange does not have insight into either MEMX's or IEX's technology infrastructure or what their determinations were based on. However, the Exchange reviewed its own technology infrastructure and believes based on its design, it is more appropriate for the Exchange to allocate a portion of its network infrastructure cost to market data based on a percentage of overall cost, not on a per server basis.

[34] The Exchange notes that it has not filed the connectivity and port filings at the time of this filing but plans to do so with an effective date of January 1, 2023, which the Exchange previously announced and socialized with market participants. *See* MIAX Exchange Group Alert, ''MIAX Options, Pearl Options and Emerald Options Exchanges—January 1, 2023 Non-Transaction Fee Changes,'' issued December 9, 2022, *available at https://www.miaxoptions.com/alerts/2022/12/09/miax-options-pearl-options-and-emerald-options-exchanges-january-1-2023-non-0.*

increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs.

Similarly, the Exchange expects that it would propose to decrease fees in the event that revenue materially exceeds current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and expects that it would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Implementation

The proposed rule change will be effective beginning January 1, 2023.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) [35] of the Act in general, and furthers the objectives of Section 6(b)(4) [36] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. Additionally, the Exchange believes that the proposed fees are consistent with the objectives of Section 6(b)(5) [37] of the Act in that they are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to a free and open market and national market system, and, in general, to protect investors and the public interest, and, particularly, are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange notes prior to addressing the specific reasons the Exchange believes the proposed fees and fee structure are reasonable, equitably allocated and not unreasonably discriminatory, that the proposed fees are consistent with the fee amounts charged by competing U.S. securities exchanges. For this reason, the Exchange believes that the proposed fees are consistent with the Act generally, and Section 6(b)(5) [38] of the Act in particular.

As noted above, in the six years since the Exchange adopted Complex Order functionality, the Exchange has grown its monthly complex market share from 0% to 10.86% of the total electronic complex non-index volume executed on U.S. options exchanges offering complex functionality for the month of November 2022.[39] One of the primary objectives of the Exchange is to provide competition and to reduce fixed costs imposed upon the industry. Consistent with this objective, the Exchange believes that this proposal reflects a simple, competitive, reasonable, and equitable pricing structure.

Reasonableness

Overall. With regard to reasonableness, the Exchange understands that the Commission has traditionally taken a market-based approach to examine whether the SRO making the fee proposal was subject to significant competitive forces in setting the terms of the proposal. The Exchange understands that in general the analysis considers whether the SRO has demonstrated in its filing that (i) there are reasonable substitutes for the product or service; (ii) ''platform'' competition constrains the ability to set the fee; and/or (iii) revenue and cost analysis shows the fee would not result in the SRO taking supra-competitive profits. If the SRO demonstrates that the fee is subject to significant competitive forces, the Exchange understands that in general the analysis will next consider whether there is any substantial countervailing basis to suggest the fee's terms fail to meet one or more standards under the Exchange Act. The Exchange further understands that if the filing fails to demonstrate that the fee is constrained by competitive forces, the SRO must provide a substantial basis, other than competition, to show that it is consistent with the Exchange Act, which may include production of relevant revenue and cost data pertaining to the product or service.

The Exchange has not determined its proposed overall market data fees based on assumptions about market competition, instead relying upon a cost-plus model to determine a reasonable fee structure that is informed by the Exchange's understanding of different uses of the products by different types of participants. In this context, the Exchange believes the proposed fees overall are fair and reasonable as a form of cost recovery plus the possibility of a reasonable return for the Exchange's aggregate costs of offering the ToM and cToM data feeds. The Exchange believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup some or all of Exchange's annual costs of providing ToM and cToM data with a reasonable mark-up. As discussed in the Purpose section, the Exchange estimates this fee filing will result in annual revenue of approximately $840,000, representing a potential mark-up of just 23% over the cost of providing ToM and cToM data. Accordingly, the Exchange believes that this fee methodology is reasonable because it allows the Exchange to recoup some or all of its expenses for providing the ToM and cToM data products (with any additional revenue representing no more than what the Exchange believes to be a reasonable rate of return). The Exchange also believes that the proposed fees are reasonable because they are generally less than the fees charged by competing options exchanges for comparable market data products, notwithstanding that the competing exchanges may have different system architectures that may result in different cost structures for the provision of market data.

The Exchange believes the proposed fees for the ToM and cToM data feeds are reasonable when compared to fees for comparable products, compared to which the Exchange's proposed fees are generally lower, as well as other comparable data feeds priced significantly higher than the Exchange's proposed fees for the ToM and cToM data feeds.[40]

Internal Distribution Fees. The Exchange believes that it is reasonable to charge fees to access the ToM and cToM data feeds for Internal Distribution because of the value of such data to subscribers in their profit-generating activities. The Exchange also believes that the proposed monthly Internal Distribution fee for cToM is

[35] 15 U.S.C. 78f.

[36] 15 U.S.C. 78f(b)(4).

[37] 15 U.S.C. 78f(b)(5).

[38] 15 U.S.C. 78f(b)(5).

[39] *See supra* note 16.

[40] *See supra* notes 17, 19, and 22, and accompanying text.

reasonable as it is similar to the amount charged by at least one other exchange of comparable size for comparable data products, and lower than the fees charged by other exchange for comparable data products.[41]

External Distribution Fees. The Exchange believes that it is reasonable to charge External Distribution fees for the ToM and cToM data feeds because vendors receive value from redistributing the data in their business products provided to their customers. The Exchange believes that charging External Distribution fees is reasonable because the vendors that would be charged such fees profit by re-transmitting the Exchange's market data to their customers. These fees would be charged only once per month to each vendor account that redistributes any ToM and cToM data feeds, regardless of the number of customers to which that vendor redistributes the data.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the ToM and cToM data feeds are reasonable

Equitable Allocation

Overall. The Exchange believes that its proposed fees are reasonable, fair, and equitable, and not unfairly discriminatory because they are designed to align fees with services provided. The Exchange believes the proposed fees for the ToM and cToM data feeds are allocated fairly and equitably among the various categories of users of the feeds, and any differences among categories of users are justified and appropriate.

The Exchange believes that the proposed fees are equitably allocated because they will apply uniformly to all data recipients that choose to subscribe to the ToM and cToM data feeds. Any subscriber or vendor that chooses to subscribe to the ToM and cToM data feeds is subject to the same Fee Schedule, regardless of what type of business they operate, and the decision to subscribe to one or more ToM and cToM data feeds is based on objective differences in usage of ToM and cToM data feeds among different Members, which are still ultimately in the control of any particular Member. The Exchange believes the proposed pricing of the ToM and cToM data feeds is equitably allocated because it is based, in part, upon the amount of information contained in each data feed and the value of that information to market participants.

Internal Distribution Fees. The Exchange believes the proposed monthly fees for Internal Distribution of the ToM and cToM data feeds are equitably allocated because they would be charged on an equal basis to all data recipients that receive the ToM and cToM data feeds for internal distribution, regardless of what type of business they operate.

External Distribution Fees. The Exchange believes the proposed monthly fees for External Distribution of the ToM and cToM data feeds are equitably allocated because they would be charged on an equal basis to all data recipients that receive the ToM and cToM data feeds that choose to redistribute the feeds externally, regardless of what business they operate. The Exchange also believes that the proposed monthly fees for External Distribution are equitably allocated when compared to lower proposed fees for Internal Distribution because data recipients that are externally distributing ToM and cToM data feeds are able to monetize such distribution and spread such costs amongst multiple third party data recipients, whereas the Internal Distribution fee is applicable to use by a single data recipient (and its affiliates).

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess Internal Distributors fees that are less than the fees assessed for External Distributors for subscriptions to the ToM and cToM data feeds because Internal Distributors have limited, restricted usage rights to the market data, as compared to External Distributors, which have more expansive usage rights. All Members and non-Members that decide to receive any market data feed of the Exchange (or its affiliates, MIAX PEARL, LLC and MIAX Emerald, LLC), must first execute, among other things, the MIAX Exchange Group Exchange Data Agreement (the ''Exchange Data Agreement'').[42] Pursuant to the Exchange Data Agreement, Internal Distributors are restricted to the ''internal use'' of any market data they receive. This means that Internal Distributors may only distribute the Exchange's market data to the recipient's officers and employees and its affiliates.[43] External Distributors may distribute the Exchange's market data to persons who are not officers, employees or affiliates of the External Distributor,[44] and may charge their own fees for the redistribution of such market data. External Distributors may monetize their receipt of the ToM and cToM data feeds by charging their customers fees for receipt of the Exchange's cToM data. Internal Distributors do not have the same ability to monetize the Exchange's ToM and cToM data feeds. Accordingly, the Exchange believes it is fair, reasonable and not unfairly discriminatory to assess External Distributors a higher fee for the Exchange's ToM and cToM data feeds as External Distributors have greater usage rights to commercialize such market data and can adjust their own fee structures if necessary.

The Exchange also utilizes more resources to support External Distributors versus Internal Distributors, as External Distributors have reporting and monitoring obligations that Internal Distributors do not have, thus requiring additional time and effort of Exchange staff. For example, External Distributors have monthly reporting requirements under the Exchange's Market Data Policies.[45] Exchange staff must then, in turn, process and review information reported by External Distributors to ensure the External Distributors are redistributing cToM data in compliance with the Exchange's Market Data Agreement and Policies.

The Exchange believes the proposed cToM fees are equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst subscribers for similar services, depending on whether the subscriber is an Internal or External Distributor. Moreover, the decision as to whether or not to purchase market data is entirely optional to all market participants. Potential purchasers are not required to purchase the market data, and the Exchange is not required to make the market data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if market participants decide not to subscribe to the data feed, firms can discontinue their use of the cToM data.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the ToM and cToM data feeds are equitably allocated.

The Proposed Fees Are Not Unfairly Discriminatory

The Exchange believes the proposed fees for the ToM and cToM data feeds are not unfairly discriminatory because

[41] *See, e.g., supra* notes 17, 19, and 22.

[42] *See* Exchange Data Agreement, *available at https://miaxweb2.pairsite.com/sites/default/files/page-files/MIAX_Exchange_Group_Data_Agreement_09032020.pdf.*

[43] *See id.*

[44] *See id.*

[45] *See* Section 6 of the Exchange's Market Data Policies, *available at https://www.miaxoptions.com/sites/default/files/page-files/MIAX_Exchange_Group_Market_Data_Policies_07202021.pdf.*

any differences in the application of the fees are based on meaningful distinctions between customers, and those meaningful distinctions are not unfairly discriminatory between customers.

Overall. The Exchange believes that the proposed fees are not unfairly discriminatory because they would apply to all data recipients that choose to subscribe to the same ToM and cToM data feeds. Any vendor or subscriber that chooses to subscribe to the ToM and cToM data feeds is subject to the same Fee Schedule, regardless of what type of business they operate. In sum, each vendor or subscriber has the ability to choose the best business solution for itself. The Exchange does not believe it is unfairly discriminatory to base pricing upon the amount of information contained in each data feed and the value of that information to market participants.

Internal Distribution Fees. The Exchange believes the proposed monthly fees for Internal Distribution of the ToM and cToM data feeds are not unfairly discriminatory because they would be charged on an equal basis to all data recipients that receive the same ToM and cToM data feeds for internal distribution, regardless of what type of business they operate.

External Distribution Fees. The Exchange believes the proposed monthly fees for redistributing the ToM and cToM data feeds are not unfairly discriminatory because they would be charged on an equal basis to all data recipients that receive the same ToM and cToM data feeds that choose to redistribute the feed(s) externally. The Exchange also believes that having higher monthly fees for External Distribution than Internal Distribution is not unfairly discriminatory because data recipients that are externally distributing ToM and cToM data feeds are able to monetize such distribution and spread such costs amongst multiple third party data recipients, whereas the Internal Distribution fee is applicable to use by a single data recipient (and its affiliates).

For all of the foregoing reasons, the Exchange believes that the proposed fees for the Exchange Data Feeds are not unfairly discriminatory.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[46] the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange does not believe that the proposed fees place certain market participants at a relative disadvantage to other market participants because, as noted above, the proposed fees are associated with usage of the data feed by each market participant based on whether the market participant internally or externally distributes the Exchange data, which are still ultimately in the control of any particular Member, and such fees do not impose a barrier to entry to smaller participants. Accordingly, the proposed fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed fees reflects the types of data consumed by various market participants and their usage thereof.

Inter-Market Competition

The Exchange does not believe the proposed fees place an undue burden on competition on other SROs that is not necessary or appropriate. In particular, market participants are not forced to subscribe to either data feed, as described above. Additionally, other exchanges have similar market data fees with comparable rates in place for their participants.[47] The proposed fees are based on actual costs and are designed to enable the Exchange to recoup its applicable costs with the possibility of a reasonable profit on its investment as described in the Purpose and Statutory Basis sections. Competing exchanges are free to adopt comparable fee structures subject to the Commission's rule filing process. Allowing the Exchange, or any new market entrant, to waive fees (as the Exchange did for cToM) for a period of time to allow it to become established encourages market entry and thereby ultimately promotes competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[48] and Rule 19b–4(f)(2)[49] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2022–49 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2022–49. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments

[46] 15 U.S.C. 78f(b)(8).

[47] *See supra* notes 17, 19, and 22, and accompanying text.

[48] 15 U.S.C. 78s(b)(3)(A)(ii).

[49] 17 CFR 240.19b–4(f)(2).

received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2022–49 and should be submitted on or before February 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[50]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00658 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96624; File No. SR–NSCC–2022–802]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Extension of Review Period of Advance Notice Related to Certain Enhancements to the Gap Risk Measure and the VaR Charge

January 10, 2023.

On December 2, 2022, the National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') advance notice SR–NSCC–2022–802 (''Advance Notice'') pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, entitled Payment, Clearing and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) [2] under the Securities Exchange Act of 1934 (''Exchange Act'') [3] to amend NSCC's Rules and Procedures to enhance the calculation of the volatility component of the Clearing Fund formula that utilizes a parametric Value-at-Risk (''VaR'') model (''VaR Charge''), specifically with respect to the Gap Risk Measure thereof.[4] The Advance Notice was published for public comment in the **Federal Register** on December 21, 2022.[5] The Commission received a comment regarding the changes proposed in the Advance Notice.[6]

Section 806(e)(1)(G) of the Clearing Supervision Act provides that NSCC may implement the changes if it has not received an objection to the proposed changes within 60 days of the later of (i) the date that the Commission receives the Advance Notice or (ii) the date that any additional information requested by the Commission is received,[7] unless extended as described below.

Pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act, the Commission may extend the review period of an advance notice for an additional 60 days, if the changes proposed in the advance notice raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension.[8]

Here, as the Commission has not requested any additional information, the date that is 60 days after NSCC filed the Advance Notice with the Commission is January 31, 2023. However, the Commission finds the issues raised by the Advance Notice complex because the proposal would revise the methodology by which NSCC determines the appropriate margin to capture the gap risk posed by a member's portfolio, including by making the gap risk measure additive as opposed to substitutive, expanding its application to the two largest positions instead of only the largest position, amending the scope of products subject to the gap risk measure, and changing the haircuts and methodology for determining the applicable haircuts.[9] Therefore, the Commission finds it appropriate to extend the review period of the Advance Notice for an additional 60 days under Section 806(e)(1)(H) of the Clearing Supervision Act.[10]

Accordingly, the Commission, pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act,[11] extends the review period for an additional 60 days so that the Commission shall have until April 1, 2023 to issue an objection or non-objection to advance notice SR–NSCC–2022–802.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00656 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

[50] 17 CFR 200.30–3(a)(12).

[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] 15 U.S.C. 78a *et seq.*

[4] *See* Notice of Filing, *infra* note 5.

[5] Securities Exchange Act Release No. 96513 (Dec. 15, 2022), 87 FR 78175 (Dec. 21, 2022) (File No. SR–NSCC–2022–802) (''Notice of Filing''). On December 2, 2022, NSCC also filed a related proposed rule change (SR–NSCC–2022–015) with the Commission pursuant to Section 19(b)(1) of the Exchange Act and Rule 19b–4 thereunder (''Proposed Rule Change''). 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively. In the Proposed Rule Change, which was published in the **Federal Register** on December 21, 2022, NSCC seeks approval of proposed changes to its rules necessary to implement the Advance Notice. Securities Exchange Act Release No. 96511 (Dec. 15, 2022), 87 FR 78157 (Dec. 21, 2022) (File No. SR–NSCC–2022–015). The comment period for the related Proposed Rule Change filing will close on January 11, 2023.

[6] *https://www.sec.gov/comments/sr-nscc-2022-802/srnscc2022802.htm.* Since the proposal contained in the Advance Notice was also filed as a proposed rule change, all public comments received on the proposal are considered regardless of whether the comments are submitted on the Proposed Rule Change or the Advance Notice. Comments on the Proposed Rule Change are available at *https://www.sec.gov/comments/sr-nscc-2022-015/srnscc2022015.htm.*

[7] 12 U.S.C. 5465(e)(1)(G).

[8] 12 U.S.C. 5465(e)(1)(H).

[9] *See* Notice of Filing, *infra* note 5.

[10] 12 U.S.C. 5465(e)(1)(H).

[11] *Id.*

[12] 17 CFR 200.30–3(a)(94).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96632; File No. SR–PEARL–2022–62]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Options Fee Schedule To Modify Certain Connectivity and Port Fees

January 10, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 30, 2022, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Pearl Options Fee Schedule (the ''Fee Schedule'') to amend certain connectivity and port fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as follows: (1) increase the fees for a 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection for Members [3] and non-Members; (2) amend the calculation of fees for MIAX Express Network Full Service (''MEO'') [4] Ports (Bulk and Single); and (3) amend the fees for Full Service MEO Ports (Bulk and Single). The Exchange and its affiliate, Miami International Securities Exchange, LLC (''MIAX'') operated 10Gb ULL connectivity on a single shared network that provided access to both exchanges via a single 10Gb ULL connection. The Exchange last increased fees for 10Gb ULL connections from $9,300 to $10,000 per month on January 1, 2021.[5] At the same time, MIAX also increased its 10Gb ULL connectivity fee from $9,300 to $10,000 per month.[6] The Exchange and MIAX shared a combined cost analysis in those filings due to the single shared 10Gb ULL connectivity network for both exchanges. In those filings, the Exchange and MIAX allocated a combined total of $17.9 million in expenses to providing 10Gb ULL connectivity.[7]

Beginning in late January 2023, the Exchange also recently determined a substantial operational need to no longer operate 10Gb ULL connectivity on a single shared network with MIAX. The Exchange is bifurcating 10Gb ULL connectivity due to ever-increasing capacity constraints and to enable it to continue to satisfy the anticipated access needs for Members and other market participants.[8] Since the time of 2021 increase discussed above, the Exchange experienced ongoing increases in expenses, particularly internal expenses.[9] As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $11,567,509 for providing 10Gb ULL connectivity on a single unshared network (an overall increase over its prior cost to provide 10Gb ULL connectivity on a shared network with MIAX) and $1,644,132 for providing Full Service MEO Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Full Service MEO Ports (Bulk and Single) in order to recoup cost related to bifurcating 10Gb connectivity to the Exchange and MIAX as well as the ongoing costs and increase in expenses set forth below in the Exchange's cost analysis.[10]

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision* [11] and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially different from it prior review process (hereinafter referred to as the ''Revised Review Process''). In the *Susquehanna Decision,* the D.C. Circuit Court stated that the Commission could not maintain a practice of ''unquestioning reliance'' on claims made by a self-regulatory organization (''SRO'') in the course of filing a rule or fee change with the Commission.[12] Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and Financial Markets Association* finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.[13] On that same day, the Commission issued an order remanding to various exchanges and national market system (''NMS'') plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the ''Remand Order'').[14] The Remand Order directed the exchanges to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [15] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[16] However, the Commission did extend the deadlines in the Remand Order ''so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] The term ''MEO Interface'' or ''MEO'' means a binary order interface for certain order types as set forth in Rule 516 into the MIAX Pearl System. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[5] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

[6] *See* Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02).

[7] *See id.*

[8] *See MIAX Options and MIAX Pearl Options—Announce planned network changes related to shared 10G ULL extranet,* issued August 12, 2022, *available at https://www.miaxoptions.com/alerts/2022/08/12/miax-options-and-miax-pearl-options-announce-planned-network-changes-related-0.* The Exchange will continue to provide access to both the Exchange and MIAX over a single shared 1Gb connection. *See* Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR–PEARL–2022–60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR–MIAX–2022–48).

[9] The Exchange notes it last filed to amend the fees for Full Service MEO Ports in 2018 (excluding filings made in July 2021 through early 2022), prior to which the Exchange provided Full Service MEO Ports free of charge since the it launched operations in 2017 and absorbed all costs since that time. *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[10] The Exchange notes that MIAX will make a similar filing to increase its 10Gb ULL connectivity fees.

[11] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[12] *Id.*

[13] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[14] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. 78k–1, 78s; *see also* Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

[15] *Id.* at page 2.

[16] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

court's mandate.'' [17] Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC (''BOX'') to establish connectivity fees (the ''BOX Order''), which significantly increased the level of information needed for the Commission to believe that an exchange's filing satisfied its obligations under the Act with respect to changing a fee.[18] Despite approving hundreds of access fee filings in the years prior to the BOX Order (described further below) utilizing a ''market-based'' test, the Commission changed course and disapproved BOX's proposal to begin charging connectivity at one-fourth the rate of competing exchanges' pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [19] In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [20] The Staff Guidance also states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [21]

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission's SIFMA Decision in *NASDAQ Stock Market, LLC* v. *SEC* [22] and remanded for further proceedings consistent with its opinion.[23] That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ.* The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision ''has now been vacated, the basis for the [Remand Order] has evaporated.'' [24] Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ* v. *SEC* that Exchange Act Section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.[25] The Commission further invited ''the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq* v. *SEC.*'' [26] Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg's request to withdraw their applications for review and dismissed the proceedings.[27]

As a result of the Commission's loss of the *NASDAQ vs. SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [28] As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings, particularly those submitted by new exchanges, to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the ''record'' or ''review'' earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission's related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (''non-legacy exchanges''), while favoring larger, incumbent, entrenched, legacy exchanges (''legacy exchanges'').[29] The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings [30]

[17] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[18] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it ''historically applied a 'market-based' test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.'' *Id.* at page 16. Despite this admission, the Commission disapproved BOX's proposal to begin charging $5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing ''market-based'' fee filings from years prior).

[19] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), *available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Staff Guidance'').

[20] *Id.*

[21] *Id.*

[22] *NASDAQ Stock Mkt., LLC* v. *SEC,* No 18–1324, --- Fed. App'x ----, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court's mandate was issued on August 6, 2020.

[23] *Nasdaq* v. *SEC,* 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court's mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act ''Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.'' *Id.* The court held that ''for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.'' *Id.* Thus, the court held that ''Section 19(d) is not an available means to challenge the fees at issue'' in the SIFMA Decision. *Id.*

[24] *Id.* at *2; see also *id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[25] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the ''Order Vacating Prior Order and Requesting Additional Briefs'').

[26] *Id.*

[27] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[28] *See supra* note 14, at page 2.

[29] Commission Chair Gary Gensler recently reiterated the Commission's mandate to ensure competition in the equities markets. *See* ''Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots'', by Chair Gary Gensler, dated December 14, 2022 (stating ''[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and *enhance competition in the securities markets, including the equity markets*'' (*emphasis added*)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k–1), including ensuring ''fair competition among brokers and dealers, among exchange markets, and *between exchange markets* and markets other than exchange markets. . . .'' (*emphasis added*). *Id.* at note 1. *See also* Securities Acts Amendments of 1975, *available at https://www.govtrack.us/congress/bills/94/s249.*

[30] This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. *Sec. Indus. & Fin. Mkts. Ass'n,* Securities

Continued

to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.[31] These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a ''market-based'' test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.,* non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as MIAX Pearl, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.[32] By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish ''fee parity'' with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff's change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (''Cboe'') reported ''access and capacity fee'' revenue of $70,893,000 for 2020[33] and $80,383,000 for 2021.[34] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020[35] and $22,843,000 for 2021.[36] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020[37] and $44,800,000 for 2021.[38] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020[39] and $30,687,000 for 2021.[40] For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported $178,712,000 in ''access and capacity fees'' in 2021. NASDAQ Phlx, LLC (''NASDAQ Phlx'') reported ''Trade Management Services'' revenue of $20,817,000 for 2019.[41] The Exchange notes it is unable to compare ''access fee'' revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the ''Trade Management Services'' line item was bundled into a much larger line item in PHLX's Form 1, simply titled ''Market services.''[42]

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,[43] new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates), which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. While one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely guidance and ''is not a rule, regulation or statement of the . . . Commission . . . the Commission has neither approved nor disapproved its

Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. *See The Nasdaq Stock Market, LLC* v. *SEC,* Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

[31] *See, e.g.,* Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

[32] The Exchange has filed, and subsequently withdrew, various forms of this proposed fee change numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

[33] According to Cboe's 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. *See* Cboe 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[34] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[35] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[36] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[37] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[38] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[39] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[40] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[41] According to PHLX, ''Trade Management Services'' includes ''a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX's] published fee schedules.'' *See* PHLX 2020 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf.*

[42] *See* PHLX Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.*

[43] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

content. . .'',[44] this is not the reality experienced by exchanges such as MIAX Pearl. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite good-faith efforts by the Exchange to provide substantial amount of cost-related details. The Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[45] However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act[46] in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[47] to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity;[48] or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and place a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.[49]

Lastly, the Exchange notes that the Commission Staff has allowed similar fee increases by other exchanges to remain in effect by publishing those filings for comment and allowing the exchange to withdraw and re-file numerous times.[50] Recently, the Commission Staff has not afforded the Exchange the same flexibility.[51] This again is evidence that the Commission Staff is not treating non-transaction fee filings in a consistent manner and is holding exchanges to different levels of scrutiny in reviewing filings.

* * * * *

10Gb ULL Connectivity Fee Change

The Exchange recently filed a proposal to no longer operate 10Gb connectivity to the Exchange on a single shared network with its affiliate, MIAX. This change is an operational necessity due to ever-increasing capacity constraints and to accommodate anticipated access needs for Members and other market participants.[52] This proposal: (i) sets forth the applicable fees for the bifurcated 10Gb ULL network; and (ii) removes provisions in the Fee Schedule that provides for a shared 10Gb ULL network; and (iii)

[44] *See supra* note 19, at note 1.

[45] *See* Securities Exchange Act Release Nos. 92798 (August 27, 2021), 86 FR 49360 (September 2, 2021) (SR–PEARL–2021–33); 92644 (August 11, 2021), 86 FR 46055 (August 17, 2021) (SR–PEARL–2021–36); 93162 (September 28, 2021), 86 FR 54739 (October 4, 2021) (SR–PEARL–2021–45); 93556 (November 10, 2021), 86 FR 64235 (November 17, 2021) (SR–PEARL–2021–53); 93774 (December 14, 2021), 86 FR 71952 (December 20, 2021) (SR–PEARL–2021–57); 93894 (January 4, 2022), 87 FR 1203 (January 10, 2022) (SR–PEARL–2021–58); 94258 (February 15, 2022), 87 FR 9659 (February 22, 2022) (SR–PEARL–2022–03); 94286 (February 18, 2022), 87 FR 10860 (February 25, 2022) (SR–PEARL–2022–04); 94721 (April 14, 2022), 87 FR 23573 (April 20, 2022) (SR–PEARL–2022–11); 94722 (April 14, 2022), 87 FR 23660 (April 20, 2022) (SR–PEARL–2022–12); 94888 (May 11, 2022), 87 FR 29892 (May 17, 2022) (SR–PEARL–2022–18).

[46] 15 U.S.C. 78f(b)(4).

[47] To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

[48] In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. *See, e.g., CSA Staff Consultation Paper 21–401, Real-Time Market Data Fees, available at https://www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_Paper.pdf.*

[49] The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (*e.g.,* healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review,'' and to ensure a comparable review process with the Exchange's filing.

[50] *See, e.g.,* Securities Exchange Act Release Nos. 93937 (January 10, 2022), 87 FR 2466 (January 14, 2022) (SR–MEMX–2021–22); 94419 (March 15, 2022), 87 FR 16046 (March 21, 2022) (SR–MEMX–2022–02); SR–MEMX–2022–12 (withdrawn before being noticed); 94924 (May 16, 2022), 87 FR 31026 (May 20, 2022) (SR–MEMX–2022–13); 95299 (July 15, 2022), 87 FR 43563 (July 21, 2022) (SR–MEMX–2022–17); SR–MEMX–2022–24 (withdrawn before being noticed); 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); 94901 (May 12, 2022), 87 FR 30305 (May 18, 2022) (SR–MRX–2022–04); SR–MRX–2022–06 (withdrawn before being noticed); 95262 (July 12, 2022), 87 FR 42780 (July 18, 2022) (SR–MRX–2022–09); 95710 (September 8, 2022), 87 FR 56464 (September 14, 2022) (SR–MRX–2022–12); 96046 (October 12, 2022), 87 FR 63119 (October 18, 2022) (SR–MRX–2022–20); 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); *and* 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32).

[51] Securities Exchange Act Release Nos. 94721 (April 14, 2022), 87 FR 23573 (April 20, 2022) (SR–PEARL–2022–11) *and* 94722 (April 14, 2022), 87 FR 23660 (April 20, 2022) (SR–PEARL–2022–12).

[52] *See supra* note 8.

specifies that market participants may continue to connect to both the Exchange and MIAX via the 1Gb network.

The Exchange plans to bifurcate the Exchange and MIAX 10Gb ULL networks in the first quarter of 2023, currently anticipated to be effective on January 23, 2023. The Exchange issued an alert on August 12, 2022 publicly announcing the planned network change and implementation plan and dates to provide market participants adequate time to prepare.[53] Upon bifurcation of the 10Gb ULL network, subscribers would need to purchase separate connections to the Exchange and MIAX at the applicable rate. The Exchange's proposed amended rate for 10Gb ULL connectivity is described below. Until the 10Gb ULL network is bifurcated, subscribers to 10Gb ULL connectivity would be able to connect to both the Exchange and MIAX at the applicable rate set forth below.

The Exchange, therefore, proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks[54] via a 10Gb ULL fiber connection and to specify that this fee is for a dedicated connection to the Exchange and no longer provides access to MIAX. Specifically, the Exchange proposes to amend Sections (5)(a)–(b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from $10,000 per month to $13,500 per month (''10Gb ULL Fee'').[55] The Exchange also proposes to amend the Fee Schedule to reflect the bifurcation of the 10Gb ULL network and specify that only the 1Gb network provides access to both the Exchange and MIAX.

The Exchange proposes to make the following changes to reflect the bifurcated 10Gb ULL network for the Exchange and MIAX. First, in the Definitions section of the Fee Schedule, the Exchange proposes to amend the last sentence in the definition of ''MENI'' to specify that the MENI can be configured to provide network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange's affiliate, MIAX, via a single, shared 1Gb connection. Next, the Exchange proposes to amend the explanatory paragraphs below the network connectivity fee tables in Sections (5)(a)–(b) of the Fee Schedule to specify that, with the bifurcated 10Gb ULL network, Members (and non-Members) utilizing the MENI to connect to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange and MIAX via a single, can only do so via a shared 1Gb connection.

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Implementation of 10Gb ULL Fee. The proposed 10Gb ULL fee will be effective January 1, 2023. From January 1, 2023 until January 22, 2023, subscribers to 10Gb ULL connectivity will continue to receive access to both the Exchange and MIAX via a single 10Gb ULL connection. Upon bifurcation of the 10Gb ULL network on January 23, 2023, subscribers that elect to continue to access both the Exchange and MIAX via a 10Gb ULL connection will need to purchase separate 10Gb ULL connections from each exchange. Existing subscribers of 10Gb ULL connections on the Exchange that also purchase a new 10Gb ULL connection to access MIAX would pay a pro-rated portion of the monthly fee for the added connection for the remainder of the month.

Full Service MEO Ports—Bulk and Single

Background

The Exchange also proposes to amend Section (5)(d) of the Fee Schedule to amend the calculation and amount of fees for Full Service MEO Ports. The Exchange currently offers different types of MEO Ports depending on the services required by the Member, including a Full Service MEO Port-Bulk,[56] a Full Service MEO Port-Single,[57] and a Limited Service MEO Port.[58] For one monthly price, a Member may be allocated two (2) Full-Service MEO Ports of either type per matching engine[59] and may request Limited Service MEO Ports for which MIAX Pearl will assess Members Limited Service MEO Port fees based on a sliding scale for the number of Limited Service MEO Ports utilized each month. The two (2) Full-Service MEO Ports that may be allocated per matching engine to a Member may consist of: (a) two (2) Full Service MEO Ports—Bulk; (b) two (2) Full Service MEO Ports—Single; or (c) one (1) Full Service MEO Port—Bulk and one (1) Full Service MEO Port—Single.

Currently, the Exchange assesses Members Full Service MEO Port Fees, either for a Full Service MEO Port—Bulk and/or for a Full Service MEO Port—Single, based upon the monthly total volume executed by a Member and its Affiliates[60] on the Exchange, across all origin types, not including Excluded Contracts,[61] as compared to the Total Consolidated Volume (''TCV''),[62] in all

[53] *Id.*

[54] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[55] Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section (4)(c) of the Exchange's fee schedule. *See* Section (4)(c) of the Exchange's fee schedule *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_10192022.pdf* (providing that ''Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.'').

[56] ''Full Service MEO Port—Bulk'' means an MEO port that supports all MEO input message types and binary bulk order entry. *See* the Definitions Section of the Fee Schedule.

[57] ''Full Service MEO Port—Single'' means an MEO port that supports all MEO input message types and binary order entry on a single order-by-order basis, but not bulk orders. *See* the Definitions Section of the Fee Schedule.

[58] ''Limited Service MEO Port'' means an MEO port that supports all MEO input message types, but does not support bulk order entry and only supports limited order types, as specified by the Exchange via Regulatory Circular. *See* the Definitions Section of the Fee Schedule.

[59] A ''Matching Engine'' is a part of the Exchange's electronic system that processes options orders and trades on a symbol-by-symbol basis. *See* the Definitions Section of the Fee Schedule.

[60] ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). *See* the Definitions Section of the Fee Schedule.

[61] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[62] ''TCV'' means total consolidated volume calculated as the total national volume in those classes listed on MIAX Pearl for the month for which the fees apply, excluding consolidated

MIAX Pearl-listed options. The Exchange adopted a tier-based fee structure based upon the volume-based tiers detailed in the definition of ''Non-Transaction Fees Volume-Based Tiers'' described in the Definitions section of the Fee Schedule. The Exchange assesses these and other monthly Port fees to Members in each month the market participant is credentialed to use a Port in the production environment.

Full Service MEO Port (Bulk) Fee Changes

Current Full Service MEO Port (Bulk) Fees. The Exchange currently assesses all Members (Market Makers [63] and Electronic Exchange Members [64] (''EEMs'')) monthly Full Service MEO Port—Bulk fees as follows:

(i) if its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $3,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $4,500; and

(iii) if its volume falls within the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $5,000.

Proposed Full Service MEO Port (Bulk) Fees. The Exchange proposes to amend the calculation and amount of Full Service MEO Port (Bulk) fees for EEMs and Market Makers. In particular, for EEMs, the Exchange proposes to move away from the above-described volume tier-based fee structure and instead charge all EEMs that utilize Full Service MEO Ports (Bulk) a flat monthly fee of $7,500. For this flat monthly fee, EEMs will continue to be entitled to two (2) Full Service MEO Ports (Bulk) for each Matching Engine for the single monthly fee of $7,500. The Exchange now proposes to amend the calculation and amount of Full Service MEO Port (Bulk) fees for Market Makers by moving away from the above-described volume tier-based fee structure to harmonize the Full Service MEO Port (Bulk) fee structure for Market Makers with that of the Exchange's affiliates, MIAX and MIAX Emerald.[65] The Exchange proposes that the amount of the monthly Full Service MEO Port (Bulk) fees for Market Makers would be based on the lesser of either the per class traded or percentage of total national average daily volume (''ADV'') measurement based on classes traded by volume. The amount of monthly Market Maker Full Service MEO Port (Bulk) fee would be based upon the number of classes in which the Market Maker was registered to quote on any given day within the calendar month, or upon the class volume percentages. This change in how Full Service MEO Port (Bulk) fees are calculated is identical to how the Exchange assesses Market Makers Trading Permit fees, which is in line with how numerous exchanges charge similar membership fees.

Specifically, the Exchange proposes to adopt the following Full Service MEO Port (Bulk) fees for Market Makers: (i) $5,000 for Market Maker registrations in up to 10 option classes or up to 20% of option classes by national ADV; (ii) $7,500 for Market Maker registrations in up to 40 option classes or up to 35% of option classes by ADV; (iii) $10,000 for Market Maker registrations in up to 100 option classes or up to 50% of option classes by ADV; and (iv) $12,000 for Market Maker registrations in over 100 option classes or over 50% of option classes by ADV up to all option classes listed on MIAX Pearl. For example, if Market Maker 1 elects to quote the top 40 option classes which consist of 58% of the total national average daily volume in the prior calendar quarter, the Exchange would assess $7,500 to Market Maker 1 for the month which is the lesser of 'up to 40 classes' and 'over 50% of classes by volume up to all classes listed on MIAX Pearl'. If Market Maker 2 elects to quote the bottom 1000 option classes which consist of 10% of the total national average daily volume in the prior quarter, the Exchange would assess $5,000 to Market Maker 2 for the month which is the lesser of 'over 100 classes' and 'up to 20% of classes by volume. The Exchange notes that the proposed tiers (ranging from $5,000 to $12,000) are lower than the tiers that the Exchange's affiliates charge for their comparable ports (ranging from $5,000 to $20,500) for similar per class tier thresholds.[66]

With the proposed changes, a Market Maker would be determined to be registered in a class if that Market Maker has been registered in one or more series in that class.[67] The Exchange will assess MIAX Pearl Market Makers the monthly Market Maker Full Service MEO Port (Bulk) fee based on the greatest number of classes listed on MIAX Pearl that the MIAX Pearl Market Maker registered to quote in on any given day within a calendar month. Therefore, with the proposed changes to the calculation of Market Maker Full Service MEO Port (Bulk) fees, the Exchange's Market Makers would be encouraged to quote in more series in each class they are registered in because each additional series in that class would not count against their total classes for purposes of the Full Service MEO Port (Bulk) fee tiers. The class volume percentage is based on the total national ADV in classes listed on MIAX Pearl in the prior calendar quarter. Newly listed option classes are excluded from the calculation of the monthly Market Maker Full Service MEO Port (Bulk) fee until the calendar quarter following their listing, at which time the newly listed option classes will be included in both the per class count and the percentage of total national ADV.

The Exchange also proposes to adopt an alternative lower Full Service MEO Port (Bulk) fee for Market Makers who fall within the 2nd, 3rd and 4th levels of the proposed Market Maker Full Service MEO Port (Bulk) fee table: (i) Market Maker registrations in up to 40 option classes or up to 35% of option classes by volume; (ii) Market Maker registrations in up to 100 option classes or up to 50% of option classes by volume; and (iii) Market Maker registrations in over 100 option classes or over 50% of option classes by volume up to all option classes listed on MIAX Pearl. In particular, the Exchange proposes to adopt footnote ''**'' following the Market Maker Full Service MEO Port (Bulk) fee table for these Monthly Full Service MEO Port (Bulk) tier levels. New proposed footnote ''**'' will provide that if the Market Maker's total monthly executed volume during the relevant month is less than 0.040% of the total monthly TCV for MIAX Pearl–listed option classes for that month, then the fee will be $6,000 instead of the fee otherwise applicable to such level.

The purpose of the alternative lower fee designated in proposed footnote ''**'' is to provide a lower fixed fee to

volume executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in the option classes of the affected Matching Engine). *See* the Definitions Section of the Fee Schedule.

[63] The term ''Market Maker'' means a Member registered with the Exchange for the purpose of making markets in options contracts traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of Exchange Rules. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[64] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is a Member representing as agent Public Customer Orders or Non-Customer Orders on the Exchange and those non-Market Maker Members conducting proprietary trading. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[65] *See* MIAX Fee Schedule, Section (5)(d)(ii) and MIAX Emerald Fee Schedule, Section (5)(d)(ii).

[66] *See id.*

[67] Pursuant to Exchange Rule 602(a), a Member that has qualified as a Market Maker may register to make markets in individual series of options.

those Market Makers who are willing to quote the entire Exchange market (or substantial amount of the Exchange market), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on the Exchange. The Exchange believes that, by offering lower fixed fees to Market Makers that execute less volume, the Exchange will retain and attract smaller-scale Market Makers, which are an integral component of the option marketplace, but have been decreasing in number in recent years, due to industry consolidation. Since these smaller-scale Market Makers utilize less Exchange capacity due to lower overall volume executed, the Exchange believes it is reasonable and equitable to offer such Market Makers a lower fixed fee. The Exchange notes that the Exchange's affiliates, MIAX and MIAX Emerald, also provide lower MIAX Express Interface (''MEI'') Port fees (the comparable ports on those exchanges) for Market Makers who quote the entire MIAX and MIAX Emerald markets (or substantial amount of those markets), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on MIAX or MIAX Emerald.[68] The proposed changes to the Full Service MEO Port (Bulk) fees for Market Makers who fall within the 2nd, 3rd and 4th levels of the fee table are based upon a business determination of current Market Maker assignments and trading volume.

Unlike other options exchanges that provide similar port functionality and charge fees on a per port basis,[69] the Exchange offers Full Service MEO Ports as a package and provides Members with the option to receive up to two Full Service MEO Ports (described above) per matching engine to which that Member connects. The Exchange currently has twelve (12) matching engines, which means Market Makers may receive up to twenty-four (24) Full Service MEO Ports for a single monthly fee, that can vary based on the lesser of either the per class traded or percentage of total national ADV measurement based on classes traded by volume, as described above. For illustrative purposes, the Exchange currently assesses a fee of $5,000 per month for Market Makers that reach the highest Full Service MEO Port (Bulk) tier, regardless of the number of Full Service MEO Ports allocated to the Market Maker. For example, assuming a Market Maker connects to all twelve (12) matching engines during a month, with two Full Service MEO Ports (Bulk) per matching engine, this results in an effective fee of $208.33 per Full Service MEO Port ($5,000 divided by 24) for the month, as compared to other exchanges that charge over $1,000 per port and require multiple ports to connect to all of their matching engines.[70] This fee had been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.[71] The Exchange proposes to increase Full Service MEO Port fees, with the highest monthly fee of $12,000 for the Full Service MEO Ports (Bulk). Market Makers will continue to receive two (2) Full Service MEO Ports to each matching engine to which they connect for the single flat monthly fee. Assuming a Market Maker connects to all twelve (12) matching engines during the month, with two Full Service MEO Ports per matching engine, this would result in an effective fee of $500 per Full Service MEO Port ($12,000 divided by 24).

FULL SERVICE MEO PORTS

[Bulk]

	Number of match engines	Total number of ports for market maker to connect to all match engines	Total fee (monthly)	Effective per port fee
Pricing Based on Market Maker Being Charged the Highest Tier (Current)	12	24	$5,000	$208.33
Pricing Based on Market Maker Being Charged the Highest Tier (as proposed)	12	24	12,000	500

Full Service MEO Port (Single) Fee Changes

Current Full Service MEO Port (Single) Fees. The Exchange currently assesses all Members (Market Makers and EEMs) monthly Full Service MEO Port (Single) fees as follows:

(i) if its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $2,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $3,375; and

(iii) if its volume falls within the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $3,750.

Proposed Full Service MEO Port (Single) Fees. The Exchange proposes to

[68] *See* MIAX Fee Schedule, Section (5)(d)(ii), note ''*'' and MIAX Emerald Fee Schedule, Section (5)(d)(ii), note ''''.

[69] *See* NYSE American Options Fee Schedule, Section V.A., Port Fees (each port charged on a per matching engine basis, with NYSE American having 17 match engines). *See* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange); NYSE Arca Options Fee Schedule, Port Fees (each port charged on a per matching engine basis, NYSE Arca having 19 match engines); *and* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange). *See* NASDAQ Fee Schedule, NASDAQ Options 7 Pricing Schedule, Section 3, Nasdaq Options Market—Ports and Other Services (each port charged on a per matching engine basis, with Nasdaq having multiple matching engines). *See* NASDAQ Specialized Quote Interface (SQF) Specification, Version 6.5b (updated February 13, 2020), Section 2, Architecture, *available at https://www.nasdaq.com/docs/2020/02/18/Specialized-Quote-Interface-SQI-6.5b.pdf* (the ''NASDAQ SQF Interface Specification''). The NASDAQ SQF Interface Specification also provides that NASDAQ's affiliates, NASDAQ Phlx and NASDAQ BX, Inc. (''BX''), have trading infrastructures that may consist of multiple matching engines with each matching engine trading only a range of option classes. Further, the NASDAQ SQF Interface Specification provides that the SQF infrastructure is such that the firms connect to one or more servers residing directly on the matching engine infrastructure. Since there may be multiple matching engines, firms will need to connect to each engine's infrastructure in order to establish the ability to quote the symbols handled by that engine.

[70] *Id. See also infra* notes 95 to 102 and accompanying text.

[71] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

amend the calculation and amount of Full Service MEO Port (Single) fees for EEMs and Market Makers. In particular, the Exchange proposes to move away from the above-described volume tier-based fee structure and instead charge all Members that utilize Full Service MEO Ports (Single) a flat monthly fee of $4,000. For this flat monthly fee, all Members will continue to be entitled to two (2) Full Service MEO Ports (Single) for each Matching Engine for the single monthly fee of $4,000.

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, MEO ports allow for a higher throughput and can handle much higher quote/order rates than FIX ports. Members that are Market Makers or high frequency trading firms utilize these ports (typically coupled with 10Gb ULL connectivity) because they transact in significantly higher amounts of messages being sent to and from the Exchange, versus FIX port users, who are traditionally customers sending only orders to the Exchange (typically coupled with 1Gb connectivity). The different types of ports cater to the different types of Exchange Memberships and different capabilities of the various Exchange Members. Certain Members need ports and connections that can handle using far more of the network's capacity for message throughput, risk protections, and the amount of information that the System has to assess. Those Members account for the vast majority of network capacity utilization and volume executed on the Exchange, as discussed throughout. For example, three (3) Members account for 64% of all 10Gb ULL connections and Full Service MEO Ports purchased.

The Exchange proposes to increase its monthly Full Service MEO Port fees since it has not done so since the fees were adopted in 2018,[72] which are designed to recover a portion of the costs associated with directly accessing the Exchange. As described above, the Exchange's affiliates, MIAX and MIAX Emerald, also charge fees for their high throughput, low latency ports in a similar fashion as the Exchange proposes to charge for its MEO Ports—generally, the more active user the Member (*i.e.,* the greater number/greater national ADV of classes assigned to quote on MIAX and MIAX Emerald), the higher the MEI Port fee.[73] This concept is, therefore, not new or novel.

Implementation of Full Service MEO Port Fees. This proposed fee change will be effective January 1, 2023.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[74] in general, and furthers the objectives of Section 6(b)(4) of the Act[75] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of Section 6(b)(5) of the Act[76] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order[77] and the Staff Guidance,[78] the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.''[79] The Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.''[80] In the Staff Guidance, the Commission Staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, . . . , specific information, including quantitative information, should be provided to support that argument.''[81]

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity (driven by the bifurcation of the 10Gb ULL network) and Full Service MEO Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction relates fees to provide them with additional necessary revenue to better compete. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates). The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the

[72] *See id.*

[73] *See* Exchange Fee Schedule, Section (5)d)ii); MIAX Emerald Fee Schedule, Section (5)(d)(ii).

[74] 15 U.S.C. 78f(b).

[75] 15 U.S.C. 78f(b)(4).

[76] 15 U.S.C. 78f(b)(5).

[77] *See supra* note 18.

[78] *See supra* note 19.

[79] *Id.*

[80] *Id.*

[81] *Id.*

Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, while one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange commenced operations in February 2017 [82] and adopted its initial fee schedule, with 10Gb ULL connectivity fees set at $8,500 (the Exchange originally had a non-ULL 10Gb connectivity option, which it has since removed) and a fee waiver for all Full Service MEO Port fees.[83] As a new exchange entrant, the Exchange chose to offer Full Service MEO Ports free of charge to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.[84]

Later in 2018, as the Exchange's market share increased,[85] the Exchange adopted nominal fees for Full Service MEO Ports.[86] The Exchange last increased the fees for its 10Gb ULL fiber connections from $9,300 to $10,000 per month on January 1, 2021.[87] The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . ..'' [88]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [89]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.''' [90] As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' [91] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [92] In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.'' [93]

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and

[82] *See* MIAX PEARL Successfully Launches Trading Operations, dated February 6, 2017, *available at https://www.miaxoptions.com/sites/default/files/alert-files/MIAX_Press_Release_02062017.pdf.*

[83] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR–PEARL–2017–10).

[84] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (stating, ''[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX. . .''). *See also* Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR–MEMX–2020–10) (proposing to adopt the initial fee schedule and stating that ''[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application sessions.''). MEMX's market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. *See* Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32) *and* 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity). *See also, e.g.,* Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf* (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

[85] The Exchange experienced a monthly average trading volume of 3.94% for the month of March 2018. *See* Market at a Glance, *available at www.miaxoptions.com.*

[86] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[87] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

[88] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[89] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[90] *See NetCoalition,* 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[91] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[92] *Id.*

[93] *See* Staff Guidance, *supra* note 19.

constrained. To that end, the Exchange believes the proposed fees are reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that are closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the market data rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX Pearl (as proposed) (equity options market share of 4.45% for the month of November 2022) [94].	10Gb ULL connection	$13,500.
	Full Service MEO Port (Bulk) for Market Makers.	Lesser of either the per class basis or percentage of total national ADV by the Market Maker, as follows: $5,000–up to 10 classes or up to 20% of classes by volume. $7,500 **–up to 40 classes or up to 35% of classes by volume. $10,000 **–up to 100 classes or up to 50% of classes by volume. $12,000 **–over 100 classes or over 50% of all classes by volume up to all classes (or $500 per port per matching engine). ** A lower rate of $6,000 will apply to these tiers if the Market Maker's total monthly executed volume is less than 0.040% of total monthly TCV for MIAX Pearl options.
	Full Service MEO Port (Bulk) for EEMs.	$7,500 (or $312.50 per port per matching engine).
	Full Service MEO Port (Single) for Market Makers and EEMs.	$4,000 (or $166.66 per port per matching engine).
NASDAQ [95] (equity options market share of 7.14% for the month of November 2022) [96].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	1–5 ports: $1,500 per port. 6–20 ports: $1,000 per port. 21 or more ports: $500 per port.
NASDAQ ISE LLC ("ISE") [97] (equity options market share of 6.19% for the month of November 2022) [98].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	$1,100 per port.
NYSE American LLC ("NYSE American") [99] (equity options market share of 6.93% for the month of November 2022) [100].	10Gb LX LCN connection	$22,000 per connection.
	Order/Quote Entry Port	Ports 1–40. $450 per port. Ports 41 and greater. $150 per port.
NASDAQ GEMX, LLC ("GEMX") [101] (equity options market share of 1.93% for the month of November 2022) [102].	10Gb Ultra connection	$15,000 per connection.
	SQF Port	$1,250 per port.

The Exchange acknowledges that, without additional contextual information, the above table may lead someone to believe that the Exchange's proposed fees for Full Service MEO Ports is higher than other exchanges when in fact, that is not true. The Exchange provides each Member or non-Member access to two (2) ports on all twelve (12) matching engines for a single fee and a vast majority choose to connect to all twelve (12) matching engines and utilize both ports for a total of 24 ports. Other exchanges charge on a per port basis and require firms to connect to multiple matching engines, thereby multiplying the cost to access their full market.[103]

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market participants may choose to become a member of one or more options exchanges based on the market participant's assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, one Member will terminate their membership effective January 1, 2023 as a direct result of the proposed fee changes.

It is not a requirement for market participants to become members of all options exchanges, in fact, certain market participants conduct an options business as a member of only one options market.[104] A very small number

[94] *See supra* note 85.

[95] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[96] *See supra* note 85.

[97] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.

[98] *See supra* note 85.

[99] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[100] *See supra* note 85.

[101] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.

[102] *See supra* note 85.

[103] *See* Specialized Quote Interface Specification, Nasdaq PHLX, Nasdaq Options Market, Nasdaq BX Options, Version 6.5a, Section 2, Architecture (revised August 16, 2019), *available at http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/SQF6.5a-2019-Aug.pdf.* The Exchange notes that it is unclear whether the NASDAQ exchanges include connectivity to each matching engine for the single fee or charge per connection, per matching engine. *See also* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020). The Exchange notes that NYSE provides a link to an Excel file detailing the number of matching engines per options exchange, with Arca and Amex having 19 and 17 matching engines, respectively.

[104] BOX recently adopted an electronic market maker trading permit fee. *See* Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17). In that proposal, BOX stated that, ''. . . it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX].'' Also in 2022, MEMX established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR

Continued

of market participants choose to become a member of all sixteen options exchanges. Most firms that actively trade on options markets are not currently Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Members or service bureaus, and only a Member may utilize a port.[105]

One other exchange recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAX, and BOX, 42 firms access only one of the three exchanges.[106] The Exchange and its affiliates, MIAX and MIAX Emerald, have a total of 47 members. Of those 47 total members, 35 are members of all three affiliated exchanges, four are members of only two (2) affiliated exchanges, and eight (8) are members of only one affiliated exchange. The Exchange also notes that no firm is a Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all options exchanges, let alone the Exchange and its two affiliates, and broker-dealers may elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the broker-dealer membership analysis of the options exchanges discussed above. As noted above, this is evidenced by the fact that one Member will terminate their membership effective January 1, 2023 as a direct result of the proposed fee changes. Indeed, broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not ''lock'' a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at—or establish connectivity to—the Exchange.[107] If the Exchange is not at the NBBO, the Exchange will route an order to any away market that is at the NBBO to ensure that the order was executed at a superior price and prevent a trade-through.[108]

With respect to the submission of orders, Members may also choose not to purchase any connection at all from the Exchange, and instead rely on the port of a third party to submit an order. For example, a third-party broker-dealer Member of the Exchange may be utilized by a retail investor to submit orders into an Exchange. An institutional investor may utilize a broker-dealer, a service bureau,[109] or request sponsored access [110] through a member of an exchange in order to submit a trade directly to an options exchange.[111] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.,* fees based on the number of firms that connect to the Exchange indirectly via the third-party).[112] Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.[113] Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 16 options markets. Accordingly, the Exchange believes that the proposed fees are fair and

2191 (January 13, 2022) (SR–MEMX–2021–19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee ''is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange'' and that ''neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.''

[105] Service Bureaus may obtain ports on behalf of Members.

[106] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX's observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

[107] *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), *available at https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.*

[108] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[109] Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

[110] Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[111] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[112] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at, US Direct-Extranet Connection* (*nasdaqtrader.com*); *and* Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); *and* 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[113] The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member, and is approved for membership by the Exchange, the Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become a Member of the Exchange, or, if it is a Member, to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Bifurcation of 10Gb ULL Connectivity and Related Fees

The Exchange stresses that bifurcating the 10Gb ULL connectivity between the Exchange and MIAX was not designed with the objective to generate an overall increase in access fee revenue. Rather, the proposed change is necessitated by 10Gb ULL connectivity experiencing a significant decrease in port availability mostly driven by connectivity demands of latency sensitive Members that seek to maintain multiple 10Gb ULL connections on every switch in the network. Due to the ever-increasing connectivity demands, the Exchange found it necessary to bifurcate 10Gb ULL connectivity to the Exchange's and MIAX Pearl's Systems and networks to continue to meet ongoing and future 10Gb ULL connectivity and access demands. Such changes accordingly necessitated a review of the Exchange's previous 10Gb ULL connectivity fees and related costs. The proposed fees are reasonable as they are intended to allow the Exchange to cover ongoing costs related to providing and maintaining such connectivity, described more fully below. The ever increasing connectivity demands that necessitated this change also proves that the proposed fees are reasonable because this demand reflects that Members and non-Members believe they are getting value from the 10Gb ULL connections they purchase.

The Exchange announced on August 12, 2022 the planned network change and January 23, 2023 implementation date to provide market participants adequate time to prepare.[114] Since August 12, 2022, the Exchange has worked with current 10Gb ULL subscribers to address their connectivity needs ahead of the January 23, 2023 date. Based on those interactions and subscriber feedback, the Exchange expects a minimal net increase of approximately six (6) overall 10Gb ULL connectivity subscriptions across the Exchange and MIAX. This anticipated immaterial increase in overall connections reflect a minimal fee impact for all types of subscribers and reflects that subscribers elected to reallocate existing 10Gb ULL connectivity directly to the Exchange or MIAX, or chose to decrease or cease connectivity as a result of the change.

Should the Commission Staff disapprove such fees, it would effectively dictate how an exchange manages its technology and would hamper the Exchange's ability to continue to invest in and fund access services in a manner that allows it to meet existing and anticipated access demands of market participants. Disapproval could also have the adverse effect of discouraging exchanges from innovating technology to the benefit of market participants if it believes the Commission would later prevent that exchange from monetizing its innovation, thus adversely impacting competition. Also, as noted above, the economic consequences of not being able to better establish fee parity with other exchanges for non-transaction fees hampers the Exchange's ability to compete as aggressively on transaction fees.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services, the Exchange seeks to be especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and also carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[115] and Rule 19b–4 thereunder,[116] with respect to the types of information SROs should provide when filing fee changes, and Section 6(b) of the Act,[117] which requires, among other things, that exchange fees be reasonable and equitably allocated,[118] not designed to permit unfair discrimination,[119] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[120] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[121] The Exchange notes that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at $11,567,509 (or approximately $963,959 per month, rounded to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Full Service MEO Ports at $1,644,132 (or approximately $137,012 per month, rounded to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its Users (both Members and non-Members[122]) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee

[114] *See supra* note 8.

[115] 15 U.S.C. 78s(b)(1).

[116] 17 CFR 240.19b–4.

[117] 15 U.S.C. 78f(b).

[118] 15 U.S.C. 78f(b)(4).

[119] 15 U.S.C. 78f(b)(5).

[120] 15 U.S.C. 78f(b)(8).

[121] *See* Staff Guidance, *supra* note 19.

[122] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access application sessions on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

Schedule to charge a fee of $13,500 per month for each physical 10Gb ULL connection and to remove language providing for a shared 10Gb ULL network between the Exchange and MIAX. The Exchange also proposes to modify its Fee Schedule to charge tiered rates for Full Service MEO Ports (Bulk) depending on the number of classes assigned or the percentage of national ADV, which is in line with how the Exchange's affiliates, MIAX and MIAX Emerald, assess fees for their comparable MEI Ports.

In 2019, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[123] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers''). Next, the Exchange adopted an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of 1Gb and 10Gb ULL physical connectivity (62%), with smaller allocations to all ports (5%), and the remainder to the provision of transaction execution, membership services and market data services (33%). The allocation methodology was developed through conversations with senior management familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity, only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange, many Members (but not all) consume market data from the Exchange in order to trade on the Exchange, and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals.

Through the Exchange's extensive updated Cost Analysis, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the cost drivers to provide 10Gb ULL connectivity and Full Service MEO Port services, results in an aggregate monthly cost of approximately $1,106,971 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Full Service MEO Ports by 12 months, then adding both numbers together), as further detailed below.

Costs Related To Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 26.9% of its overall Human Resources cost to offering physical connectivity).

[123] The Exchange frequently updates it Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange's most recent Cost Analysis was conducted ahead of this filing.

Cost drivers	Annual cost [124]	Monthly cost [125]	% of all
Human Resources	$3,675,098	$306,258	26.3
Connectivity (external fees, cabling, switches, etc.)	70,163	5,847	60.6
Internet Services, including External Market Data	322,388	26,866	73.3
Data Center	739,983	61,665	60.6
Hardware and Software Maintenance and Licenses	959,157	79,930	58.6
Depreciation	1,885,969	157,164	58.2
Allocated Shared Expenses	3,914,751	326,229	49.2
Total	11,567,509	963,959	40.5

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity.

Human Resources

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange's network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity) and for which the Exchange allocated a percentage of 42.9% of each employee's time. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security and finance personnel), for which the Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who do support functions related to providing physical connectivity) and then applied a smaller allocation to such employees (less than 17%). The Exchange notes that it has 184 employees and each department leader has direct knowledge of the time spent by those spent by each employee with respect to the various tasks necessary to operate the Exchange. The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing physical connectivity. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity and Internet Services

The Connectivity cost includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity line-item is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity and content service providers for connectivity and data feeds for the entire U.S. options industry, as well as content, connectivity, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity and content service providers to connect to other national securities exchanges, the Options Price Reporting Authority (''OPRA''), and to receive market data from other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity and market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data providers, or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity and content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (60.6%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity of participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange included External Market Data fees to the provision of 10Gb ULL connectivity as such market data is necessary here to offer certain services related to such connectivity, such as certain risk checks that are performed prior to execution, and checking for other conditions (*e.g.,* re-pricing of orders to avoid lock or crossed markets, trading collars). This allocation was included as part of the Internet Services

[124] The Annual Cost includes figures rounded to the nearest dollar.

[125] The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

cost described above. Thus, as market data from other Exchanges is consumed at the matching engine level, (to which 10Gb ULL connectivity provides access to) in order to validate orders before additional entering the matching engine or being executed, the Exchange believes it is reasonable to allocate a small amount of such costs to 10Gb ULL connectivity.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.

Monthly Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. As noted above, the Exchange allocated 58.2% of all depreciation costs to providing physical 10Gb ULL connectivity. The Exchange notes, however, that it did not allocate depreciation costs for any depreciated software necessary to operate the Exchange to physical connectivity, as such software does not impact the provision of physical connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall physical connectivity costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide physical connectivity. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange notes that the cost of paying directors to serve on its Board of Directors is also included in the Exchange's general shared expenses.[126] The Exchange notes that the 49.2% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Full Service MEO Ports based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), Full Service MEO Ports do not require as many broad or indirect resources as other Core Services. The total monthly cost for 10Gb ULL connectivity of $963,959 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (108), to arrive at a cost of approximately $8,925 per month, per physical 10Gb ULL connection.

Costs Related To Offering Full Service MEO Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Full Service MEO Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 8.3% of its overall Human Resources cost to offering Full Service MEO Ports).

Cost drivers	Annual cost [127]	Monthly cost [128]	% of all
Human Resources	$1,159,831	$96,653	8.3
Connectivity (external fees, cabling, switches, etc.)	1,589	132	1.4
Internet Services, including External Market Data	6,033	503	1.4
Data Center	41,881	3,490	3.4
Hardware and Software Maintenance and Licenses	22,438	1,870	1.4
Depreciation	127,986	10,666	3.9
Allocated Shared Expenses	284,374	23,698	3.6
Total	1,644,132	137,012	5.8

Human Resources

With respect to Full Service MEO Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Full Service MEO Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). The estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing application sessions and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing application sessions and maintaining performance thereof. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing application sessions and maintaining performance thereof. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity and Internet Services

The Connectivity cost includes external fees paid to connect to other exchanges, cabling and switches, as described above. For purposes of Full Service MEO Ports, the Exchange also includes a portion of its costs related to

[126] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

[127] *See supra* note 124 (describing rounding of Annual Costs).

[128] *See supra* note 125 (describing rounding of Monthly Costs based on Annual Costs).

External Market Data, as described below.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment as well as related costs (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange included External Market Data fees to the provision of application sessions as such market data is also necessary here (in addition to physical connectivity) to offer certain services related to such sessions, such as validating orders on entry against the national best bid and national best offer and checking for other conditions (*e.g.,* whether a symbol is halted). This allocation was included as part of the internet Services cost described above.[129] Thus, as market data from other Exchanges is consumed at the application session level in order to validate orders before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to application sessions.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

Monthly Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 3.9% of all depreciation costs to providing Full Service MEO Ports. In contrast to physical connectivity, described above, the Exchange did allocate depreciation costs for depreciated software necessary to operate the Exchange to Full Service MEO Ports because such software is related to the provision of such connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall Full Service MEO Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide application sessions. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 4.0% of the overall cost for directors was allocated to providing Full Service MEO Ports. The Exchange notes that the 3.6% allocation of general shared expenses for Full Service MEO Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Full Service MEO Ports have several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange. The total monthly cost of $137,012 was divided by the number of Full Service MEO Ports the Exchange maintained at the time that proposed pricing was determined (20 total; 16 Full Service MEO Port, Bulk, and 4 Full Service MEO Port, Single), to arrive at a cost of approximately $6,851 per month, per Full Service MEO Port.

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Full Service MEO Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42.9%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 12.3% to Full Service MEO Ports and the remaining 44.8% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 16.9% for 10Gb ULL connectivity or 17.3% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (6.0% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Full Service MEO Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Full Service MEO Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 26.9% of its personnel costs to providing physical connections and 8.3% of its personnel costs to providing Full Service MEO Ports, for a total allocation of 35.2% Human Resources expense to provide these specific connectivity services. In turn, the Exchange allocated the remaining 64.8% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Full Service MEO Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer

[129] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 62.1% of the Exchange's overall depreciation and amortization expense to connectivity services (58.2% attributed to 10Gb ULL physical connections and 3.9% to Full Service MEO Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 37.9%) toward the cost of providing transaction services, membership services, other port services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Full Service MEO Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. As such, the Exchange believes that its costs will remain relatively similar in future years. It is possible however that such costs will either decrease or increase. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases.

However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange would propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, we believe that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Projected Revenue [130]

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services at $11,567,509. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $17,496,000. This represents a modest profit of 34% when compared to the cost of providing 10Gb ULL connectivity services. The Exchange's Cost Analysis estimates the annual cost to provide Full Service MEO Port services at $1,644,132. Based on current Full Service MEO Port services usage, the Exchange would generate annual revenue of approximately $1,644,000. This represents a small negative margin when compared to the cost of providing Full Service MEO Port services. Even if the Exchange earns those amounts or incrementally more, the Exchange believes the proposed fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total expense of the Exchange associated with providing 10Gb ULL connectivity and Full Service MEO Port services versus the total projected revenue of the Exchange associated with network 10Gb ULL connectivity and Full Service MEO Port services.

* * * * *

The Exchange has operated at a cumulative net annual loss since it launched operations in 2017.[131] The Exchange has operated at a net loss due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as connectivity, at lower rates than other options

[130] For purposes of calculating revenue for 10Gb ULL connectivity, the Exchange used projected revenues for February 2023, the first full month for which it will provide dedicated 10Gb ULL connectivity to the Exchange and cease operating a shared 10Gb ULL network with MIAX.

[131] The Exchange has incurred a cumulative loss of $79 million since its inception in 2017 to 2021. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 28, 2021, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000461.pdf.*

exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange should not now be penalized for seeking to raise its fees in light of necessary technology changes and its increased costs after offering such products as discounted prices. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Full Service MEO Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 10Gb ULL connectivity and Full Service MEO Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity actually produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Full Service MEO Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Full Service MEO Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Full Service MEO Ports, the Exchange does not believe it should be penalized for such success. The Exchange, like other exchanges, is, after all, a for-profit business, which provides economic value to its Members. To the extent the Exchange has mispriced and experiences a net loss in clients, the Exchange could experience a net reduction in revenue. While the Exchange believes in transparency around costs and potential revenue, the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted.

Further, the proposal reflects the Exchange's efforts to control its costs, which the Exchange does on an ongoing basis as a matter of good business practice. A potential profit margin should not be judged alone based on its size, but is also indicative of costs management and whether the ultimate fee reflects the value of the services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive where on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.[132] Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

Full Service MEO Ports

The tiered pricing structure for Full Service MEO Ports has been in effect since 2018.[133] The Exchange now proposes a pricing structure that is used by the Exchange's affiliates, MIAX and MIAX Emerald, except with lower pricing for each tier for Full Service MEO Ports (Bulk) and a flat fee for Full Service MEO Ports (Single). Members that are frequently in the highest tier for Full Service MEO Ports consume the most bandwidth and resources of the network. Specifically, like above for the 10Gb ULL connectivity, the Exchange notes that the Market Makers who reach the highest tier for Full Service MEO Ports (Bulk) account for approximately greater than 84% of ADV on the Exchange, while Market Makers that are typically in the lowest Tier for Full Service MEO Ports, account for approximately less than 14% of ADV on the Exchange. The remaining 1% is accounted for by Market Makers who are frequently in the middle Tier for Full Service MEO Ports (Bulk).

To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. Billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the

[132] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[133] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

Exchange Act.[134] Thus, as the number of connections a Market Maker has increases, the related pull on Exchange resources also increases. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange.

The Exchange further believes that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory because, for the flat fee, the Exchange provides each Member two (2) Full Service MEO Ports for each matching engine to which that Member is connected. Unlike other options exchanges that provide similar port functionality and charge fees on a per port basis,[135] the Exchange offers Full Service MEO Ports as a package and provides Members with the option to receive up to two Full Service MEO Ports per matching engine to which it connects. The Exchange currently has twelve (12) matching engines, which means Members may receive up to twenty-four (24) Full Service MEO Ports for a single monthly fee, that can vary based on certain volume percentages. The Exchange currently assesses Members a fee of $5,000 per month in the highest Full Service MEO Port—Bulk Tier, regardless of the number of Full Service MEO Ports allocated to the Member. Assuming a Member connects to all twelve (12) matching engines during a month, with two Full Service MEO Ports per matching engine, this results in a cost of $208.33 per Full Service MEO Port—Bulk ($5,000 divided by 24) for the month. This fee has been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.[136] Members will continue to receive two (2) Full Service MEO Ports to each matching engine to which they are connected for the single flat monthly fee. Assuming a Member connects to all twelve (12) matching engines during the month, and achieves the highest Tier for that month, with two Full Service MEO Ports (Bulk) per matching engine, this would result in a cost of $500 per Full Service MEO Port ($12,000 divided by 24).

[134] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[135] *See supra* notes 95 to 102 and accompanying text.

[136] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Full Service MEO Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2017 [137] due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry, which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Full Service MEO Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

[137] *See supra* note 131.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one Member will terminate their membership on January 1, 2023 as a direct result of the proposed fee changes. The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the

allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to connect to all options exchanges. There is no reason to believe that our proposed price increase will harm another exchange's ability to compete. There are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. There is also a range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. Market participants are free to choose which exchange or reseller to use to satisfy their business needs. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange also believes that the proposed fees for 10Gb connectivity are appropriate and warranted in light of it bifurcating 10Gb connectivity between the Exchange and MIAX and would not impose any burden on competition because this is a technology driven change that would assist the Exchange in recovering costs related to providing dedicating 10Gb connectivity to the Exchange while enabling it to continue to meet current and anticipated demands for connectivity by its Members and other market participants. Separating its 10Gb network from MIAX would enable the Exchange to better compete with other exchanges by ensuring it can continue to provide adequate connectivity to existing and new Members, which may increase in ability to compete for order flow and deepen its liquidity pool, improving the overall quality of its market.

The proposed rates for 10Gb ULL connectivity are also driven by the Exchange's need to bifurcate its 10Gb ULL network shared with MIAX so that it can continue to meet current and anticipated connectivity demands of all market participants. Similarly, and also in connection with a technology change, Cboe Exchange, Inc. (''Cboe'') amended access and connectivity fees, including port fees.[138] Specifically, Cboe adopted certain logical ports to allow for the delivery and/or receipt of trading messages—*i.e.,* orders, accepts, cancels, transactions, etc. Cboe established tiered pricing for BOE and FIX logical ports, tiered pricing for BOE Bulk ports, and flat prices for DROP, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. Cboe argued in its fee proposal that the proposed pricing more closely aligned its access fees to those of its affiliated exchanges, and reasonably so, as the affiliated exchanges offer substantially similar connectivity and functionality and are on the same platform that Cboe migrated to.[139] Cboe also justified its proposal by stating that, ''. . . the Exchange believes substitutable products and services are in fact available to market participants, including, among other things, other options exchanges a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity and/or trading of any options product, including proprietary products, in the Over-the-Counter (OTC) markets.'' [140] Cboe stated in its proposal that,

The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are handled by the exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements. Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.[141]

The proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[142] wherein the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. The Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by multiple competitors.[143] Further, the Commission explicitly stated that ''[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by existing competitors.'' [144] Finally, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.[145]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[146] Cboe reasoned that purchasing additional Certification Logical Ports, beyond the one Certification Logical Port per logical port type offered in the production environment free of charge, is voluntary and not required in order to participate in the production

[138] *See* Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR–CBOE–2020–105). The Exchange notes that Cboe submitted this filing *after* the Staff Guidance and contained no cost based justification.

[139] *Id.* at 71676.

[140] *Id.*

[141] *Id.* at 71676.

[142] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011). Cboe offers BOE and FIX Logical Ports, BOE Bulk Logical Ports, DROP Logical Ports, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. For each type of the aforementioned logical ports that are used in the production environment, the Exchange also offers corresponding ports which provide Trading Permit Holders and non-TPHs access to the Exchange's certification environment to test proprietary systems and applications (*i.e.,* ''Certification Logical Ports'').

environment, including live production trading on the Exchange.[147]

In its statutory basis, Cboe justified the new port fee by stating that it believed the Certification Logical Port fee were reasonable because while such ports were no longer completely free, TPHs and non-TPHs would continue to be entitled to receive free of charge one Certification Logical Port for each type of logical port that is currently offered in the production environment.[148] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[149] Cboe also noted that the decision to purchase additional ports is optional and no market participant is required or under any regulatory obligation to purchase excess Certification Logical Ports in order to access the Exchange's certification environment.[150] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[151] BZX,[152] and Cboe EDGA Exchange, Inc.[153]

The Cboe fee proposals described herein were filed subsequent to the D.C. Circuit decision in *Susquehanna Int'l Grp., LLC* v. *SEC,* 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as this proposal. In summary, the Exchange requests the Commission apply the same standard of review to this proposal which was applied to the various Cboe and Cboe affiliated markets' filings with respect to non-transaction fees. If the Commission were to apply a different standard of review to this proposal than it applied to other exchange fee filings it would create a burden on competition such that it would impair the Exchange's ability to make necessary technology driven changes, such as bifurcating its 10Gb ULL network, because it would be unable to monetize or recoup costs related to that change and compete with larger, non-legacy exchanges.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[154] and Rule 19b–4(f)(2)[155] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2022–62 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2022–62. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2022–62 and should be submitted on or before February 7, 2023.

[147] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011).

[148] *Id.* at 18426.

[149] *Id.*

[150] *Id.*

[151] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[152] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[153] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeBZX–2022–021).

[154] 15 U.S.C. 78s(b)(3)(A)(ii).

[155] 17 CFR 240.19b–4(f)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[156]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00662 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96629; File No. SR–MIAX–2022–50]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule To Modify Certain Connectivity and Port Fees

January 10, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 30, 2022, Miami International Securities Exchange, LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Exchange Fee Schedule (the ''Fee Schedule'') to amend certain connectivity and port fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as follows: (1) increase the fees for a 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection for Members[3] and non-Members; and (2) amend the fees for Limited Service MIAX Express Interface (''MEI'') Ports[4] available to Market Makers.[5] The Exchange and its affiliate, MIAX PEARL, LLC (''MIAX Pearl'') operated 10Gb ULL connectivity (for MIAX Pearl's options market) on a single shared network that provided access to both exchanges via a single 10Gb ULL connection. The Exchange last increased fees for 10Gb ULL connections from $9,300 to $10,000 per month on January 1, 2021.[6] At the same time, MIAX Pearl also increased its 10Gb ULL connectivity fee from $9,300 to $10,000 per month.[7] The Exchange and MIAX Pearl shared a combined cost analysis in those filings due to the single shared 10Gb ULL connectivity network for both exchanges. In those filings, the Exchange and MIAX Pearl allocated a combined total of $17.9 million in expenses to providing 10Gb ULL connectivity.[8]

Beginning in late January 2023, the Exchange also recently determined a substantial operational need to no longer operate 10Gb ULL connectivity on a single shared network with MIAX Pearl. The Exchange is bifurcating 10Gb ULL connectivity due to ever-increasing capacity constraints and to enable it to continue to satisfy the anticipated access needs for Members and other market participants.[9] Since the time of 2021 increase discussed above, the Exchange experienced ongoing increases in expenses, particularly internal expenses. As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $12,034,554 for providing 10Gb ULL connectivity on a single unshared network (an overall increase over its prior cost to provide 10Gb ULL connectivity on a shared network with MIAX Pearl) and $2,157,178 for providing Limited Service MEI Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Limited Service MEI Ports in order to recoup cost related to bifurcating 10Gb connectivity to the Exchange and MIAX Pearl as well as the ongoing costs and increase in expenses set forth below in the Exchange's cost analysis.[10]

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision*[11] and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially

[156] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] MIAX Express Interface is a connection to MIAX systems that enables Market Makers to submit simple and complex electronic quotes to MIAX. *See* Fee Schedule, note 26.

[5] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* Exchange Rule 100.

[6] *See* Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02).

[7] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

[8] *See id.*

[9] *See MIAX Options and MIAX Pearl Options—Announce planned network changes related to shared 10G ULL extranet,* issued August 12, 2022, *available at https://www.miaxoptions.com/alerts/2022/08/12/miax-options-and-miax-pearl-options-announce-planned-network-changes-related-0.* The Exchange will continue to provide access to both the Exchange and MIAX Pearl over a single shared 1Gb connection. *See* Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR–PEARL–2022–60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR–MIAX–2022–48).

[10] The Exchange notes that MIAX Pearl will make a similar filing to increase its 10Gb ULL connectivity fees.

[11] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

different from it prior review process (hereinafter referred to as the ''Revised Review Process''). In the *Susquehanna Decision,* the D.C. Circuit Court stated that the Commission could not maintain a practice of ''unquestioning reliance'' on claims made by a self-regulatory organization (''SRO'') in the course of filing a rule or fee change with the Commission.[12] Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and Financial Markets Association* finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.[13] On that same day, the Commission issued an order remanding to various exchanges and national market system (''NMS'') plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the ''Remand Order'').[14] The Remand Order directed the exchanges to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [15] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[16] However, the Commission did extend the deadlines in the Remand Order ''so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court's mandate.'' [17] Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC (''BOX'') to establish connectivity fees (the ''BOX Order''), which significantly increased the level of information needed for the Commission to believe that an exchange's filing satisfied its obligations under the Act with respect to changing a fee.[18] Despite approving hundreds of access fee filings in the years prior to the BOX Order (described further below) utilizing a ''market-based'' test, the Commission changed course and disapproved BOX's proposal to begin charging connectivity at one-fourth the rate of competing exchanges' pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [19] In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [20] The Staff Guidance also states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [21]

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission's SIFMA Decision in *NASDAQ Stock Market, LLC* v. *SEC* [22] and remanded for further proceedings consistent with its opinion.[23] That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ.* The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision ''has now been vacated, the basis for the [Remand Order] has evaporated.'' [24] Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ* v. *SEC* that Exchange Act Section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.[25] The Commission further invited ''the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq* v. *SEC.*'' [26] Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg's request to withdraw their applications for review and dismissed the proceedings.[27]

As a result of the Commission's loss of the *NASDAQ* vs. *SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [28] As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings, particularly those submitted by new exchanges, to the new Revised Review Process, while allowing the previously challenged fee filings,

[12] *Id.*

[13] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[14] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. 78k–1, 78s; *see also* Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

[15] *Id.* at page 2.

[16] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[17] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[18] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it ''historically applied a 'market-based' test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.'' *Id.* at page 16. Despite this admission, the Commission disapproved BOX's proposal to begin charging $5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing ''market-based'' fee filings from years prior).

[19] See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Staff Guidance'').

[20] *Id.*

[21] *Id.*

[22] *NASDAQ Stock Mkt., LLC* v. *SEC,* No 18–1324, --- Fed. App'x ----, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court's mandate was issued on August 6, 2020.

[23] *Nasdaq* v. *SEC,* 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court's mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act ''Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.'' *Id.* The court held that ''for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.'' *Id.* Thus, the court held that ''Section 19(d) is not an available means to challenge the fees at issue'' in the SIFMA Decision. *Id.*

[24] *Id.* at *2; see also *id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[25] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the ''Order Vacating Prior Order and Requesting Additional Briefs'').

[26] *Id.*

[27] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[28] *See supra* note 14, at page 2.

mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the ''record'' or ''review'' earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission's related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (''non-legacy exchanges''), while favoring larger, incumbent, entrenched, legacy exchanges (''legacy exchanges'').[29] The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings[30] to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.[31] These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a ''market-based'' test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.,* non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as the Exchange, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.[32] By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish ''fee parity'' with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff's change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (''Cboe'') reported ''access and capacity fee'' revenue of $70,893,000 for 2020[33] and $80,383,000 for 2021.[34] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020[35] and $22,843,000 for 2021.[36] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020[37] and $44,800,000 for 2021.[38] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020[39] and $30,687,000 for 2021.[40] For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported $178,712,000 in ''access and capacity fees'' in 2021. NASDAQ Phlx, LLC (''NASDAQ Phlx'') reported ''Trade Management Services'' revenue of $20,817,000 for 2019.[41] The Exchange notes it is unable to compare ''access fee'' revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the ''Trade Management Services'' line item was

[29] Commission Chair Gary Gensler recently reiterated the Commission's mandate to ensure competition in the equities markets. *See* ''Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots'', by Chair Gary Gensler, dated December 14, 2022 (stating ''[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and *enhance competition in the securities markets, including the equity markets*'' (*emphasis added*)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k–1), including ensuring ''fair competition among brokers and dealers, among exchange markets, and *between exchange markets* and markets other than exchange markets. . . .'' (*emphasis added*). *Id.* at note 1. *See also* Securities Acts Amendments of 1975, *available at https://www.govtrack.us/congress/bills/94/s249.*

[30] This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. *See The Nasdaq Stock Market, LLC* v. *SEC,* Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

[31] *See, e.g.,* Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

[32] The Exchange has filed, and subsequently withdrawn, various forms of this proposed fee change numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

[33] According to Cboe's 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. *See* Cboe 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[34] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[35] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[36] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[37] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[38] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[39] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[40] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[41] According to PHLX, ''Trade Management Services'' includes ''a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX's] published fee schedules.'' *See* PHLX 2020 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf.*

bundled into a much larger line item in PHLX's Form 1, simply titled ''Market services.'' [42]

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,[43] new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates), which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. While one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely guidance and ''is not a rule, regulation or statement of the . . . Commission . . . the Commission has neither approved nor disapproved its content . . .'',[44] this is not the reality experienced by exchanges such as MIAX. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite good-faith efforts by the Exchange to provide substantial amount of cost-related details. The Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[45] However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act [46] in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[47] to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity; [48] or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and place a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.[49]

Lastly, the Exchange notes that the Commission Staff has allowed similar fee increases by other exchanges to remain in effect by publishing those

[42] *See* PHLX Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.*

[43] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[44] *See supra* note 19, at note 1.

[45] *See* Securities Exchange Act Release Nos. 94890 (May 11, 2022), 87 FR 29945 (May 17, 2022) (SR–MIAX–2022–20); 94720 (April 14, 2022), 87 FR 23586 (April 20, 2022) (SR–MIAX–2022–16); 94719 (April 14, 2022), 87 FR 23600 (April 20, 2022) (SR–MIAX–2022–14); 94259 (February 15, 2022), 87 FR 9747 (February 22, 2022) (SR–MIAX–2022–08); 94256 (February 15, 2022), 87 FR9711 (February 22, 2022) (SR–MIAX–2022–07); 93771 (December 14, 2021), 86 FR 71940 (December 20, 2021) (SR–MIAX–2021–60); 93775 (December 14, 2021), 86 FR 71996 (December 20, 2021) (SR–MIAX–2021–59); 93185 (September 29, 2021), 86 FR 55093 (October 5, 2021) (SR–MIAX–2021–43); 93165 (September 28, 2021), 86 FR 54750 (October 4, 2021) (SR–MIAX–2021–41); 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR–MIAX–2021–37); 92643 (August 11, 2021), 86 FR 46034 (August 17, 2021) (SR–MIAX–2021–35).

[46] 15 U.S.C. 78f(b)(4).

[47] To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

[48] In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. *See, e.g., CSA Staff Consultation Paper 21–401, Real-Time Market Data Fees, available at https://www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_Paper.pdf.*

[49] The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (*e.g.,* healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever-increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review,'' and to ensure a comparable review process with the Exchange's filing.

filings for comment and allowing the exchange to withdraw and re-file numerous times.[50] Recently, the Commission Staff has not afforded the Exchange the same flexibility.[51] This again is evidence that the Commission Staff is not treating non-transaction fee filings in a consistent manner and is holding exchanges to different levels of scrutiny in reviewing filings.

* * * * *

10Gb ULL Connectivity Fee Change

The Exchange recently filed a proposal to no longer operate 10Gb connectivity to the Exchange on a single shared network with its affiliate, MIAX Pearl. This change is an operational necessity due to ever-increasing capacity constraints and to accommodate anticipated access needs for Members and other market participants.[52] This proposal: (i) sets forth the applicable fees for the bifurcated 10Gb ULL network; and (ii) removes provisions in the Fee Schedule that provides for a shared 10Gb ULL network; and (iii) specifies that market participants may continue to connect to both the Exchange and MIAX Pearl via the 1Gb network.

The Exchange plans to bifurcate the Exchange and MIAX Pearl 10Gb ULL networks in the first quarter of 2023, currently anticipated to be effective on January 23, 2023. The Exchange issued an alert on August 12, 2022 publicly announcing the planned network change and implementation plan and dates to provide market participants adequate time to prepare.[53] Upon bifurcation of the 10Gb ULL network, subscribers would need to purchase separate connections to the Exchange and MIAX at the applicable rate. The Exchange's proposed amended rate for 10Gb ULL connectivity is described below. Until the 10Gb ULL network is bifurcated, subscribers to 10Gb ULL connectivity would be able to connect to both the Exchange and MIAX Pearl at the applicable rate set forth below.

The Exchange, therefore, proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks[54] via a 10Gb ULL fiber connection and to specify that this fee is for a dedicated connection to the Exchange and no longer provides access to MIAX Pearl. Specifically, the Exchange proposes to amend Sections 5(a)–(b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from $10,000 per month to $13,500 per month (''10Gb ULL Fee'').[55] The Exchange also proposes to amend the Fee Schedule to reflect the bifurcation of the 10Gb ULL network and specify that only the 1Gb network provides access to both the Exchange and MIAX Pearl.

The Exchange proposes to make the following changes to reflect the bifurcated 10Gb ULL network for the Exchange and MIAX Pearl. The Exchange proposes to amend the explanatory paragraphs below the network connectivity fee tables in Sections 5(a)–(b) of the Fee Schedule to specify that, with the bifurcated 10Gb ULL network, Members (and non-Members) utilizing the MENI to connect to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange and MIAX Pearl via a single, can only do so via a shared 1Gb connection.

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Implementation of 10Gb ULL Fee. The proposed 10Gb ULL fee will be effective January 1, 2023. From January 1, 2023 until January 22, 2023, subscribers to 10Gb ULL connectivity will continue to receive access to both the Exchange and MIAX Pearl via a single 10Gb ULL connection. Upon bifurcation of the 10Gb ULL network on January 23, 2023, subscribers that elect to continue to access both the Exchange and MIAX Pearl via a 10Gb ULL connection will need to purchase separate 10Gb ULL connections from each exchange. Existing subscribers of 10Gb ULL connections on the Exchange that also purchase a new 10Gb ULL connection to access MIAX Pearl would pay a pro-rated portion of the monthly fee for the added connection for the remainder of the month.

Limited Service MEI Ports

Background

The Exchange also proposes to amend Section 5)d) of the Fee Schedule to adopt a tiered-pricing structure for Limited Service MEI Ports available to Market Makers. The Exchange allocates two (2) Full Service MEI Ports[56] and two (2) Limited Service MEI Ports[57] per matching engine[58] to which each

[50] *See, e.g.,* Securities Exchange Act Release Nos. 93937 (January 10, 2022), 87 FR 2466 (January 14, 2022) (SR–MEMX–2021–22); 94419 (March 15, 2022), 87 FR 16046 (March 21, 2022) (SR–MEMX–2022–02); SR–MEMX–2022–12 (withdrawn before being noticed); 94924 (May 16, 2022), 87 FR 31026 (May 20, 2022) (SR–MEMX–2022–13); 95299 (July 15, 2022), 87 FR 43563 (July 21, 2022) (SR–MEMX–2022–17); SR–MEMX–2022–24 (withdrawn before being noticed); 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); 94901 (May 12, 2022), 87 FR 30305 (May 18, 2022) (SR–MRX–2022–04); SR–MRX–2022–06 (withdrawn before being noticed); 95262 (July 12, 2022), 87 FR 42780 (July 18, 2022) (SR–MRX–2022–09); 95710 (September 8, 2022), 87 FR 56464 (September 14, 2022) (SR–MRX–2022–12); 96046 (October 12, 2022), 87 FR 63119 (October 18, 2022) (SR–MRX–2022–20); 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26); *and* 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32).

[51] *See* Securities Exchange Act Release Nos. 94719 (April 14, 2022), 87 FR 23600 (April 20, 2022) (SR–MIAX–2022–14) *and* 94720 (April 14, 2022), 87 FR 23586 (April 20, 2022) (SR–MIAX–2022–16).

[52] *See supra* note 9.

[53] *Id.*

[54] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[55] Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section 4(c) of the Exchange's fee schedule. *See* Section 4(c) of the Exchange's fee schedule *available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_10192022.pdf* (providing that ''Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.'').

[56] Full Service MEI Ports provide Market Makers with the ability to send Market Maker quotes, eQuotes, and quote purge messages to the MIAX System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine. *See* Fee Schedule, Section (5)(d)(ii), note 27.

[57] Limited Service MEI Ports provide Market Makers with the ability to send eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per matching engine. *See* Fee Schedule, Section (5)(d)(ii), note 28.

[58] A ''matching engine'' is a part of the MIAX electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one

Continued

Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports and Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports. Currently, Market Makers are assessed a $100 monthly fee for each Limited Service MEI Port for each matching engine above the first two Limited Service MEI Ports that are included for free. This fee was unchanged since 2016.[59]

Limited Service MEI Port Fee Changes

The Exchange now proposes to move from a flat monthly fee per Limited Service MEI Port for each matching engine to a tiered-pricing structure for Limited Service MEI Ports for each matching engine under which the monthly fee would vary depending on the number of Limited Service MEI Ports each Market Maker elects to purchase. Specifically, the Exchange will continue to provide the first and second Limited Service MEI Ports for each matching engine free of charge. For Limited Service MEI Ports, the Exchange proposes to adopt the following tiered-pricing structure: (i) the third and fourth Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $150 per port; (ii) the fifth and sixth Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $200 per port; and (iii) the seventh or more Limited Service MEI Ports will increase from the current monthly flat fee of $100 to $250 per port. The Exchange believes a tiered-pricing structure will encourage Market Makers to be more efficient when determining how to connect to the Exchange. This should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System[60] in accordance with its fair access requirements under Section 6(b)(5) of the Act.[61]

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, Market Makers who take the maximum amount of Limited Service MEI Ports account for approximately greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for approximately less than 1% of message traffic over the network. In the Exchange's experience, Market Makers who only utilize the two free Limited Service MEI Ports do not have a business need for the high performance network solutions required by Market Makers who take the maximum amount of Limited Service MEI Ports. The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 18 million quote messages per second. Based on November 2022 trading results, on an average day, the Exchange handles over approximately 8.8 billion quotes, and more than 185 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generate approximately 5 billion quotes, and Market Makers who utilize the two free Limited Service MEI Ports generate approximately 1.5 billion quotes. Also for November 2022, Market Makers who utilized 3 to 4 Limited Service MEI ports submitted an average of 1,152,654,133 quotes per day and Market Makers who utilized 5 to 9 Limited Service MEI ports submitted an average of 1,172,105,181 quotes per day. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[62] Thus, as the number of connections a Market Maker has increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes no fee or lower fees for those Market Makers who receive fewer Limited Service MEI Ports since those Market Makers generally tend to send the least amount of orders and messages over those connections. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who take the most Limited Service MEI Ports pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, but is designed and maintained from a capacity standpoint to specifically handle the message rate and performance requirements of those Market Makers.

The Exchange proposes to increase its monthly Limited Service MEI Port fees since it has not done so since 2016,[63] which is designed to recover a portion of the costs associated with directly accessing the Exchange.

Implementation of Limited Service MEI Port fees. This proposed fee changes will be effective January 1, 2023.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[64] in general, and furthers the objectives of Section 6(b)(4) of the Act[65] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The

single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines. *See* Fee Schedule, Section (5)(d)(ii), note 29.

[59] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[60] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[61] *See* 15 U.S.C. 78f(b). The Exchange may offer access on terms that are not unfairly discriminatory among its Members, and ensure sufficient capacity and headroom in the System. The Exchange monitors the System's performance and makes adjustments to its System based on market conditions and Member demand.

[62] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[63] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[64] 15 U.S.C. 78f(b).

[65] 15 U.S.C. 78f(b)(4).

Exchange also believes the proposed fees further the objectives of Section 6(b)(5) of the Act[66] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order[67] and the Staff Guidance[68], the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.''[69] The Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.''[70] In the Staff Guidance, the Commission Staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, . . . , specific information, including quantitative information, should be provided to support that argument.''[71]

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity (driven by the bifurcation of the 10Gb ULL network) and Limited Service MEI Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction relates fees to provide them with additional necessary revenue to better compete. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates). The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, while one could debate whether the pricing of non-transaction fees are subject to the same market forces as transaction fees, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange commenced operations in 2012 and adopted its initial fee schedule, with all connectivity and port fees set at $0.00 (the Exchange originally had a non-ULL 10Gb connectivity option, which it has since removed).[72] As a new exchange entrant, the Exchange chose to offer connectivity and ports free of charge to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.[73]

[66] 15 U.S.C. 78f(b)(5).

[67] *See supra* note 18.

[68] *See supra* note 19.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See* Securities Exchange Act Release No. 68415 (December 12, 2012), 77 FR 74905 (December 18, 2012) (SR–MIAX–2012–01).

[73] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (stating, ''[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX. . .''). *See also* Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR–MEMX–2020–10) (proposing to adopt the initial fee schedule and stating that ''[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application sessions.''). MEMX's market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. *See* Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32) *and* 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity). *See also, e.g.,* Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf* (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

Later in 2013, as the Exchange's market share increased,[74] the Exchange adopted a nominal $10 fee for each additional Limited Service MEI Port.[75] The Exchange last increased the fees for its 10Gb ULL fiber connections from $9,300 to $10,000 per month on January 1, 2021.[76] The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . ''[77]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.''[78]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' ''[79] As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.''[80] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.''[81] In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.''[82]

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that are closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the market data rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX (as proposed) (equity options market share of 5.64% for the month of November 2022)[83].	10Gb ULL connection	$13,500.
	Limited Service MEI Ports	1–2 ports: FREE (not changed in this proposal). 3–4 ports: $150 each. 5–6 ports: $200 each. 7 or more ports: $250 each.
NASDAQ[84] (equity options market share of 6.61% for the month of November 2022)[85].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	1–5 ports: $1,500 per port. 6–20 ports: $1,000 per port. 21 or more ports: $500 per port.
NASDAQ ISE LLC (''ISE'')[86] (equity options market share of 5.76% for the month of November 2022)[87].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	$1,100 per port.

[74] The Exchange experienced a monthly average equity options trading volume of 1.87% for the month of November 2013. *See* Market at a Glance, *available at www.miaxoptions.com.*

[75] *See* Securities Exchange Act Release No. 70903 (November 20, 2013), 78 FR 70615 (November 26, 2013) (SR–MIAX–2013–52).

[76] *See* Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02).

[77] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[78] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[79] *See NetCoalition,* 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[80] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[81] *Id.*

[82] *See* Staff Guidance, *supra* note 19.

[83] *See supra* note 74.

[84] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[85] *See supra note 74.*

[86] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.

[87] *See supra note 74.*

[88] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[89] *See supra note 74.*

[90] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.

[91] *See supra note 74.*

Exchange	Type of connection or port	Monthly fee (per connection or per port)
NYSE American LLC (''NYSE American'')[88] (equity options market share of 6.41% for the month of November 2022)[89].	10Gb LX LCN connection	$22,000 per connection.
	Order/Quote Entry Port	Ports 1–40. $450 per port.
		Ports 41 and greater. $150 per port.
NASDAQ GEMX, LLC (''GEMX'')[90] (equity options market share of 1.79% for the month of November 2022)[91].	10Gb Ultra connection	$15,000 per connection.
	SQF Portection	$1,250 per port.

The Exchange notes that, in regard to Limited Service MEI Ports, other exchanges charge on a per port basis and require firms to connect to multiple matching engines, thereby multiplying the cost to access their full market.[92]

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market participants may choose to become a member of one or more options exchanges based on the market participant's assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, the Exchange's affiliate, MIAX PEARL, LLC (''MIAX Pearl''), experienced a decrease in membership as the result of similar fees proposed herein. One MIAX Pearl Member notified MIAX Pearl that it will terminate their MIAX Pearl membership effective January 1, 2023, as a direct result of the proposed connectivity and port fee changes on MIAX Pearl.

It is not a requirement for market participants to become members of all options exchanges, in fact, certain market participants conduct an options business as a member of only one options market.[93] A very small number of market participants choose to become a member of all sixteen options exchanges. Most firms that actively trade on options markets are not currently Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Members or service bureaus, and only a Member may utilize a port.[94]

One other exchange recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAX, and BOX, 42 firms access only one of the three exchanges.[95] The Exchange and its affiliates, MIAX Pearl and MIAX Emerald, have a total of 47 members. Of those 47 total members, 35 are members of all three affiliated exchanges, four are members of only two (2) affiliated exchanges, and eight (8) are members of only one affiliated exchange. The Exchange also notes that no firm is a Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all options exchanges, let alone the Exchange and its two affiliates, and broker-dealers may elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the broker-dealer membership analysis of the options exchanges discussed above. As noted above, this is evidenced by the fact that one MIAX Pearl Member will terminate their MIAX Pearl membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl (which are similar to the changes proposed herein). Indeed, broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not ''lock'' a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at—or establish connectivity to—the Exchange.[96] If the Exchange is not at the NBBO, the Exchange will route an order to any away market that is at the NBBO to ensure that the order

[92] *See* Specialized Quote Interface Specification, Nasdaq PHLX, Nasdaq Options Market, Nasdaq BX Options, Version 6.5a, Section 2, Architecture (revised August 16, 2019), *available at http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/SQF6.5a-2019-Aug.pdf.* The Exchange notes that it is unclear whether the NASDAQ exchanges include connectivity to each matching engine for the single fee or charge per connection, per matching engine. *See also* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020). The Exchange notes that NYSE provides a link to an Excel file detailing the number of matching engines per options exchange, with Arca and Amex having 19 and 17 matching engines, respectively.

[93] BOX recently adopted an electronic market maker trading permit fee. *See* Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17). In that proposal, BOX stated that, ''. . . it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX].'' Also in 2022, MEMX established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee ''is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange'' and that ''neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.''

[94] Service Bureaus may obtain ports on behalf of Members.

[95] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX's observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

[96] *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), *available at https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.*

was executed at a superior price and prevent a trade-through.[97]

With respect to the submission of orders, Members may also choose not to purchase any connection at all from the Exchange, and instead rely on the port of a third party to submit an order. For example, a third-party broker-dealer Member of the Exchange may be utilized by a retail investor to submit orders into an Exchange. An institutional investor may utilize a broker-dealer, a service bureau,[98] or request sponsored access [99] through a member of an exchange in order to submit a trade directly to an options exchange.[100] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.,* fees based on the number of firms that connect to the Exchange indirectly via the third-party).[101] Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.[102] Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 16 options markets. Accordingly, the Exchange believes that the proposed fees are fair and reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member, and is approved for membership by the Exchange, the Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become a Member of the Exchange, or, if it is a Member, to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Bifurcation of 10Gb ULL Connectivity and Related Fees

The Exchange stresses that bifurcating the 10Gb ULL connectivity between the Exchange and MIAX Pearl was not designed with the objective to generate an overall increase in access fee revenue. Rather, the proposed change is necessitated by 10Gb ULL connectivity experiencing a significant decrease in port availability mostly driven by connectivity demands of latency sensitive Members that seek to maintain multiple 10Gb ULL connections on every switch in the network. Due to the ever-increasing connectivity demands, the Exchange found it necessary to bifurcate 10Gb ULL connectivity to the Exchange's and MIAX Pearl's Systems and networks to continue to meet ongoing and future 10Gb ULL connectivity and access demands. Such changes accordingly necessitated a review of the Exchange's previous 10Gb ULL connectivity fees and related costs. The proposed fees are reasonable as they are intended to allow the Exchange to cover ongoing costs related to providing and maintaining such connectivity, described more fully below. The ever increasing connectivity demands that necessitated this change also proves that the proposed fees are reasonable because this demand reflects that Members and non-Members believe they are getting value from the 10Gb ULL connections they purchase.

The Exchange announced on August 12, 2022 the planned network change and January 23, 2023 implementation date to provide market participants adequate time to prepare.[103] Since August 12, 2022, the Exchange has worked with current 10Gb ULL subscribers to address their connectivity needs ahead of the January 23, 2023 date. Based on those interactions and subscriber feedback, the Exchange expects a minimal net increase of approximately six (6) overall 10Gb ULL connectivity subscriptions across the Exchange and MIAX Pearl. This anticipated immaterial increase in overall connections reflect a minimal fee impact for all types of subscribers and reflects that subscribers elected to reallocate existing 10Gb ULL connectivity directly to the Exchange or MIAX Pearl, or chose to decrease or cease connectivity as a result of the change.

Should the Commission Staff disapprove such fees, it would effectively dictate how an exchange manages its technology and would hamper the Exchange's ability to continue to invest in and fund access services in a manner that allows it to meet existing and anticipated access demands of market participants. Disapproval could also have the adverse effect of discouraging exchanges from innovating technology to the benefit of market participants if it believes the Commission would later prevent that exchange from monetizing its

[97] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[98] Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

[99] Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[100] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[101] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at,* U.S. Direct-Extranet Connection (nasdaqtrader.com); *and* Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); *and* 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[102] The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

[103] *See supra* note 9.

innovation, thus adversely impacting competition. Also, as noted above, the economic consequences of not being able to better establish fee parity with other exchanges for non-transaction fees hampers the Exchange's ability to compete as aggressively on transaction fees.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services, the Exchange seeks to be especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and also carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[104] and Rule 19b–4 thereunder,[105] with respect to the types of information SROs should provide when filing fee changes, and Section 6(b) of the Act,[106] which requires, among other things, that exchange fees be reasonable and equitably allocated,[107] not designed to permit unfair discrimination,[108] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[109] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[110] The Exchange notes that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at $12,034,554 (or approximately $1,002,880 per month, rounded up to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Limited Service MEI Ports at $2,157,178 (or approximately $179,765 per month, rounded down to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its Users (both Members and non-Members [111]) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of $13,500 per month for each physical 10Gb ULL connection and to remove language providing for a shared 10Gb ULL network between the Exchange and MIAX Pearl. The Exchange also proposes to modify its Fee Schedule to charge tiered rates for additional Limited Service MEI Ports.

In 2019, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[112] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers''). Next, the Exchange adopted an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical 1Gb and 10Gb ULL connectivity (62%), with smaller allocations to all ports (15%), and the remainder to the provision of transaction execution, membership services and market data services (23%). The allocation methodology was developed through conversations with senior management familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity, only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange, many Members (but not all) consume market data from the Exchange in order to trade on the Exchange, and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals.

Through the Exchange's extensive updated Cost Analysis, the Exchange

[104] 15 U.S.C. 78s(b)(1).

[105] 17 CFR 240.19b–4.

[106] 15 U.S.C. 78f(b).

[107] 15 U.S.C. 78f(b)(4).

[108] 15 U.S.C. 78f(b)(5).

[109] 15 U.S.C. 78f(b)(8).

[110] *See* Staff Guidance, *supra* note 19.

[111] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access Limited Service MEI Ports on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

[112] The Exchange frequently updates it Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange's most recent Cost Analysis was conducted ahead of this filing.

analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the cost drivers to provide 10Gb ULL connectivity and Limited Service MEI Port services, including both physical 10Gb connections and Limited Service MEI Ports, result in an aggregate monthly cost of approximately $1,182,645 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Limited Service MEI Ports by 12 months, then adding both numbers together), as further detailed below.

Costs Related To Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 25.6% of its overall Human Resources cost to offering physical connectivity).

Cost drivers	Annual cost [113]	Monthly cost [114]	% of all
Human Resources	$3,867,297	$322,275	25
Connectivity (external fees, cabling, switches, etc.)	70,163	5,847	60.6
Internet Services, including External Market Data	424,584	35,382	73.3
Data Center	718,950	59,912	60.6
Hardware and Software Maintenance and Licenses	727,734	60,645	49.8
Depreciation	2,310,898	192,575	61.6
Allocated Shared Expenses	3,914,928	326,244	49.1
Total	12,034,554	1,002,880	39.4

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity.

Human Resources

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange's network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity) and for which the Exchange allocated a percentage of 42% of each employee's time. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security and finance personnel), for which the Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who do support functions related to providing physical connectivity) and then applied a smaller allocation to such employees (less than 18%). The Exchange notes that it has 184 employees and each department leader has direct knowledge of the time spent by those spent by each employee with respect to the various tasks necessary to operate the Exchange. The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing physical connectivity. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity and Internet Services

The Connectivity cost includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity line-item is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity and content service providers for connectivity and data feeds for the entire U.S. options industry, as well as content, connectivity, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity and content service providers to connect to other national securities exchanges, the Options Price Reporting Authority (''OPRA''), and to receive market data from other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity and market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data

[113] The Annual Cost includes figures rounded to the nearest dollar.

[114] The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

providers, or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity and content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (60.6%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity of participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange included External Market Data fees to the provision of 10Gb ULL connectivity as such market data is necessary here to offer certain services related to such connectivity, such as certain risk checks that are performed prior to execution, and checking for other conditions (*e.g.,* re-pricing of orders to avoid lock or crossed markets, trading collars). This allocation was included as part of the internet Services cost described above. Thus, as market data from other exchanges is consumed at the matching engine level, (to which 10Gb ULL connectivity provides access to) in order to validate orders before additional entering the matching engine or being executed, the Exchange believes it is reasonable to allocate a small amount of such costs to 10Gb ULL connectivity.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.

Monthly Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. As noted above, the Exchange allocated 61.6% of all depreciation costs to providing physical 10Gb ULL connectivity. The Exchange notes, however, that it did not allocate depreciation costs for any depreciated software necessary to operate the Exchange to physical connectivity, as such software does not impact the provision of physical connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall physical connectivity costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide physical connectivity. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange notes that the cost of paying directors to serve on its Board of Directors is also included in the Exchange's general shared expenses.[115] The Exchange notes that the 49.1% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Limited Service MEI Ports based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), Limited Service MEI Ports do not require as many broad or indirect resources as other Core Services. The total monthly cost for 10Gb ULL connectivity of $1,002,880 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (93), to arrive at a cost of approximately $10,784 per month, per physical 10Gb ULL connection.

Costs Related to Offering Limited Service MEI Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Limited Service MEO Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 5.8% of its overall Human Resources cost to offering Limited Service MEI Ports).

Cost drivers	Annual cost [116]	Monthly cost [117]	% of all
Human Resources	$898,480	$74,873	5.8%
Connectivity (external fees, cabling, switches, etc.)	4,435	370	3.8
Internet Services, including External Market Data	41,601	3,467	7.2
Data Center	85,214	7,101	7.2
Hardware and Software Maintenance and Licenses	104,859	8,738	7.2
Depreciation	237,335	19,778	6.3
Allocated Shared Expenses	785,254	65,438	9.8
Total	2,157,178	179,765	7.1

[115] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

Human Resources

Withrespect to Limited Service MEI Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Limited Service MEI Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). The estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Limited Service MEI Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Limited Service MEI Ports and maintaining performance thereof. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing Limited Service MEI Ports and maintaining performance thereof. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity and Internet Services

The Connectivity cost includes external fees paid to connect to other exchanges, cabling and switches, as described above. For purposes of Limited Service MEI Ports, the Exchange also includes a portion of its costs related to External Market Data, as described below.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment as well as related costs (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange included External Market Data fees to the provision of Limited Service MEI Ports as such market data is also necessary here (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the national best bid and national best offer and checking for other conditions (*e.g.,* whether a symbol is halted). This allocation was included as part of the internet Services cost described above.[118] Thus, as market data from other Exchanges is consumed at the Limited Service MEI Port level in order to validate orders before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to Limited Service MEI Ports.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

Monthly Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 6.3% of all depreciation costs to providing Limited Service MEI Ports. In contrast to physical connectivity, described above, the Exchange did allocate depreciation costs for depreciated software necessary to operate the Exchange to Limited Service MEI Ports because such software is related to the provision of such connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall Limited Service MEI Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide Limited Service MEI Ports. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 10% of the overall cost for directors was allocated to providing Limited Service MEI Ports. The Exchange notes that the 9.8% allocation of general shared expenses for Limited Service MEI Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Limited Service MEI Ports have several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange. The total monthly cost of $179,765 was divided by the number of chargeable Limited Service MEI Ports (excluding the two free Limited Service MEI Ports per matching engine that each Member receives) the Exchange maintained at the time that proposed pricing was determined (1303), to arrive at a cost of approximately $138 per month, per charged Limited Service MEI Port.

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Limited Service MEI Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure

[116] *See supra* note 113 (describing rounding of Annual Costs).

[117] *See supra* note 114 (describing rounding of Monthly Costs based on Annual Costs).

[118] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

personnel with a high percentage of the cost of such personnel (42%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 8.4% to Limited Service MEI Ports and the remaining 49.6% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 17.8% for 10Gb ULL connectivity or 18.2% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (5% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Limited Service MEI Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Limited Service MEI Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 25.6% of its personnel costs to providing physical connections and 5.8% of its personnel costs to providing Limited Service MEI Ports, for a total allocation of 31.4% Human Resources expense to provide these specific connectivity services. In turn, the Exchange allocated the remaining 68.6% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Limited Service MEI Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 67.9% of the Exchange's overall depreciation and amortization expense to connectivity services (61.6% attributed to 10Gb ULL physical connections and 6.3% to Limited Service MEI Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 32.1%) toward the cost of providing transaction services, membership services, other port services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Limited Service MEI Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. As such, the Exchange believes that its costs will remain relatively similar in future years. It is possible however that such costs will either decrease or increase. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases.

However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange would propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Projected Revenue [119]

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the

[119] For purposes of calculating revenue for 10Gb ULL connectivity, the Exchange used projected revenues for February 2023, the first full month for which it will provide dedicated 10Gb ULL connectivity to the Exchange and cease operating a shared 10Gb ULL network with MIAX Pearl.

Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services at $12,034,554. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $15,066,000. This represents a modest profit of 20% when compared to the cost of providing 10Gb ULL connectivity services. The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services at $2,157,178. Based on current Limited Service MEI Port services usage, the Exchange would generate annual revenue of approximately $3,300,600. This represents a modest profit of 35% when compared to the cost of providing Limited Service MEI Port services. Even if the Exchange earns those amounts or incrementally more, the Exchange believes the proposed fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total expense of the Exchange associated with providing 10Gb ULL connectivity and Limited Service MEI Port services versus the total projected revenue of the Exchange associated with network 10Gb ULL connectivity and Limited Service MEI Port services.

* * * * *

The Exchange has operated at a cumulative net annual loss since it launched operations in 2012.[120] The Exchange has operated at a net loss due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as connectivity, at lower rates than other options exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange should not now be penalized for seeking to raise its fees in light of necessary technology changes and its increased costs after offering such products as discounted prices. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Limited Service MEI Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 10Gb ULL connectivity and Limited Service MEI Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity actually produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Limited Service MEI Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange does not believe it should be penalized for such success. The Exchange, like other exchanges, is, after all, a for-profit business, which provides economic value to its Members. To the extent the Exchange has mispriced and experiences a net loss in clients, the Exchange could experience a net reduction in revenue. While the Exchange believes in transparency around costs and potential revenue, the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted.

Further, the proposal reflects the Exchange's efforts to control its costs, which the Exchange does on an ongoing basis as a matter of good business practice. A potential profit margin should not be judged alone based on its size, but is also indicative of costs management and whether the ultimate fee reflects the value of the services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive where on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.[121] Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly

[120] The Exchange has incurred a cumulative loss of $121 million since its inception in 2012 through full year 2021. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 29, 2022, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001163.pdf.*

[121] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

Limited Service MEI Ports

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity alternatives, as the users of the Limited Service MEI Ports consume the most bandwidth and resources of the network. Specifically, like above for the 10Gb ULL connectivity, the Exchange notes that the Market Makers who take the maximum amount of Limited Service MEI Ports account for approximately greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for approximately less than 1% of message traffic over the network. In the Exchange's experience, Market Makers who only utilize the two free Limited Service MEI Ports do not have a business need for the high performance network solutions required by Market Makers who take the maximum amount of Limited Service MEI Ports. The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 18 million quote messages per second. Based on November 2022 trading results, on an average day, the Exchange handles over approximately 8.8 billion quotes, and more than 185 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generate approximately 5 billion quotes, and Market Makers who utilize the two free Limited Service MEI Ports generate approximately 1.5 billion quotes. Also for November 2022, Market Makers who utilized 3 to 4 Limited Service MEI ports submitted an average of 1,152,654,133 quotes per day and Market Makers who utilized 5 to 9 Limited Service MEI ports submitted an average of 1,172,105,181 quotes per day. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[122] Thus, as the number of connections a Market Maker has increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes no fee or lower fees for those Market Makers who receive fewer Limited Service MEI Ports since those Market Makers generally tend to send the least amount of orders and messages over those connections. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who take the most Limited Service MEI Ports pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, but is designed and maintained from a capacity standpoint to specifically handle the message rate and performance requirements of those Market Makers.

To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. Billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[123] Thus, as the number of connections a Market Maker has increases, the related pull on Exchange resources also increases. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Limited Service MEI Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2012 [124] due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry, which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Limited Service MEI Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants

[122] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[123] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[124] *See supra* note 120.

at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one MIAX Pearl Member will terminate their MIAX Pearl membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAX Pearl. The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to connect to all options exchanges. There is no reason to believe that our proposed price increase will harm another exchange's ability to compete. There are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. There is also a range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. Market participants are free to choose which exchange or reseller to use to satisfy their business needs. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange also believes that the proposed fees for 10Gb connectivity are appropriate and warranted in light of it bifurcating 10Gb connectivity between the Exchange and MIAX Pearl and would not impose any burden on competition because this is a technology driven change that would assist the Exchange in recovering costs related to providing dedicating 10Gb connectivity to the Exchange while enabling it to continue to meet current and anticipated demands for connectivity by its Members and other market participants. Separating its 10Gb network from MIAX Pearl would enable the Exchange to better compete with other exchanges by ensuring it can continue to provide adequate connectivity to existing and new Members, which may increase in ability to compete for order flow and deepen its liquidity pool, improving the overall quality of its market.

The proposed rates for 10Gb ULL connectivity are also driven by the Exchange's need to bifurcate its 10Gb ULL network shared with MIAX Pearl so that it can continue to meet current and anticipated connectivity demands of all market participants. Similarly, and also in connection with a technology change, Cboe Exchange, Inc. (''Cboe'') amended access and connectivity fees, including port fees.[125] Specifically, Cboe adopted certain logical ports to allow for the delivery and/or receipt of trading messages—*i.e.,* orders, accepts, cancels, transactions, etc. Cboe established tiered pricing for BOE and FIX logical ports, tiered pricing for BOE Bulk ports, and flat prices for DROP, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. Cboe argued in its fee proposal that the proposed pricing more closely aligned its access fees to those of its affiliated exchanges, and reasonably so, as the affiliated exchanges offer substantially similar connectivity and functionality and are on the same platform that Cboe migrated to.[126] Cboe also justified its proposal by stating that, ''. . .the Exchange believes substitutable products and services are in fact available to market participants, including, among other things, other options exchanges a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity and/or trading of any options product, including proprietary products, in the Over- the-Counter (OTC) markets.'' [127] Cboe stated in its proposal that,

The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are

[125] *See* Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR–CBOE–2020–105). The Exchange notes that Cboe submitted this filing *after* the Staff Guidance and contained no cost based justification.

[126] *Id.* at 71676.

[127] *Id.*

handled by the exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements. Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.[128]

The proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[129] wherein the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. The Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by multiple competitors.[130] Further, the Commission explicitly stated that ''[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by existing competitors.'' [131] Finally, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.[132]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[133] Cboe reasoned that purchasing additional Certification Logical Ports, beyond the one Certification Logical Port per logical port type offered in the production environment free of charge, is voluntary and not required in order to participate in the production environment, including live production trading on the Exchange.[134]

In its statutory basis, Cboe justified the new port fee by stating that it believed the Certification Logical Port fee were reasonable because while such ports were no longer completely free, TPHs and non-TPHs would continue to be entitled to receive free of charge one Certification Logical Port for each type of logical port that is currently offered in the production environment.[135] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[136] Cboe also noted that the decision to purchase additional ports is optional and no market participant is required or under any regulatory obligation to purchase excess Certification Logical Ports in order to access the Exchange's certification environment.[137] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[138] BZX,[139] and Cboe EDGA Exchange, Inc.[140]

The Cboe fee proposals described herein were filed subsequent to the D.C. Circuit decision in *Susquehanna Int'l Grp., LLC* v. *SEC,* 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as this proposal. In summary, the Exchange requests the Commission apply the same standard of review to this proposal which was applied to the various Cboe and Cboe affiliated markets' filings with respect to non-transaction fees. If the Commission were to apply a different standard of review to this proposal than it applied to other exchange fee filings it would create a burden on competition such that it would impair the Exchange's ability to make necessary technology driven changes, such as bifurcating its 10Gb ULL network, because it would be unable to monetize or recoup costs related to that change and compete with larger, non-legacy exchanges.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[141] and Rule 19b–4(f)(2) [142] thereunder. At any time

[128] *Id.* at 71676.

[129] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011). Cboe offers BOE and FIX Logical Ports, BOE Bulk Logical Ports, DROP Logical Ports, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. For each type of the aforementioned logical ports that are used in the production environment, the Exchange also offers corresponding ports which provide Trading Permit Holders and non-TPHs access to the Exchange's certification environment to test proprietary systems and applications (*i.e.,* ''Certification Logical Ports'').

[134] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011).

[135] *Id.* at 18426.

[136] *Id.*

[137] *Id.*

[138] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[139] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[140] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeEDGA–2022–004).

[141] 15 U.S.C. 78s(b)(3)(A)(ii).

[142] 17 CFR 240.19b–4(f)(2).

within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2022–50 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2022–50. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2022–50 and should be submitted on or before February 7, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[143]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–00660 Filed 1–13–23; 8:45 am]

BILLING CODE 8011–01–P

[143] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Privacy Act of 1974 System of Records Notice

AGENCY: U.S. Small Business Administration.

ACTION: Notice of a modified system of records.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to modify its system of records titled, Government Contracting and Business Development System (SBA 30), to its inventory of records systems subject to the Privacy Act of 1974, as amended. Publication of this notice complies with the Privacy Act and the Office of Management and Budget (OMB) Circulars A–108 and A–130 requirement for agencies to publish a notice in the **Federal Register** whenever the agency establishes a new, modified or rescinds a system of records. System of Records Notice (SORN) Government Contracting and Business Development System, (SBA 30), includes modifying authority, categories of individuals, categories of records, record source categories, and routine use. SBA 30 has expanded the scope of its system of records with additional applications serving a unique purpose for carrying out the mission of the SBA Office of Government Contracting and Business Development. SBA 30 collects personal, business, veteran status, and financial information to determine if applicants qualify and if current participants certify or are compliant with statutory and regulatory requirements for continued eligibility for participation in the following government programs: 8(a) Business Development Program, Mentor Protégé Program (MPP) formerly known as All Small Mentor Protégé Program (ASMPP), Women Owned Small Business (WOSB) Federal Contracting Program, Historically Underutilized Business Zone (HUBZone) Program, Veteran Owned Small Business (VOSB) Program and any future certification programs deemed necessary by congress or statute.

DATES: Submit comments on or before February 16, 2023. This revised system will be effective upon publication.

ADDRESSES: You may submit comments on this notice by any of the following methods:

Federal e-Rulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

Mail/Hand Delivery/Courier: Submit written comments to: Ms. Beatrice Hidalgo, Office of Government Contracting and Business Development, U.S. Small Business Administration, 409 3rd Street SW, Suite 6300, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: General questions, please contact Ms. Hilary F. Cronin, Office of Government Contracting and Business Development, U.S. Small Business Administration, 409 3rd Street SW, Suite 6300, Washington, DC 20416 or via email *Hilary.Cronin@sba.gov,* telephone (202) 205–7055. For Privacy related matters, please contact Stephen Kucharski, (Acting) Chief Information Officer/Senior Agency Official for Privacy, Office of the Chief Information Officer, U.S. Small Business Administration, 409 3rd Street SW, Suite 4000, Washington, DC 20416 or via email to *Privacyofficer@sba.gov.*

SUPPLEMENTARY INFORMATION: The Privacy Act of 1974 (5 U.S.C. 552a), as amended, embodies fair information practice principles in a statutory framework governing the means by which Federal agencies collect, maintain, use, and disseminate individuals' personal information. The Privacy Act applies to records about individuals that are maintained in a ''system of records.'' A system of records is a group of any records under the control of a Federal agency from which information is retrieved by the name of an individual or by a number, symbol or another identifier assigned to the individual. The Privacy Act requires each Federal agency to publish in the **Federal Register** a System of Records Notice (SORN) identifying and describing each system of records the agency maintains, the purposes for which the Agency uses the Personally Identifiable Information (PII) in the system, the routine uses for which the Agency discloses such information outside the Agency, and how individuals can exercise their rights related to their PII information.

The modified Privacy Act system of records for titled, Government Contracting and Business Development (GCBD) System, (SBA 30) will be used by small business, SBA personnel and overseen by Office of Government Contracting and Business Development. SBA 30 collects personal, business, and financial information and veteran status to determine if applicants are eligible and if current participants are compliant with statutory and regulatory requirements for continued eligibility for participation in the following government programs: 8(a) Business Development Program, MPP, WOSB Federal Contracting Program, HUBZone Program, and VOSB Federal Contracting Program. Multiple SBA IT systems/applications are used to certify the participants on an SBA platform.

Certify.sba.gov is a certification management system used for elements of initial certification and continuing eligibility functions for the 8(a) Business Development program and for MPP. Its primary component is a custom developed application which includes an interface for small businesses to manage their eligibility documents and applications for various contracting programs, as well as workflows for SBA staff.

WOSB.Certify.sba.gov is a certification management system used for elements of initial certification and continuing eligibility functions for the WOSB Program. Its primary component is a custom developed application which includes an interface for small businesses to manage their eligibility documents and applications for various contracting programs, as well as workflows for SBA staff. HUBZone Certification Tracking System (HCTS) is a certification management system used for elements of initial certification and continuing eligibility for the HUBZone program. *veterans.certify.sba.gov* is a certification management system used for elements of initial application and continuing eligibility functions for the VOSB program. Its primary component is a custom developed application which includes an interface for small businesses to manage their eligibility documents and applications for various contracting programs, as well as workflows for SBA staff. To be eligible for certification in SBA's Veteran Small Business Certification Program, an applicant's small business must be owned and controlled by one or more qualifying veterans. A ''qualifying veteran'' is a veteran as defined by 38 U.S.C. 101(2) or a service-disabled veteran. The modification of SBA 30 will not have any undue impact on the privacy of individuals and its use is compatible with collection.

System Name and Number: Government Contracting and Business Development System, SBA 30.

System Classification: Unclassified.

System Location: SBA Headquarters, 409 3rd Street SW, Washington, DC 20416.

System Manager(s): Hilary F. Cronin, Office of Government Contracting and Business Development, U.S. Small Business Administration, 409 3rd Street SW, Suite 6300, Washington, DC 20416.

Authority for Maintenance of the System: 15 U.S.C. 636 (j); 15 U.S.C. 637; 15 U.S.C. 657a(a); Public Law 105–13, 111 Stat. 26275 (15 U.S.C. 631); 13 CFR 125.9 and Section 862 of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, 134 Stat. 3388 (January 1, 2021) (NDAA 2021), amended 38 U.S.C. 8127.

Purposes of the System: To collect personal, business, and financial information used to determine eligibility of applicants and current participants in the Agency's certification program to include but not limited to: 8(a) Business Development Program, Mentor Protégé Program (MPP) formerly known as All Small Mentor Protégé Program (ASMPP), Women-Owned Small Business (WOSB) Federal Contracting Program, Historically Underutilized Business Zone (HUBZone) Program and Veteran Owned Small Business Program.

Categories of Individuals Covered by the System: Applicants and program participants in SBA's 8(a) Business Development program, Mentor Protégé Program, WOSB Federal Contracting Program, HUBZone Program, and VOSB Federal Contracting Program.

Categories of Records in the System: Personal, business, veteran status and financial information.

Record Source Categories: Small business applicants or participants in the 8(a) Business Development program, Mentor Protégé Program (formerly known as All Small Mentor Protégé Program (ASMPP), HUBZone Program, WOSB Federal Contracting Program, and VOSB Federal Contracting Program

Routine Uses of Records Maintained in the System, Including Categories of Users and Purposes of Such Uses: In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside SBA as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including offices of the U.S Attorneys, or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is deemed by the SBA to be relevant and necessary to the litigation or the SBA has an interest in such litigation when any of the following are a party to the litigation or have an interest in the litigation: (1) Any employee or former employee of the SBA in his or her official capacity; (2) Any employee or former employee of the SBA in his or her individual capacity when DOJ or SBA has agreed to represent the employee or a party to the litigation or have an interest in the litigation; or (3) The United States or any agency thereof.

B. To a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the request of the individual. The member's access rights are no greater than those of the individual.

C. To the National Archives and Records Administration (NARA) or General Services Administration (GSA) pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization, including the SBA's Office of Inspector General, for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when (1) SBA suspects or has confirmed that there has been a breach of the system of records, (2) SBA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, SBA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with SBA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

F. To another Federal agency or Federal entity, when SBA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national

security, resulting from a suspected or confirmed breach.

G. To another agency or agent of a Government jurisdiction within or under the control of the U.S., lawfully engaged in national security or homeland defense when disclosure is undertaken for intelligence, counterintelligence activities (as defined by 50 U.S.C. 3003(3)), counterterrorism, homeland security, or related law enforcement purposes, as authorized by U.S. law or Executive Order.

H. To SBA contractors, grantees, volunteers, interns, and experts who have been engaged by SBA to assist in the performance and performance improvement of a servicerelated to this system of records and who need access to the records to perform this activity. Recipients of these records shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. Sec. 552a.

Policies and Practices for Storage of Records: Information is stored electronically and is protected through the implementation of multi-factor access controls, user permissions, event logging, and monitoring. External media are further protected using encryption.

Policies and Practices for Retrieval of Records: Records are retrieved by name of individual, business name, and Unique Entity Identifier (UEI).

Policies and Practices for Retention and Disposal of Records: Records are maintained in accordance with latest edition SBA Standard Operating Procedure (SOP) series 00 41, schedules Records Management Records 4.1 and Agency Accountability Records 5.7. Records maintained as part of the General Records Schedules (GRS) are disposed of in accordance with applicable SBA policies.

Administrative, Technical, and Physical Safeguards: Access and use are limited to persons with official need to know. Users are evaluated on a recurring basis to ensure need-to-know still exists. Safeguards are implemented in accordance with the Federal Information Security Modernization Act of 2014 (FISMA) and are evaluated on a recurring basis to ensure desired operation.

Record Access Procedures: Individuals wishing to request access to records about them should submit a Privacy Act request to the SBA Chief, Freedom of Information and Privacy Act Office, U.S. Small Business Administration, 409 Third St. SW, Eighth Floor, Washington, DC 20416 or *FOIA@sba.gov.* Individuals must provide their full name, mailing address, personal email address, telephone number, and a detailed description of the records being requested. Individuals requesting access must also follow SBA's Privacy Act regulations regarding verification of identity and access to records (13 CFR part 102 subpart B).

Contesting Record Procedures: Individuals wishing to contest information contained in records about them should submit a Privacy Act request to the SBA Chief, Freedom of Information and Privacy Act Office, U.S. Small Business Administration, 409 Third St. SW, Eighth Floor, Washington, DC 20416 or *FOIA@sba.gov.* Individuals must provide their full name, mailing address, personal email address, telephone number, and a detailed description of the records being requested. Requesting individuals must follow SBA's Privacy Act regulations regarding verification of identity and access to records (13 CFR part 102 subpart B).

Notification Procedures: Individuals may make record inquiries in person or in writing to the Systems Manager through the SBA Chief, Freedom of Information and Privacy Act Office, U.S. Small Business Administration, 409 Third St. SW, Eighth Floor, Washington, DC 20416 or *FOIA@sba.gov.*

Exemptions Promulgated for the System: None.

History: [FR Doc. 2004–54823, Vol. 69, No. 175]; and [FR Doc. 2021–07363, Vol. 86, No. 68]

Hilary Cronin,

Director of Technology Solutions, Office of Government Contracting and Business Development.

[FR Doc. 2023–00623 Filed 1–13–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2022–0828]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Small Unmanned Aircraft Registration System

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on June 22, 2022. Aircraft registration is necessary to ensure personal accountability among all users of the National Airspace System (NAS). Aircraft registration also allows the FAA and law enforcement agencies to address non-compliance by providing the means for identifying an aircraft's owner and operator. This collection also permits individuals to de-register or update their record in the registration database.

DATES: Written comments should be submitted by February 16, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Bonnie Lefko by email at: *Bonnie.Lefko@FAA.gov;* phone: 405–954–7461.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0765.

Title: Small Unmanned Aircraft Registration System.

Form Numbers: None.

Type of Review: Renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on June 22, 2022 (87 FR 37373). The Secretary of the Department of Transportation (DOT) and the Administrator of the Federal Aviation Administration (FAA) affirmed that all unmanned aircraft, including model aircraft, are aircraft. As such, in accordance with 49 U.S.C. 44101(a) and as further prescribed in 14 CFR part 48, registration is required prior to operation. *See* 80 FR 63912, 63913 (October 22, 2015). Registration allows the FAA to provide respondents with educational materials regarding safety of

flight in the NAS to promote greater accountability and responsibility of these new users. Registration also allows the FAA and law enforcement agencies to address non-compliance by providing the means for identifying an aircraft's owner and operator.

Subject to certain exceptions discussed below, aircraft must be registered prior to operation. See 49 U.S.C. 44101–44103. Upon registration, the Administrator must issue a certificate of registration to the aircraft owner. See 49 U.S.C. 44103.

Registration, however, does not provide the authority to operate. Persons intending to operate a small unmanned aircraft must operate in accordance with the exception for limited recreational operations (49 U.S.C. 44809), part 107 or part 91, in accordance with a waiver issued under part 107, in accordance with an exemption issued under 14 CFR part 11 (including those persons operating under an exemption issued pursuant to 49 U.S.C. 44807), or in conjunction with the issuance of a special airworthiness certificate, and are required to register.

Respondents: 283,761 registrants and 21,910 de-registrants based on CY 2021 data.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 6 minutes per response to register and 3 minutes per response to de-register.

Estimated Total Annual Burden: Approximately 28,376 hours to register and 1,096 to de-register.

Issued in Oklahoma City, OK on January 11, 2023.

Bonnie Lefko,

Program Analyst, FAA, Civil Aviation Registry, AFB–700.

[FR Doc. 2023–00707 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Approval of Teterboro Airport (TEB) Noise Compatibility Program

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of approval of the Teterboro Airport (TEB) noise compatibility program.

SUMMARY: The Federal Aviation Administration (FAA) announces its findings for the noise compatibility program submitted by LGA, see supplementary information for details. On June 15, 2017, the FAA determined that the noise exposure maps submitted by TEB were in compliance with applicable requirements. On July 15, 2022, the FAA determined that the noise compatibility program submitted by TEB would be initiating final review for approval or disapproval. On January 10, 2023, the FAA approved the TEB noise compatibility program. The noise compatibility program contained 33 recommended measures, including 16 noise abatement measures, four land use measures, and 13 program management measures. Of the measures proposed, 23 were approved, four were approved as voluntary, three were disapproved, and three were determined to have no FAA action as continuations of existing mandatory practices at TEB. Six of the 16 noise abatement procedures proposed at LGA are related to new or revised flight procedures.

DATES: The effective date of the FAA's approval of the LGA noise compatibility program is January 10, 2023.

FOR FURTHER INFORMATION CONTACT: Andrew Brooks, Regional Environmental Program Manager, Airports Division, Federal Aviation Administration, 1 Aviation Plaza, Room 516, Jamaica, NY 11434. Phone Number: 718–553–2511.

SUPPLEMENTARY INFORMATION: This notice announces FAA's approval of the noise compatibility program (NCP) for TEB, effective on January 10, 2023. Per United States Code section 47504 (49 U.S.C. 47504) and Title 14, Code of Federal Regulations (CFR) part 150, an airport sponsor who previously submitted a noise exposure map (NEM) may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport sponsor for the reduction of existing non-compatible land uses and prevention of additional non-compatible land uses within the area covered by the NEMs. As required by 49 U.S.C. 47504, such programs must be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and the FAA. The FAA does not substitute its judgment for that of the airport sponsor with respect to which measures should be recommended for action. The FAA approval or disapproval of an airports recommendations in their noise compatibility program are made in accordance with the requirements and standards pursuant to 49 U.S.C. 47504 and 14 CFR part 150, which is limited to the following determinations:

a. The noise compatibility program was developed in accordance with the provisions and procedures of 14 CFR 150.23;

b. Program measures are reasonably consistent with achieving the goals of reducing existing non-compatible land uses around the airport and preventing the introduction of additional non-compatible land uses;

c. Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal Government; and

d. Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the navigable airspace and air traffic control systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations of FAA's approval of NCPs are delineated in 14 CFR 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, state, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the noise compatibility program nor a determination that all measures covered by the NCP are eligible for grant-in-aid funding from the FAA. Where federal funding is sought, requests must be submitted to the FAA New York Airports District Office at 1 Aviation Plaza, Room 111, Jamaica, New York 11434.

TEB submitted the noise exposure maps, descriptions, and other documentation produced during the noise compatibility planning study to the FAA and the FAA determined that the NEMs for TEB were in compliance with applicable requirements under 14 CFR 150, effective June 15, 2017 (Noise Exposure Map Notice for Teterboro Airport, Teterboro, New Jersey, volume 82, **Federal Register**, pages 28545–6, June 22, 2017). The FAA formally received the NCP based on the accepted NEMs for TEB on July 7, 2022. The airport operator requested that the FAA review the submitted material and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved

as a NCP. The formal review period, limited by law to a maximum of 180 days, was initiated on July 15, 2022. Notice of the intent to review the NCP was published in the **Federal Register** on July 21, 2022 (Notice of Receipt and Request for Review of Noise Compatibility Program, volume 87, **Federal Register**, pages 43594–5, July 21, 2022). That **Federal Register** Notice also announced the start of a 60-day period of public review for the NCP documentation. The FAA received no comments from interested parties during the public review period.

The TEB proposed NCP is comprised of actions designed for phased implementation by airport management and adjacent jurisdictions within the next one to five years. It was requested that the FAA evaluate and approve this material as a noise compatibility program as described in 49 U.S.C. 47504. The FAA began its review of the program on July 15, 2022 and was required by a provision of 49 U.S.C. 47504 to approve or disapprove the program within 180 days, other than the use of new or modified flight procedures for noise control. Failure to approve or disapprove such program within the 180-day period shall be deemed an approval of such program.

The submitted program contained 33 proposed measures to minimize impacts of aviation noise on and off the airport. The FAA completed its review and determined that the procedural and substantive requirements of the 49 U.S.C. 47504 and 14 CFR part 150 were satisfied. A Record of Approval for the overall program was issued by the FAA, effective January 10, 2023.

The specific program elements and their individual determinations are as follows:

Noise Abatement (NA) Measure 1: Implement a Runway 24 Departure Turn to 230 degrees at Night—Approved as Voluntary.

NA Measure 2: Encourage Intersection Departures from Taxiway K on Runway 1 at Night—Approved as Voluntary.

NA Measure 3: Design and Implement a Centralized Aircraft Run-up Pad—Approved.

NA Measure 4: Implement an Offset Approach Procedure to Runway 19—Disapproved for Purposes of Part 150.

NA Measure 5: Implement an Offset Approach Procedure to Runway 6—Disapproved for Purposes of Part 150.

NA Measure 6: Implement a Published Approach Procedure to Runway 1 and Increase Usage at Night—Approved as Voluntary.

NA Measure 7: Implement a Published Departure Procedure from Runway 19—Disapproved for Purposes of Part 150.

NA Measure 8: Existing Mandatory Permission to Operate Jet Aircraft—No Action.

NA Measure 9: Existing Mandatory Noise Limits—No Action.

NA Measure 10: Existing Mandatory Aircraft Maintenance Run-Up Restrictions—No Action.

NA Measure 11: Existing Voluntary Restraint from Operations between 11:00 p.m. and 6:00 a.m.—Approved.

NA Measure 12: Existing Voluntary Preferential Runway Use at Night—Approved.

NA Measure 13: Existing Voluntary Encouragement of the Use of National Business Aviation Association (NBAA) Noise Abatement Departure Procedures (NADP)—Approved.

NA Measure 14: Existing Voluntary Restraint from the Use of Reverse Thrust—Approved.

NA Measure 15: Existing Voluntary IFR and VFR Approach and Landing Procedures to Runway 1 at Night—Approved.

NA Measure 16: Existing Voluntary Helicopter Routes—Approved.

Land Use (LU) Measure 1: Acquire Non-compatible Residential Parcels—Approved.

LU Measure 2: Sound-Insulate Eligible Dwelling Units—Approved.

LU Measure 3: Sound-Insulate Eligible Non-Residential Noise-Sensitive Structures—Approved.

LU Measure 4: Assist with Establishing an Airport Noise Overlay Zone—Approved.

Program Management (PM) Measure 1: Maintain Noise Office—Approved.

PM Measure 2: Maintain Noise and Operations Management System—Approved.

PM Measure 3: Maintain Public Flight Tracking Portal—Approved.

PM Measure 4: Maintain Noise Complaint Management System—Approved.

PM Measure 5: Maintain Noise Office Website—Approved.

PM Measure 6: Continue Community Outreach Activities—Approved.

PM Measure 7: Establish a Community Planners Forum—Approved.

PM Measure 8: Establish and Manage a Fly Quiet Program—Approved as Voluntary.

PM Measure 9: Make Aircraft Noise Contours Available in a Geographic Information System (GIS)—Approved.

PM Measure 10: Update the Noise Exposure Map—Approved.

PM Measure 11: Update the Noise Compatibility Program—Approved.

PM Measure 12: Update Airfield Noise Abatement Program Signage—Approved.

PM Measure 13: The Port Authority To Coordinate With the FAA on Development and Implementation of NextGen Procedures—Approved.

These determinations are set forth in detail in the Record of Approval signed by the FAA Airports Eastern Division Director on January 10, 2023. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above. The Record of Approval also will be available on the internet on the FAA's website at *http://www.faa.gov/airports/environmental/airport_noise/part_150/states/* and the Port Authority of New York and New Jersey's website at *http://panynjpart150.com/TEB_documents.asp.*

Issued in Jamaica, NY, on January 10, 2023.

David A. Fish,

Director, Airports Division, Eastern Region.

[FR Doc. 2023–00651 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 2023–0088]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Airman Knowledge Test Registration Collection

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval of a renewed collection. The collection involves the voluntary submission of information for registration of an Airman Knowledge Test as part of the FAA Airman Certification Process. The information collected is necessary to ensure compliance and proper registration of an individual for the necessary knowledge test for the certification or rating pursued by the individual.

DATES: Written comments should be submitted by March 20, 2023.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Ryan C. Smith, Airman Testing Standards (AFS–630) 6500 S MacArthur Blvd., Oklahoma City, OK 73169.

By fax: n/a.

FOR FURTHER INFORMATION CONTACT: Ryan C. Smith by email at: *Ryan.C.Smith@faa.gov.* Phone: 405–651–5400.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0792.

Title: Airman Knowledge Test Registration Collection.

Form Numbers: There are no forms associated with this collection.

Type of Review: Renewed information collection.

Background: Individuals pursuing an FAA certificate or rating to operate in the National Airspace System (NAS) must meet the standards established in the FAA regulations specific to the certificate sought by the individual. FAA certification requires that an individual must successfully pass an Airman Knowledge Test as part of the requirements to obtain an FAA certificate or rating. The FAA develops and administers 90 different knowledge tests in many different areas that are required as part of the overall airman certification process.

Airman Knowledge Tests are administered at approved Knowledge Testing Centers by an approved test proctor who is required to administer the appropriate Airman Knowledge Test to the individual pursuing FAA certification. Individuals taking an FAA Airman Knowledge Test must provide the following information to be collected in order to complete the registration process before the administration of the Airman Knowledge Test: Name, FAA Tracking Number (FTN), physical address, Date of Birth, email address, photo identification, phone number, test authorization (credentials of the individual such as an instructor endorsement), and previous number of test attempts.

The information provided by the individual is collected and stored electronically in the application used for test registration and delivery. This information is used to determine the identify and eligibility of the individual for compliance of FAA certification requirements.

Respondents: 210,000 annually.

Frequency: n/a.

Estimated Average Burden per Response: 2 minutes.

Estimated Total Annual Burden: 7,000 hours annually.

210,000 respondents × 2 minutes each = 420,000 minutes.

420,000 minutes/60 minutes in an hour = 7,000 hours annually.

Issued in Oklahoma City, OK, on January 11, 2023.

Ryan C. Smith,

Airman Knowledge Testing Program Manager, Airman Testing Standards Branch (AFS–630).

[FR Doc. 2023–00719 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2017–0109]

Petition for Extension of Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on October 6, 2022, and November 29, 2022,[1] The Port Authority Trans-Hudson Corporation (PATH) petitioned the Federal Railroad Administration (FRA) for an extension of a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 229, Railroad Locomotive Safety Standards. The relevant FRA Docket Number is FRA–2017–0109.[2]

Specifically, PATH seeks to extend its waiver of compliance from a portion of 49 CFR 229.123, *Emergency roof access,* which requires passenger cars ordered on or after April 1, 2009, or placed in service for the first time on or after April 1, 2011, to have two emergency roof access locations. Alternatively, PATH requests continued approval to install a single emergency roof access location on any newly ordered passenger cars. In support of its request, PATH states that its PA–5 vehicles are of a ''unique nature'' and PATH's operations are ''more representative of an inter-urban rapid transit system.'' The supplemental information further adds that the vehicles have ''multiple emergency exits on each side . . . that can be opened by the passengers or first responders in the event of an emergency.''

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov*.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Communications received by March 20, 2023 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), the U.S. Department of Transportation (DOT) solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy*. See also *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov*.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety Chief Safety Officer.

[FR Doc. 2023–00687 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–06–P

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[1] PATH submitted supplemental information to its October 6, 2022, petition, by letter dated November 29, 2022.

[2] Additional relief applicable to this equipment (pertaining to requirements for each lead locomotive to be equipped with a pilot, snowplow, or end plate across both rails) may be found in Docket Number FRA–2008–0135.

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2022–0096]

Notice of Application for Approval of Discontinuance or Modification of a Railroad Signal System

Under part 235 of title 49 Code of Federal Regulations (CFR) and 49 U.S.C. 20502(a), this document provides the public notice that on November 2, 2022, and December 1, 2022, Amtrak petitioned the Federal Railroad Administration (FRA) seeking approval to discontinue or modify a signal system. FRA assigned the petition Docket Number FRA–2022–0096.

Specifically, Amtrak requests permission to retire fixed wayside signals between Bridge Interlocking at milepost (MP) 98.2, Baltimore, Maryland, and Grove Interlocking at MP 112.4, Severn, Maryland, on Amtrak's Mid-Atlantic Division, from Main Line Philadelphia to Washington, Northeast Corridor. In its petition, Amtrak states that it plans to ''convert approximately [14] miles of its cab signal with fixed automatic block signal system to a signal system having cab signals without fixed automatic block signals, operated under NORAC Rule 562.'' Therefore, Amtrak determined that ''the automatic block signals are not necessary and require additional maintenance.'' Amtrak seeks permission to remove wayside signals at automatic block points in three locations: 1) 994 and 1014 on Track Nos. 1, 2, 3, and A Track; 2) 1031 and 1034 on Track Nos. 2 and 3; and 3) 1054, 1078, and 1102 on Track Nos. 1, 2, and 3. Amtrak adds that all locations will remain in service as block points without wayside signals.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Communications received by March 20, 2023 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), the U.S. Department of Transportation (DOT) solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacy-notice* for the privacy notice of regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2023–00688 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2003–15012]

Petition for Extension of Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on November 17, 2022, Canadian National Railway Company (CN) petitioned the Federal Railroad Administration (FRA) for an extension of a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 241 (United States Locational Requirements for Dispatching of United States Rail Operations). The relevant FRA Docket Number is FRA–2003–15012.

Specifically, CN requests an extension of relief pursuant to 49 CFR 241.7(c), *Fringe border dispatching,* to allow the continuation of Canadian dispatching of two locations in the United States: the portion of the Sprague Subdivision extending approximately 43.8 miles between Baudette and International Boundary, Minnesota, and the portion of the Strathroy Subdivision extending approximately 3.1 miles between Sarnia, Ontario, Canada, through the St. Clair River Tunnel, to Port Huron, Michigan.[1] CN notes that since FRA's August 29, 2018, decision letter, CN has idled the Rail Traffic Control Center at Macmillan Yard in Concord (Toronto), Ontario. Therefore, CN is only seeking relief for the locations dispatched by the Rail Traffic Control Center in Edmonton, Alberta, Canada. In support of its request, CN states that it is ''unaware of any issues that have developed since 2018 regarding the current arrangement [of dispatching].''

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov.*

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted at *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Communications received by March 20, 2023 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), the U.S. Department of Transportation (DOT) solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov.*

[1] Both of these locations are defined in appendix A to part 241, List of Lines Being Extraterritorially Dispatched in Accordance with the Regulations Contained in 49 CFR part 241, Revised as of October 1, 2002.

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2023–00686 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0003]

Establishment of an Emergency Relief Docket for Calendar Year 2023

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of establishment of public docket.

SUMMARY: This Notice announces the establishment of FRA's emergency relief docket (ERD) for calendar year 2023. The designated ERD for calendar year 2023 is docket number FRA–2023–0003.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** section for further information regarding submitting petitions and/or comments to docket number FRA–2023–0003.

SUPPLEMENTARY INFORMATION: On May 19, 2009, FRA published a direct final rule establishing ERDs and the procedures for handling petitions for emergency waivers of safety rules, regulations, or standards during an emergency situation or event. 74 FR 23329. That direct final rule became effective on July 20, 2009 and made minor modifications to 49 CFR 211.45 in FRA's Rules of Practice in 49 CFR part 211. Section 211.45(b) provides that each calendar year FRA will establish an ERD in the publicly accessible DOT docket system (available at *www.regulations.gov*). Section 211.45(b) further provides that FRA will publish a notice in the **Federal Register** identifying by docket number the ERD for that year. FRA established the ERD and emergency waiver procedures to provide an expedited process for FRA to address the needs of the public and the railroad industry during emergency situations or events. This Notice announces the designated ERD for calendar year 2023 is docket number FRA–2023–0003.

As detailed in § 211.45, if the FRA Administrator determines an emergency event as defined in 49 CFR 211.45(a) has occurred, or that an imminent threat of such an emergency occurring exists, and public safety would benefit from providing the railroad industry with operational relief, the emergency waiver procedures of 49 CFR 211.45 will go into effect. In such an event, the FRA Administrator will issue a statement in the ERD indicating the emergency waiver procedures are in effect and FRA will make every effort to post the statement on its website at *railroads.dot.gov.* Any party desiring relief from FRA regulatory requirements as a result of the emergency should submit a petition for emergency waiver under 49 CFR 211.45(e) and (f). Specific instructions for filing petitions for emergency waivers under 49 CFR 211.45 are found at 49 CFR 211.45(f). Specific instructions for filing comments in response to petitions for emergency waivers are at 49 CFR 211.45(h).

Privacy

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety Chief Safety Officer.

[FR Doc. 2023–00690 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Meeting of the Transit Advisory Committee for Safety

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice of public meeting.

SUMMARY: The Federal Transit Administration (FTA) announces a public meeting of the Transit Advisory Committee for Safety (TRACS).

DATES: The TRACS meeting will be held on January 31, 2023, from 1:00 p.m. to 4:30 p.m. Eastern Time. Requests to attend the meeting must be received no later than January 24, 2023. Requests for disability accommodations must be received no later than January 24, 2023. Requests to verbally address the committee during the meeting must be submitted with a written copy of the remarks to the U.S. Department of Transportation (DOT) no later than January 24, 2023. Requests to submit written materials to be reviewed during the meeting must be received no later than January 24, 2023.

ADDRESSES: The meeting will be held virtually via Zoom for Government. Any committee related requests should be sent by email to *TRACS@dot.gov.* The virtual meeting's online access link and a detailed agenda will be provided upon registration. They will also be posted on the TRACS web page at: *https://www.transit.dot.gov/regulations-and-guidance/safety/transit-advisory-committee-safety-tracs* one week in advance of the meeting. A copy of the meeting minutes and other TRACS related information will also be available on the TRACS web page.

FOR FURTHER INFORMATION CONTACT: Joseph DeLorenzo, TRACS Designated Federal Officer, Associate Administrator, FTA Office of Transit Safety and Oversight, (202) 366–1783, *Joseph.DeLorenzo@dot.gov;* or Bridget Zamperini, TRACS Program Manager, FTA Office of Transit Safety and Oversight, *TRACS@dot.gov.*

SUPPLEMENTARY INFORMATION:

This notice is provided in accordance with the Federal Advisory Committee Act (FACA) (Pub. L. 92–463, 5 U.S.C. App. 2). TRACS is composed of 25 members representing a broad base of perspectives on transit safety necessary to discharge its responsibilities. Please see the TRACS web page for additional information at *https://www.transit.dot.gov/regulations-and-guidance/safety/transit-advisory-committee-safety-tracs.*

I. Background

The U.S. Secretary of Transportation (Secretary) established TRACS in accordance with FACA to provide information, advice, and recommendations to the Secretary and FTA Administrator on matters relating to the safety of public transportation systems.

II. Agenda

- Welcome Remarks and Introductions
- Overview of Virtual Meeting Platform Functions
- Review of TRACS Tasks, Subcommittees, and Subcommittee Work Plans
- Discussion of Future TRACS Activities
- Chair and Vice Chair Selection

- Subcommittee Assignments
- Public Comments
- Adjournment and Next Steps

III. Public Participation

The meeting will be open to the public. Members of the public who wish to participate are asked to register via email by submitting their name and affiliation to the email address listed in the **ADDRESSES** section.

DOT is committed to providing equal access to this meeting for all participants. If you need alternative formats or services because of a disability, such as sign language, interpretation, or other ancillary aids, please contact the email address listed in the **ADDRESSES** section.

There will be a total of 30 minutes allotted for oral comments from members of the public at the meeting. To accommodate as many speakers as possible, the time for each commenter may be limited. Individuals wishing to reserve speaking time during the meeting must submit a request with the individual's name, address, and organizational affiliation to the email address listed in the **ADDRESSES** section.

Written and oral comments for consideration by TRACS during the meeting must be submitted no later than the deadline listed in the **DATES** section to ensure transmission to TRACS members prior to the meeting. Comments received after that date will be distributed to the members but may not be reviewed prior to the meeting.

Nuria I. Fernandez,

Administrator.

[FR Doc. 2023–00636 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0014; Notice 1]

Porsche Cars North America, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: Porsche Cars North America, Inc., (Porsche) has determined that certain model year (MY) 2020–2021 Porsche Panamera motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 126, *Electronic Stability Control Systems for Light Vehicles,* No. 135, *Light Vehicle Brake Systems,* FMVSS No. 138, *Tire Pressure Monitoring Systems.* Porsche filed a noncompliance report dated December 15, 2021. Porsche subsequently petitioned NHTSA on January 14, 2022, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces receipt of Porsche's petition.

DATES: Send comments on or before February 16, 2023.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the docket. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Vince Williams, General Engineer, NHTSA, Office of Vehicle Safety Compliance, (202) 366–2319.

SUPPLEMENTARY INFORMATION:

I. Overview: Porsche has determined that certain MY 2020–2021 Porsche Panamera motor vehicles do not fully comply with the requirements of paragraph S5.3.4 of FMVSS No. 126, *Electronic Stability Control Systems for Light Vehicles* (49 CFR 571.126), paragraph S5.5.2 of No. 135, *Light Vehicle Brake Systems* (49 CFR 571.135); paragraph S4.3.3 of FMVSS No. 138, *Tire Pressure Monitoring Systems* (49 CFR 571.138). Porsche filed a noncompliance report dated December 15, 2021, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Porsche subsequently petitioned NHTSA on January 14, 2022, for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of Porsche's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any Agency decision or other exercise of judgment concerning the merits of the petition.

II. Vehicles Involved: Approximately 4,720 MY 2020–2021 Porsche Panamera motor vehicles manufactured between November 3, 2020, and December 8, 2021, are potentially involved.

III. Noncompliance: Porsche explains that the noncompliance is that the digital telltales do not illuminate during the lamp check function when the ignition is in the ''On'' position.

IV. Rule Requirements: Paragraph S5.3.4 of FMVSS No. 126, paragraph S5.5.2 of FMVSS No. 135, and

paragraph S4.3.3 of FMVSS No. 138 include the requirements relevant to this petition:

• Except when a starter interlock is in operation, each ESC malfunction telltale must be activated as a check of lamp function either when the ignition locking system is turned to the ''On'' (''Run'') position when the engine is not running, or when the ignition locking system is in a position between ''On'' (''Run'') and ''Start'' that is designated by the manufacturer as a check position.

• All indicators shall be activated as a check function by either: (1) automatic activation when the ignition (start) switch is turned to the ''On'' (''Run'') position when the engine is not running, or when the ignition (''Start'') switch is in a position between ''On'' (''Run'') and ''Start'' that is designated by the manufacturer as a check position, or (2) a single manual action by the driver, such as momentary activation of a test button or switch mounted on the instrument panel in front of and in clear view of the driver, or, in the case of an indicator for application of the parking brake, by applying the parking brake when the ignition is in the ''On'' (''Run'') position. In the case of a vehicle that has an interlock device that prevents the engine from being started under one or more conditions, check functions meeting the two aforementioned requirements need not be operational under any condition in which the engine cannot be started. The manufacturer must explain the brake check function test procedure in the owner's manual.

• Except when a starter interlock is in operation, each low tire pressure warning telltale must illuminate as a check of lamp function either when the ignition locking system is activated to the ''On'' (''Run'') position when the engine is not running, or when the ignition locking system is in a position between ''On'' (''Run'') and ''Start'' that is designated by the manufacturer as a check position.

V. Summary of Porsche's Petition: The following views and arguments presented in this section, ''V. Summary of Porsche's Petition,'' are the views and arguments provided by Porsche. They have not been evaluated by the Agency and do not reflect the views of the Agency. Porsche begins by describing the subject noncompliance and stating its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

Porsche explains that the telltale displays for several systems found in the subject vehicles, including the ESC system, brake system, and the tire pressure monitoring system (TPMS), do not use light bulbs or lamps but instead ''utilize Thin-film-transistor (TFT) LCD technology.'' Therefore, according to Porsche, ''the bulb check or lamp check requirements of the cited FMVSS would not fulfill the safety purpose for which these requirements were originally written.''

Porsche claims that despite the subject noncompliance, ''there is no adverse effect on the function on the warning telltale itself in the intended (warning) cases for any of the FMVSS-required telltales'' because in the event that the system fails, the corresponding light would still illuminate.

Porsche states that when the bulb check requirements were first developed in 1969, vehicles used light bulbs with filament which ''had a limited life span and were expected to fail routinely during the life of the vehicle,'' therefore the bulb check requirements were intended to notify the driver of these anticipated bulb failures. According to Porsche, because the subject vehicles instead use LCD displays which ''do not use filaments and have an expected life span that far exceeds the expected useful life of the vehicle,'' the required bulb check function is ''superfluous to safety.''

Furthermore, Porsche says that ''even in the event of an illumination failure of the subject displays, the nature of the LCD cluster would make the failure obvious to the driver, eliminating the need for a bulb check.'' If the display were to malfunction, Porsche explains that ''the entire LCD display would go dark, leaving a substantial, and obvious portion of the instrument cluster dark'' which would immediately alert the driver. Therefore, Porsche claims that NHTSA's stated purpose of the bulb check requirement [1] would be fulfilled.

Additionally, Porsche claims that ''NHTSA also has recognized that these types of multi-function displays would not be expected to have the same functionality as traditional telltales and therefore may meet bulb check requirements in different ways.'' Porsche references the FMVSS No. 126 final rule published by NHTSA on April 6, 2007,[2] to support its assertion that NHTSA has previously determined that a bulb check is not relevant or necessary to the type of display technology utilized for information/message centers. Therefore, if the display experiences a problem analogous to one which would be found by a telltale's bulb check, the entire message center would be non-operational, a situation likely to be rapidly discovered by the driver.

Porsche concludes by stating its belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that Porsche no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Porsche notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2023–00682 Filed 1–13–23; 8:45 am]

BILLING CODE P

[1] *See* Letter from A. Cooke, Chief Counsel, NHTSA, to R. Clarke, President, Truck Manufacturers Association (March 5, 2007) *https://isearch.nhtsa.gov/files/001402rls.htm.*

[2] *See* 72 FR 17235.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0064; Notice 1]

Nissan North America, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: Nissan North America, Inc., (Nissan), has determined that certain model year (MY) 2022 Nissan Altima motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 110, *Tire Selection and Rims and Motor Home/Recreation*

Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or less. Nissan filed an original noncompliance report dated June 14, 2022. Nissan petitioned NHTSA on July 7, 2022, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of Nissan's petition.

DATES: Send comments on or before February 16, 2023.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Ahmad Barnes, General Engineer, NHTSA, Office of Vehicle Safety Compliance, (202) 366–7236.

SUPPLEMENTARY INFORMATION:

I. Overview: Nissan determined that certain MY 2022 Nissan Altima Midnight Edition 2WD motor vehicles do not fully comply with paragraph S4.3(d) of FMVSS No. 110, *Tire Selection and Rims and Motor Home/Recreation Vehicle Trailer Load Carrying Capacity Information for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or less.* (49 CFR 571.110).

Nissan filed an original noncompliance report dated June 14, 2022, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Nissan petitioned NHTSA on July 7, 2022, for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of Nissan's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or another exercise of judgment concerning the merits of the petition.

II. Vehicles Involved: Approximately 4,537 MY 2022 Nissan Altima Midnight Edition 2WD motor vehicles, manufactured between November 3, 2021, and April 4, 2022, are potentially involved.

III. Noncompliance: Nissan explains that the subject vehicles are equipped with a spare tire that does not match the spare tire size designation identified on the tire placard. Specifically, the subject vehicles were equipped with the all-wheel drive (AWD) T135/90D16 sized spare tire instead of the two-wheel drive (2WD) T135/70D16 sized spare tire as intended and stated on the vehicle placard. Therefore, the vehicle placard does not state the correct spare tire size as required by paragraph S4.3(d) of FMVSS No. 110.

IV. Rule Requirements: Paragraph S4.3(d) of FMVSS No. 110 includes the requirements relevant to this petition. Each vehicle, except for a trailer or incomplete vehicle, must show the tire size designation on a placard permanently affixed to the driver's side B-pillar and indicated by the headings ''size'' or ''original tire size'' or ''original size,'' and ''spare tire'' or ''spare,'' for the tires installed at the time of the first purchase for purposes other than resale. For full size spare tires, the statement ''see above'' may, at the manufacturer's option replace the tire size designation. If no spare tire is provided, the word ''none'' must replace the tire size designation.

V. Summary of Nissan's Petition: The following views and arguments presented in this section, ''V. Summary of Nissan's Petition,'' are the views and arguments provided by Nissan. They have not been evaluated by the Agency and do not reflect the views of the Agency. Nissan describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

Nissan explains that the subject vehicles were equipped with an AWD tire instead of the intended 2WD that is identified on the vehicle placard with the tire size designation ''T135/70D16.'' However, Nissan claims ''that the AWD tire was an acceptable fitment for the subject vehicles and the tire pressures are the same for both spare tire sizes (AWD and 2WD).'' According to Nissan, overloading would not occur if the tire pressure stated on the vehicle placard is applied to the spare tire, and other than the subject noncompliance, the tires equipped on the subject vehicles meet the requirements provided in FMVSS No. 110.

Nissan says that the tire inflation pressure stated on the vehicle placard is correct for both the spare tire equipped on the subject vehicle (T135/90D16) and the spare tire size designation stated on the vehicle placard (T135/70D16). Therefore, Nissan believes the subject noncompliance ''is unlikely to result in overloading because when checking the placard to determine inflation pressure for the spare tire, the customer will find the correct tire pressure value on the label.''

Nissan states that both tire sizes can be used on the subject vehicles because the AWD (T135/90D16) tire equipped on the subject vehicle has a higher load rating (102) than the 2WD (T135/70D16) tire indicated on the vehicle placard (100). Nissan also states that the purpose of FMVSS No. 110 is to prevent tire overloading which would not occur due to the subject noncompliance because both the equipped AWD tire and the intended 2WD tire can be used on the subject vehicle.

Nissan states that correct information for both the AWD and 2WD spare tire sizes is readily available to the consumer in the owner's manual provided with the vehicle. Furthermore, Nissan says that its belief that the subject noncompliance is inconsequential to motor vehicle safety is supported by field data. Nissan also states that it is not aware of any customer complaints, accidents, or injuries regarding the subject noncompliance.

NHTSA has previously granted petitions for inconsequentiality for noncompliances Nissan believes to be similar to the subject noncompliance. Nissan refers to a petition submitted by Mercedes-Benz USA, LLC,[1] in which the tire placard incorrectly identifies the spare tire size due to a labeling error. In that case, NHTSA found the noncompliance to be inconsequential because (1) both the tire equipped on those vehicles and the tire indicated by the tire placard could be used and are appropriate for the affected vehicle's maximum loaded weight conditions, (2) in the event that a consumer inadvertently used the labeled inflation pressure to inflate the originally equipped spare tire, the tire load rating would be sufficient for the maximum loaded vehicle weight, and (3) the owner's manual for the affected vehicles describes both spare tire sizes which can be used by the consumer to ensure either tire size is appropriate for use.

Nissan concludes by stating its belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety and its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that Nissan no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Nissan notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2023–00684 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–59–P

[1] Mercedes-Benz USA, LLC, Grant of Petition for Decision of Inconsequential Noncompliance, 82 FR 5640 (January 18, 2017).

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0113; Notice 1]

Mack Trucks, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Receipt of petition.

SUMMARY: Mack Trucks, Inc., (Mack Trucks), has determined that certain model year (MY) 2015–2023 Mack GU/GR Class 8 trucks and truck-tractors do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective Devices, and Associated Equipment*. Mack Trucks filed an original noncompliance report dated November 1, 2022, and amended the report on November 3, 2022. Mack Trucks petitioned NHTSA on November 23, 2022, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of Mack Trucks' petition.

DATES: Send comments on or before February 16, 2023.

ADDRESSES: Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/*. Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a

Federal Register notice published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Leroy Angeles, Safety Compliance Engineer, Office of Vehicle Safety Compliance, NHTSA, (202) 366–5304.

SUPPLEMENTARY INFORMATION:

I. Overview: Mack Trucks determined that certain MY 2015–2023 Mack GU/GR Class 8 trucks and truck-tractors do not fully comply with paragraph S6.4.3(a) and Table V-b of FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment* (49 CFR 571.108).

Mack Trucks filed an original noncompliance report dated November 1, 2022, and amended the report on November 3, 2022, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. Mack Trucks petitioned NHTSA on November 23, 2022, for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

This notice of receipt of Mack Trucks' petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or another exercise of judgment concerning the merits of the petition.

II. Vehicles Involved: Approximately 27,544 MY 2015–2023 Mack GU/GR Class 8 trucks and truck-tractors, manufactured between September 1, 2014, and September 30, 2022, are potentially involved:

III. Noncompliance: Mack Trucks explains that the subject vehicles are equipped with turn signal lamps that do not meet the visibility requirement specified by S6.4.3(a) and Table V-b of FMVSS No. 108. Specifically, in the direction of the corner point 15 degrees downward and 45 degrees inboard angle, the turn signal lamps provide less than the required 1,250 sq mm of unobstructed effective projected luminous lens area.

I*V. Rule Requirements:* Paragraph S6.4.3 of FMVSS No. 108 includes the requirements relevant to this petition. A manufacturer is required to certify compliance of each lamp function to one of two visibility requirement options: the lens area option or the luminous intensity option. The manufacturer may not thereafter choose a different option for that vehicle.

V. Summary of Mack Trucks' Petition: The following views and arguments presented in this section, ''V. Summary of Mack Trucks' Petition,'' are the views and arguments provided by Mack Trucks. They have not been evaluated by the Agency and do not reflect the views of the Agency. Mack Trucks describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

Mack Trucks explains that after FMVSS No. 108 was updated in 2014, certain vehicle configurations were not updated accordingly which resulted in the subject vehicles being noncompliant with the taillamp signal visibility requirements provided in S6.4.3. Mack Trucks states that due to an unrelated engineering change, the subject noncompliance was identified. Mack Trucks found the GU and GR Axle Back models of the subject vehicles only provided at least 1,250 sq mm of unobstructed view until the 15 degrees downward and 37 degrees inboard angle instead of the required 15 degrees downward and 45 degrees inboard angle. For the GU and GR Axle Forward and Axle Forward Extended Frame Rails models of the subject vehicles, Mack Trucks found that the required visibility area was only provided until the 7 degrees downward and 45 degrees inboard angle instead of the 15 degrees downward and 45 degrees inboard angle that is required by S6.4.3(a) and Table V-b of FMVSS No. 108.

Mack Trucks provides illustrations of the subject vehicles in its petition to show how the noncompliance occurs on the affected vehicle configurations.

Mack Trucks concludes by stating its belief that the subject noncompliance is inconsequential to motor vehicle safety and its petition for relief from providing notice and remedy for the noncompliance be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject vehicles that Mack Trucks no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Mack Trucks notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.)

Otto G. Matheke III,

Director, Office of Vehicle Safety Compliance.

[FR Doc. 2023–00683 Filed 1–13–23; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Agency Information Collection Activities; Proposed Collection; Comment Request; Beneficial Ownership Information Reports

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice and request for comments.

SUMMARY: FinCEN invites all interested parties to comment on the report that will be used to collect beneficial ownership information, as required by the Beneficial Ownership Information Reporting Requirements final rule that was published on September 30, 2022. The details included in the information collection are listed below. This request for comment is made pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments are welcome and must be received on or before March 20, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2023–0002 and the specific Office of Management and Budget (OMB) control number 1506–0076.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2023–0002 and OMB control number 1506–0076.

Please submit comments by one method only. Comments will be reviewed consistent with the Paperwork Reduction Act of 1995 (PRA) and applicable OMB regulations and guidance. Comments submitted in response to this notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at 1–800–767–2825 or electronically at *https://www.fincen.gov/contact.*

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Provisions

FinCEN issued the Beneficial Ownership Information Reporting Requirements final rule on September 30, 2022 (''final BOI reporting rule'').[1] The final BOI reporting rule requires certain legal entities to file with FinCEN reports that identify the beneficial owners of the entity. Entities created or registered to do business on or after January 1, 2024, must also identify the individual who directly filed the document with specified governmental authorities that created the entity or registered it to do business, as well as the individual who was primarily responsible for directing or controlling such filing if more than one individual was involved in the filing of the document. Further, the regulations describe who must file a report, what information must be provided, and when a report is due. Entities must certify that the report is true, correct, and complete.

These regulations implement Section 6403 of the Corporate Transparency Act (CTA), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA).[2] The requirements are intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on reporting entities.

II. Paperwork Reduction Act of 1995[3]

Title: Beneficial Ownership Information (BOI) Reports.

OMB Control Number: 1506–0076.

Type of Review: Regular.

Description: In accordance with the CTA, the rule imposes a new reporting requirement on certain entities (''reporting companies'') to file with FinCEN reports that identify the entities' beneficial owners, as well as, in certain cases, the individual who directly filed the document with specified governmental authorities that created the entity or registered it to do business, as well as the individual who was primarily responsible for directing or controlling such filing, if more than one individual was involved in the filing of the document (''company applicants'').[4] The reports are to be filed electronically through an online interface. The report must also contain information about the entity itself. The reporting company must certify that the report is true, correct, and complete. The rule also requires that reporting companies update the information in these reports as needed, and correct any previous incorrectly reported information, within specific timeframes. The collected information will be maintained by FinCEN and made accessible to authorized users.

Report: None.

Affected Public: Domestic entities that are: (1) corporations; (2) limited liability companies; or (3) created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe, and foreign entities that are: (1) corporations, limited liability companies, or other entities; (2) formed under the law of a foreign country; and (3) registered to do business in any state or Tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the laws of a state or Indian tribe. The rule does not require corporations, limited liability companies, or other entities that are described in any of 23 specific exemptions[5] to file BOI reports, except that certain foreign legal entities that qualify as pooled investment vehicles must report the BOI of an individual who exercises substantial control over the pooled investment vehicle.[6]

Estimated Number of Respondents: As explained in detail in the final BOI reporting rule regulatory impact analysis (RIA), the number of entities that are reporting companies is difficult to estimate.[7] FinCEN assumes that all entities created or registered prior to the effective date of January 1, 2024, that are subject to the BOI reporting requirement will submit their initial BOI reports in Year 1 (2024), as required by the rule. Therefore, FinCEN estimates that 32,556,929 entities will submit initial BOI reports in Year 1 (2024).[8] In Year 2 (2025) and beyond, FinCEN estimates that the number of initial BOI reports filed will be 4,998,468 per year, which is the same estimate as the number of new entities per year that meet the definition of reporting company and are not exempt.[9] The total five-year average of expected BOI initial reports is 10,510,160. In order to estimate the total burden hours and costs associated with the reporting requirement, FinCEN further assesses a distribution of the reporting companies' beneficial ownership structure. FinCEN assumes that 59 percent of reporting companies will have a simple structure (*i.e.,* 1 beneficial owner who is also the company applicant), 36.1 percent will have an intermediate structure (*i.e.,* 4 beneficial owners and 1 company applicant), and 4.9 percent will have a complex structure (*i.e.,* 8 beneficial owners and 2 company applicants). FinCEN estimates that 6,578,732 updated BOI reports will be filed in Year 1 (2024), and 14,456,452 such reports will be filed annually in Year 2 (2025) and beyond.[10] The total five-year average of expected BOI update reports is 12,880,908.

Frequency of Response: As required.[11]

Estimated Time per Respondent: FinCEN has updated the estimated time burden per respondent to account for comments received to the notice of proposed rulemaking (NPRM) that preceded the final BOI reporting rule.[12] Considering the comments and the final BOI reporting rule, it is apparent that the time burden for filing initial BOI reports will vary depending on the complexity of the reporting company's structure. FinCEN therefore estimates a range of time burdens associated with filing an initial BOI report to account for the likely variance among reporting

[1] 87 FR 59498 (Sept. 30, 2022).

[2] Specifically, the CTA is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (Jan. 1, 2021). Division F of the NDAA is the Anti-Money Laundering Act of 2020, which includes the CTA. Section 6403 of the CTA, among other things, amends the Bank Secrecy Act (BSA) by adding a new section 5336, Beneficial Ownership Information Reporting Requirements, to subchapter II of chapter 53 of title 31, United States Code.

[3] Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

[4] 31 U.S.C. 5336(b) and 31 CFR 1010.380(b).

[5] *See* 31 CFR 1010.380(c)(2).

[6] *See* 31 CFR 1010.380(b)(2)(iii). The special reporting rule for foreign pooled investment vehicle specifies that, ''[i]f more than one individual exercises substantial control over the entity, the entity shall report information with respect to the individual who has the greatest authority over the strategic management of the entity.''

[7] Refer to the final BOI reporting rule RIA for a detailed description of these estimates. *See* 87 FR 59589 (Sept. 30, 2022).

[8] Refer to the final BOI reporting rule RIA cost analysis for the underlying sources and analysis related to this estimate. *See* 87 FR 59562–59579 (Sept. 30, 2022).

[9] Refer to the final BOI reporting rule RIA cost analysis for the underlying sources and analysis related to this estimate. As noted therein, for analysis purposes FinCEN assumes that the number of new entities per year from years 2 through 10 (2025 to 2033) will be the same as the 2024 new entity estimate, which accounts for a growth factor of 13.1 percent per year from the date of the underlying source (2020) through 2024. Annually thereafter, FinCEN assumes no change in the number of new entities. FinCEN provides an alternative cost analysis in the conclusion section where the 13.1 percent growth factor continues throughout the entire 10-year time horizon of the analysis (*i.e.,* through 2033). However, this growth factor is possibly an overestimate given that it is a based on a relatively narrow timeframe of data (two years). *See* 87 FR 59562–59579 (Sept. 30, 2022).

[10] Refer to the final BOI reporting rule RIA cost analysis for the underlying sources and analysis related to these estimates. *See* 87 FR 59562–59579 (Sept. 30, 2022).

[11] For BOI reports, there is an initial filing and subsequent filings; the latter are required as information changes or if previously reported information was incorrect.

[12] 86 FR 69920 (Dec. 8, 2021).

companies. FinCEN estimates the average burden of reporting BOI as 90 minutes per response for reporting companies with simple beneficial ownership structures (40 minutes to read the form and understand the requirement, 30 minutes to identify and collect information about beneficial owners and company applicants, and 20 minutes to fill out and file the report, including attaching an image of an acceptable identification document for each beneficial owner and company applicant). FinCEN estimates the average burden of reporting BOI as 650 minutes per response for reporting companies with complex beneficial ownership structures (300 minutes to read the form and understand the requirement, 240 minutes to identify and collect information about beneficial owners and company applicants, and 110 minutes to fill out and file the report, including attaching an image of an acceptable identification document for each beneficial owner and company applicant). FinCEN estimates the average burden of updating such reports for reporting companies with simple beneficial ownership structures as 40 minutes per update (20 minutes to identify and collect information about beneficial owners or company applicants and 20 minutes to fill out and file the update). FinCEN estimates the average burden of updating such reports for reporting companies with complex beneficial ownership structures as 170 minutes per update (60 minutes to identify and collect information about beneficial owners or company applicants and 110 minutes to fill out and file the update). FinCEN also assesses that reporting companies with intermediate beneficial ownership structures will have a time burden that is the average of the time burden for reporting companies with simple structures and those with complex structures.

Estimated Total Reporting Burden Hours: FinCEN estimates that during Year 1 (2024), the filing of initial BOI reports will result in approximately 118,572,335 burden hours for reporting companies.[13] In Year 2 (2025) and beyond, FinCEN estimates that the filing of initial BOI reports will result in 18,204,421 burden hours annually for new reporting companies.[14] The five-year average of burden hours for initial BOI reports is 38,278,004 hours. FinCEN estimates that filing BOI updated reports in Year 1 (2024) will result in approximately 7,657,096 burden hours for reporting companies.[15] In Year 2 (2025) and beyond, the estimated number of burden hours for updated reports will be 16,826,105.[16] The five-year average of burden hours for updated BOI reports is 14,992,203 hours. The total five-year average of burden hours for BOI reports is 53,270,307.

Estimated Total Reporting Cost: Considering the comments received in response to the NPRM, the final BOI reporting rule makes clear that the costs for filing initial BOI reports will vary depending on the complexity of a reporting company's structure. FinCEN therefore estimates a range of costs associated with filing an initial BOI report to account for the likely variance among reporting companies. FinCEN estimates the average cost of filing an initial BOI report per reporting company to be a range of $85.14 for entities with simple beneficial ownership structures to $2,614.87 for entities with complex beneficial ownership structures.[17] FinCEN estimates the average cost of filing an updated BOI report per reporting company to be $37.84 to $560.81.[18]

For initial BOI reports, the range of total costs in Year 1 (2024), assuming for the lower bound that all reporting companies are simple structures and assuming for the upper bound that all reporting companies are complex structures, is $2.8 billion to $85.1 billion.[19] Applying the distribution of reporting companies' structures explained in connection with Table 1, FinCEN calculates total costs in Year 1 (2024) of initial BOI reports to be $21.7 billion.[20] In Year 2 (2025) and onward, in which FinCEN assumes that initial BOI reports will be filed by newly created entities, the range of total costs is $425.6 million to $13.1 billion annually.[21] Applying the reporting companies' structure distribution, the estimated total cost of initial BOI reports annually in Year 2 (2025) and onward is $3.3 billion.[22] [23]

For updated BOI reports, the range of total costs in Year 1 (2024), assuming for the lower bound that all reporting companies are simple structures and assuming for the upper bound that all reporting companies are complex structures, is $249 million to $3.7 billion.[24] Applying the distribution of reporting companies' structures, FinCEN calculates total costs in Year 1 (2024) of updated BOI reports to be $1 billion.[25] In Year 2 (2025) and onward, the range of total costs is $547 million to $8.1 billion annually.[26] Applying the reporting companies' structure distribution, the estimated total cost of updated BOI reports annually in Year 2 (2025) and onward is $2.3 billion.[27] The total five-year average of costs is $6,996,732,512 for initial reports and $2,033,391,518 for updated reports.

Please note, there are no non-labor costs associated with these collections of information, because FinCEN assumes that reporting companies already have the necessary equipment and tools to comply with the regulatory requirements.

Request for Comments

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control

[13] ((0.59 × 32,556,929) × (90/60)) + ((0.361 × 32,556,929) × (370/60)) + ((0.049 × 32,556,929) × (650/60)) = 118,572,335.

[14] ((0.59 × 4,998,468) × (90/60)) + ((0.361 × 4,998,468) × (370/60)) + ((0.049 × 4,998,468) × (650/60)) = 18,204,421.

[15] ((0.59 × 6,578,732) × (40/60)) + ((0.361 × 6,578,732) × (105/60)) + ((0.049 × 6,578,732) × (170/60)) = 7,657,096.

[16] ((0.59 × 14,456,452) × (40/60)) + ((0.361 × 14,456,452) × (105/60)) + ((0.049 × 14,456,452) × (170/60)) = 16,826,105.

[17] (90/60) × $56.76 = $85.14 and ((650/60) × $56.76) + $2,000 = $2,614.87.

[18] (40/60) × $56.76 = $37.84 and ((170/60) × $56.76) + $400 = $560.81.

[19] (32,556,929 × $85.14) = $2,771,769,963.58 and (32,556,929 × $2,614.87) = $85,132,196,638.53.

[20] ((0.59 × 32,556,929) × $85.14) + ((0.361 × 32,556,929) × $1,350.00) + ((0.049 × 32,556,929) × $2,614.87) = $21,673,487,885.48.

[21] (4,998,468 × $85.14) = $425,550,075.79 and (4,998,468 × $2,614.87) = $13,070,353,315.07.

[22] ((0.59 × 4,998,468) × $85.14) + ((0.361 × 4,998,468) × $1,350.00) + ((0.049 × 4,998,468) × $2,614.87) = $3,327,532,419.21

[23] FinCEN assumes that each reporting company will make one initial BOI report. Given the implementation period of one year to comply with the rule for entities that were formed or registered prior to the effective date of the final BOI reporting rule, FinCEN assumes that all the entities that meet the definition of reporting company will submit their initial BOI reports in Year 1 (2024), totaling 32.6 million reports. Additionally, FinCEN has applied a 6.83 percent growth factor each year since the date of the underlying source (2020) to account for the creation of new entities. For analysis purposes, FinCEN assumes that the number of new entities per year from years 2 through 10 (2025 to 2033) will be the same as the 2024 new entity estimate, which accounts for a growth factor of 13.1 percent per year from the date of the underlying source (2020) through 2024. Annually thereafter, FinCEN assumes no change in the number of new entities. FinCEN provides an alternative cost analysis in the conclusion section where the 13.1 percent growth factor continues throughout the entire 10-year time horizon of the analysis (*i.e.,* through 2033). However, this growth factor is possibly an overestimate given that it is a based on a relatively narrow timeframe of data (two years).

[24] (6,578,732 × $37.84) = $248,927,811.14 and (6,578,732 × $560.81) = $3,689,435,948.74.

[25] ((0.59 × 6,578,732) × $37.84) + ((0.361 × 6,578,732) × $299.33) + ((0.049 × 6,578,732) × $560.81) = $1,038,524,428.72.

[26] (14,456,452 × $37.84) = $547,007,086.12 and (14,456,452 × $560.81) = $8,107,360,919.04.

[27] ((0.59 × 14,456,452) × $37.84) + ((0.361 × 14,456,452) × $299.33) + ((0.049 × 14,456,452) × $560.81) = $2,282,108,290.77.

number. Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

Himamauli Das,

Acting Director, Financial Crimes Enforcement Network.

Appendix—Beneficial Ownership Information (BOI) Report Summary of Data Fields

Note: Lines that must be filled in for a report to be accepted are identified with the * symbol next to the line number. *Italicized text* provides a description and/or explanation of lines and response options for purposes of this PRA notice.

Filing Information

1. * Type of filing *(check only one box for lines 1a–1d)*
   a. Initial report
   b. Correct prior report *(if this box is checked, then you must fill out lines 1e–1h (Reporting Company information associated with most recent report))*
   c. Update prior report *(if this box is checked, then you must fill out lines 1e–1h (Reporting Company information associated with most recent report))*
   d. New exempt entity *(if this box is checked, then you must fill out lines 1e–1h (Reporting Company information associated with most recent report) and no other lines in the report)*

   Reporting Company information associated with most recent report, if any: *(Lines 1e–1h must be filled out when the type of filing is ''Correct prior report'' (line 1b), ''Update prior report'' (line 1c), or ''Newly exempt entity'' (line 1d) in order to link the new filing to the previous filing)*
   e. Legal name
   f. Tax identification type *(select one from list of options)*
   ▪ EIN
   ▪ SSN/ITIN
   ▪ Foreign
   g. Tax identification number
   h. Country/Jurisdiction (if foreign tax ID only) *(select from list of countries/jurisdictions)*
2. Date prepared (assigned automatically when filer finalizes report) (*line 2 populates automatically with the date when the filer selects ''Finalize'' on the form*)

Part I. Reporting Company Information

3. Request to receive FinCEN Identifier (FinCEN ID) *(check the box to receive a FinCEN ID)*
4. Foreign pooled investment vehicle *(check the box if Reporting Company is a foreign pooled investment vehicle)*

Full legal name and alternate name(s):

5. * Reporting Company legal name
6. Alternate name (*e.g.,* trade name, DBA) *(multiple alternate names may be reported)*

Form of identification:

7. * Tax identification type *(select one from list of options)*
   ▪ EIN
   ▪ SSN/ITIN
   ▪ Foreign
8. * Tax identification number
9. Country/Jurisdiction (if foreign tax ID only) *(select from list of countries/jurisdictions)*

Jurisdiction of formation or first registration:

10. * a. Country/Jurisdiction of formation (select from list of countries/jurisdictions, including the United States, each U.S. Territory,[28] and all foreign countries. If United States is selected, complete lines 10b, 10c, or 10d as applicable; if a U.S. Territory is selected, line 10b populates automatically with the selected U.S. Territory; if a foreign country is selected, complete lines 10e, 10f, or 10g as applicable.)

Domestic Reporting Company:

   b. State of formation *(select from list of U.S. States; if a U.S. Territory is selected in line 10a, line 10b populates automatically with the selected U.S. Territory)*
   c. Tribal jurisdiction of formation *(select from list of Tribes and ''Other Tribe'')*
   d. Name of other Tribe *(enter name of other Tribe not included in list for line 10c, only available if ''Other Tribe'' selected in line 10c)*

   Foreign Reporting Company:

   e. State of first registration *(select from list of U.S. States and U.S. Territories)*
   f. Tribal jurisdiction of first registration *(select from list of Tribes and ''Other Tribe'')*
   g. Name of other Tribe *(enter name of other Tribe not included in list for line 10f, only available if ''Other Tribe'' selected in line 10f)*

Current U.S. address:

11. * Address (number, street, and apt. or suite no.)
12. * City
13. * U.S. or U.S Territory
14. * State *(select from list of U.S. States; if a U.S. Territory is selected in line 13, line 14 populates automatically with the selected U.S. Territory)*
15. * ZIP Code
16. Existing Reporting Company (check if Reporting Company was created or registered before January 1, 2024) *(if this box is checked, then Company Applicant information is not required)*

Part II. Company Applicant Information *(report up to two Company Applicants, lines 18–33 are repeated for each Company Applicant)*

17. Unable to identify all Company Applicants (check if you are unable to obtain any required information about one or more Company Applicants)

Company Applicant FinCEN ID:

18. FinCEN ID *(if FinCEN Identifier is not provided, information about the Company Applicant must be provided in the lines below)*

Full legal name:

19. * Individual's last name
   z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
20. * First name
   z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
21. Middle name *(required if the Company Applicant has a middle name)*
22. Suffix *(required if the Company Applicant's name has a suffix)*

Date of birth:

23. * Date of birth
   z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*

Current address:

24. * Address type *(check the appropriate box for lines 24a, 24b, or 24z)*
   a. Business address
   b. Residential address
   z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
25. * Address (number, street, and apt. or suite no.)
   z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
26. * City
   z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
27. * Country/Jurisdiction *(select from list of countries/jurisdictions)*
   z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
28. * State *(select from list when United States, Canada, or Mexico is the country/jurisdiction selected in line 27; if a U.S. Territory is the country/jurisdiction selected in line 27, line 28 populates automatically with the selected U.S. Territory; if a foreign country is the country/jurisdiction selected in line 45, line 46 remains empty)*
   z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
29. * ZIP/Foreign postal code

[28] U.S. Territories are considered part of the United States for purposes of determining the reporting obligations of domestic and foreign Reporting Companies. However, per ISO standard 3166–1, U.S. Territories are listed as jurisdictions separate from the United States for database management purposes.

z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*

Form of identification and issuing jurisdiction:

30. * Identifying document type *(select one from list of lines 30a–30d or check box 30z)*
    a. State-issued driver's license
    b. State/local/Tribe-issued ID
    c. U.S. passport
    d. Foreign passport
    z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
31. * Identifying document number
    z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
32. * Identifying document issuing jurisdiction *(select country/jurisdiction in line 32a or checkbox 32z, and complete lines 32b–32d if applicable)*
    a. Country/Jurisdiction *(select from list of countries/jurisdictions)*
    z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
    b. State *(select from list when the United States is the country/jurisdiction selected in line 32a and the identifying document is issued by a State; if a U.S. Territory is the country/jurisdiction selected in line 32a, line 32b populates automatically with the selected U.S. Territory; if a foreign country is the country/jurisdiction selected in line 32a, line 32b remains empty)*
    z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
    c. Local/Tribal *(select from list when the United States is the country/jurisdiction selected in line 32a and the identifying document is issued by a local jurisdiction or Tribe; if local jurisdiction or Tribe is not included in list, select ''Other'' and go to line 32d; if a U.S. territory or foreign country is the country/jurisdiction selected in line 32a, line 32c remains empty)*
    z. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*
    d. Other local/Tribal name *(only available if ''Other'' selected in line 32c; enter name of local jurisdiction or Tribe that was not included in the list for line 32c)*
33. * Identifying document image *(attach image of identifying document referred to in lines 31–33) (instructions on upload process will be provided here)*
    a. Unknown *(check the box if you are not able to obtain this information about the Company Applicant)*

Part III. Beneficial Owner Information *(multiple Beneficial Owners may be reported, lines 35–51 are repeated for each Beneficial Owner)*

34. Unable to identify all Beneficial Owners (check if you are unable to obtain any required information on one or more Beneficial Owners)
35. Parent/Guardian information instead of minor child (check if the Beneficial Owner is a minor child and the parent/guardian information is provided instead)

Beneficial Owner FinCEN ID:

36. FinCEN ID *(if FinCEN Identifier is not provided, information about the Beneficial Owner must be provided in the lines below)*

Exempt entity:

37. Exempt entity *(check the box when an exempt entity is being reported in lieu of a Beneficial Owner's information; if checked, provide the legal name of the exempt entity in line 38, and lines 39–41 are grayed out)*

Full legal name:

38. * Individual's last name *(or* Exempt entity's legal name *if line 37 box is checked*
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*
39. * First name
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*
40. Middle name *(required if the Beneficial Owner has a middle name)*
41. Suffix *(required if the Beneficial Owner's name has a suffix)*

Date of birth:

42. * Date of birth
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*

Residential address:

43. * Address (number, street, and apt. or suite no.)
    z. Unknown (*check the box if you are not able to obtain this information about the Beneficial Owner)*
44. * City
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*
45. * Country/Jurisdiction *(select from list of countries/jurisdictions)*
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*
46. * State *(select from list when United States, Canada, or Mexico is the country/jurisdiction selected in line 45; if a U.S. Territory is the country/jurisdiction selected in line 45, line 46 populates automatically with the selected U.S. Territory; if a foreign country is the country/jurisdiction selected in line 45, line 46 remains empty)*
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*
47. * ZIP/Foreign postal code
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*

Form of identification and issuing jurisdiction:

48. * Identifying document type *(select one from list of lines 48a-48d or checkbox 48z)*
    a. State-issued driver's license
    b. State/local/Tribe-issued ID
    c. U.S. passport
    d. Foreign passport
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*
49. * Identifying document number
    z. Unknown (*check the box if you are not able to obtain this information about the Beneficial Owner)*
50. * Identifying document issuing jurisdiction *(select country/jurisdiction in line 50a or checkbox 50z, and complete lines 50b–50d if applicable)*
    a. Country/Jurisdiction *(select from list of countries/jurisdictions)*
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*
    b. State *(select from list when the United States is the country/jurisdiction selected in line 50a and the identifying document is issued by a State; if a U.S. Territory is the country/jurisdiction selected in line 50a, line 50b populates automatically with the selected U.S. Territory; if a foreign country is the country/jurisdiction selected in line 50a, line 50b remains empty)*
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*
    c. Local/Tribal *(select from list when the United States is the country/jurisdiction selected in line 50a and the identifying document is issued by a local jurisdiction or Tribe (if local jurisdiction or Tribe is not included in the list, select ''Other'' and go to line 50d); if a U.S. Territory or foreign country is the country/jurisdiction selected in line 50a, line 50c remains empty)*
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*
    d. Other local/Tribal name *(only available if ''Other'' selected in line 50c; enter name of local jurisdiction or Tribe that was not included in list for line 50c)*
51. * Identifying document image *(attach image of identifying document referred to in in lines 48–50) (instructions on upload process will be provided here)*
    z. Unknown *(check the box if you are not able to obtain this information about the Beneficial Owner)*

[FR Doc. 2023–00703 Filed 1–13–23; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Agency Information Collection Activities; Proposed Collection; Comment Request; Individual FinCEN Identifiers

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice and request for comments.

SUMMARY: FinCEN invites all interested parties to comment on the application that will be used to collect information from individuals who seek to obtain a FinCEN identifier, consistent with the Beneficial Ownership Information

Reporting Requirements final rule that was published on September 30, 2022. Obtaining a FinCEN identifier is voluntary; however, individuals who seek to obtain a FinCEN identifier must submit an application and update the information provided on the application as necessary. The details included in the information collection are listed below. This request for comment is made pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments are welcome and must be received on or before March 20, 2023.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number FINCEN–2023–0001 and the specific Office of Management and Budget (OMB) control number 1506–0076.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Refer to Docket Number FINCEN–2023–0001 and OMB control number 1506–0076.

Please submit comments by one method only. Comments will be reviewed consistent with the Paperwork Reduction Act of 1995 (PRA) and applicable OMB regulations and guidance. Comments submitted in response to this notice will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at 1–800–767–2825 or electronically at *https://www.fincen.gov/contact.*

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Provisions

FinCEN issued the Beneficial Ownership Information Reporting Requirements final rule on September 30, 2022 (''final BOI reporting rule'').[1] The final BOI reporting rule requires certain legal entities to file with FinCEN reports that identify the beneficial owners of the entity. Entities created or registered to do business on or after January 1, 2024, must also identify the individual who directly filed the document with specified governmental authorities that created the entity or registered it to do business, as well as the individual who was primarily responsible for directing or controlling such filing if more than one individual was involved in the filing of the document. Further, the regulations describe who must file a report, what information must be provided, and when a report is due. Entities must certify that the report is true, correct, and complete. The rule also sets out various requirements for individuals and entities that seek to obtain a FinCEN identifier, which can be used in certain circumstances to substitute for other information required to be reported.[2]

These regulations implement Section 6403 of the Corporate Transparency Act (CTA), enacted into law as part of the National Defense Authorization Act for Fiscal Year 2021 (NDAA).[3] These requirements are intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on reporting entities.

II. Paperwork Reduction Act of 1995[4]

Title: Individual FinCEN Identifiers.
OMB Control Number: 1506–0076.
Type of Review: Regular.
Description: The final BOI reporting rule requires the collection of information from individuals in order to issue them a FinCEN identifier. This is a voluntary collection. Individuals are not required to obtain FinCEN identifiers; however, in order to be issued a FinCEN identifier, the rule requires individuals to file applications electronically with FinCEN that contain certain information about themselves. Individuals are also required to submit updates of their identifying information as needed. FinCEN will store such information in its beneficial ownership information (BOI) database for access by authorized users. (Entities will not use the FinCEN identifier application to request a FinCEN identifier; instead, entities will request a FinCEN identifier when they submit a BOI report.[5])
Report: None.
Affected Public: Any individuals who meet the statutory criteria could apply for a FinCEN identifier under the rule. However, the primary reasons for individual beneficial owners to apply for a FinCEN identifier likely include data security (where an individual may see less risk in submitting personal identifiable information to FinCEN directly and exclusively, compared with doing so indirectly through one or more individuals at one or more reporting companies) and administrative efficiency (where an individual is likely to be identified as a beneficial owner of numerous reporting companies). Company applicants who are responsible for registering many reporting companies may have a similar incentive to request a FinCEN identifier in order to limit the number of companies with access to their personal information.
Estimated Number of Respondents: FinCEN estimates that the number of individuals who will apply for a FinCEN identifier will likely be relatively low. Specifically, FinCEN estimates that number to be approximately 1 percent of the reporting company estimates. FinCEN assumes that, similar to reporting companies' initial filings, there would be an initial influx of applications for a FinCEN identifier that would then decrease to a smaller annual rate of requests after Year 1 (2024). Therefore, FinCEN estimates that 325,569 individuals will apply for a FinCEN identifier during Year 1 (2024) and 49,985 individuals will apply for a FinCEN identifier annually thereafter.[6] The total five-year average of expected FinCEN identifier applications is 105,102. To estimate the number of updated reports for individuals' FinCEN identifier information per year, FinCEN used the methodology explained in the final BOI reporting rule to calculate, and then total, monthly updates based on the number of FinCEN identifier applications received in Year 1 (2024). FinCEN applied the monthly probability of 0.0068021 (8.16 percent, the annual likelihood of a change in address, divided by 12 to find a monthly rate). This analysis estimated 12,180 updates in Year 1 (2024) and 26,575 annually thereafter.[7] The total five-year average of estimated FinCEN identifier updates is 23,696.
Frequency of Response: As required.
Estimated Time per Respondent: FinCEN anticipates that initial FinCEN identifier applications would require

[1] 87 FR 59498 (Sept. 30, 2022).

[2] *See* 31 CFR 1010.380(b)(4). ''FinCEN identifier'' means the unique identifying number assigned by FinCEN to an individual or reporting company upon request, subject to certain conditions.

[3] Specifically, the CTA is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (Jan. 1, 2021). Division F of the NDAA is the Anti-Money Laundering Act of 2020, which includes the CTA. Section 6403 of the CTA, among other things, amends the Bank Secrecy Act (BSA) by adding a new section 5336, Beneficial Ownership Information Reporting Requirements, to subchapter II of chapter 53 of title 31, United States Code.

[4] Public Law 104–13, 44 U.S.C. 3506(c)(2)(A).

[5] FinCEN is not separately calculating a cost estimate for entities requesting a FinCEN identifier, because FinCEN assumes this would already be accounted for in the process and cost of submitting the BOI reports.

[6] $32,556,929 \times 0.01 = 325,569$ and $4,998,468 \times 0.01 = 49,985$, respectively.

[7] Refer to the final BOI reporting rule RIA cost analysis for the underlying sources and analysis related to these estimates. *See* 87 FR 59562–59579 (Sept. 30, 2022).

approximately 20 minutes (10 minutes to read the form and understand the information required, and 10 minutes to fill out and file the request, including attaching an image of an acceptable identification document), given that the information to be submitted to FinCEN would be readily available to the person requesting the FinCEN identifier. FinCEN estimates that updates would require 10 minutes (10 minutes to fill out and file the update).

Estimated Total Reporting Burden Hours: FinCEN estimates the total burden hours of individuals initially applying for a FinCEN identifier during Year 1 (2024) to be 108,535,[8] with an annual burden of 16,662 hours thereafter.[9] The five-year average of initial application burdens is 35,034 hours. FinCEN estimates the burden hours of individuals updating information related to FinCEN identifiers to be 2,030 in Year 1 (2024),[10] with an annual burden of 4,429 hours thereafter.[11] The five-year average of updated application burdens is 3,949 hours. The total five-year average of time burdens is 38,983.

Estimated Total Reporting Cost: The total cost of FinCEN identifier applications for individuals in Year 1 (2024) is estimated to be $6.2 million, with an annual cost of $945,667 thereafter.[12] The five-year average cost of initial applications is $1,988,431. The total cost of FinCEN identifier updates for individuals in Year 1 (2024) is estimated to be $115,219, with an annual cost of $251,386 thereafter.[13] The five-year average cost of updated applications is $224,153. The total five-year average cost is $2,212,584.

Request for Comments

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

Himamauli Das,

Acting Director, Financial Crimes Enforcement Network.

Appendix—FinCEN Identifier Application Summary of Data Fields

Note: Form is only available to persons who have already obtained *login.gov* accounts and have signed in through *login.gov*. Lines that must be filled in for a report to be accepted are identified with the * symbol next to the line number. *Italicized text* provides a description and/or explanation of lines and response options for purposes of this PRA notice.

Filing Information

1. FinCEN ID *(assigned by FinCEN and cannot be edited; populates automatically if individual has already applied for and received a FinCEN Identifier, based on the linkage empty if filer has not already received a FinCEN Identifier)*
2. Date Last Amended *(assigned by FinCEN and cannot be edited; populates automatically with the date the information associated with the FinCEN Identifier was last updated if individual has already applied for and received a FinCEN Identifier, based on the linkage between login.gov account and FinCEN Identifier assigned to the account; line 2 is empty if filer has not already received a FinCEN Identifier)*

Part I. Individual Information

Full legal name:
3. * First name
4. Middle name *(required if individual has a middle name)*
5. * Last name
6. Suffix *(required if the individual's name has a suffix)*

Date of birth:
7. * Date of birth

Address: (report both business address and residential address if the FinCEN ID will be used for both a Company Applicant and a Beneficial Owner)
8. * Address type *(check the box that applies to the type of address to be provided in lines 9–13)*
   a. Residential address
   b. Business address
9. * Address (number, street, and apt. or suite no.)
10. * City
11. * Country/Jurisdiction *(select from list of countries/jurisdictions)*
12. * State *(select from list when United States, Canada, or Mexico is the country/jurisdiction selected in line 11; if a U.S. Territory is the country/jurisdiction selected in line 11, line 12 populates automatically with the selected U.S. Territory; if a foreign country is the country/jurisdiction selected in line 11, line 12 remains empty)*
13. * ZIP/Foreign postal code

Form of identification and issuing jurisdiction:
14. * Identifying document type *(select one from list of lines 14a–14d)*
   a. State-issued driver's license
   b. State/local/Tribe-issued ID
   c. U.S. passport
   d. Foreign passport
15. * Identifying document number
16. * Identifying document issuing jurisdiction *(select country/jurisdiction in line 16a and complete lines 16b–16d if applicable)*
   a. Country/Jurisdiction *(select from list of countries/jurisdictions)*
   b. State *(select from list when the United States is the country/jurisdiction selected in line 16a and the identifying document is issued by a State; if a U.S. Territory is the country/jurisdiction selected in line 16a, line 16b populates automatically with the selected U.S. Territory; if a foreign country is the country/jurisdiction selected in line 16a, line 16b remains empty)*
   c. Local/Tribal *(select from list when the United States is the country/jurisdiction selected in line 16a and the identifying document is issued by a local jurisdiction or Tribe; if local jurisdiction or Tribe is not included in the list, select ''Other'' and go to line 16d; if a U.S. Territory or foreign country is the country/jurisdiction selected in line 16a, line 16c remains empty)*
   d. Other local/Tribal name *(enter name of local jurisdiction or Tribe that was not included in the list for line 16c)*
17. * Identifying document image *(attach image of identifying document referred to in lines 14–16) (upload instructions will be provided here)*

Certification

18. * I certify that the information furnished is true, correct, and complete. I understand that the willful provision of false or fraudulent beneficial ownership information to FinCEN may result in civil or criminal penalties.
   a. I agree *(check the box to certify)*

[FR Doc. 2023–00708 Filed 1–13–23; 8:45 am]

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[8] 325,569 × (20/60) = 108,535.

[9] 49,985 × (20/60) = 16,662.

[10] 12,180 × (10/60) = 2,030.

[11] 26,575 × (10/60) = 4,429.

[12] ($56.76 × (20/60)) × 325,569 = $6,159,488.81 and ($56.76 × (20/60)) × 49,985 = $945,666.84.

[13] ($56.76 × (10/60)) × 12,180 = $115,218.68 and ($56.76 × (10/60)) × 26,575 = $251,386.22.

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0905]

Agency Information Collection Activity Under OMB Review: Legal Services for Homeless Veterans and Veterans At-Risk for Homelessness (LSV) Grant Program

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Refer to ''OMB Control No. 2900–0905.''

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov*. Please refer to ''OMB Control No. 2900–0905'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Authority: 44 U.S.C. 3501–3521.

Title: Legal Services for Homeless Veterans and Veterans At-Risk for Homelessness (LSV) Grant Program, VA Forms 10–318a–b and 10–319a–b.

OMB Control Number: 2900–0905.

Type of Review: Extension of a currently approved collection.

Abstract: Public Law 116–315, Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, provided authority for VA's Homeless Programs Office (HPO) to grant funding to eligible organizations that will coordinate or provide legal services to Veterans who are homeless or at-risk of homelessness. Several sections, including section 4202, of the Act were created to better serve Veterans who are struggling with homelessness or housing insecurity. Requests for funding by applicants are likely to exceed the amount of funding appropriated to the VA for these grants. The VA must collect data to prioritize applicants for funding. The legal authority for this data collection is found under 38 U.S.C., part I, chapter 5, section 527, which authorizes the collection of data that will allow measurement and evaluation of the Department of Veterans Affairs Programs, the goal of which is to improve health care and services for Veterans. This information collection includes grant eligibility criteria, application requirements, scoring criteria, constraints on the allocation and use of the funds, and other requirements necessary to implement this grant program.

HPO will use information collected to determine if an applicant is eligible to receive grant funding. HPO also will obtain information necessary to ensure that federal funds are awarded to applicants who are financially stable and have the capacity to conduct the program for which a grant is awarded. HPO could not perform its statutory obligation to administer the program if this data were not collected.

The following forms will be used to collect data for the LSV Grant Program:

VA Form 10–318a—Application for Legal Services Grant: This form will be used to collect data from eligible entities that are applying to be Legal Services for Homeless and At-Risk Veterans grant recipients. The items required in this application are used to determine if an applicant can provide legal services to Veterans. The scoring criteria is at VA's discretion and is not mandated by the statute.

VA Form 10–318b—Renewal Application for Legal Services Grant: This form will be used to collect data from existing grantees that were previously awarded Legal Services for Homeless and At-Risk Veterans grants.

VA Form 10–319a—Quarterly Grantee Performance Reports for Legal Services Grant: HPO will collect this information to ensure that grantees comply with program requirements described in 38 CFR part 79 and their grant agreements.

VA Form 10–319b—Program or Budget Change and Corrective Action Plan for Legal Services Grant: This information is needed for a grantee to inform HPO of significant changes that will alter their approved grant program. HPO may require grantees to initiate and develop corrective action plans, and submit to VA for approval.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 87 FR 215 on November 8, 2022, pages 67538 and 67539.

Total Annual Number of Responses = 485.

Total Annual Time Burden = 4,070 hours.

VA Form 10–318a—Application for Legal Services Grant

Affected Public: Private sector.

Estimated Annual Burden: 2,400 hours.

Estimated Average Burden per Respondent: 24 hours.

Frequency of Response: Once annually.

Estimated Number of Respondents: 100.

VA Form 10–318b—Renewal Application for Legal Services Grant

Affected Public: Private sector.

Estimated Annual Burden: 1,500 hours.

Estimated Average Burden Per Respondent: 20 hours.

Frequency of Response: Once annually.

Estimated Number of Respondents: 75.

VA Form 10–319a—Quarterly Grantee Performance Report

Affected Public: Private sector.

Estimated Annual Burden: 150 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: Four times per year.

Estimated Number of Respondents: 75.

VA Form 10–319b—Program or Budget Change and Corrective Action Plan (CAP)

Affected Public: Private sector.

Estimated Annual Burden: 20 hours.

Estimated Average Burden per Respondent: 2 hours.

Frequency of Response: Once annually.

Estimated Number of Respondents: 10.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration, Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2023–00692 Filed 1–13–23; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 88 Tuesday,

No. 10 January 17, 2023

Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Parts 50 and 380

Applications for Permits To Site Interstate Electric Transmission Facilities; Proposed Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 50 and 380

[Docket No. RM22–7–000]

Applications for Permits To Site Interstate Electric Transmission Facilities

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission proposes to revise its existing regulations governing applications for permits to site electric transmission facilities under section 216 of the Federal Power Act, as amended by the Infrastructure Investment and Jobs Act of 2021.

DATES: Comments are due April 17, 2023.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through *http://www.ferc.gov* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by U.S. Postal Service mail or by hand (including courier) delivery.
  - *Mail via U.S. Postal Service only:* Addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426.
  - *For delivery via any other carrier (including courier):* Deliver to: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, MD 20852.

The Comment Procedures section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

Brandon Cherry (Technical Information), Office of Energy Projects, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8328, *brandon.cherry@ferc.gov*.

Cleo Deschamps (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8377, *cleo.deschamps@ferc.gov*.

SUPPLEMENTARY INFORMATION:

United States of America

Federal Energy Regulatory Commission

Applications for Permits To Site Interstate Electric Transmission Facilities Docket No. RM22–7–000

Notice of Proposed Rulemaking

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181 FERC ¶ 61,205

United States of America

Federal Energy Regulatory Commission

Before Commissioners: Richard Glick, Chairman; James P. Danly, Allison Clements, Mark C. Christie, and Willie L. Phillips.

Applications for Permits to Site Interstate Electric Transmission Facilities Docket No. RM22–7–000

Notice of Proposed Rulemaking

(Issued December 15, 2022)

1. On November 15, 2021, the Infrastructure Investment and Jobs Act (IIJA) became law.[1] The IIJA, among other things, amended section 216 of the Federal Power Act (FPA), which provides for Federal siting of electric transmission facilities under certain circumstances. The Federal Energy

[1] Public Law 117–58, sec. 40105, 135 Stat. 429 (2021).

Regulatory Commission (Commission) proposes to amend its regulations governing applications for permits to site electric transmission facilities to ensure consistency with the IIJA's amendments to FPA section 216, to modernize certain regulatory requirements, and to incorporate other updates and clarifications to provide for the efficient and timely review of permit applications.

I. Background

A. Energy Policy Act of 2005 and FPA Section 216

2. The authority to site electric transmission facilities has traditionally resided solely with the States. However, the August 8, 2005 enactment of the Energy Policy Act of 2005 (EPAct 2005) [2] established a limited Federal role in electric transmission siting by adding section 216 to the FPA. Under section 216, Federal siting authority for electric transmission facilities (as defined in that section) is divided between the Department of Energy (DOE) and the Commission. Section 216(a) directs DOE, on a triennial basis, to conduct a study and issue a report on electric transmission congestion and permits DOE to designate certain transmission-constrained or congested geographic areas as national interest electric transmission corridors (National Corridors). Section 216(b) authorizes the Commission in certain instances to issue permits for the construction or modification of electric transmission facilities in areas that DOE has designated as National Corridors.

3. As originally enacted in EPAct 2005, section 216(b)(1) authorized the Commission to issue permits to construct or modify electric transmission facilities in a National Corridor if it found that: (A) a State in which such facilities are located lacks the authority to approve the siting of the facilities or consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State; [3] (B) the permit applicant is a transmitting utility but does not qualify to apply for a permit or siting approval in a State because the applicant does not serve end-use customers in the State; [4] or (C) a State commission or entity with siting authority has withheld approval of the facilities for more than one year after an application is filed or one year after the designation of the relevant National Corridor, whichever is later, or the State conditions the construction or modification of the facilities in such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.[5]

4. In addition, before issuing a permit, sections 216(b)(2) through (6) required the Commission to find that the proposed facilities: (1) will be used for the transmission of electricity in interstate commerce; (2) are consistent with the public interest; (3) will significantly reduce transmission congestion in interstate commerce and protect or benefit consumers; (4) are consistent with sound national energy policy and will enhance energy independence; and (5) will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.[6]

5. Section 216(e) authorized a permit holder, if unable to reach agreement with a property owner, to use eminent domain to acquire the necessary right-of-way for the construction or modification of transmission facilities for which the Commission has issued a permit under section 216(b).[7] Federal and State-owned land was expressly excluded from the purview of section 216(e) and thus could not be acquired via eminent domain.[8]

6. Section 216(h)(2) designated DOE as the lead agency for purposes of coordinating all Federal authorizations and related environmental reviews needed to construct proposed electric transmission facilities. To ensure timely and efficient reviews and permit decisions, under section 216(h)(4)(A), DOE is required to establish prompt and binding intermediate milestones and ultimate deadlines for all Federal reviews and authorizations required for a proposed electric transmission facility.[9] Under section 216(h)(5)(A), DOE, as lead agency, in consultation with other affected agencies, is required to prepare a single environmental review document that would be used as the basis for all decisions for proposed projects under Federal law.

7. On May 16, 2006, the Secretary of DOE delegated to the Commission authority to implement parts of section 216(h), specifically paragraphs (2), (3), (4)(A)–(B), and (5), for the proposed transmission facilities in designated National Corridors for which an applicant has applied to the Commission for issuance of a permit under section 216(b).[10] Specifically, the Secretary delegated DOE's lead agency responsibilities to the Commission for the purposes of coordinating all applicable Federal authorizations and related environmental reviews and preparing a single environmental review document for proposed facilities under the Commission's siting jurisdiction.[11]

8. As discussed further below, the IIJA amended certain provisions of section 216 that pertain to the Commission's permitting authority.

B. Order No. 689

9. Section 216(c)(2) of the FPA required the Commission to issue rules specifying the form of, and the information to be contained in, an application for proposed construction or modification of electric transmission facilities in National Corridors, and the manner of service of notice of the permit application on interested persons. Pursuant to this statutory requirement, on November 16, 2006, the Commission issued Order No. 689, which implemented new regulations for section 216 permit applications by adding part 50 to the Commission's regulations.[12] In addition, Order No. 689 adopted certain modifications to the Commission's regulations implementing the National Environmental Policy Act of 1969 (NEPA) in part 380 to ensure that the Commission is provided sufficient information to conduct an environmental analysis of a proposed electric transmission project.

10. In Order No. 689, the Commission addressed a question of statutory interpretation raised by commenters concerning the text of section 216(b)(1)(C), which, at the time, conferred jurisdiction to the Commission whenever a State had withheld approval of a State siting

[2] Public Law 109–58, sec. 1221, 119 Stat. 594 (2005) (amended 2021).

[3] 16 U.S.C. 824p(b)(1)(A) (2018).

[4] *Id.* 824p(b)(1)(B) (2018).

[5] *Id.* 824p(b)(1)(C) (2018).

[6] 16 U.S.C. 824p(b)(2)–(6) (as amended by IIJA section 1221).

[7] *Id.* 824p(e)(1).

[8] *Id.*

[9] Under FPA section 216(h)(6)(A), if any agency has denied a Federal authorization required for a transmission facility, or has failed to act by the deadline established by the Secretary of DOE, the applicant or any State in which the facility would be located may file an appeal with the President.

[10] *See* DOE Delegation Order No. 00–004.00A.

[11] While Congress has provided the authority to establish prompt and binding milestones and deadlines for the review of, and Federal authorization decisions relating to, facilities proposed under section 216, 16 U.S.C. 824p(h)(4)(A), efficient processing of applications will depend upon agencies complying with the established milestones and deadlines.

[12] *Regulations for Filing Applications for Permits to Site Interstate Elec. Transmission Facilities,* Order No. 689, 71 FR 69440 (Dec. 1, 2006), 117 FERC ¶ 61,202 (2006) (Order No. 689 Final Rule), *reh'g denied,* 119 FERC ¶ 61,154 (2007) (Order No. 689 Rehearing Order).

application for more than one year.[13] The Commission interpreted the phrase ''withheld approval'' to include any action that resulted in an applicant not receiving State approval within one year, including a State's express denial of an application to site transmission facilities.[14]

C. Piedmont & California Wilderness Judicial Decisions

11. In 2009, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit), in *Piedmont Environmental Council* v. *FERC,*[15] held that the Commission's interpretation of ''withheld approval'' was contrary to the plain meaning of the statute, and that the Commission's permitting authority does not apply when a State has affirmatively denied a permit application within the one-year deadline.[16] In addition, the Fourth Circuit vacated the Commission's transmission-related amendments to its regulations implementing NEPA, finding that the Commission had failed to consult with the Council on Environmental Quality (CEQ) before adopting the revisions.[17]

12. Two years later, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), in *California Wilderness Coalition* v. *DOE,* considered petitions for review challenging DOE's actions following the enactment of section 216.[18] In August 2006, DOE had issued a Congestion Study, which identified two critically congested areas in the Mid-Atlantic and Southern California.[19] Based on the results of the Congestion Study, in October 2007, DOE formally designated two National Corridors, the Mid-Atlantic and the Southwest Area Corridors.[20] The Ninth Circuit vacated DOE's Congestion Study and National Corridor designations, finding that the agency: (1) failed to properly consult with affected States in preparing the Congestion Study, as required by section 216; and (2) failed to consider the environmental effects of the National Corridor designations under NEPA.[21]

13. Since the Ninth Circuit decision in 2011, DOE has not designated any National Corridors, and the Commission has not received any applications for permits to site electric transmission facilities.

D. IIJA Amendments to FPA Section 216

14. On November 15, 2021, the IIJA amended section 216 of the FPA. As relevant to the Commission's permitting authority, the IIJA amended section 216(b)(1)(C) by deleting the phrase ''withheld approval'' and by incorporating revisions to the statutory text. As amended, section 216(b)(1)(C) provides that the Commission's permitting authority is triggered when a State commission or other entity with authority to approve the siting of the transmission facilities: (i) has not made a determination on an application by one year after the later of the date on which the application was filed or the date on which the relevant National Corridor was designated; (ii) has conditioned its approval such that the proposed project will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible; or (iii) has denied an application.[22] This statutory amendment resolves the jurisdictional issue at the heart of *Piedmont* by giving the Commission permitting authority when a State has denied an application.[23]

15. Additionally, the IIJA amended section 216(e), which grants a permit holder the right to acquire the necessary right-of-way by eminent domain.[24] As amended, section 216(e)(1) requires the Commission to determine, as a precondition to such eminent domain authority, that a permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process.[25]

16. With respect to DOE's authority, the IIJA amended section 216(a)(2) to expand the circumstances under which DOE may designate a National Corridor. In addition to geographic areas currently experiencing transmission capacity constraints or congestion that adversely affects consumers, DOE may designate National Corridors in geographic areas expected to experience such constraints or congestion. The IIJA also amended section 216(a)(4) to expand the factors that DOE may consider in determining whether to designate a National Corridor.

II. Discussion

A. Commission Jurisdiction and State Siting Proceedings

17. Section 216(b)(1)(C) of the FPA addresses instances where a State commission or other State entity with authority to site transmission facilities has acted, or has failed to act, triggering the Commission's jurisdiction. Below, the Commission proposes to revise § 50.6 of its regulations to reflect the IIJA's amendments to section 216(b)(1)(C) and announces a policy change with respect to the commencement of the Commission's pre-filing process for cases where the Commission's jurisdiction rests on section 216(b)(1)(C).

1. IIJA Amendments to FPA Section 216(b)(1)(C)

18. As discussed above, the IIJA amended FPA section 216(b)(1)(C) by revising the statutory text to expressly state that the Commission may issue a permit for the construction or modification of electric transmission facilities in National Corridors if a State has denied an applicant's request to site transmission facilities.[26] Therefore, the Commission proposes to revise § 50.6 of its regulations, which describes the information that is required in each application filed pursuant to our part 50 regulations. As relevant here, § 50.6(e) requires the applicant to demonstrate that its proposed project would satisfy the requirements of section 216(b)(1) through (6). To reflect the IIJA's amendments to section 216(b)(1)(C), the Commission proposes corresponding revisions to § 50.6(e)(3) to provide that the applicant is required to submit evidence demonstrating that a State has: (i) not made a determination on an application; (ii) conditioned its approval in such a manner that the proposed facilities would not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible; or (iii) denied an application.

2. Commencement of Pre-Filing

19. The Commission has recognized that Congress, in enacting section 216 of the FPA, adopted a statutory scheme that allows simultaneous State and Commission siting processes.[27] As explained in Order No. 689, the statute

[13] Order No. 689 Final Rule, 117 FERC ¶ 61,202 at PP 24–31; Order No. 689 Rehearing Order, 119 FERC ¶ 61,154 at PP 7–23.

[14] Order No. 689 Final Rule, 117 FERC ¶ 61,202 at P 26; Order No. 689 Rehearing Order, 119 FERC ¶ 61,154 at P 11.

[15] 558 F.3d 304 (4th Cir. 2009), *cert. denied,* 558 U.S. 1147 (2010) (*Piedmont*).

[16] *Id.* at 313.

[17] *Id.* at 319, 320.

[18] 631 F.3d 1072 (9th Cir. 2011) (*California Wilderness*).

[19] *Id.* at 1081 (citing National Electric Transmission Congestion Study, 71 FR 45047 (Aug. 8, 2006)).

[20] *Id.* at 1083 (citing National Electric Transmission Congestion Report, 72 FR 56992 (Oct. 5, 2007)).

[21] *Id.* at 1096, 1106.

[22] 16 U.S.C. 824p(b)(1)(C) (as amended by IIJA section 1221).

[23] *Id.* 824p(b)(1)(C)(iii).

[24] *Id.* 824p(e)(1).

[25] *See id.*

[26] *See supra* P 14.

[27] Order No. 689 Final Rule, 117 FERC ¶ 61,202 at P 19.

provides for this potential overlap by allowing the Commission to issue a permit one year after the State siting process has begun and requiring an expeditious pre-application mechanism for all permit decisions under Federal law.[28] Thus, the Commission has recognized that our pre-filing process can occur at the same time as simultaneous State proceedings.[29]

20. Notwithstanding that the statute allows simultaneous State and Federal proceedings, the Commission in the preamble to Order No. 689 announced a policy that, in cases where its jurisdiction rests on section 216(b)(1)(C),[30] the pre-filing process would not commence until one year after the relevant State applications have been filed.[31] This approach, the Commission explained, would provide the States one full year to process an application without any intervening Federal proceedings, including both the pre-filing and application processes, after which time an applicant might seek to commence the Commission's pre-filing process.[32] However, the Commission noted that it would reconsider this issue if it later determined that requiring applicants to wait one year before commencing the Commission's pre-filing process was delaying projects or otherwise not in the public interest.[33]

21. We are now reconsidering that policy. To ensure that permit applicants receive as timely a decision as possible from the Commission, we propose to eliminate the one-year delay before the Commission's pre-filing process may commence. The purpose of the pre-filing process is to facilitate maximum participation from all stakeholders to provide them with an opportunity to present their views and recommendations with respect to the environmental impacts of the facilities early in the planning stages of the proposed facilities. In addition to gathering stakeholder input, during the pre-filing process Commission staff will work with the applicant to ensure the applicant has compiled the necessary information for a complete application under §§ 50.6 and 50.7,[34] and begin our coordination with other agencies as required under section 216(h).[35] Therefore, to encourage the development of needed transmission infrastructure and to minimize the risk of delays, we propose to allow simultaneous processing of State applications and Commission pre-filing proceedings.

22. The Commission continues to recognize the primacy of the States' role in siting transmission infrastructure but, as discussed, believes that allowing for simultaneous processing could facilitate a more efficient process. In addition, we note that, the applicant could potentially collect information that is relevant to both State and Federal proceedings only once, avoiding the need to re-do or update analysis needed to meet Federal permit requirements. While states and other interested stakeholders are free to submit information in the pre-filing process, they are under no obligation to participate and will not waive any rights or otherwise be prejudiced if they choose not to do so. No rights are adjudicated in the pre-filing process, nor are findings of fact made. The pre-filing process is intended to facilitate the development of a complete application that can be acted upon expeditiously.

23. Though the statute does not limit when the Commission's pre-filing process may begin, the Commission intends to entertain requests to commence pre-filing, and may grant such requests, at any time after the relevant State applications have been filed. However, out of respect for State siting processes, the Commission proposes to provide an additional opportunity for State input before we determine that the pre-filing process is complete and that an application may be filed. Specifically, one year after the commencement of the Commission's pre-filing process, if a State has not made a determination on an application, we propose to provide a 90-day window for the State to provide comments on any aspect of the pre-filing process, including any information submitted by the applicant. We also seek comment on the advantages or disadvantages of the Commission entertaining requests to commence the pre-filing process before a State application has been filed.

B. Eminent Domain Authority and Applicant Efforts To Engage With Landowners and Other Stakeholders

24. As described above, the IIJA amended FPA section 216(e)(1) to require the Commission to determine, as a precondition to receiving eminent domain authority, that the permit holder has made good faith efforts to engage with landowners and stakeholders early in the permitting process.[36] Therefore, the Commission proposes to supplement the existing landowner and stakeholder participation provisions in part 50 of its regulations.

25. Section 50.4 of the regulations requires the applicant to develop and file a Project Participation Plan early in the pre-filing process and to distribute, by mail and newspaper publication, project participation notices early in both the pre-filing and application review processes. Specifically, under § 50.4(a), the Project Participation Plan must: (1) identify specific tools and actions to facilitate stakeholder communications and public information; (2) list locations throughout the project area where the applicant will provide copies of all project filings; and (3) explain how the applicant intends to respond to requests for information from the public and other entities. Under § 50.4(c), the project participation notices must provide a range of information on the proposed project and permitting process, including a general description of the property an applicant would need from an affected landowner and a brief summary of what rights an affected landowner has at the Commission and in proceedings under the eminent domain rules of the relevant State.

26. To address the IIJA's amendment to section 216(e)(1), we propose to supplement the regulatory requirements in § 50.4 by adding a new § 50.12. Under proposed § 50.12, an applicant may demonstrate that it has met the statutory good faith efforts standard by complying with an Applicant Code of Conduct in its communications with affected landowners. The Applicant Code of Conduct in proposed § 50.12(a) includes particular recordkeeping and information-sharing requirements for engagement with affected landowners, as well as more general prohibitions against certain misconduct in such engagement. For example, an applicant that chooses to comply with the Applicant Code of Conduct set forth in proposed § 50.12(a) must: retain an affected landowner contact log; provide affected landowners with certain information about the project and the Commission; ensure communications with affected landowners are factually correct, devoid of misrepresentation, and respectful; obtain affected landowner permission to enter property and leave when asked; and, if applicable, provide an affected landowner with a copy of any appraisal

[28] *Id.*

[29] *Id.*

[30] In Order No. 689, the Commission explained that in all other instances, the pre-filing process may be commenced at any time. *Id.* P 21 n.14.

[31] *Id.* P 21.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] 16 U.S.C. 824p(h); DOE Delegation Order No. 00–004.00A.

[36] 16 U.S.C. 824p(e)(1) (as amended by IIJA section 1221).

prepared by, or on behalf of, the applicant for that landowner's property.

27. Under proposed § 50.12(b)(1), an applicant that chooses to show good faith by complying with the Applicant Code of Conduct must file, as part of the pre-filing request required under § 50.5(c), an affirmative statement indicating its intent to comply with the Applicant Code of Conduct. Under proposed § 50.12(b)(2), such an applicant must, as part of the monthly status reports required under § 50.5(e), demonstrate compliance by: (i) affirming that the applicant and its representatives have complied with the Applicant Code of Conduct; or (ii) explaining any instances of non-compliance during the relevant month and any remedial actions taken or planned. Under proposed § 50.12(b)(3), an applicant must also identify any known instances of non-compliance that were not disclosed in prior monthly status reports and explain any remedial actions taken to remedy such instances of non-compliance.

28. We emphasize that voluntary compliance with the Applicant Code of Conduct is one way, but not the only way, that an applicant may demonstrate that it has met the ''good faith efforts'' standard in section 216(e)(1). However, we believe that the Applicant Code of Conduct reflects principles that are broadly relevant to determining whether an applicant has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process. We propose to require under § 50.12 that an applicant that chooses not to rely on compliance with the Applicant Code of Conduct must specify its alternative method of demonstrating that it meets the good faith efforts standard, including any specific commitments to record-keeping and information-sharing. The applicant must explain how its alternative method is equal to or superior to compliance with the Applicant Code of Conduct as a means to ensure the good faith efforts standard is met. The applicant should specifically explain, for each deviation from the Applicant Code of Conduct in its alternative method, its reasoning for not following that provision of the Applicant Code of Conduct and why the alternative method is an equal or better means to ensure the good faith standard is met notwithstanding that deviation.

29. An applicant bears the burden of demonstrating it has met the good faith efforts standard in a permit application proceeding. For an applicant that elects to rely on compliance with the Applicant Code of Conduct, the Commission will assess ''good faith efforts'' by evaluating whether evidence in the record shows the applicant substantially complied with the provisions of the Applicant Code of Conduct in its engagement with landowners and other stakeholders. For an applicant that elects to rely on an alternative method to show good faith efforts, the Commission will first assess whether the applicant's alternative method is equal to or superior to the Applicant Code of Conduct as a means to ensure the good faith efforts standard is met. If so, the Commission will then assess ''good faith efforts'' by evaluating whether evidence in the record shows the applicant substantially complied with the commitments of its alternative method.

C. Environmental Justice Public Engagement Plan

30. As described above, applicants are currently required by § 50.4(a) to develop and file a Project Participation Plan early in the pre-filing process. This requirement is intended to facilitate stakeholder communication and the dissemination of public information about the proposed project. Consistent with that goal, we believe that applicants should, early in the pre-filing process, meaningfully engage with potentially affected environmental justice communities. As discussed in this notice of proposed rulemaking (NOPR), the term ''environmental justice community'' includes disadvantaged communities that have been historically marginalized and overburdened by pollution.[37] The term also includes, but may not be limited to, minority populations, low-income populations, or indigenous peoples.[38] Applicants will identify potential environmental justice communities using the identification methods consistent with current Commission practice.[39] This engagement would be consistent with: (1) Executive Order 12898, which directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority and low-income populations (*i.e.,* environmental justice communities);[40] (2) Executive Order 14008, which directs agencies to develop ''programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts;''[41] (3) Executive Order 13985, which requires Federal agencies to conduct Equity Assessments to identify and remove barriers to underserved communities and ''to increase coordination, communication, and engagement with community-based organizations and civil rights organizations;''[42] and (4) the Environmental Protection Agency's (EPA) *Promising Practices* report.[43] This engagement would also be consistent with the Commission's Equity Action Plan adhering to Executive Order 13985, which promotes equitable processes and outcomes for underserved communities,

[37] E.O. 14008, 86 FR 7619, § 219 (Jan. 27, 2021).

[38] *See* EPA, *EJ 2020 Glossary* (Aug. 18, 2022), *https://www.epa.gov/environmentaljustice/ej-2020-glossary.*

[39] To identify potential environmental justice communities, Commission staff uses current U.S. Census American Community Survey data for the race, ethnicity, and poverty data at the State, county, and block group level. As recommended in *Promising Practices,* the Commission currently uses the fifty percent and the meaningfully greater analysis methods to identify minority populations. Specifically, a minority population is present where either: (1) the aggregate minority population of the block groups in the affected area exceeds 50 percent; or (2) the aggregate minority population in the block group affected is 10 percent higher than the aggregate minority population percentage in the county. Environmental Protection Agency (EPA), *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016) (*Promising Practices*), *https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.* The Commission intends to review and incorporate any updated guidance from CEQ and EPA in our future analyses, as appropriate. Using *Promising Practices'* low-income threshold criteria method, Commission staff currently identifies low-income populations as block groups where the percent of a low-income population in the identified block group is equal to or greater than that of the county. We recognize that CEQ and EPA are in the process of updating their guidance and recommendations regarding environmental justice. We expect applicants to utilize the latest guidance and data from CEQ, EPA, the Census Bureau, and other authoritative sources. The Commission intends to update our methods for identifying potential environmental justice communities following review of any updated environmental justice guidance and recommendations from CEQ and EPA, as appropriate.

[40] E.O. 12898, 59 FR 7629 (Feb. 16, 1994). Minority populations are those groups that include: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic. CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* at 25 (Dec. 1997) (CEQ's *Environmental Justice Guidance*), *https://www.energy.gov/sites/default/files/nepapub/nepa_documents/RedDont/G-CEQ-EJGuidance.pdf.*

[41] E.O. 14008, 86 FR 7619 (Jan. 27, 2021).

[42] E.O. 13985, 86 FR 7009, 7010–11 (Jan. 25, 2021).

[43] EPA, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016), *https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf* (*Promising Practices*). The report includes guiding principles aimed at, among other things, early and meaningful engagement with minority populations, low-income populations, and other interested individuals, communities, and organizations in the NEPA process.

including environmental justice communities, at the Commission.[44]

31. Therefore, the Commission proposes to require applicants to develop and file an Environmental Justice Public Engagement Plan as part of their Project Participation Plan under § 50.4(a)(4). The Environmental Justice Public Engagement Plan must describe the applicant's completed and planned outreach activities that are targeted to identified environmental justice communities. The plan must also summarize comments received from potentially impacted environmental justice communities during any previous outreach activities, if applicable, and describe planned outreach activities during the permitting process, including efforts to identify, engage, and accommodate non-English speaking groups or linguistically isolated communities. The plan should also describe the manner in which the applicant will reach out to environmental justice communities about potential mitigation.[45]

D. Other Proposed Revisions to 18 CFR Part 50

1. Section 50.1—Definitions

32. Section 50.1 sets forth the definitions for part 50 of the Commission's regulations. The Commission proposes to add a definition for the term ''Indian Tribe'' for consistency with its regulations governing other types of energy infrastructure projects.[46] Specifically, the Commission proposes to define the term ''Indian Tribe'' as a Tribe that is recognized by treaty, by Federal statute, or by the U.S. Department of the Interior in its periodic publication of Tribal governments.[47] We also propose to add a definition for the term ''environmental justice community'' to assist applicant compliance with the requirement in proposed § 50.4(a)(4) that an applicant develop and file an Environmental Justice Public Engagement Plan.[48] Specifically, the Commission proposes to define the term ''environmental justice community'' as any disadvantaged community that has been historically marginalized and overburdened by pollution, including, but not limited to, minority populations, low-income populations, or indigenous peoples. We seek comment on the proposed definition of ''environmental justice community'' and whether the Commission should consider adopting an alternative definition, and, if so, why? The Commission also proposes to revise the definitions of: (1) ''national interest electric transmission corridor'' to include any geographic area that is expected to experience energy transmission capacity constraints or congestion, for consistency with the IIJA's amendments to section 216(a); (2) ''permitting entity,'' for clarity and consistency with the statute; and (3) ''stakeholder,'' for clarity and to ensure that environmental justice community members and other interested persons or organizations are covered by the definition.

33. Section 50.1 defines ''affected landowners'' as owners of property interests, as noted in the most recent county/city tax records as receiving the tax notice, whose property: (1) is directly affected (*i.e.,* crossed or used) by the proposed activity including all facility sites, rights-of-way, access roads, staging areas, and temporary workspace; or (2) abuts either side of an existing right-of-way or facility site owned in fee by any utility company, or abuts the edge of a proposed facility site or right-of-way which runs along a property line in the area in which the facilities would be constructed, or contains a residence within 50 feet of a proposed construction work area. The Commission is not proposing to revise the definition of ''affected landowners.'' Nevertheless, we seek comment on whether the Commission should revise the definition of ''affected landowners'' to include landowners located within a certain geographic distance from the proposed project facilities to address effects on visual (or other) resources, and, if so, what geographic distance should be used and why?

2. Section 50.3—Filing and Formatting Requirements

34. Section 50.3 establishes the filing and formatting requirements for submissions in the Commission's pre-filing and application processes. The Commission proposes to revise § 50.3(b) to eliminate the requirement that applications, amendments, and all exhibits and other submissions must be submitted in an original and seven conformed copies. Instead, to reduce waste, applicants would only be required to make these submissions in electronic format.

3. Section 50.4—Stakeholder Participation

i. Project Participation Plan

35. As described above, § 50.4(a) requires each applicant to develop and file a Project Participation Plan for use during the pre-filing and application processes to ensure that stakeholders have access to timely and accurate information on the proposed project and permitting process. The Project Participation Plan must, among other things, identify specific tools and actions to facilitate stakeholder communications and public information, including a regularly updated website. The Commission proposes to revise § 50.4(a)(1) to specify that an applicant's website must include an interactive mapping component to provide users with the ability to locate the proposed facilities in relation to specific properties and other features. Additionally, as discussed above, the Commission proposes to require an applicant to develop and file an Environmental Justice Public Engagement Plan early in the pre-filing process, which would describe an applicant's outreach to environmental justice communities.[49]

ii. Project Notification Requirements

36. As described above, § 50.4(c) sets forth the project notification requirements for applicants. Section 50.4(c)(1) requires the applicant to distribute, by mail and newspaper publication, project participation notices within a specified time following notice that the pre-filing process has commenced and notice that an application has been filed. Section 50.4(c)(1) directs the applicant to notify, among others, all affected landowners and landowners with a residence within a quarter mile from the edge of the construction right-of-way for the proposed project. The Commission proposes to revise § 50.4(c)(1) for clarity and to ensure that applicants provide notice of the proposed project to all interested individuals and organizations. We seek comment on whether a quarter-mile limit is sufficient and, if not, what geographic distance should be used and why?

37. Section 50.4(c)(2)(i) describes the required contents of the pre-filing notice. For clarity and to avoid confusion, the Commission proposes organizational changes in the regulations to distinguish the

[44] FERC, Equity Action Plan (2022), *https://www.ferc.gov/equity.*

[45] We note that the Environmental Justice Resource Report, discussed further below, would require the applicant to describe any proposed mitigation measures intended to avoid or minimize impacts on environmental justice communities, including any community input received on the proposed mitigation measures and how that input informed such measures. *See infra* P 65.

[46] *See, e.g.,* 18 CFR 4.30(b)(10) (2021) (defining ''Indian Tribe'' in reference to an application for a license or exemption for a hydropower project) and 18 CFR 157.1 (defining ''Indian Tribe'' in reference to an application for a certificate of public convenience and necessity for a natural gas pipeline project).

[47] 25 CFR 83.6(a) (2021).

[48] *See supra* PP 30–31.

[49] *Supra* PP 30–31.

requirements that pertain to any pre-filing notice that is sent by mail or published in a newspaper (proposed § 50.4(c)(2)(i)) from the requirements that pertain only to any pre-filing notice that is sent by mail to an affected landowner (proposed § 50.4(c)(2)(ii)).

38. In addition to this reorganization, we propose to add a requirement that any pre-filing notice mailed to an affected landowner also include a copy of a Commission document titled ''*Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings*'' (Landowner Bill of Rights). We seek comment on a draft version of the Landowner Bill of Rights provided in the Appendix to this NOPR. The Commission believes that requiring the applicant to provide this information at the outset of the permitting process would help ensure that affected landowners are informed of their rights in dealings with the applicant, in Commission proceedings, and in eminent domain proceedings. We also propose to require that any pre-filing notice sent by mail or published in the newspaper include information clarifying that the Commission's pre-filing and application processes are separate from any simultaneous State siting proceeding and explaining how to participate in any such State siting proceeding.

39. The Commission expects applicants to make a good faith effort to ensure that individuals and organizations entitled to receive project participation notices can comprehend the contents of such notices. Accordingly, applicants should consider the need for project participation notices in languages other than English as part of the Environmental Justice Public Engagement Plan described above. Additionally, we seek comment on what methods of notice beyond mail and newspaper publication might be utilized in order to effectively reach the largest number of stakeholders as possible.

4. Section 50.5—Pre-Filing Procedures

40. Section 50.5 describes the required pre-filing procedures for applicants seeking a permit under FPA section 216. Section 50.5(c) describes the information that an applicant must provide in the pre-filing request. The Commission proposes to require that any pre-filing request include a detailed description of how the proposed project will reduce capacity constraints and congestion on the transmission system (proposed § 50.5(c)(8)) and, as described above, a statement indicating whether an applicant intends to comply with the Applicant Code of Conduct (proposed § 50.5(c)(9)).

41. Section 50.5(e) describes the information that an applicant must provide once the Director of the Office of Energy Projects has issued a notice commencing the pre-filing process, and the respective deadlines for filing such information. The Commission proposes clarifications to § 50.5(e)(3) and (4) to ensure consistency with the project notification requirements in § 50.4(c). We also propose to require an applicant to file congestion-related information earlier in the Commission's permitting process to provide sufficient time for Commission staff to evaluate the adequacy of information needed to conduct the required analyses under section 216(b)(4).[50] Specifically, within 30 days of the notice commencing the pre-filing process, we propose to require an applicant to file a draft version of Exhibit H, *System analysis data,* required by § 50.7 (proposed § 50.5(e)(8)), showing how the proposed project will reduce capacity constraints and congestion on the transmission system. In addition to a draft version of Exhibit H, we also propose to require an applicant to file additional supporting information such as system impact study reports, relevant regional transmission plans, and, if applicable, expert witness testimony and other relevant information submitted with the State application(s) (proposed § 50.5(e)(7)).

5. Section 50.6—General Content of Applications

42. Section 50.6 describes the information that must be provided as part of an application for a permit under FPA section 216. In § 50.6(c), the Commission proposes to update certain terminology for clarity (*e.g.,* deleting origin and termination points and replacing those terms with point of receipt and point of delivery, respectively). We also propose to revise § 50.6(d) to specify that verification that the proposed route lies within a DOE-designated National Corridor must include the date of designation.

43. Each application filed under part 50 of the Commission's regulations must provide evidence demonstrating that one of the jurisdictional bases set forth in section 216(b)(1) applies to the proposed facilities. To ensure consistency with section 216(b)(1)(A), as amended by the IIJA, the Commission proposes to add to § 50.6(e)(1) the phrase ''or interregional benefits'' to clarify that an application may provide evidence that a State does not have the authority to consider the interstate benefits or interregional benefits expected to be achieved by the proposed facilities. While the statute, as amended by the IIJA, does not define the term ''interregional,'' the Commission for the purposes of this NOPR proposes to apply a meaning that is consistent with Order No. 1000, which defines an interregional transmission facility as one that is located in two or more transmission planning regions.[51] As discussed above, we also propose revisions to § 50.6(e)(3) to ensure that the regulatory text tracks the IIJA's amendments to section 216(b)(1)(C).[52]

6. Section 50.7—Application Exhibits

44. Section 50.7 identifies the exhibits that applicants must file with an application and describes the technical data that must be provided in each exhibit. Section 50.7(g) requires each applicant to submit Exhibit G—*Engineering data,* which must include a detailed project description. For consistency and clarity, the Commission proposes revisions to ensure that the project description includes points of receipt and delivery (§ 50.7(g)(1)(i)), line design features that minimize audible corona noise during rain or fog (§ 50.7(g)(1)(vi)), and overhead and underground structures (§ 50.7(g)(2)(ii)).

45. The Commission also proposes revisions to § 50.7(h), which describes the requirements for Exhibit H—*System analysis data.* Specifically, we propose to: (1) require the analysis to include project impacts on transmission capacity constraints (§ 50.7(h)(1)); (2) clarify that the analysis must include steady-state, short-circuit, and dynamic power flow cases, as applicable, and consider planned and forecasted forced outage rate for generation and transmission and generation dispatch scenarios (§ 50.7(h)(2)); and (3) require the analysis to identify how the proposed project will affect congestion on neighboring transmission systems (§ 50.7(h)(3)). This information is necessary for Commission staff to evaluate whether the proposed facilities would significantly reduce transmission congestion and protect or benefit consumers, as required by section 216(b)(4).

[50] FPA section 216(b)(4) requires the Commission to find that the proposed construction or modification of transmission facilities will significantly reduce transmission congestion in interstate commerce and protects or benefits consumers.

[51] *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Public Utilities,* Order No. 1000, 76 FR 49842 (Aug. 11, 2011), 136 FERC ¶ 61,051, at P 482 n.374 (2011).

[52] *Supra* P 18.

7. Section 50.11—General Permit Conditions

46. Section 50.11 lists the general conditions that would apply to any permit issued under part 50 of the Commission's regulations. The Commission proposes clarifying edits to §§ 50.11(a) and (b). The proposed revision to § 50.11(b) is intended to foreclose a situation where an applicant would need to accept a permit in instances where rehearing has been denied by operation of law and the applicant has appealed, but the Commission intends to issue a future order before the record is filed with the court of appeals.

47. In addition, to balance our commitment to expeditiously respond to parties' concerns in comprehensive orders on rehearing and the serious concerns posed by the possibility of construction proceeding prior to the completion of Commission review, we propose to add language to § 50.11(d) that would, under certain circumstances and for a limited time, preclude the issuance of authorizations to proceed with construction of transmission facilities authorized under FPA section 216 while requests for rehearing of orders issuing permits remain pending before the Commission. This proposed addition, which mirrors a regulation that the Commission previously adopted in the natural gas context,[53] would ensure that construction of approved transmission facilities does not begin during 30-day rehearing period and, if a qualifying rehearing request is filed, until that request is no longer pending before the Commission, the record of the proceeding is filed with the court of appeals, or 90 days has elapsed since the rehearing request was deemed denied by operation of law.

8. Proposed Clarifying Revisions to 18 CFR Part 50

48. In addition to the proposed revisions discussed above, we propose minor, non-substantive edits throughout part 50 of our regulations. These proposed revisions are intended to clarify or streamline existing requirements, to correct grammatical errors and cross-references, and to maintain consistency.

E. Regulations Implementing NEPA

49. In Order No. 689, in addition to establishing the requirements for applications filed under FPA section 216, the Commission also adopted several amendments to its NEPA regulations. These amendments included revisions or additions to: § 380.3(c) (adding electric transmission projects to the list of project types for which applicants must provide environmental information), § 380.5(b)(14) (adding electric transmission facilities to the list of project types for which the Commission will prepare an Environmental Assessment), § 380.6(a)(5) (adding major electric transmission facilities using right-of-way in which there is no existing facility to the list of project types for which the Commission will prepare an Environmental Impact Statement), § 380.8 (designating the Office of Energy Projects as responsible for the preparation of environmental documents for electric transmission facilities), § 380.10(a)(2)(iii) (clarifying that pre-filing proceedings for electric transmission facilities are not open to motions to intervene), and § 380.15 (stating that electric transmission project sponsors must comply with the National Electric Safety Code and transmission rights-of-way are subject to the same construction and maintenance requirements as natural gas pipelines).

50. The Commission also added a new section to its NEPA regulations, 18 CFR 380.16, which describes the specific environmental information that must be included in applications for permits to site transmission facilities under section 216. Section 380.16 currently requires each applicant to submit an environmental report that includes eleven resource reports, as follows.

51. Resource Report 1 requires the applicant to describe the project and proposed construction methods and requirements; submit topographic maps, aerial images and/or photographs showing the proposed project facilities; identify all authorizations and mitigation measures required to construct the proposed project; and provide the names and addresses of all affected landowners.[54]

52. Resource Report 2 requires the applicant to provide information necessary to determine the impact of the proposed project on water use and water quality and proposed mitigation measures.[55]

53. Resource Report 3 requires the applicant to describe aquatic life, wildlife, and vegetation in the vicinity of the proposed project; the expected impacts on these resources; and proposed mitigation measures.[56]

54. Resource Report 4 requires the applicant to provide information necessary for the Commission to consider the effect of a proposed project on cultural resources in furtherance of the Commission's obligations under section 106 of the National Historic Preservation Act (NHPA).[57]

55. Resource Report 5 requires the applicant to describe the socioeconomic impact area and to identify and quantify the impacts of constructing and operating the proposed project on factors affecting towns and counties in the project vicinity.[58]

56. Resource Report 6 requires the applicant to describe geological resources and hazards in the project area that might be directly or indirectly affected by the proposed facility or may place the proposed facility at risk, the potential effects of those hazards on the facility, and the methods to reduce the effects or risks.[59]

57. Resource Report 7 requires the applicant to describe the soils that will be affected by the proposed project and measures proposed to minimize or avoid impacts.[60]

58. Resource Report 8 requires the applicant to provide information concerning the uses of land in the project area and proposed mitigation measures to protect and enhance existing land use.[61]

59. Resource Report 9 requires the applicant to describe alternatives to the project, including the ''no action'' alternative, and to compare the environmental impacts of such alternatives.[62]

60. Resource Report 10 requires the applicant to address reliability and safety considerations, including the potential hazard to the public from the proposed facilities resulting from accidents or natural catastrophes; how these events would affect reliability; and the procedures and design features employed to reduce potential hazards.[63]

61. Finally, Resource Report 11 requires the applicant to provide design and engineering data, including general design and engineering drawings of all major project structures, and a supporting design report.[64]

62. As explained above, the Fourth Circuit's 2009 *Piedmont* decision vacated Order No. 689's amendments to the Commission's NEPA regulations

[53] *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing,* Order No. 871–B, 86 FR 26150 (May 13, 2021), 175 FERC ¶ 61,098, *order on reh'g,* Order No. 871–C, 86 FR 43077 (Aug. 6, 2021), 176 FERC ¶ 61,062 (2021).

[54] 18 CFR 380.16(c) (2021).

[55] *Id.* 380.16(d).

[56] *Id.* 380.16(e).

[57] *Id.* 380.16(f).

[58] *Id.* 380.16(g).

[59] *Id.* 380.16(h).

[60] *Id.* 380.16(i).

[61] *Id.* 380.16(j).

[62] *Id.* 380.16(k).

[63] *Id.* 380.16(l).

[64] *Id.* 380.16(m).

because the court found that the Commission had failed to consult with CEQ prior to issuing the revised regulations.[65] Notwithstanding the Fourth Circuit's vacatur, the NEPA amendments set forth in Order No. 689 are still reflected in 18 CFR part 380. We seek comment on the whole of the Commission's NEPA regulations pertaining to electric transmission facilities, as well as the specific proposed changes to those regulations described further below. The Commission will consult with CEQ on the proposed changes to its NEPA regulations described below as well as those originally implemented by Order No. 689.

1. *Tribal Resources Resource Report*

63. The Commission recognizes the unique relationship between the United States and Indian Tribes, acknowledges its trust responsibility to Indian Tribes, and endeavors to work with tribes on a government-to-government basis, seeking to address the effects of proposed projects on Tribal rights and resources through consultation.[66] To evaluate the effects of proposed transmission facilities on Tribal rights and resources, the Commission's existing regulations require an applicant to submit information describing the project's effects on Tribes, Tribal lands, and Tribal resources as part of the *Land use, recreation, and aesthetics* resource report.[67] Specifically, the applicant must identify Tribes that may attach religious and cultural significance to historic properties within the right-of-way or in the project vicinity;[68] provide available information on traditional cultural and religious properties;[69] and ensure that specific site or location information, disclosure of which will create a risk of harm, theft, or destruction or violate Federal law, is not disclosed.[70]

64. The Commission proposes to relocate the existing Tribal resource-related information requirements to a new, standalone resource report, Resource Report 6—*Tribal resources,* in proposed § 380.16(h). In addition to consolidating the existing requirements in a new resource report,[71] we also propose to require an applicant to identify potentially-affected Tribes (proposed § 380.16(h)(1)); describe the impacts of project construction, operation, and maintenance on Tribes and Tribal interests, including impacts related to enumerated resource areas (proposed § 380.16(h)(2)); and describe project impacts that may affect Tribal interests that are not necessarily associated with particular resource areas (*e.g.,* treaties, Tribal practices, or agreements) (proposed § 380.16(h)(3)). The Commission believes this information is necessary to fully evaluate the effects of a proposed project in furtherance of the Commission's trust responsibility and our statutory obligations under the FPA and NEPA.

2. Environmental Justice Resource Report

65. In conducting NEPA reviews of proposed transmission facilities, the Commission intends to follow the instruction of Executive Orders 12898,[72] 14008,[73] and 13985,[74] as described above, and relevant CEQ guidance[75] and EPA's *Promising Practices* report[76] on assessing impacts on environmental justice communities under NEPA.[77] Section 380.16 does not currently require an applicant to submit information on the potential project impacts on environmental justice communities. Therefore, the Commission proposes to add a new resource report, Resource Report 7—*Environmental justice,* in proposed § 380.16(i). Specifically, the resource report would require the applicant to identify environmental justice communities within the project's area of potential impacts (proposed § 380.16(i)(1));[78] describe the impacts of project construction, operation, and maintenance on environmental justice communities, including whether any impacts would be disproportionately high and adverse (proposed § 380.16(i)(2)); discuss cumulative impacts on environmental justice communities, including whether any cumulative impacts would be disproportionately high and adverse (proposed § 380.16(i)(3)); and describe any proposed mitigation measures intended to avoid or minimize impacts on environmental justice communities, including any community input received on the proposed measures and how the input informed the proposed measures (proposed § 380.16(i)(4)).

66. The Commission also proposes a corresponding addition to § 380.2, which sets forth the definitions for the Commission's NEPA regulations. Specifically, the Commission proposes to define the term ''environmental justice community'' in proposed § 380.2(f). The proposed definition of the term ''environmental justice community'' is identical to the definition that the Commission proposes to add to § 50.1.[79]

67. Finally, while we recognize that EPA and CEQ are in the process of updating their guidance regarding environmental justice, we expect applicants to utilize the latest guidance and data from CEQ, EPA, the Census Bureau, and other authoritative sources. The Commission intends to review and incorporate any updated guidance from CEQ and EPA in our future analyses, as appropriate.

3. Air Quality and Environmental Noise Resource Report

68. Section 380.16(l)(7) requires applicants, as part of the existing *Reliability and safety* resource report, to indicate the noise level generated by the proposed transmission line and compare the noise level to any known noise ordinances for the zoning districts through which the line will pass. Section 380.16 does not currently require information on proposed project

[65] *See supra* P 11.

[66] 18 CFR 2.1c (2021).

[67] *See id.* § 380.16(j)(5).

[68] *Id.* § 380.16(j)(5)(i).

[69] *Id.*

[70] *Id.* § 380.16(j)(5)(ii).

[71] *See* proposed §§ 380.16(h)(4)–(5).

[72] E.O. 12898, 59 FR 7629 (Feb. 16, 1994). While the Commission is not one of the specified agencies in Executive Order 12898, the Commission nonetheless intends to address environmental justice in its analysis, in accordance with our governing regulations and statutory duties. 16 U.S.C. 824p(b)(3); 18 CFR 380.16(g) (2021) (requiring applicants to submit information about the socioeconomic impact area of a project for the Commission's consideration during NEPA review); *see also* FERC, *Guidance Manual for Environmental Report Preparation* at 4–76 to 4–82 (Feb. 2017), *https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf* (providing guidance for preparing Resource Report 5—Socioeconomics, including addressing project effects on environmental justice communities, for applications filed under the Natural Gas Act).

[73] E.O. 14008, 86 FR 7619 (Jan. 27, 2021).

[74] E.O. 13985, 86 FR 7009 (Jan. 25, 2021).

[75] CEQ's *Environmental Justice Guidance, https://www.energy.gov/sites/default/files/nepapub/nepa_documents/RedDont/G-CEQ-EJGuidance.pdf.* CEQ offers recommendations on how Federal agencies can provide opportunities for effective community participation in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices.

[76] *See generally Promising Practices, https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.*

[77] NEPA requires the Commission before taking an action, to analyze, disclose, and take a ''hard look'' at the potential environmental impacts of that action. *See* 42 U.S.C. 4332(2)(C); *Balt. Gas & Elec. Co.* v. *Nat. Res. Def. Council, Inc.,* 462 U.S. 87, 97 (1983) (discussing the twin aims of NEPA).

[78] As discussed, to identify environmental justice communities, Commission staff currently reviews U.S. Census Bureau population data for the applicable location and applies population thresholds provided by EPA and CEQ in their environmental justice recommendations and guidance. *See supra* at note 40.

[79] *See supra* P 32.

emissions and the corresponding effects on air quality and the environment.

69. To fully evaluate the effects of a proposed project in furtherance of our obligations under NEPA,[80] the Commission believes additional information on emissions, air quality, and environmental noise is necessary. Therefore, the Commission proposes to add a new resource report, Resource Report 11—*Air quality and environmental noise,* in proposed § 380.16(m). Proposed Resource Report 11 would require the applicant to estimate emissions from the proposed project and the corresponding impacts on air quality and the environment, estimate the impact of the proposed project on the noise environment, and describe proposed measures to mitigate the impacts. Consistent with the Commission's requirements for natural gas compressor stations,[81] we also propose to establish a noise limit for proposed substations and appurtenant facilities at pre-existing noise-sensitive areas, such as schools, hospitals, or residences.

70. Under proposed § 380.16(m)(1), the *Air quality and environmental noise* resource report must describe the existing air quality in the project area, indicate if any project facilities are located within a designated nonattainment or maintenance area under the Clean Air Act,[82] and provide the distance from the project facilities to any Class I area in the project vicinity. Under proposed § 380.16(m)(3), the resource report must estimate emissions from the proposed project and the corresponding impacts on air quality and the environment. Specifically, the applicant must provide the reasonably foreseeable emissions from construction, operation, and maintenance of the project facilities; provide a comparison of emissions with applicable General Conformity thresholds (40 CFR part 93) for each designated nonattainment or maintenance area; identify the corresponding impacts on communities and the environment in the project area; and describe any proposed mitigation measures to control emissions.

71. Under proposed § 380.16(m)(2), the resource report must, for proposed substations and appurtenant facilities, quantitatively describe existing noise levels at nearby noise-sensitive areas. Under proposed § 380.16(m)(4), the resource report must provide a quantitative estimate of project operation (including proposed transmission lines, substations, and other appurtenant facilities) on noise levels. The operational noise estimates must demonstrate that the proposed project will comply with applicable State and local noise regulations and that noise attributable to any proposed substation or appurtenant facility does not exceed a day-night sound level (L_{dn}) of 55 dBA at any pre-existing noise-sensitive area.[83] Additionally, the resource report must describe the impact of proposed construction activities on the noise environment and any proposed mitigation measures to reduce noise impacts.

4. Visual Resources

72. Section 380.16(j)(11) requires applicants, as part of the existing *Land use, recreation, and aesthetics* resource report, to describe the visual characteristics of the lands and waters affected by the project, including how the transmission line facilities will impact the visual character of the project right-of-way and surrounding vicinity and related mitigation measures. The Commission's existing regulations encourage, but do not require, applicants to supplement this description with visual aids.

73. The Commission believes that more specific information is needed to evaluate the effects of the proposed project facilities on visual resources. Above ground high-voltage transmission lines may cause substantial visual contrast and be a major focus for viewer attention. To assess visual impacts of infrastructure projects, including high-voltage transmission lines, Commission staff has, in some cases, used the Bureau of Land Management's Visual Resource Management methodology,[84] and other agencies have used the Federal Highway Administration's Visual Impact Assessment for Highway Projects.[85] The Commission seeks comment on whether either of these tools, or any other tools, are appropriate for our analysis. Additionally, we believe that visual aids are necessary to support this evaluation. Therefore, in proposed § 380.16(l)(10), we propose to require the applicant to identify the area of potential visual effects from the proposed project; describe any visually sensitive areas, visual classifications, and key viewpoints in the project vicinity; and provide visual aids to support the evaluation of visual impacts from the proposed project.

5. Additional Proposed Revisions to 18 CFR 380.16

74. Because the Commission proposes to add to § 380.16 three new resource reports (*Tribal resources, Environmental justice* and *Air quality and environmental noise*), we propose to redesignate all resource reports after Resource Report 5—*Socioeconomics* as follows: Resource Report 6—*Tribal resources* (proposed § 380.16(h)); Resource Report 7—*Environmental justice* (proposed § 380.16(i)); Resource Report 8—*Geological resources* (proposed § 380.16(j)); Resource Report 9—*Soils* (proposed § 380.16(k)); Resource Report 10—*Land use, recreation, and aesthetics* (proposed § 380.16(l)); Resource Report 11—*Air quality and environmental noise* (proposed § 380.16(m)); Resource Report 12—*Alternatives* (proposed § 380.16(n)); Resource Report 13—*Reliability and safety* (proposed § 380.16(o)); and Resource Report 14—*Design and engineering* (proposed § 380.16(p)).

75. In addition to the proposed addition of three new resource reports and the proposed changes to the visual resources requirements described above, the Commission proposes revisions throughout § 380.16. We discuss the main substantive revisions below.

76. In § 380.16(b)(3), we propose to clarify the scope of cumulative effects that must be identified in each resource report for consistency with the definition of cumulative effects in CEQ's NEPA regulations.[86]

77. In § 380.16(c)(2), we propose to revise Resource Report 1—*General project description* to more clearly identify the types of facilities that must be depicted on the topographic maps and aerial images or photo-based alignment sheets. We also propose to add requirements to describe any proposed horizontal directional drilling and pile driving that may be necessary (§ 380.16(c)(3)), indicate the days of the week and times of the day during which construction activities would occur, and

[80] As noted above, NEPA requires the Commission to take a ''hard look'' at the environmental impacts of a proposed action. *See* 42 U.S.C. 4332(2)(C); *Balt. Gas & Elec. Co.* v. *Nat. Res. Def. Council, Inc.,* 462 U.S. at 97.

[81] 18 CFR 380.12(k)(4)(v)(A) (2021).

[82] 42 U.S.C. 7401 *et seq.*

[83] The EPA has indicated that a day-night noise level of 55 decibels on the A-weighted scale protects the public from indoor and outdoor activity interference. The Commission has adopted this criterion and uses it to evaluate the potential noise impact from operation of natural gas compressor facilities. *Elba Express Co., L.L.C.,* 141 FERC ¶ 61,027, at P 21 n.12 (2012). We think it is appropriate to use this same criterion to evaluate the potential noise impact from operation of substations and appurtenant facilities.

[84] *See, e.g.,* Final Environmental Impact Statement for the Swan Lake North Pumped Storage Project (P–13318–003).

[85] *See, e.g.,* Final Environmental Impact Statement for the Susquehanna to Roseland 500kv Transmission Line Right-of-Way and Special Use Permit at 588, *https://parkplanning.nps.gov/document.cfm?documentID=49285&parkID=220&projectID=25147.*

[86] 40 CFR 1508.1(g)(3) (2021).

describe any proposed nighttime construction activities (§ 380.16(c)(4)).

78. In § 380.16(d)(6), the Commission proposes to add a requirement that Resource Report 2—*Water use and quality* describe the impact of proposed land clearing and vegetation management practices on water resources. In § 380.16(e), the Commission proposes to clarify that Resource Report 3—*Fish, wildlife, and vegetation* must describe potential impacts on interior forest (§ 380.16(e)(3)), as well as the impact of proposed land clearing and vegetation management practices on fish, wildlife, and vegetation (§ 380.16(e)(4)).

79. In § 380.16(k)(4), the Commission proposes to add a requirement that Resource Report 9—*Soils* describe any proposed mitigation measures intended to reduce the potential for adverse impacts to soils or agricultural productivity.

80. In § 380.16(l)(4), the Commission proposes to add a requirement that Resource Report 10—*Land use, recreation, and aesthetics* identify the area of direct effect of the proposed facilities on interior forest. The Commission also proposes to: (1) clarify the scope of facilities (*e.g.,* buildings, electronic installations, airstrips, airports, and heliports) in the project vicinity that must be identified; (2) clarify the corresponding requirements to depict such facilities on the maps and photographs in Resource Report 1 (§ 380.16(l)(5)); and (3) require copies of any consultation with the Federal Aviation Administration (§ 380.16(l)(5)(iii)).

81. In § 380.16(o)(3), the Commission proposes to add a requirement that Resource Report 13—*Reliability and safety* include a discussion of any proposed measures intended to ensure that the facilities proposed by the applicant would be resilient against future climate change impacts. We also propose to clarify the existing requirement that the *Reliability and safety* resource report discuss contingency plans for maintaining service or reducing downtime by adding that such contingency plans should ensure that the proposed facilities would not adversely affect the bulk electric system in accordance with applicable North American Electric Reliability Corporation reliability standards (§ 380.16(o)(4)). Finally, given the addition of new Resource Report 11—*Air quality and environmental noise,* the Commission proposes to eliminate from the *Reliability and safety* resource report the now redundant requirement that the applicant must indicate the noise level generated by the transmission line.

82. For all of the proposed revisions discussed above, we seek comment on, as appropriate, whether the Commission has authority to impose such changes and, if it does, whether it should impose such changes. We also propose minor, non-substantive edits throughout § 380.16. These proposed revisions are intended to clarify or streamline existing requirements, to correct grammatical errors and cross-references, and to maintain consistency.

6. Proposed Revisions to 18 CFR 380.13 and 380.14

83. Finally, the Commission also proposes to amend §§ 380.13 (Compliance with the Endangered Species Act) and 380.14 (Compliance with the NHPA) to add cross-references to the appropriate paragraphs of § 380.16. We believe the prior omission of such cross-references to be an oversight. Section 380.14 also contains a proposed revision to correct the legal citation for section 106 of the NHPA,[87] following the act's recodification in title 54 of the U.S. Code.

III. Information Collection Statement

84. The Paperwork Reduction Act[88] requires each Federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contemplated by proposed rules.[89] Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

85. *Public Reporting Burden:* In this NOPR, the Commission proposes to revise its regulations governing applications for permits to site transmission facilities under section 216 of the FPA. This proposed rule would modify certain reporting and recordkeeping requirements included in FERC–729 (OMB Control No. 1902–0239).[90]

86. The proposed revisions to the Commission's regulations associated with the FERC–729 information collection are intended to ensure consistency with section 216 of the FPA, as amended by the IIJA. The Commission also proposes revisions to modernize certain regulatory requirements and to incorporate other updates and clarifications to provide for the efficient and timely review of permit applications. Several of the proposed revisions have information collection implications. For example, the Commission proposes to require an applicant to:

- maintain an affected landowner contact log, provide certain information to affected landowners, file an affirmative statement with the Commission indicating the applicant's intent to comply with the Applicant Code of Conduct, and include compliance updates as part of the monthly status reports required during the pre-filing process;[91]
- provide additional congestion and system analysis information during the pre-filing process and as part of the application;
- develop and file an environmental justice public engagement plan describing completed and planned targeted outreach efforts during the pre-filing process and after an application has been submitted;
- develop and file a new resource report describing the proposed project's impacts on Tribal resources;
- develop and file a new resource report describing the proposed project's impacts on environmental justice communities;
- develop and file a new resource report describing the proposed project's impact on air quality and environmental noise;
- provide additional information describing the proposed project's visual impacts; and
- provide additional information as part of the following existing resource reports: *General project description; Water use and quality; Fish, wildlife, and vegetation; Soils; Land use, recreation, and aesthetics;* and *Reliability and safety.*

These proposed revisions would represent an increase in information collection requirements and burden for FERC–729.

87. The Commission recognizes that some of the estimates for the information collection activities proposed in this NOPR are novel. Therefore, the Commission seeks comments on the burden and costs

[87] 54 U.S.C. 306108.

[88] 44 U.S.C. 3501–3521.

[89] *See* 5 CFR 1320.11 (2021).

[90] FERC–729 includes the reporting and recordkeeping requirements for ''Electric Transmission Facilities.''

[91] These requirements would only apply to applicants who elect to comply with the Applicant Code of Conduct set forth in proposed § 50.12.

associated with the requirements contained in this NOPR.

88. The estimated burden and cost for the requirements contained in this NOPR follow.

ANNUAL CHANGES PROPOSED BY THE NOPR IN DOCKET NO. RM22–7–000

	Number of respondents (1)	Number of responses [92] per respondent (2)	Total number of responses (1) × (2) = (3)	Average burden hours & cost per response [93] (4)	Total annual burden hours & total annual cost (3) × (4) = 5
Current FERC 729 Collection					
FERC–729	1	1	1	9,600 hrs.; $873,600	9,600 hrs.; $873,600.
Proposed Revisions in RM22–7–000					
Applicant Code of Conduct [94].	[95] 1	1	1	136 hrs; $12,376	136 hrs.; $12,376.
Environmental Justice Public Engagement Plan.	1	1	1	24 hrs.; $2,184	24 hrs.; $2,184.
Congestion and System Analysis Data [96].	1	1	1	160 hrs.; $14,560	160 hrs.; $14,560.
Other Updates to 18 CFR pt. 50 [97].	1	1	1	28 hrs.; $2,548	28 hrs.; $2,548.
Resource Report: Tribal Resources.	1	1	1	40 hrs.; $3,640	40 hrs.; $3,640.
Resource Report: Environmental Justice.	1	1	1	80 hrs.; $7,280	80 hrs.; $7,280.
Resource Report: Air Quality & Environmental Noise.	1	1	1	296 hrs.; $26,936	296 hrs.; $26,936.
Information on Visual Impacts.	1	1	1	100 hrs.; $9,100	100 hrs.; $9,100.
Other Updates to 18 CFR pt. 380 [98].	1	1	1	148 hrs.; $13,468	148 hrs.; $13,468.
Total			11		1,012 hrs.; $92,092.

89. *Titles:* FERC–729—*Electric Transmission Facilities.*

90. *Action:* Revisions to information collection FERC–729.

91. *OMB Control Nos.:* 1902–0238 (FERC–729).

92. *Respondents:* Entities proposing to construct electric transmission facilities pursuant to the Commission's authority under section 216 of the FPA.

93. *Frequency of Information:* Ongoing.

94. *Necessity of Information:* The new information collection requirements are necessary for the Commission to carry out its responsibilities under the FPA, as amended by the IIJA, and NEPA. The required information would enable the Commission to review the features of the proposed project and determine whether the proposed project meets the statutory criteria enumerated in section 216(b) of the FPA. In addition, the proposed revisions to the Commission's mandatory pre-filing process that would require certain information to be filed earlier in the process would help ensure that an application can be acted on no later than one year after the date of filing in compliance with section 216(h)(4)(B). The revised regulations would affect only the number of entities that would pursue a permit to site electric transmission facilities.

95. *Internal Review:* The Commission has reviewed the proposed revisions and has determined that they are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

96. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director], by email to

[92] We consider the filing of an application, including the mandatory pre-filing information, to be a ''response.''

[93] The estimates for cost per response are derived using the following formula: Average Burden Hours per Response * $91 per Hour = Average Cost per Response. The hourly cost figure is the FY2022 FERC average annual salary plus benefits ($188,992/year or $91/hour). Commission staff estimates that industry costs for salary plus benefits are similar to Commission costs.

[94] Notwithstanding that compliance with the Applicant Code of Conduct is voluntary, we are providing the estimated burden hours associated with such compliance.

[95] After implementation of this proposed rule, we estimate one application for a permit to site electric transmission facilities will be filed per year.

[96] This category covers the proposed updates to the congestion and system analysis data that an applicant must provide during the pre-filing process and as part of the application in Exhibit H, *System analysis data.*

[97] This category covers additional proposed updates to part 50 of the Commission's regulations that involve minor increases in burden (*e.g.,* adding an interactive mapping feature to an applicant's project website and including additional material in the project notifications mailed to affected landowners) as well as a reduction in burden associated with eliminating the requirement that an applicant provide seven paper copies of an application, exhibits, and other submittals.

[98] This category covers a variety of non-substantial proposed updates to § 380.16 of the Commission's regulations that, if adopted, would require an applicant to develop and submit additional information as part of the following resource reports: *General project description; Water use and quality; Fish, wildlife, and vegetation; Soils; Land use, recreation, and aesthetics;* and *Reliability and safety.*

DataClearance@ferc.gov or by phone (202) 502–8663.

97. Comments concerning the collections of information and the associated burden estimates may also be sent to: Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission]. Due to security concerns, comments should be sent electronically to the following email address: *oira_submission@omb.eop.gov.* Comments submitted to OMB should refer to FERC–729 (OMB Control No. 1902–0238).

IV. Environmental Analysis

98. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant effect on the human environment.[99] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment, including the promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or the regulations being amended.[100] Because the actions proposed herein fall within this categorical exclusion, preparation of an Environmental Assessment or an Environmental Impact Statement is not required.

V. Regulatory Flexibility Act

99. The Regulatory Flexibility Act of 1980 (RFA)[101] generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and minimize any significant economic impact on a substantial number of small entities.[102] In lieu of preparing a regulatory flexibility analysis, an agency may certify that a proposed rule will not have a significant economic impact on a substantial number of small entities.[103]

100. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[104] The SBA size standard for electric utilities is based on the number of employees, including affiliates.[105] Under SBA's size standards, a transmission owner covered under the category of Electric Bulk Power Transmission and Control (NAICS code 221121)[106] is small if, including its affiliates, it employs 500 or fewer people.[107]

101. In Order No. 689, the Commission expected that entities seeking approval for transmission siting projects under FPA section 216 would be major transmission utilities capable of financing complex and costly transmission projects.[108] At that time, the Commission anticipated that the high cost of constructing transmission facilities would preclude entry into this field by small entities as defined by the RFA.[109] Though the SBA size standard for electric utilities has changed from megawatt hours to number of employees since Order No. 689 was issued, we continue to find it unlikely that small entities in any number, let alone a substantial number, will pursue the permitting of transmission projects before the Commission. Since Order No. 689, only Southern California Edison, which would not qualify as a small entity under the SBA's current size standards, has participated in the Commission's pre-filing process for applications to site transmission facilities under section 216. To date, the Commission has not received any applications for permits to site transmission facilities under section 216.

102. Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

VI. Comment Procedures

103. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due April 17, 2023. Comments must refer to Docket No. RM22–7–000 and must include the commenter's name; the organization they represent, if applicable; and their address in their comments. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

104. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software must be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

105. Commenters that are not able to file comments electronically may file an original of their comment by U.S. Postal Service mail or by courier or other delivery services. For submission sent via U.S. Postal Service only, filings should be mailed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submission of filings other than by U.S. Postal Service should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

VII. Document Availability

106. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19).

107. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

108. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202)

[99] *Regs. Implementing the Nat'l Env'l Pol'y Act of 1969,* Order No. 486, 52 FR 47897 (Dec. 10, 1987), FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at 41 FERC ¶ 61,284).

[100] 18 CFR 380.4(a)(2)(ii) (2021).

[101] 5 U.S.C. 601–612.

[102] *Id.* 603(c).

[103] *Id.* 605(b).

[104] 13 CFR 121.101 (2021).

[105] *Id.* 121.201.

[106] The North American Industry Classification System (NAICS) is an industry classification system that Federal statistical agencies use to categorize businesses for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. economy. United States Census Bureau, *North American Industry Classification System, https://www.census.gov/eos/www/naics/.*

[107] 13 CFR 121.201 (Sector 22—Utilities).

[108] Order No. 689 Final Rule, 117 FERC ¶ 61,202 at P 73.

[109] *Id.*

502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

List of Subjects

18 CFR Part 50

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 380

Environmental impact statements, Reporting and recordkeeping requirements.

By direction of the Commission.

Commissioner Danly is concurring with a separate statement attached.

Commissioner Christie is concurring with separate statement attached.

(S E A L)

Issued December 15, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend Parts 50 and 380, Chapter I, Title 18, Code of Federal Regulations, as follows.

PART 50—APPLICATIONS FOR PERMITS TO SITE INTERSTATE ELECTRIC TRANSMISSION FACILITIES

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

Authority: 16 U.S.C. 824p; DOE Delegation Order No. 00–004.00A.

■ 2. Amend § 50.1 as follows:

■ a. Add a definition in alphabetical order for ''Environmental justice community'';

■ b. Remove the words ''special use authorization'' in the definition of ''Federal authorization'' and add in its place the words ''special use authorizations'';

■ c. Add a definition in alphabetical order for ''Indian Tribe''; and

■ d. Revise the definitions of ''National interest electric transmission corridor'', ''Permitting entity'', and ''Stakeholder''.

The additions and revisions read as follows:

§ 50.1 Definitions.

* * * * *

Environmental justice community means any disadvantaged community that has been historically marginalized and overburdened by pollution. Environmental justice communities include, but may not be limited to, minority populations, low-income populations, or indigenous peoples.

* * * * *

Indian Tribe means an Indian Tribe that is recognized by treaty with the United States, by Federal statute, or by the U.S. Department of the Interior in its periodic listing of Tribal governments in the **Federal Register** in accordance with 25 CFR 83.6(a), and whose Tribal interests may be affected by the development and operation of the proposed transmission facilities.

National interest electric transmission corridor means any geographic area that is experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers or is expected to experience such energy transmission capacity constraints or congestion, as designated by the Secretary of Energy.

Permitting entity means any Federal or State agency, Indian Tribe, or multistate entity that is responsible for issuing separate authorizations pursuant to Federal law that are required to construct electric transmission facilities in a national interest electric transmission corridor.

Stakeholder means any Federal, State, interstate, or local agency; any Tribal government; any affected landowner; any environmental justice community member; or any other interested person or organization.

* * * * *

§ 50.2 [Amended]

■ 3. Amend § 50.2 as follows:

■ a. Remove the word ''tribes'' in the third sentence of paragraph (a) and add in its place the word ''Tribes''; and

■ b. Remove the word ''which'' in paragraph (c) and add in its place the word ''that''.

■ 4. Amend § 50.3 by revising paragraph (b) to read as follows:

§ 50.3 Applications/pre-filing; rules and format.

* * * * *

(b) Applications, amendments, and all exhibits and other submissions required to be furnished by an applicant to the Commission under this part must be submitted in electronic format.

* * * * *

■ 5. Amend § 50.4 as follows:

■ a. Revise paragraphs (a)(1) through (3);

■ b. Add paragraph (a)(4); and

■ c. Revise the first sentence of paragraph (c)(1) introductory text and revise paragraphs (c)(1)(ii) and (c)(2) through (4).

The revisions and addition read as follows:

§ 50.4 Stakeholder participation.

* * * * *

(a) * * *

(1) Identifies specific tools and actions to facilitate stakeholder communications and public information, including an up-to-date project website with an interactive mapping component, and a readily accessible, single point of contact for the applicant;

(2) Lists all central locations in each county throughout the project area where the applicant will provide copies of all its filings related to the proposed project;

(3) Includes a description and schedule explaining how the applicant intends to respond to requests for information from the public, permitting entities, and other legal entities with local authorization requirements; and

(4) Includes an Environmental Justice Public Engagement Plan that addresses all targeted outreach to identified environmental justice communities. This plan must summarize comments received from potentially impacted environmental justice communities during any previous outreach activities and describe planned targeted outreach activities with such communities during the pre-filing process and after the filing of an application, including efforts to identify, engage, and accommodate non-English speaking groups or linguistically isolated communities. This plan must also describe how the applicant will conduct outreach to environmental justice communities about any potential mitigation.

* * * * *

(c) * * *

(1) The applicant must make a good faith effort to notify all: affected landowners; landowners with a residence within a quarter mile of the edge of the construction right-of-way of the proposed project; municipalities in the project area; permitting entities; other local, State, Tribal, and Federal governments and agencies involved in the project; electric utilities and transmission owners and operators that are, or may be, connected to the proposed transmission facilities; any known individuals or organizations that have expressed an interest in the State siting proceeding; and any other individuals or organizations that have expressed to the applicant, or its representatives, an interest in the proposed project. * * *

* * * * *

(ii) By twice publishing a notice of the pre-filing request and application filings, in a daily, weekly, and/or Tribal newspaper of general circulation in each county in which the project is located, no later than 14 days after the date that a docket number is assigned for the pre-filing process or to the application.

(2) *Contents of participation notice.* (i) Any pre-filing request notification sent by mail or published in a newspaper must, at a minimum, include:

(A) The docket number assigned to the proceeding;

(B) The most recent edition of the Commission's pamphlet *Electric Transmission Facilities Permit Process.* The newspaper notice need only refer to the pamphlet and indicate that it is available on the Commission's website;

(C) A description of the applicant and a description of the proposed project, its location (including a general location map), its purpose, and the proposed project schedule;

(D) Contact information for the applicant, including a local or toll-free telephone number, the name of a specific contact person who is knowledgeable about the project, and information on how to access the project website;

(E) Information on how to get a copy of the pre-filing information from the applicant and the location(s) where copies of the pre-filing information may be found as specified in paragraph (b) of this section;

(F) A copy of the Director's notification of commencement of the pre-filing process, the Commission's internet address, and contact information for the Commission's Office of Public Participation;

(G) Information explaining the pre-filing and application processes and when and how to intervene in the application proceedings; and

(H) Information explaining that the Commission's pre-filing and application processes are separate from any simultaneous State siting proceeding(s) and how to participate in any such State siting proceeding(s).

(ii) In addition to the requirements of paragraph (c)(2)(i) of this section, any pre-filing request notification sent by mail to an affected landowner must also include:

(A) A general description of the property the applicant will need from an affected landowner if the project is approved;

(B) The most recent edition of the document entitled ''*Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings,*'' on its own page(s) in at least 12-point font, legible, and contained within the first 10 pages of the notification; and

(C) A brief summary of what specific rights the affected landowner has in proceedings under the eminent domain rules of the relevant State.

(iii) The application notification must include the Commission's notice issued under § 50.9 and restate, or clearly identify the location of, the comment and intervention instructions provided in the Commission's notice.

(3) If, for any reason, a person or entity entitled to this notice has not yet been identified when the notices under this paragraph (c) are sent or published, the applicant must supply the information required under paragraphs (c)(2)(i) through (iii) of this section, as applicable, when the person or entity is identified.

(4) If the notification is returned as undeliverable, the applicant must make a reasonable attempt to find the correct address and re-send the notice.

* * * * *

■ 6. Amend § 50.5 as follows:

■ a. Revise paragraph (c) introductory text, the first sentence of paragraph (c)(3) introductory text, paragraph (c)(3)(i), and the first sentence of paragraph (c)(5);

■ b. Add paragraphs (c)(8) and (9);

■ c. Revise paragraphs (d)(1)(i) and (e)(3)(i);

■ d. Remove paragraph (e)(3)(ii);

■ e. Redesignate paragraph (e)(3)(iii) as (e)(3)(ii);

■ f. Revise the first sentence of paragraph (e)(4);

■ g. Redesignate paragraphs (e)(7) and (8) as paragraphs (e)(9) and (10), respectively;

■ h. Add new paragraphs (e)(7) and (8); and

■ i. Revise the first sentence of newly redesignated paragraph (e)(10).

The revisions and additions read as follows:

§ 50.5 Pre-filing procedures.

* * * * *

(c) *Contents of the initial filing.* An applicant's pre-filing request cannot be filed prior to the initial consultation and must include the following information:

* * * * *

(3) A list of the permitting entities responsible for conducting separate Federal permitting and environmental reviews and authorizations for the project, including contact names and telephone numbers, and a list of Tribal, State, and local entities with authorization requirements. * * *

(i) How the applicant intends to account for each of the relevant entity's permitting and environmental review schedules, including its progress in the Department of Energy's pre-application process; and

* * * * *

(5) A description of completed work, including contacting stakeholders, agency and Tribal consultations, project engineering, route planning, environmental and engineering contractor engagement, environmental surveys/studies, open houses, and any work completed or actions taken in conjunction with a State proceeding. * * *

* * * * *

(8) A detailed description of how the proposed project will reduce capacity constraints and congestion on the transmission system.

(9) A statement indicating whether the applicant intends to comply with the Applicant Code of Conduct described in § 50.12, and, if not, how the applicant intends to ensure good faith dealings with affected landowners.

(d) * * *

(1) * * *

(i) The notification will designate the third-party contractor, if applicable, and

* * * * *

(e) * * *

(3) * * *

(i) Provide project notification in compliance with the requirements of § 50.4(c); and

* * * * *

(4) Within 30 days, submit a mailing list of all notifications made under paragraph (e)(3) of this section, including the names of the Federal, State, Tribal, and local jurisdictions' representatives. * * *

* * * * *

(7) Within 30 days, file supporting information showing how the proposed project will reduce capacity constraints and congestion on the transmission system, including:

(i) Full report(s) of the System Impact Study for the proposed project;

(ii) For each transmission planning region that would be crossed by the proposed project, the most recent Regional Transmission Plan; and

(iii) Expert witness testimony and other relevant information submitted with the State siting application(s), where applicable.

(8) Within 30 days, file a draft Exhibit H—System analysis data required in § 50.7.

* * * * *

(10) On a monthly basis, file status reports detailing the applicant's project activities, including surveys, stakeholder communications, agency and Tribal meetings, and updates on the status of other required permits or authorizations. * * *

* * * * *

■ 7. Amend § 50.6 as follows:

■ a. Revise paragraph (b), the second sentence of paragraph (c), and paragraphs (d), (e)(1), and (e)(3)(i) and (ii);

■ b. Add paragraph (e)(3)(iii); and
■ c. Revise paragraph (i).

The revisions and addition read as follows:

§ 50.6 Applications: general content.

* * * * *

(b) A concise description of applicant's existing operations, if applicable.

(c) * * * The description must, at a minimum: identify the proposed geographic location of the principal project features and the planned routing of the transmission line; contain the general characteristics of the transmission line, including voltage, types of towers, point of receipt and point of delivery, and the geographic character of the area traversed by the line; and be accompanied by an overview map of sufficient scale to show the entire transmission route on one (or a few) 8.5 by 11-inch sheets.

(d) Verification that the proposed route lies within a national interest electric transmission corridor designated by the Secretary of the Department of Energy under section 216 of the Federal Power Act, including the date on which the relevant corridor was designated.

(e) * * *

(1) A State in which the transmission facilities are to be constructed or modified does not have the authority to approve the siting of the facilities or consider the interstate benefits or interregional benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;

* * * * *

(3) * * *

(i) Not made a determination on an application seeking approval pursuant to applicable law;

(ii) Conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible; or

(iii) Denied an application seeking approval pursuant to applicable law.

* * * * *

(i) A full statement as to whether any other application to supplement or effectuate the applicant's proposal must be (or is to be) filed by the applicant, any of the applicant's customers, or any other person with any other Federal, State, Tribal, or other regulatory body; and if so, the nature and status of each such application.

* * * * *

■ 8. Amend § 50.7 as follows:

■ a. Revise the introductory text and paragraphs (g)(1)(i) and (vi), (g)(2)(ii) and (vi), (g)(3)(iii), (g)(4)(iii), (g)(5) introductory text, (g)(6) introductory text, (g)(6)(ii), (g)(8), (h)(1), the first sentence of paragraph (h)(2) introductory text, and paragraph (h)(2)(ii);
■ b. Remove paragraphs (h)(3) and (4);
■ c. Redesignate paragraphs (h)(5) and (6) as paragraphs (h)(3) and (4); and
■ d. Revise newly redesignated paragraphs (h)(3) and (4) and paragraphs (i)(2) and and (j).

The revisions read as follows:

§ 50.7 Applications: exhibits.

Each exhibit must contain a title page showing the applicant's name, the title of the exhibit, and the proper letter designation of the exhibit. If an exhibit is 10 or more pages in length, it must include a table of contents citing (by page, section number, or subdivision) the component elements or matters contained in the exhibit.

* * * * *

(g) * * *

(1) * * *

(i) Name, point of receipt, and point of delivery of the project;

* * * * *

(vi) Line design features that minimize audible corona noise during fog/rain caused by operation of the proposed facilities.

(2) * * *

(ii) Type of structures, including overhead and underground structures;

* * * * *

(vi) A list of the names of all new (and existing, if applicable) substations or switching stations that will be associated with the proposed transmission line.

(3) * * *

(iii) Width of the right-of-way; and

* * * * *

(4) * * *

(iii) Conductor size, conductor type, and number of conductors per phase.

(5) If the proposed project includes an overhead transmission line, the following additional information also must be provided:

* * * * *

(6) If an underground or underwater transmission line is proposed, the following additional information also must be provided:

* * * * *

(ii) Type of cable and a description of any required supporting equipment, such as pressurizing plants;

* * * * *

(8) Any other data or information identified as a minimum requirement for the siting of a transmission line in the State in which the facility will be located.

(h) * * *

(1) An analysis of the existing and expected capacity constraints and congestion on the electric transmission system.

(2) Steady-state, short-circuit, and dynamic power flow cases, as applicable, used to analyze the existing transmission system, proposed project, and future transmission system under anticipated load growth, operating conditions, variations in power import and export levels, generation additions and retirements, and additional transmission facilities required for system reliability. * * *

* * * * *

(ii) State the assumptions, criteria, and guidelines upon which the models are based and take into consideration transmission facility loading, planned and forecasted forced outage rate for generation and transmission, generation dispatch scenarios, system protection, and system stability.

(3) A concise analysis of how the proposed project will:

(i) Improve system reliability over the long and short term;

(ii) Impact long-term regional transmission expansion plans;

(iii) Impact congestion on the applicant's entire system and neighboring systems; and

(iv) Incorporate any advanced technology design features, if applicable.

(4) Single-line diagrams, including existing system facilities identified by name and circuit number, that show system transmission elements, in relation to the project and other principal interconnected system elements, as well as power flow and loss data that represent system operating conditions.

(i) * * *

(2) The estimated capital cost and estimated annual operations and maintenance expense of each proposed mitigation measure.

* * * * *

(j) *Exhibit J—Construction, operation, and management.* A concise statement providing arrangements for supervision, management, engineering, accounting, legal, or other similar services to be rendered in connection with the construction, operation, and maintenance of the project, if not to be performed by employees of the applicant, including reference to any existing or contemplated agreements, together with a statement showing any affiliation between the applicant and

any parties to the agreements or arrangements.

§ 50.8 [Amended]

■ 9. Amend § 50.8 as follows:
■ a. Remove the word ''applicant's'' in the second sentence of paragraph (b) and add in its place the word ''applicant''; and
■ b. Remove the comma directly following the word ''rejected'' in paragraph (c).
■ 10. Amend § 50.9 by revising paragraph (b) to read as follows:

§ 50.9 Notice of Application

* * * * *

(b) The notice will establish prompt and binding intermediate milestones and ultimate deadlines for the review of, and Federal authorization decisions relating to, the proposed facilities.

§ 50.11 [Amended]

■ 11. Amend § 50.11 as follows:
■ a. Revise paragraph (a) and the second sentence of paragraph (b);
■ b. Add a sentence at the end of paragraph (d) introductory text and add paragraphs (d)(1) and (2);
■ c. Remove the word ''permitee'' in the first sentence of paragraph (e) and add in its place the word ''permittee'';
■ d. Remove the word ''Order'' in the first sentence of paragraph (g) introductory text and add in its place the word ''order''; and
■ e. Remove the word ''Orders'' in paragraph (g)(2) and add in its place the word ''orders''.

The revisions and addition read as follows:

§ 50.11 General conditions applicable to permits.

(a) The following terms and conditions, along with others that the Commission finds are required by the public interest, will attach to the issuance of each permit and to the exercise of the rights granted under the permit.

(b) * * * *Provided that,* when an applicant files for rehearing of the order in accordance with FPA section 313(a), the acceptance must be filed within 30 days after final disposition of the request for rehearing. * * *

* * * * *

(d) * * * *Provided that,* no authorization to proceed with construction activities will be issued:

(1) Until the time for the filing of a request for rehearing under 16 U.S.C. 825*l*(a) has expired with no such request being filed, or

(2) If a timely request for rehearing raising issues reflecting opposition to project construction, operation, or need is filed, until:

(i) The request is no longer pending before the Commission;

(ii) The record of the proceeding is filed with the court of appeals; or

(iii) 90 days has passed after the date that the request for rehearing may be deemed to have been denied under 16 U.S.C. 825*l*(a).

* * * * *

■ 12. Add § 50.12 to read as follows:

§ 50.12 Applicant code of conduct for landowner engagement.

Under section 216(e)(1) of the Federal Power Act, any applicant that may, upon receipt of a permit, seek to acquire the necessary right-of-way by the exercise of the right of eminent domain must demonstrate to the Commission that it has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process. An applicant's commitment to and compliance with the Applicant Code of Conduct in its communications with affected landowners during the permitting process is one way to demonstrate to the Commission that such good faith efforts have been made.

(a) *Applicant code of conduct.* To promote good faith engagement with affected landowners, applicants committing to comply with the Applicant Code of Conduct must:

(1) For the duration of the pre-filing and application review process, develop and retain a log of discussions with affected landowners, organized by name and property address, that includes:

(i) The name of the affected landowner;

(ii) The substance of the items discussed;

(iii) The nature of the contact (such as in-person, virtual meeting, telephone, electronic mail);

(iv) The date of the contact; and

(v) The status of discussions with the affected landowner following the contact, including any permissions granted, negotiations, or future meetings scheduled.

(2) In addition to the pre-filing request notification required by § 50.4(c)(1)(i) and (ii), provide to each affected landowner, prior to, during, or immediately after the first contact, a document that, at a minimum, includes: a description of the project, a description of the Commission and its role, a map of the project route, and the Landowner Bill of Rights in the form described in § 50.4(c)(2)(ii)(B). If the first contact with the affected landowner is in-person, the applicant must offer to provide the affected landowner at least one paper copy of the document. If the first contact with the affected landowner is by telephone, text, or electronic mail, the applicant may provide the affected landowner with a copy of the document by electronic means or by first class mail, at the affected landowner's preference. The applicant must review the provisions of the document with the affected landowner upon request.

(3) Ensure that any representative acting on the applicant's behalf states their full name, title, and employer, as well as the name of the applicant that they represent, at the beginning of any discussion with an affected landowner, and provides the representative's contact information, including mailing address, telephone number, and electronic mail address, prior to the end of the discussion.

(4) Ensure that all communications with affected landowners are factually correct. The applicant must correct any statements made by it or any representative acting on its behalf that it becomes aware were:

(i) Inaccurate when made; or

(ii) Have been rendered inaccurate based on subsequent events, within three business days of discovery of any such inaccuracy.

(5) Ensure that communications with affected landowners do not misrepresent the status of the discussions or negotiations between the parties.

(6) Provide affected landowners with updated contact information whenever an applicant's contact information changes.

(7) Communicate respectfully with affected landowners and avoid harassing, coercive, manipulative, or intimidating communications or high-pressure tactics.

(8) Except as otherwise provided by State or local law, abide by an affected landowner's request to end the communication or for the applicant or its representative to leave the affected landowner's property.

(9) Except as otherwise provided by State or local law, obtain an affected landowner's permission prior to entering the property, including for survey or environmental assessment, and leave the property without argument or delay if the affected landowner revokes permission.

(10) Refrain from discussing an affected landowner's communications or negotiations status with any other affected landowner.

(11) Provide the affected landowner with a copy of any appraisal that has been prepared by, or on behalf of, the applicant for that affected landowner's property, if any, before discussing the value of the property in question.

(12) Ensure that any representative acting on the applicant's behalf complies with all provisions of the Applicant Code of Conduct described in this paragraph (a).

(b) *Compliance with Applicant Code of Conduct.* Applicants committing to comply with the Applicant Code of Conduct must:

(1) File, as part of the pre-filing request required by § 50.5(c), an affirmative statement that the applicant intends to comply with the Applicant Code of Conduct.

(2) Include, as part of the monthly status reports required by § 50.5(e)(10):

(i) An affirmation that the applicant and its representatives have, to the best of their knowledge, complied with the Applicant Code of Conduct during the month in question; or

(ii) A detailed explanation of any instances of non-compliance with the Applicant Code of Conduct during the month in question and any remedial actions taken or planned.

(3) Identify, in a filing with the Commission or as part of the monthly status reports required by § 50.5(e)(10), any known instances of non-compliance that were not disclosed in prior monthly status reports and explain any remedial actions taken in the current month to address instances of non-compliance occurring in prior months.

(c) *Compliance with an alternative method.* Applicants not committing to comply with the Applicant Code of Conduct must:

(1) File, as part of the pre-filing request required by § 50.5(c):

(i) An affirmative statement that the applicant intends to rely on an alternative method of demonstrating that it meets the good faith efforts standard;

(ii) A detailed explanation of the alternative method of demonstrating that it meets the good faith efforts standard, including any commitments to record-keeping, information-sharing, or other conduct;

(iii) An explanation of how the alternative method is equal to or superior to compliance with the Applicant Code of Conduct as a means to ensure the good faith efforts standard is met;

(iv) An explanation, for each component of the Applicant Code of Conduct with which it does not comply, why it did not follow that component; and

(v) An explanation, for each component of the Applicant Code of Conduct with which it does not comply, why the alternative method is an equal or better means to ensure the good faith standard is met notwithstanding that deviation from the Applicant Code of Conduct.

PART 380—REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

■ 13. The authority citation for part 380 continues to read as follows:

Authority: 42 U.S.C. 4321–4370h, 7101–7352; E.O. 12009, 3 CFR 1978 Comp., p. 142.

■ 14. Amend § 380.2 by redesignating paragraphs (f) and (g) as paragraphs (g) and (h) and adding new paragraph (f).

The addition reads as follows:

§ 380.2 Definitions and terminology.

* * * * *

(f) *Environmental justice community* means any disadvantaged community that has been historically marginalized and overburdened by pollution. Environmental justice communities include, but may not be limited to, minority populations, low-income populations, or indigenous peoples.

* * * * *

§ 380.13 [Amended]

■ 15. Amend § 380.13 in paragraph (b)(2)(i) by adding ''or § 380.16, as applicable'' directly after the reference to ''§ 380.12''.

§ 380.14 [Amended]

■ 16. Amend § 380.14 in paragraph (a) introductory text as follows:

■ a. Remove the parenthetical reference to ''16 U.S.C. 470(f)'' in the first sentence and adding, in its place, a parenthetical reference to ''54 U.S.C. 306108''; and

■ b. Add the ''or § 380.16(f), as applicable'' directly after the reference to ''380.12(f)''.

■ 17. Amend § 380.16 as follows:

■ a. Revise the second sentence of paragraph (a)(1), revise paragraph (b)(3), revise the first sentence of paragraph (c) introductory text and the first sentence of paragraph (c)(1), and revise paragraphs (c)(2)(i) through (iii) and (c)(3) and (4);

■ b. Revise paragraph (d)(6) and the second sentence of paragraph (d)(7);

■ c. Revise paragraph (e)(3), the first two sentences of paragraph (e)(4), the first and third sentences of paragraph (e)(5), and paragraphs (e)(6) through (8);

■ d. Revise paragraphs (f)(1)(i), (iii), (iv), and (v), (f)(2) introductory text, and the first sentence of paragraph (f)(4);

■ e. Revise the first sentence of paragraph (g) introductory text and paragraphs (g)(3) and (6);

■ f. Redesignate paragraphs (k) through (m) as paragraphs (n) through (p);

■ g. Redesignate paragraphs (h) through (j) as paragraphs (j) through (l);

■ h. Add new paragraphs (h) and (i);

■ i. Revise the heading and the second sentence of newly redesignated paragraph (j) introductory text and revise newly redesignated paragraph (j)(3);

■ j. Revise the newly redesignated paragraph (k) heading and paragraphs (k) introductory text and (k)(2) and (3);

■ k. Add paragraph (k)(4);

■ l. Revise newly redesignated paragraph (l);

■ m. Add new paragraph (m);

■ n. Revise the newly redesignated paragraph (n) heading and introductory text, the second sentence of newly redesignated paragraph (n)(2)(i), and the second sentence of newly redesignated paragraph (n)(2)(ii);

■ o. Revise the newly redesignated paragraph (o) heading and introductory text, newly redesignated paragraphs (o)(1) through (4), the first sentence of newly redesignated paragraph (o)(5), and newly redesignated paragraph (o)(7); and

■ p. Revise the newly redesignated paragraph (p) heading, the second sentence of newly redesignated paragraph (p) introductory text, the third sentence of newly redesignated paragraph (p)(2), and newly redesignated paragraphs (p)(3)(i) and (iii) and (p)(4).

The revisions and additions read as follows:

§ 380.16 Environmental reports for Section 216 Federal Power Act Permits.

(a) * * *

(1) * * * The environmental report must include the 14 resource reports and related material described in this section.

* * * * *

(b) * * *

(3) Identify the effects of construction, operation (including malfunctions), and maintenance, as well as cumulative effects resulting from the incremental effects of the project when added to the effects of other past, present, and reasonably foreseeable actions;

* * * * *

(c) * * * This report must describe facilities associated with the project; special construction, operation, and maintenance procedures; construction timetables; future plans for related construction; compliance with regulations and codes; and permits that must be obtained. * * *

(1) Describe and provide location maps of all project facilities (such as transmission line towers, substations, and any appurtenant facilities) to be constructed, modified, replaced, or removed, and related construction and operational support activities and areas,

such as maintenance bases, staging areas, communications towers, power lines, and new access roads (roads to be built or modified). * * *

(2) * * *

(i) Current, original United States Geological Survey (USGS) 7.5–minute series topographic maps, or maps of equivalent detail, covering at least a 0.5–mile-wide corridor centered on the electric transmission facility centerline, with integer mileposts identified, showing the location of rights-of-way, new access roads, other linear construction areas, substations, and construction materials storage areas. Nonlinear construction areas must be shown on maps at a scale of 1:3,600, or larger, keyed graphically and by milepost to the right-of-way maps. The topographic maps must depict the facilities identified under paragraph (l)(5) of this section, including any facilities located outside of the 0.5-mile-wide corridor.

(ii) Original aerial images or photographs or photo-based alignment sheets based on these sources, not more than one year old (unless older ones accurately depict current land use and development) and with a scale of 1:6,000, or larger, showing the proposed transmission line route and location of transmission line towers, substations and appurtenant facilities, covering at least a 0.5-mile-wide corridor, and including mileposts. The aerial images or photographs or photo-based alignment sheets must show all existing transmission facilities located in the area of the proposed facilities and the facilities identified under paragraph (l)(5) of this section, including any facilities located outside of the 0.5-mile-wide corridor. Older images/photographs/alignment sheets must be modified to show any facilities not depicted in the original. Alternative formats (*e.g.,* blue-line prints of acceptable resolution) need prior approval by the environmental staff of the Commission's Office of Energy Projects.

(iii) In addition to the requirements under § 50.3(b) of this chapter, the applicant must contact the environmental staff of the Office of Energy Projects regarding the need for any additional copies of topographic maps and aerial images/photographs.

(3) Describe and identify, by milepost, proposed general construction and restoration methods, and any special methods to be used in areas of rugged topography, residential areas, active croplands, and sites where explosives are likely to be used. Describe any proposed horizontal directional drilling and pile driving that may be necessary.

(4) Identify the number of construction spreads, average workforce requirements for each construction spread and estimated duration of construction from initial clearing to final restoration. Indicate the days of the week and times of the day that proposed construction activities would occur and describe any proposed nighttime construction activities.

* * * * *

(d) * * *

(6) Discuss proposed mitigation measures to reduce the potential for adverse impacts to surface water, wetlands, or groundwater quality. Discuss the potential for blasting or contamination/spills to affect water wells, springs, and wetlands, and measures to be taken to detect and remedy such effects. Describe the impact of proposed land clearing and vegetation management practices, including herbicide treatment, in the project area on water resources.

(7) * * * Identify locations of Environmental Protection Agency or State-designated, sole-source aquifers and wellhead protection areas crossed by the proposed transmission line facilities.

(e) * * *

(3) Describe and provide the acreage of vegetation cover types that would be affected, including unique ecosystems or communities, such as remnant prairie, interior forest, or old-growth forest, or significant individual plants, such as old-growth specimen trees.

(4) Describe the impact of construction, operation, and maintenance on aquatic and terrestrial species and their habitats, including the possibility of a major alteration to ecosystems or biodiversity, and any potential impact on State-listed endangered or threatened species. Describe the impact of proposed land clearing and vegetation management practices, including herbicide treatment, in the project area on fish, wildlife, and vegetation. * * *

(5) Identify all federally listed or proposed threatened or endangered species and critical habitat that potentially occur in the vicinity of the project. * * * The application must include the results of any required surveys unless seasonal considerations make this impractical. * * *

(6) Identify all federally listed essential fish habitat (EFH) that potentially occurs in the vicinity of the project. Provide information on all EFH, as identified by the pertinent Federal fishery management plans, that may be adversely affected by the project and the results of abbreviated consultations with the National Marine Fisheries Service, and any resulting EFH assessments.

(7) Describe proposed, site-specific mitigation measures to minimize impacts on fisheries, wildlife, and vegetation.

(8) Include copies of correspondence not provided under paragraph (e)(5) of this section, containing recommendations from appropriate Federal and State fish and wildlife agencies to avoid or limit impacts on wildlife, fisheries, and vegetation, and the applicant's response to the recommendations.

(f) * * *

(1) * * *

(i) Documentation of the applicant's initial cultural resource consultations, including consultations with Native Americans and other interested persons (if appropriate);

* * * * *

(iii) An Evaluation Report, as appropriate;

(iv) A Treatment Plan, as appropriate; and

(v) Written comments from State Historic Preservation Officer(s) (SHPO), Tribal Historic Preservation Officers (THPO), as appropriate, and applicable land-management agencies on the reports in paragraphs (f)(1)(i) through (iv) of this section.

(2) The application or pre-filing documents, as applicable, must include the documentation of initial cultural resource consultation(s), the Overview and Survey Reports, if required, and written comments from SHPOs, THPOs, and land-management agencies, if available. The initial cultural resource consultations should establish the need for surveys. If surveys are deemed necessary by the consultation with the SHPO/THPO, the survey reports must be filed with the application or pre-filing documents.

* * * * *

(4) The applicant must request privileged treatment for all material filed with the Commission containing location, character, and ownership information about cultural resources in accordance with § 388.112 of this chapter. * * *

* * * * *

(g) * * * This report must identify and quantify the impacts of project construction, operation, and maintenance on factors affecting municipalities and counties in the vicinity of the project. * * *

* * * * *

(3) Describe on-site manpower requirements and payroll during construction, operation, and maintenance, including the number of

construction personnel who currently reside within the impact area, will commute daily to the site from outside the impact area, or will relocate temporarily within the impact area.

* * * * *

(6) Conduct a fiscal impact analysis evaluating incremental local government expenditures in relation to incremental local government revenues that will result from the project. Incremental expenditures include, but are not limited to, school operation, road maintenance and repair, public safety, and public utilities.

(h) *Resource Report 6—Tribal resources.* This report must describe Indian Tribes, Tribal lands, and Tribal interests that may be affected by the proposed project. Resource Report 6 must:

(1) Identify Indian Tribes that may be affected by the construction, operation, and maintenance of the proposed transmission facilities.

(2) Describe the impacts of construction, operation, and maintenance of the project on Indian Tribes and Tribal interests, including those related to: water use and quality; wildlife and vegetation; cultural and historic resources; socioeconomics; geological resources; soils; land use, recreation, and aesthetics; air quality and environmental noise; traffic; and health.

(3) Identify project impacts that may affect Tribal interests not necessarily associated with resources specified in paragraph (h)(2) of this section, *e.g.,* treaties, Tribal practices, or agreements between the Indian Tribe and entities other than the applicant.

(4) Identify Indian Tribes that may attach religious and cultural significance to historic properties within the proposed project right-of-way or in the project vicinity, as well as available information on Indian traditional cultural and religious properties, whether on or off of any Indian reservation.

(5) Ensure that information made available under this section not include specific site or property locations, the disclosure of which will create a risk of harm, theft, or destruction of archaeological or Tribal cultural resources or to the site at which the resources are located, or which would violate any Federal law, including the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470hh, and the National Historic Preservation Act of 1966, 54 U.S.C. 307103.

(i) *Resource Report 7—Environmental justice.* This report must address the effects of the proposed project on environmental justice communities, as defined in § 380.2 of this chapter. Resource Report 7 must:

(1) Identify environmental justice communities within the area of potential project impacts using current guidance and data, including localized data, from the Environmental Protection Agency, the Council, the Census Bureau, and other authoritative sources. Provide maps depicting identified environmental justice communities in relation to the proposed project facilities using granular data.

(2) Describe the impacts of construction, operation, and maintenance of the project on environmental justice communities, including those related to: water use and quality; wildlife and vegetation; cultural and historic resources; socioeconomics; geological resources; soils; land use, recreation, and aesthetics; air quality and environmental noise; traffic; and health. Identify any disproportionately high and adverse impacts on environmental justice communities.

(3) Discuss any cumulative impacts on environmental justice communities, regarding resources affected by the project, including whether any cumulative impacts would be disproportionately high and adverse. Describe the proposed project's impacts in relation to the aggregation of past, present, and reasonably foreseeable actions taken by Federal or non-Federal entities, and the environmental justice communities' capacity to tolerate additional impacts.

(4) Describe any proposed mitigation measures to avoid or minimize impacts on environmental justice communities, including any community input received on the proposed measures and how the input informed the proposed measures.

(j) *Resource Report 8—Geological resources.* * * * Resource Report 8 must:

* * * * *

(3) Describe how the project will be located or designed to avoid or minimize adverse effects to geological resources or risk to itself. Describe any geotechnical investigations and monitoring that would be conducted before, during, and after construction. Discuss the potential for blasting to affect structures and the proposed measures to be taken to remedy such effects.

* * * * *

(k) *Resource Report 9—Soils.* This report must describe the soils that will be affected by the proposed project, the effect on those soils, and measures proposed to minimize or avoid impacts. Resource Report 9 must:

* * * * *

(2) Identify, by milepost, potential impacts from: soil erosion due to water, wind, or loss of vegetation; soil compaction and damage to soil structure resulting from movement of construction vehicles; wet soils and soils with poor drainage that are especially prone to structural damage; damage to drainage tile systems due to movement of construction vehicles and trenching activities; and interference with the operation of agricultural equipment due to the possibility of large stones or blasted rock occurring on or near the surface as a result of construction.

(3) Identify, by milepost, cropland and residential areas where project construction may result in the loss of soil fertility, including any land classified as prime or unique farmland by the U.S. Department of Agriculture, Natural Resources Conservation Service.

(4) Describe any proposed mitigation measures to reduce the potential for adverse impacts to soils or agricultural productivity.

(l) *Resource Report 10—Land use, recreation, and aesthetics.* This report must describe the existing uses of land in the project vicinity and changes to those land uses that will occur if the project is approved. The report must discuss proposed mitigation measures, including the protection and enhancement of existing land use. Resource Report 10 must:

(1) Describe the width and acreage requirements of all construction and permanent rights-of-way for project construction, operation and maintenance.

(i) List, by milepost, locations where the proposed construction or permanent rights-of-way would be adjacent to existing rights-of-way of any kind.

(ii) Identify, preferably by diagrams, existing rights-of-way that will be used for a portion of the construction or permanent rights-of-way, the overlap and how much additional width will be required.

(iii) Identify the total amount of land to be purchased or leased for each project facility; the amount of land that would be disturbed for construction, operation, and maintenance of the facility; and the proposed use of the remaining land not required for project operation and maintenance, if any.

(iv) Identify the size of typical staging areas and expanded work areas, such as those at railroad, road, and waterbody crossings, and the size and location of all construction materials storage yards and access roads.

(2) Identify, by milepost, the existing use of lands crossed by, or adjacent to, the proposed project facilities or rights-of-way.

(3) Describe planned development on land crossed by, or within 0.25 mile of, the proposed facilities, the time frame (if available) for such development, and proposed coordination to minimize impacts on land use. Planned development means development that is included in a master plan or is on file with the local planning board or the county.

(4) Identify, by milepost and length of crossing, the area of direct effect of each proposed facility and operational site on sugar maple stands; orchards and nurseries; landfills; operating mines; hazardous waste sites; State wild and scenic rivers; State or local designated trails; nature preserves; game management areas; remnant prairie; old-growth forest; interior forest; national or State forests or parks; golf courses; designated natural, recreational or scenic areas; registered natural landmarks; Native American religious sites and traditional cultural properties (to the extent they are known to the public at large) and reservations; lands identified under the Special Area Management Plan of the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration; and lands owned or controlled by Federal or State agencies or private preservation groups. Also identify if any of those areas are located within 0.25 mile of any proposed facility.

(5) Identify and describe buildings, electronic installations, airstrips, airports, and heliports in the project vicinity. The facilities identified under this paragraph (l)(5) must be depicted on the maps and photographs in Resource Report 1, as required by paragraph (c)(2) of this section.

(i) *Buildings:* List all single-family and multi-family dwellings and related structures, mobile homes, apartment buildings, commercial structures, industrial structures, business structures, churches, hospitals, nursing homes, schools, or other structures normally inhabited by humans or intended to be inhabited by humans on a daily or regular basis within a 0.5-mile-wide corridor centered on the proposed transmission line alignment. Provide a general description of each habitable structure and its distance from the centerline of the proposed project. In cities, towns, or rural subdivisions, houses can be identified in groups. Provide the number of habitable structures in each group and list the distance from the centerline to the closest habitable structure in the group. Provide a list of all habitable structures within 200 feet of a proposed construction work area for all proposed project facilities, including transmission line towers, substations, access roads, and appurtenant facilities; a general description of each habitable structure; and the distance of each habitable structure from the proposed construction work area.

(ii) *Electronic installations:* List all commercial AM radio transmitters located within 10,000 feet of the centerline of the proposed project and all FM radio transmitters, microwave relay stations, or other similar electronic installations located within 2,000 feet of the centerline of the proposed project. Provide a general description of each installation and its distance from the centerline of the proposed project.

(iii) *Airstrips, Airports, and Heliports:* List all known private airstrips within 10,000 feet of the centerline of the project. List all airports registered with the Federal Aviation Administration (FAA), with at least one runway more than 3,200 feet in length, that are located within 20,000 feet of the centerline of the proposed project. Indicate whether any transmission structures will exceed a 100:1 horizontal slope (one foot in height for each 100 feet in distance) from the closest point of the closest runway. List all airports registered with the FAA having no runway more than 3,200 feet in length that are located within 10,000 feet of the centerline of the proposed project. Indicate whether any transmission structures will exceed a 50:1 horizontal slope from the closest point of the closest runway. List all heliports located within 5,000 feet of the centerline of the proposed project. Indicate whether any transmission structures will exceed a 25:1 horizontal slope from the closest point of the closest landing and takeoff area of the heliport. Provide a general description of each private airstrip, registered airport, and registered heliport, and state the distance of each from the centerline of the proposed transmission line. Include copies of any consultation with the FAA.

(6) Describe any areas crossed by, or within 0.25 mile of, the proposed transmission project facilities that are included in, or are designated for study for inclusion in: the National Wild and Scenic Rivers System (16 U.S.C. 1271), the National Trails System (16 U.S.C. 1241), or a wilderness area designated under the Wilderness Act (16 U.S.C. 1132).

(7) For facilities within a designated coastal zone management area, provide a consistency determination or evidence that the applicant has requested a consistency determination from the State's coastal zone management program.

(8) Describe the impact the project will have on present uses of the affected areas as identified above, including commercial uses, mineral resources, recreational areas, public health and safety, and the aesthetic value of the land and its features. Describe any temporary or permanent restrictions on land use resulting from the project.

(9) Describe proposed mitigation measures intended for all special use areas identified under this section.

(10) Identify the area of potential visual effects from the proposed project. Describe the visual characteristics of the lands and waters affected by the project, including any visually sensitive areas, visual classifications, and key viewpoints in the project vicinity. Describe how the transmission line project facilities will impact the visual character and scenic quality of the landscape and proposed mitigation measures to lessen these impacts. Provide visual aids to support the textual descriptions required by this paragraph.

(11) Demonstrate that applications for rights-of-way authorizations or other proposed land uses have been, or soon will be, filed with Federal land-management agencies with jurisdiction over land that would be affected by the project.

(m) *Resource Report 11—Air quality and environmental noise.* This report must estimate emissions from the proposed project and the corresponding impacts on air quality and the environment, estimate the impact of the proposed project on the noise environment, and describe proposed measures to mitigate the impacts. Resource Report 11 must:

(1) Describe the existing air quality in the project area, indicate if any project facilities are located within a designated nonattainment or maintenance area under the Clean Air Act (42 U.S.C. 7401 *et seq.*), and provide the distance from the project facilities to any Class I area in the project vicinity.

(2) For proposed substations and appurtenant facilities, quantitatively describe existing noise levels at nearby noise-sensitive areas, such as schools, hospitals, or residences.

(i) Report existing noise levels as the Leq (day), Leq (night), and Ldn and include the basis for the data or estimates.

(ii) Include a plot plan that identifies the locations and duration of noise measurements, time of day, weather conditions, wind speed and direction,

engine load, and other noise sources present during each measurement.

(iii) Identify any State or local noise regulations that may be applicable to the project facilities.

(3) Estimate emissions from the proposed project and the corresponding impacts on air quality and the environment.

(i) Estimate the reasonably foreseeable emissions from construction, operation, and maintenance of the project facilities (such as emissions from tailpipes, equipment, fugitive dust, open burning, and substations) expressed in tons per year. Include supporting calculations, emissions factors, fuel consumption rates, and annual hours of operation.

(ii) For each designated nonattainment or maintenance area, provide a comparison of the emissions from construction, operation, and maintenance of the project facilities with the applicable General Conformity thresholds (40 CFR part 93).

(iii) Identify the corresponding impacts on communities and the environment in the project area from the estimated emissions.

(iv) Describe any proposed mitigation measures to control emissions identified under this section.

(4) Estimate the impact of the proposed project on the noise environment.

(i) Provide a quantitative estimate of the impact of transmission line operation on noise levels at the edge of the proposed right-of-way, including corona, insulator, and Aeolian noise. For proposed substations and appurtenant facilities, provide a quantitative estimate of the impact of operations on noise levels at nearby noise-sensitive areas, including discrete tones.

(A) Include step-by-step supporting calculations or identify the computer program used to model the noise levels, input and raw output data and all assumptions made when running the model, far-field sound level data for maximum facility operation, and source of the data.

(B) Include sound pressure levels for project facilities, dynamic insertion loss for structures, and sound attenuation from the project facilities to the edge of the right-of-way or to nearby noise-sensitive areas (as applicable).

(C) Far-field sound level data measured from similar project facilities in service elsewhere, when available, may be substituted for manufacturer's far-field sound level data.

(D) The operational noise estimates must demonstrate that the proposed project will comply with applicable State and local noise regulations and that noise attributable to any proposed substation or appurtenant facility does not exceed a day-night sound level (Ldn) of 55 dBA at any pre-existing noise-sensitive area.

(ii) Describe the impact of proposed construction activities, including any nighttime construction, on the noise environment. Estimate the impact of any horizontal directional drilling, pile driving, or blasting on noise levels at nearby noise-sensitive areas and include supporting assumptions and calculations.

(iii) Describe any proposed mitigation measures to reduce noise impacts identified under this section.

(n) *Resource Report 12—Alternatives.* This report must describe alternatives to the project and compare the environmental impacts (as identified in Resource Reports 1 through 11 of this section) of such alternatives to those of the proposal. * * * Resource Report 12 must:

* * * * *

(2) * * *

(i) * * * Where applicable, identify the location of such alternatives on maps of sufficient scale to depict their relationship to the proposed action and existing rights-of-way; and

(ii) * * * Provide comparative tables showing the differences in environmental characteristics for the alternatives and proposed action. * * *

(o) *Resource Report 13—Reliability and safety.* This report must address the potential hazards to the public from failure of facility components resulting from, among other things, accidents or natural catastrophes; how these events would affect reliability; and proposed procedures and design features to reduce potential hazards. Resource Report 13 must:

(1) Discuss hazards, environmental impacts, and service interruptions that could reasonably ensue from failure of the proposed facilities.

(2) Describe proposed measures to protect the public from failure of the proposed facilities (including coordination with local agencies).

(3) Discuss proposed design and operational measures to avoid or reduce risk, including any measures to ensure that the proposed project facilities would be resilient against future climate change impacts in the project area.

(4) Discuss proposed contingency plans for maintaining service or reducing downtime to ensure that the proposed facilities would not adversely affect the bulk electric system in accordance with applicable North American Electric Reliability Corporation reliability standards.

(5) Describe proposed measures to exclude the public from hazardous areas. * * *

* * * * *

(7) Discuss the potential for electrical noise from electric and magnetic fields, including shadowing and reradiation, as they may affect health or communication systems along the transmission right-of-way.

* * * * *

(p) *Resource Report 14—Design and engineering.* * * * If the version of this report submitted with the application is preliminary in nature, the applicant must state that in the application. * * *

* * * * *

(2) * * * If a permit is granted on the basis of preliminary designs, the applicant must submit final design drawings for written approval by the Director of the Office of Energy Projects prior to commencement of any construction of the project.

(3) * * *

(i) An assessment of the suitability of the locations of proposed transmission line towers, substations, and appurtenant structures based on geological and subsurface investigations, including investigations of soils and rock borings and tests evaluating all foundations and construction materials;

* * * * *

(iii) An identification of all borrow areas and quarry sites and an estimate of required quantities of suitable construction material; and

* * * * *

(4) The applicant must submit the supporting design report described in paragraph (p)(3) of this section at the time preliminary and final design drawings are filed. If the report contains preliminary drawings, it must be designated as a ''Preliminary Supporting Design Report.''

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix

Draft Version: Landowner Bill of Rights in Federal Energy Regulatory Commission Electric Transmission Proceedings

1. You have the right to receive compensation if your property is necessary for the construction or modification of an authorized project. The amount of such compensation would be determined through a negotiated easement agreement between you and the entity applying to the Federal Energy Regulatory Commission (Commission) for authorization to construct a transmission line (applicant) or through an eminent domain proceeding in the appropriate Federal or State court. The applicant cannot seek to take a property by

eminent domain unless and until the Commission approves the application, unless otherwise provided by State or local law.

2. You have the right to request the full name, title, contact information including email address and phone number, and employer of every representative of the applicant that contacts you about your property.

3. You have the right to access information about the proposed project through a variety of methods, including by accessing the project website that the applicant must maintain and keep current, by visiting a central location in your county designated by the applicant for review of project documents, or by accessing the Commission's eLibrary online document information system at *www.ferc.gov.*

4. You have the right to participate, including by filing comments and, after an application is filed, by intervening in any open Commission proceedings regarding the proposed transmission project in your area. Deadlines for making these filings may apply. For more information about how to participate and any relevant deadlines, contact the Commission's Office of Public Participation by phone (202–502–6595) or by email (*OPP@ferc.gov*).

5. When contacted by the applicant or a representative of the applicant either in person, by phone, or in writing, you have the right to communicate or not to communicate. You also have the right to hire counsel to represent you in your dealings with the applicant and to direct the applicant and its representatives to communicate with you only through your counsel.

6. The applicant may seek to negotiate a written easement agreement with you that would govern the applicant's and your rights to access and use the property that is at issue and describe other rights and responsibilities. You have the right to negotiate or to decline to negotiate an easement agreement with the applicant; however, if the Commission approves the proposed project and negotiations fail or you chose not to engage in negotiations, there is a possibility that your property could be taken through an eminent domain proceeding, in which case the appropriate Federal or State court would determine fair compensation.

7. You have the right to hire your own appraiser or other professional to appraise the value of your property or to assist you in any easement negotiations with the applicant or in an eminent domain proceeding before a court.

8. Except as otherwise provided by State or local law, you have the right to grant or deny access to your property by the applicant or its representatives for preliminary survey work or environmental assessments, and to limit any such grant in time and scope.

9. In addition to the above rights, you may have additional rights under Federal, State, or local laws.

United States of America

Federal Energy Regulatory Commission

Applications for Permits to Site Interstate Electric Transmission Facilities Docket No. RM22–7–000

(Issued December 15, 2022)

DANLY, Commissioner, *concurring:*

1. I concur with the issuance of this Notice of Proposed Rulemaking (NOPR) because it is not my habit to oppose any but the most infirm proposed rules. Today's issuance purports to be the first step in discharging the Commission's obligations under Infrastructure Investment and Jobs Act,[1] which, among other things, included amendments to certain provisions of section 216 of the Federal Power Act[2] (FPA) to clarify Federal ''backstop'' siting of electric transmission facilities in limited circumstances when states fail to act on certain transmission proposals. The NOPR itself, however, largely appears to be an exercise to extend various environmental reviews typically seen in natural gas project proceedings—a regime in which the majority of the Commission has been imposing pervasive, standardless environmental tests well beyond our statutory authority.

2. I agree that our ''backstop'' siting authority is limited under the Commission's governing statutes. I disagree that the limited ''backstop'' siting authority that the Commission has been granted also confers extensive powers as an environmental and social regulator. Regardless, the statute certainly did not extend our obligations beyond the requirements we have always observed in order to discharge our duties under the National Environmental Policy Act (NEPA).

3. In going far beyond that which is required by the Infrastructure Investment and Jobs Act, this NOPR instead appears to represent the majority's ''environmental justice'' wish list. Accordingly, I specifically solicit citations to the provisions in section 216, as amended—or any other statutory basis—to support each revision proposed in the NOPR (such citations are often omitted in the NOPR itself).[3] Once statutory authority is certain, commenters should further provide legal analysis and evidence whether the proposed rule constitutes good policy, such as, for example, whether it will be beneficial in determining whether to site electric transmission projects when the states have not done so, or whether the rule will tend to ensure almost nothing is ever sited.

4. For example, we propose to ''require [electric transmission project] applicants to develop and file an Environmental Justice Public Engagement Plan as part of their Project Participation Plan under § 50.4(a)(4).''[4] The Commission does not cite any statute that requires or even permits us to require this Environmental Justice Public Engagement Plan, instead citing Executive Orders, at least one of which the majority acknowledges does not bind the Commission.[5] The Commission further ''proposes to define the term 'environmental justice community' as any disadvantaged community that has been historically marginalized and *overburdened by pollution,* including, but not limited to, minority populations, low-income populations, or indigenous peoples.''[6] What does it mean to be ''overburdened by pollution?'' Is this a concept that the Commission—a Federal energy rate regulator—is authorized and equipped to define or establish? Will the regulated community of transmission developers have any idea how to comply with such ambiguities? Is there anything about being ''overburdened'' in the Infrastructure Investment and Jobs Act?

5. The Commission also seeks to decree that the Environmental Justice Public Engagement Plan must ''describe the manner in which the applicant will reach out to environmental justice communities about potential mitigation,''[7] or, in other words, include a mitigation plan, even though ''NEPA not only does not require agencies to discuss any particular mitigation plans that they might put in place, it does not require agencies—or third parties—to effect any.''[8] Commenters should tell us how the Commission can impose such a requirement when the Supreme Court and the D.C. Circuit have ruled otherwise.

6. By way of further example, as part of its NEPA review, the Commission proposes to require applicants to submit ''Resource Report 10'' on ''Air quality and environmental noise.''[9] ''Proposed Resource Report 10 would require the applicant to estimate emissions from the proposed project . . . and describe proposed measures to mitigate the impacts.''[10] ''Specifically, the

[1] Public Law 117–58, § 40105, 135 Stat. 429.

[2] 16 U.S.C. 824p (2018).

[3] As amended by the Infrastructure Investment and Jobs Act, FPA section 216(a)(4)(G) provides that in determining whether to designate a national interest electric transmission corridor the Secretary of Energy ''may consider'' whether the designation ''avoids and minimizes, to the maximum extent practicable, and offsets to the extent appropriate and practicable, sensitive environmental areas and cultural heritage sites.'' 16 U.S.C. 824p(a)(4), 824p(a)(4)(G)(ii). As amended, FPA section 216(e)(1) provides that a permit holder may acquire rights-of-way by the exercise of eminent domain if, among other things, ''in the determination of the Commission, the permit holder has made good faith efforts to engage with landowners and other stakeholders early in the applicable permitting process.'' *Id.* § 824p(e)(1). It is stretching these amendments to FPA section 216 beyond their breaking point to use them to justify the scope of environmental review the Commission now proposes in the NOPR.

[4] *Applications for Permits to Site Interstate Elec. Transmission Facilities,* 181 FERC ¶ 61,205 at P 31 (2022) (NOPR); *see also* 18 CFR 50.4(a).

[5] NOPR, 181 FERC ¶ 61,205 at PP 30, 65, n.72. The Commission also proposes to require a new ''Environmental Justice Report'' as part of its regulations implementing NEPA. *See id.* PP 65–67. Again, I would like to know where the Commission gets this authority. We also ''expect applicants to utilize the latest guidance and data from [the Council on Environmental Quality], [the Environmental Protection Agency], the Census Bureau, and other authoritative sources.'' *Id.* P 67. Does the ''latest'' guidance and data include anything issued after pre-filing but before permitting? What about the day after permitting? What about during the pendency of a rehearing request? And who or what are ''other authoritative sources?''

[6] *Id.* P 32 (emphasis added).

[7] *Id.* P 31.

[8] *Citizens Against Burlington, Inc.* v. *Busey,* 938 F.2d 190, 206 (D.C. Cir. 1991) (*citing Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 353 & n.16 (1989)).

[9] NOPR, 181 FERC ¶ 61,205 at P 69.

[10] *Id.*

applicant must provide the reasonably foreseeable emissions from construction, operation, and maintenance of the project facilities . . . and describe any proposed mitigation measures to control emissions.'' [11] Someone better propose some standards because these proposals sound much more like aspirational goals than clear rules that a developer could figure out how to comply with. What are ''foreseeable emissions'' from ''maintenance,'' for example? If a transmission line falls in a storm, is a transmission developer supposed to predict ''reasonably foreseeable'' emissions from the truck the utility line worker uses to drive out to the site? If the line worker uses a rechargeable ratchet to loosen a bolt, is the transmission developer supposed to predict the ''reasonably foreseeable'' emissions from electric generation required to recharge the battery? And, again, by what authority do we propose to require a mitigation plan over directly contrary judicial precedent? [12]

7. As another example, the Commission proposes to ''add language to § 50.11(d) that would, under certain circumstances and for a limited time, preclude the issuance of authorizations to proceed with construction of transmission facilities authorized under FPA section 216 while requests for rehearing of orders issuing permits remain pending before the Commission.'' [13] Though in a different context and sounding in a different statute, the majority imposed a similar policy, including the issuance of stays, for natural gas projects, over my dissent.[14] I solicit comment whether we have this authority, and if so, whether it is sound policy to exercise it as part of our limited ''backstop'' siting jurisdiction.

8. I have similar questions to those raised here about nearly every aspect of the NOPR.[15] The powers that Congress has granted the Commission are narrow, as has been acknowledged, but they are profound and, depending upon how the Commission implements those authorities, can have a lasting effect on the development of the transmission system. Accordingly, I invite comments from every interested party on my questions and any other aspect of the proposed rules so that the Commission will have a full record as it considers whether to promulgate these or related rules.

9. It is hard to reconcile today's proposed rule, adorned as it is by burdensome, unnecessary requirements, with what appears, at the merest glance, to have been the purpose of Congress when passing the Infrastructure Investment and Jobs Act—to facilitate, not inhibit, the siting of transmission infrastructure.

For these reasons, I respectfully concur.

James P. Danly,
Commissioner.

United States of America

Federal Energy Regulatory Commission

Applications for Permits to Site Interstate Electric Transmission Facilities Docket No. RM22–7–000

(Issued December 15, 2022)

CHRISTIE, Commissioner, *concurring:*

1. Updating the Commission's existing regulations and practices governing the Commission's exercise of its transmission siting backstop authority is required by a statutory change adopted last year by Congress.[1] While, of course, we must implement the change made by Congress, a simple update to our existing regulation would have been sufficient. This order,[2] however, goes beyond merely implementing the required conforming changes to our existing regulation. So while I concur with putting these amendments out for comment, I look forward to reviewing the comments on this proposal, particularly from organizations representing State regulators.

2. Some relevant history: States have historically had sole authority for permitting and siting transmission lines (two very separate functions), and for good reasons. Every power line, from the small ones below 100 kV to the huge 765 kV lines, visible for many miles around, comes with its own unique set of facts and local concerns. One of those concerns—let us not forget—is the *cost,* and that cost will be paid, in some portion, by consumers in the *situs* state, through FERC formula rates. So, whenever the day comes when FERC orders a line built after a State has found it was not needed or found the cost was not reasonable and prudent, FERC will not only be choosing a route that was rejected by State regulators, but FERC will be ordering the State's consumers to pay for the project, under applicable cost allocation rules. And even if the proposed project ends up being litigated for years before any steel is in the ground—a virtual certainty for a controversial project that was rejected by State regulators but imposed by FERC—consumers will likely be paying through formula rates for years for pre-construction costs, which can be substantial.[3]

3. State regulators are much better prepared to deal with that myriad of local concerns, including concerns over routing and costs, than FERC. Furthermore, State processes are far more convenient and user-friendly than processes at FERC, if for no other reason than geographic proximity. So, waiting one full year to allow a State to ''go first'' and make its decision makes sense for a lot of reasons. One obvious reason is that if the line is truly needed, the State regulators will in all likelihood approve it, and no FERC staff time and resources will need to be expended at all. The whole mantra that goes ''the states are blocking needed transmission all over the country!'' is simply a political and special-interest narrative. The steadily mounting increases over the past decade in transmission rate base nationally,[4] with concomitant skyrocketing increases in transmission costs to consumers, blows up the narrative that states are systemically blocking needed transmission lines. Contrary to the narrative, states need *more* authority to scrutinize transmission projects for need and prudence of cost, not less, to protect consumers.

4. This proposed regulation changes the practice this Commission adopted in 2006 of holding off on *all* processes here for a year, to one in which pre-filing processes will begin, potentially concurrent with the initiation of State proceedings.[5] That change is not required by last year's congressional action. It is an act of discretion.

5. Some more history: The Energy Policy Act of 2005 [6] altered the traditional arrangement of State authority by creating FPA section 216, which provided this Commission with supplemental or ''backstop'' siting authority in certain narrow circumstances. This authority was limited, not plenary: As discussed in greater detail in the order, EPAct 2005 explicitly authorized the Commission to exercise transmission siting authority in DOE-designated ''national-interest'' transmission corridors when a State application had been rendered futile because the State lacks authority to act, the applicant lacks standing to obtain authority from the State, the State attaches conditions rendering the project infeasible, or the State fails to act within one year.[7]

6. In Order No. 689, the Commission implemented this new FPA section 216 authority.[8] In doing so, it construed that

[11] *Id.* P 70.

[12] *See supra* P 5 n.8.

[13] NOPR, 181 FERC ¶ 61,205 at P 47.

[14] *See Limiting Authorizations to Proceed with Constr. Activities Pending Rehearing,* Order No. 871–B, 175 FERC ¶ 61,098 (Danly, Comm'r, dissenting), *order on reh'g,* 176 FERC ¶ 61,062 (2021) (Danly, Comm'r, dissenting).

[15] For example, I question whether we are complying with the purpose of the act to engage in parallel activity with the states during the pendency of the states' review of transmission project proposals, a subject that Commissioner Christie has thoroughly canvassed in his separate statement to this order.

[1] The Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58, 40105, 135 Stat. 429 (2021), amended section 216 of the Federal Power Act (FPA) in certain respects. Most notably, it explicitly allows the Commission to grant transmission siting authority even when a State has denied an application within one year. 16 U.S.C. 824p(b)(1)(C) (as amended by IIJA section 1221).

[2] *Applications for Permits to Site Interstate Electric Transmission Facilities,* 181 FERC ¶ 61,205 (2022) (Backstop Siting NOPR).

[3] For example, the Potomac-Appalachian Transmission Highline (PATH) Project—which was abandoned, and never even completed—spawned several years of litigation and imposed many millions of dollars in costs (including return on equity) to ratepayers. *See Newman* v. *FERC,* 27 F.4th 690 (D.C. Cir. 2022) (noting that PATH sought recovery through rates of over $121 million in abandonment costs alone, charges that were litigated over several years).

[4] *See, e.g., RRA Regulatory Focus An Overview of Transmission Ratemaking in the U.S.—2021 Update*, S&P Global Market Intelligence, Sept. 16, 2021 (''Growth in aggregate transmission rate base, 2012–2020'' chart at page 3, showing increase from $57.8 billion to $131.7 billion); *see also* Jim O'Reilly, *PJM, AEP transcos drive 9.17% YOY [year-over-year] increase in US transmission rate base*, S&P Capital IQ Pro, November 1, 2022 (''Transmission rate base among a group of 76 utilities in the U.S. maintained year-over-year growth *above 9% for the third consecutive year. . . .*''.'') (emphasis added).

[5] Backstop Siting NOPR, 181 FERC ¶ 61,205 at PP 21–23.

[6] Public Law 109–58, 1221, 119 Stat. 594 (2005) (amended 2021) (EPAct 2005).

[7] *See* Backstop Siting NOPR, 181 FERC ¶ 61,205 at PP 2–7.

[8] *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities,*

Continued

authority expansively in two respects. First, it construed the statute as vesting siting authority in the Commission even when a State acts within a year to deny an application. Second, it construed the statute as ''permit[ting] parallel Commission-State processes.'' [9] But these expansive constructions were promptly curbed: the first, by the Fourth Circuit Court of Appeals; the second, by the Commission itself.

7. As for the first, the Fourth Circuit correctly found in *Piedmont* that Congress had not, in fact, authorized the Commission to grant an application that had been timely denied by a State.[10] In direct response to the Fourth Circuit's opinion, last year Congress expanded the Commission's FPA section 216 a notch further, by empowering the Commission essentially to exercise a veto over a State's timely decision to *deny* a transmission siting application. In other words, in the IIJA, Congress sought to (and did) overturn the key holding in *Piedmont.*

8. As for the second, the Commission wisely decided that ''that States which have authority to approve the siting of facilities should have one full year to consider a siting application without there being any overlapping Commission process,'' and therefore found that, ''in cases where our jurisdiction rests on FPA section 216(b)(1)(C), the pre-filing process should not commence until one year after the relevant State applications have been filed.'' [11] This policy was not set in stone, of course—the Commission noted that it would ''reconsider the issue'' if in the future it turned out ''that the lack of a Commission pre-filing process prior to the end of the one year is delaying projects or otherwise not in the public interest.'' [12]

9. This was sound policy in 2006, and I am not convinced that the intervening years have taught us that ''the lack of a Commission pre-filing process prior to the end of the one year is delaying projects or otherwise not in the public interest.'' [13] Nor did Congress, in the IIJA, do anything to suggest that commencement of the Commission's pre-filing process should be accelerated—although of course it could have.

10. Nonetheless, I support this order, in its current form, because I believe that the proposal to allow states a 90-day comment period following a year of pre-filing processes *may* afford adequate protection for the states and their processes, provided that the Commission's pre-filing process does not begin *before* the relevant State processes have been commenced. This order actually invites comment on whether FERC's pre-filing processes should be allowed to commence *prior to* the initiation of State proceedings.[14] I would not even have raised that prospect. I ask states in particular to review closely and comment on these provisions. There are also other examples of this order going beyond where it needed to go.[15]

11. To be clear, I have no concern with *informal* communications between applicants and Commission staff before the states have had a year to act. Nor do I have any concern with allowing an initial consultation or other preparatory work during this one-year period. But as discussed above, I believe strongly that the states should have an opportunity to complete their processes without any impediment or distraction from Commission proceedings.

12. I support revising the Commission's Regulations to reflect the modest expansion of its authority worked on FPA section 216 by the IIJA, and I am inclined to believe that the 90-day comment period afforded to states at the close of a year's worth of pre-filing may adequately protect a State's interests. To that extent, I support putting this order out for comment and I look forward to the comments the Commission will receive.

For these reasons, I concur.

Mark C. Christie,
Commissioner.

[FR Doc. 2022–27716 Filed 1–13–23; 8:45 am]

BILLING CODE 6717–01–P

Order No. 689, FERC Stats. & Regs. ¶ 31,234 (2006) (Order No. 689), *reh'g denied,* 119 FERC ¶ 61,154 (2007).

[9] *Id.* P 20; *see also id.* P 19 (same). I won't opine on whether this construction is correct or not—though seemingly reasonable, it doesn't seem to be rooted in anything more than an inference from the fact that the Commission may act if the State has failed to do so within a year—but I will observe that it is not compelled by citations to the statutory text or legislative history.

[10] *Piedmont Envtl. Council* v. *FERC,* 558 F.3d 304 (4th Cir. 2009) (*Piedmont*), *cert. denied,* 558 U.S. 1147 (2010).

[11] Order No. 689, FERC Stats. & Regs. ¶ 31,234 at P 21 (footnote omitted).

[12] *Id.*

[13] *Id.*

[14] Backstop Siting NOPR, 181 FERC ¶ 61,205 at P 23.

[15] For example, the order proposes a new regulatory definition of ''environmental justice community.'' *Id.* P 32. This concept has been in flux since it was created and it continues to evolve; nothing in the IIJA's amendments to FPA section 216 either explicitly or implicitly requires the Commission to adopt any such definition at all herein.

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