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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 630

**RIN 3206–AO04**

## Scheduling of Annual Leave by Employees Determined Necessary To Respond to Certain National Emergencies

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule.

**SUMMARY:** The Office of Personnel Management (OPM) is revising the interim regulation regarding the restoration of annual leave for employees who are essential to respond to certain national emergencies, such as the National Emergency Concerning the Novel Coronavirus Disease (COVID–19). This rule extends the latest possible termination date for the exigency established in connection with the COVID–19 national emergency, which would be March 13, 2023, under the current interim regulations. Under this new rule, that date would be the date the national emergency is ended by the President. This rule also provides for special handling of restored annual leave resulting from an agency-specific ongoing exigency that is directly related to a matter that was determined to be a national emergency exigency and that immediately follows that national emergency exigency. Finally, this rule expands an agency's authority to exempt employees from the advance annual leave scheduling requirement in the leave year during which a national emergency exigency is terminated.

**DATES:** The interim regulations are effective on March 13, 2023. Comments must be received on or before on May 12, 2023.

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by the following method: *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

OPM will address previously submitted comments on the August 10, 2020, interim regulation and any comments submitted regarding this new interim regulation when it issues final regulations.

**FOR FURTHER INFORMATION CONTACT:** Doris Rippey by telephone at (202) 606–2858 or by email at *pay-leave-policy@opm.gov.*

**SUPPLEMENTARY INFORMATION:** On August 10, 2020, OPM published an interim final rule (85 FR 48096 [1]) to replace the reserved 5 CFR 630.310 with a new 5 CFR 630.310 to (1) allow agencies to continue to meet their vital missions while streamlining the process for restoration of annual leave for employees whose services are determined by the agency head (or designee) to be essential for the response to certain national emergencies and (2) permit the Director of OPM to deem a specific national emergency, as declared by the President under the National Emergencies Act, to be an exigency of the public business for the purpose of restoring annual leave under this authority. OPM will address previously submitted comments on the August 10, 2020, interim regulation and any comments submitted regarding this new interim regulation when it issues final regulations.

On March 13, 2020, the President issued Proclamation 9994 declaring a ''National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak'' (85 FR 15337 [2]). On August 27, 2020, the Director of OPM issued CPM 2020–11 [3] announcing the publication of an interim final rule on the scheduling of annual leave by employees whose work is essential to respond to certain national emergencies. The memo also announced the Director's determination that the COVID–19 national emergency constituted an exigency of the public business for the purpose of restoring forfeited annual leave and authorized agencies to streamline the process for the restoration of annual leave for the COVID–19 national emergency as outlined in the interim regulations. Agencies were required to determine the specific employees or groups of employees whose services were essential in response to the COVID–19 national emergency and were qualified for coverage under the regulations and inform designated employees in writing of such determinations.

### Termination of the National Emergency Exigency

Under the interim regulation of August 10, 2020, an agency head (or designee) may not grant more than two 12-month extensions of a national emergency exigency. (See 5 CFR 630.310(f)(2)(iv).) As noted above, the President declared the COVID–19 outbreak a national emergency on March 13, 2020. Assuming the exigency has not been terminated for an employee or a group of employees for another reason listed in § 630.310(f)(2), the regulation requires the agency to establish the date for termination of the exigency as 12 months after the declaration of the exigency—*i.e.,* March 13, 2021. The agency may extend this deadline annually by an additional 12 months, but may not grant more than two 12-month extensions (§ 630.310(f)(2)(iv)). Therefore, with respect to the COVID–19 national emergency, an agency was authorized to first extend the termination date of the exigency until March 13, 2022, and then to further extend the termination date until March 13, 2023.

On February 10, 2023, President Biden extended the COVID–19 national emergency and announced that he anticipates ending that emergency on May 11, 2023. In light of these circumstances, to avoid confusion and

[1] *https://www.federalregister.gov/documents/2020/08/10/2020-16823/scheduling-of-annual-leave-by-employees-determined-necessary-to-respond-to-certain-national.*

[2] *https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf.*

[3] *https://www.chcoc.gov/content/interim-regulations-scheduling-annual-leave-employees-performing-services-determined-be.*

simplify the rules for restored annual leave, this new interim rule will automatically deem a second agency extension of the COVID–19 national emergency exigency that had been set to end on March 13, 2023, to continue through the date that the President ends the COVID–19 national emergency, which is expected to be May 11, 2023. Under the August 10, 2020, interim regulation, an agency head (or designee) was not permitted to grant more than two 12-month extensions to the deadline for establishing the termination date of the exigency of the public business. (See 5 CFR 630.310(f)(2)(iv).) The continuation of this second extension is outlined in new paragraph (i) being added to § 630.310.

The August 10, 2020, interim regulation already addressed what would happen when a national emergency exigency terminates for an employee or a group of employees—all restored leave to an employee's credit (from any source) is consolidated into one account and a single time limit is applied, using the tiered time limits in § 630.310(d) that vary based on the balance of hours (§ 630.310(e)).

The August 10, 2020, interim regulation also addressed the possibility of not applying normal rules requiring advance scheduling of annual leave in § 630.308(a) at the end of the leave year in which the national emergency exigency terminated based on an agency determination that the employee was unable to comply with the advance scheduling requirement because of circumstances beyond the employee's control (§ 630.310(g)). We are revising paragraph (g) of § 630.310 to broaden the authority of an agency head (or designee) to exempt an employee or group of employees from the advanced scheduling requirement under § 630.308(a) during the leave year in which the national emergency exigency terminated. Under the revised paragraph (g), the agency head (or designee) would simply have to make a determination that such an exemption is warranted. This determination will no longer be solely tied to whether the employee was unable to comply with the advance scheduling requirement because of circumstances beyond the employee's control. We are also adding a requirement that agencies notify in writing any employee that is exempted from the advance scheduling requirement. In applying the revised paragraph (g) to the termination of the COVID–19 national emergency exigency, an agency will be able to choose to not apply the advance scheduling requirement this leave year since the exigency is ending during leave year 2023.

**Special Treatment of an Ongoing Exigency Related to the National Emergency Exigency**

Regardless of the anticipated termination date of the national emergency regarding the COVID–19 pandemic, there are also anticipated continuing significant workload implications for certain categories of employees at certain agencies, such as the Department of Veterans Affairs. Such agencies may also be dealing with lingering effects, such as the fact that many employees built up large balances of unused annual leave, which if used quickly would result in challenges in meeting current workload demands. In order to allow agencies to better manage workload demands, OPM is adding a new regulation to cover employees identified as performing work in connection with an ''ongoing exigency'' related to the circumstances concerning COVID–19 and its aftermath effects. The new regulation would cover not only those who were affected by the COVID–19 national emergency but also future national emergencies that may present similar issues. The new paragraph (h) being added to § 630.310 would have the following elements:

• *Paragraph (h)(1)*—When a national emergency exigency terminates under paragraph (f)(2)(i), (ii), or (iv), an agency head (or designee) may determine that certain agency employees immediately continue to be subject to an ''ongoing exigency'' of the public business. For example, once the COVID–19 national emergency terminates, an agency could determine that certain of its healthcare workers continue to be subject to an ongoing exigency such that they cannot yet schedule and take annual leave. An ongoing exigency of the public business is an exigency that commences immediately after the termination of a national emergency exigency and is directly related to the matter that was previously determined to be a national emergency exigency. In order for an employee to be covered under an ongoing exigency, the employee must first be covered by a national emergency exigency and then be covered by the ongoing exigency without a break in time. For example, if the COVID–19 national emergency ends on May 11, 2023, due to a declaration by the President, an agency could establish effective May 12, 2023, an agency-specific ongoing exigency related to the circumstances of COVID–19 and its lingering effects for certain employees.

• *Paragraph (h)(2)*—During the entire period during which an employee is covered by the above-described ongoing exigency, the employee will not be subject to time limits on usage of any restored leave to the employee's credit under 5 U.S.C. 6304(d), including a time limit established under § 630.310(d) that was based on the termination of the national emergency exigency. When the ongoing exigency ends, all restored annual leave under 5 U.S.C. 6304(d) to the employee's credit must be consolidated at that time and made subject to a single time limit that is determined under the rules in § 630.310(d), using the termination date of the ongoing exigency in place of the termination date of the national emergency exigency. Thus, if an agency establishes an ongoing exigency related to COVID–19 that is terminated on May 11, 2024, all restored leave to the employee's credit at that time (including the restored leave that was part of the consolidated total at the end the COVID–19 national emergency exigency) will be consolidated into a single restored leave account and subject to a time limit established using the tiered time limits in § 630.310(d) that vary based on the balance of hours, with the May 11, 2024, termination date being used.

• *Paragraph (h)(3)*—During the entire period during which an employee is covered by the ongoing exigency, the employee will not be subject to the advance scheduling requirements in § 630.308(a). Also, even after the ongoing exigency terminates, an agency may choose to exempt an employee or a group of employees from the advanced scheduling requirement in § 630.308(a) for the remainder of the leave year in which the termination takes place.

• *Paragraph (h)(4)*—Coverage of an employee or a group of employees under an ongoing exigency may not be continued for more than 12 months unless the Director of OPM approves the employing agency's request for one or more time-limited waivers based on a critical agency need for the services of the employees. The OPM Director will prescribe the specific requirements and procedures associated with an agency request.

• *Paragraph (h)(5)*—If the agency-authorized ongoing exigency covering an employee lasts for 3 full calendar years and meets the other requirements under § 630.309 to qualify as an extended exigency, the usage time limits in that section would be used in place of the time limits in § 630.310(d). We note that the time an employee spent covered by the preceding national emergency exigency would not be considered in determining if the

ongoing exigency is an extended exigency.

For example, if the COVID–19 national emergency terminates on May 11, 2023, an agency could authorize an ongoing exigency directly related to COVID–19 beginning on May 12, 2023. To qualify as an extended exigency under § 630.309(b), the agency must first receive the Director of OPM's approval of the required time-limited waivers of the ongoing exigency, as required under paragraph (h)(4), and the ongoing exigency must last at least 3 full calendar years and must meet the other requirements at § 630.309(b). Thus, the ongoing exigency must last at least until January 1, 2027, to qualify. The time an employee is covered under the COVID–19 national emergency (beginning on March 13, 2020, and ending on May 11, 2023) would not count towards determining whether the exigency is an extended exigency under § 630.309. If the ongoing exigency begins on May 12, 2023, 3 full calendar years—2024, 2025, and 2026—would need to elapse before the agency-authorized ongoing exigency would meet the time requirements at § 630.309(b)(2) to potentially qualify as an extended exigency under § 630.309.

**Administrative Procedure Act**

Both the Administrative Procedure Act (APA) and the Civil Service Reform Act (CSRA)'s parallel rulemaking provision allow OPM to forego standard notice and comment procedures, and the standard 30-day delayed effective date, in certain circumstances. Under the APA, notice and comment and a 30-day delayed effective date is not required ''when an agency for good cause finds . . . that notice and public procedures [would be] impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B); *see id.* 553(d)(d). Likewise, the CSRA provides that notice and comment is not required if a rule ''is temporary in nature and . . . ne[eds] to be implemented expeditiously.'' *Id.* 1103(b)(3). I find that both standards are met here and OPM is thus issuing this as an interim final rule.

President Biden announced in February 2023 that he anticipates ending the national emergency associated with COVID–19 on May 11, 2023. At present, however, the Director's designation of an exigency of the public business will expire on March 13, 2023. OPM has been notified that there are continuing significant lingering workload implications of the COVID–19 national emergency for certain categories of employees at certain agencies, such as the Department of Veterans Affairs, such that these employees continue to be unable to schedule and take their annual leave. OPM thus needs to issue this rule before the current March expiration to protect such employees and ensure agencies can operate at the capacity necessary to continue addressing the COVID–19 national emergency. Given the Administration's recent announcement of its intention to end the national emergency, notice and comment procedures, as well as a delayed effective date, would be impracticable and contrary to the public interest, as they would curtail OPM's ability to extend this important protection for federal workers who are essential to the Government's COVID–19 response.

Moreover, prior to the termination of the COVID–19 national emergency, agencies will need to implement procedures to determine whether they will authorize an ongoing exigency and, if they do so, to make determinations as to which employees will be covered by such ongoing exigency for purposes of utilizing the restored annual leave authorities under this rule. Further, once covered employees are identified, agencies will need to communicate to those employees that they are subject to the authorities in this rule and that the advance scheduling requirement does not apply to them. Notice and comment and a delayed effective date would thus be impracticable and contrary to the public interest as it would impede the ongoing work of agencies across the federal government to address the impacts of COVID–19, as well as harming employees who, absent these regulatory changes, could permanently lose leave that they may be unable to take as a result of such ongoing exigencies.

Accordingly, in order to give practical effect to these regulations, I find that good cause exists to waive the general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(B) and the 30-day delay in effective date pursuant to 5 U.S.C. 553(d)(3). For similar reasons, I find that the interim final rule is temporary in nature, and expeditious timing is required because of the circumstances agencies will continue to face even after the COVID–19 national emergency has officially ended. *See* 5 U.S.C. 1103(b)(3). OPM will promulgate a final rule as soon as practical after receiving public comments on this interim final rule.

**Executive Order 13563 and Executive Order 12866**

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

**Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will apply only to Federal agencies and employees.

**Paperwork Reduction Act Requirements**

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

**List of Subjects in 5 CFR Part 630**

Government employees.

Office of Personnel Management.

**Stephen Hickman,**

*Federal Register Liaison.*

Accordingly, OPM amends 5 CFR part 630 as follows:

## PART 630—ABSENCE AND LEAVE

■ 1. The authority citation for part 630 continues to read as follows:

5 U.S.C. chapter 63 as follows: Subparts A through E issued under 5 U.S.C. 6133(a) (read with 5 U.S.C. 6129), 6303(e) and (f), 6304(d)(2), 6306(b), 6308(a), and 6311; subpart F issued under 5 U.S.C. 6305(a) and 6311 and E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G issued under 5 U.S.C. 6305(c) and 6311; subpart H issued under 5 U.S.C. 6133(a) (read with 5 U.S.C. 6129) and 6326(b); subpart I issued under 5 U.S.C. 6332, 6334(c), 6336(a)(1) and (d), and 6340; subpart J issued under 5 U.S.C. 6340, 6363, 6365(d), 6367(e), and 6373(a); subpart K issued under 5 U.S.C. 6391(g); subpart L issued under 5 U.S.C. 6383(f) and 6387; subpart M issued under sec. 2(d), Pub. L. 114–75, 129 Stat. 641 (5 U.S.C. 6329 note); subpart P issued under 5 U.S.C. 6329c(d); and subpart Q issued under 5 U.S.C. 6387.

■ 2. Amend § 630.310 by revising paragraph (g) and adding new paragraphs (h) and (i) to read as follows:

**§ 630.310 Scheduling of annual leave by employees whose work is essential to respond to certain national emergencies.**

* * * * *

(g) When the agency head (or designee) fixes a termination date of the exigency of the public business under paragraph (f)(2) of this section, each affected employee must make a reasonable effort to comply with the scheduling requirement in § 630.308(a). The head of the agency (or designee), in his or her sole and exclusive discretion, may exempt such an employee or group of employees from the advanced scheduling requirement in § 630.308(a) for the remainder of the leave year if coverage under paragraphs (a) and (b) of this section terminates during that leave year and if the agency head (or

designee) determines such exemption is warranted. The agency head (or designee) must notify any employee exempted from the scheduling requirement in writing.

(h)(1) Upon termination of an exigency established under paragraphs (a) and (b) of this section based on the ending of the exigency under paragraphs (f)(2)(i), (ii), or (iv) of this section, an agency head (or designee) may determine that certain agency employees continue to be subject to an ongoing exigency of the public business. An ongoing exigency of the public business is an exigency that commences immediately after the termination of a national emergency exigency and is directly related to the matter that was previously determined to be a national emergency exigency. In order for an employee to be covered under an ongoing exigency, the employee must first be covered by a national emergency exigency and then be covered by the ongoing exigency without a break in time.

(2) For the entire period during which an employee is covered by such an ongoing exigency, the employee will not be subject to time limits on usage of any restored leave to the employee's credit under 5 U.S.C. 6304(d), including a time limit established under paragraph (d) of this section that is determined based on the termination of the national emergency exigency. When the ongoing exigency ends, all restored annual leave under 5 U.S.C. 6304(d) to the employee's credit must be consolidated at that time and made subject to a single time limit that is determined under the rules in paragraph (d) of this section, using the termination date of the ongoing exigency in place of the termination date of the national emergency exigency.

(3) For the entire period during which an employee is covered by such an ongoing exigency, the employee will not be subject to the advance scheduling requirements in § 630.308(a). An agency head (or designee), in his or her sole and exclusive discretion, may exempt an employee or group of employees from the advanced scheduling requirement in § 630.308(a) for the remainder of the leave year if coverage under the ongoing exigency terminates during that leave year and if the agency head (or designee) determines such exemption is warranted. The agency head (or designee) must notify any employee exempted from the scheduling requirement in writing.

(4) Employee coverage under such an ongoing exigency may not be continued for more than 12 months unless the agency head (or designee) requests, and the Director of OPM approves, one or more time-limited waivers based on a critical agency need for the services of the employee or group of employees.

(5) Notwithstanding paragraph (h)(2) of this section, if an ongoing exigency (which excludes time covered by the preceding national emergency exigency) also qualifies as an extended exigency under § 630.309, the time limit for use of the restored leave under paragraph (a) of that section must be applied to the consolidated restored leave.

(i) Notwithstanding paragraph (f)(2)(iv), an agency extension granted through March 13, 2023, under that paragraph for an exigency established under this section based on the COVID–19 national emergency declared on March 13, 2020, must be deemed to continue through the date that the President ends that national emergency.

[FR Doc. 2023–05204 Filed 3–10–23; 11:15 am]

**BILLING CODE 6325–39–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2022–1645; Project Identifier MCAI–2022–00734–T; Amendment 39–22371; AD 2023–05–02]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA is superseding Airworthiness Directive (AD) 2020–21–10, which applied to certain Airbus SAS Model A318, A320, and A321 series airplanes; and Model A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, and –153N airplanes; and AD 2022–07–08, which applied to all Airbus SAS Model A318, A319, A320 and A321 series airplanes. AD 2020–21–10 and AD 2022–07–08 required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD continues to require the actions in AD 2020–21–10 and AD 2022–07–08 and requires revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective April 18, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 18, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of May 19, 2022 (87 FR 22117, April 14, 2022).

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of November 19, 2020 (85 FR 65190, October 15, 2020).

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1645; 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.

*Material Incorporated by Reference:*

- For EASA material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu*. You may find this material on the EASA website at *ad.easa.europa.eu*.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2022–1645.

**FOR FURTHER INFORMATION CONTACT:** Dan Rodina, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3225; email *dan.rodina@faa.gov*.

**SUPPLEMENTARY INFORMATION:**

### Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2020–21–10, Amendment 39–21283 (85 FR 65190,

October 15, 2020) (AD 2020–21–10) and AD 2022–07–08, Amendment 39–21996 (87 FR 22117, April 14, 2022) (AD 2022–07–08).

AD 2020–21–10 applied to certain Airbus SAS Model A318, A320, and A321 series airplanes, and Model A319–111, –112, –113, –114, –115, –131, –132, –133, –151N, and –153N airplanes. AD 2020–21–10 required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2020–21–10 to address the risks associated with the effects of aging on airplane systems. Such effects could change system characteristics, leading to an increased potential for failure of certain life-limited parts, and reduced structural integrity or controllability of the airplane.

AD 2022–07–08 applied to all Airbus SAS Model A318, A319, A320, and A321 series airplanes. AD 2022–07–08 required inspections of certain trimmable horizontal stabilizer actuators (THSAs) and replacement if necessary, and revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2022–07–08 to address premature wear of the carbon friction disks on the no-back brake of the THSA, which could lead to reduced braking efficiency in certain load conditions, and, in conjunction with the inability of the power gear train to keep the ball screw in its last commanded position, could result in uncommanded movements of the trimmable horizontal stabilizer and loss of control of the airplane. AD 2022–07–08 also specified that accomplishing the revision required by that AD terminates certain requirements of AD 2020–21–10. This AD continues to allow that termination.

The NPRM published in the **Federal Register** on December 19, 2022 (87 FR 77535). The NPRM was prompted by AD 2022–0102, dated June 8, 2022, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2022–0102) (referred to after this as the MCAI). The MCAI states that new or more restrictive airworthiness limitations have been developed to address the unsafe condition on these products, which, if not addressed, could result in an increased potential for failure of certain life-limited parts, and reduced structural integrity of the airplane. EASA AD 2022–0102 superseded EASA AD 2020–0034, dated February 25, 2020, and EASA AD 2020–0270, dated December 7, 2020 (which correspond to FAA AD 2020–21–10 and AD 2022–07–08, respectively).

EASA AD 2022–0102 specifies that the revised airworthiness limitations section document contains new tasks 274000–00002–1–E and 274000–00003–1–E, which cover the inspections, corrective actions, and reporting previously required by EASA AD 2017–0237, dated December 4, 2017 (which corresponds to FAA AD 2018–23–02, Amendment 39–19488 (83 FR 59278, November 23, 2018) (AD 2018–23–02)). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (n) of this AD terminates the requirements of paragraphs (g) through (k) of AD 2018–23–02 for Airbus SAS Model A318 series airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–211, –212, –214, –216, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes only.

In the NPRM, the FAA proposed to continue to require the actions in AD 2020–21–10 and AD 2022–07–08. The NPRM also proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, as specified in EASA AD 2022–0102. The FAA is issuing this AD to address the risks associated with the effects of aging on airplane systems. Such effects could change system characteristics. The unsafe condition, if not addressed, could result in an increased potential for failure of certain life-limited parts, and reduced structural integrity of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1645.

## Discussion of Final Airworthiness Directive

### Comments

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

### Previous Alternative Methods of Compliance (AMOCs)

Paragraphs (r)(1)(ii) and (iii) of the proposed AD allowed previous AMOCs as AMOCs for the corresponding provisions of paragraph (n) of the proposed AD (which contain new requirements). However, the AMOC paragraphs did not indicate that the previous AMOCs were allowed to continue to be AMOCs for the retained requirements in paragraphs (g), (h), (j), and (k) of the proposed AD. The FAA has added paragraphs (r)(1)(ii) and (iii) to this AD to allow previous AMOCs as AMOCs to the restated requirements of this AD and reidentified subsequent paragraphs accordingly.

### Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on this product. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

### Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2022–0102, dated June 8, 2022, which specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This AD requires EASA AD 2020–0270, dated December 7, 2020, which the Director of the Federal Register approved for incorporation by reference as of May 19, 2022 (87 FR 22117, April 14, 2022).

This AD requires EASA AD 2020–0034, dated February 25, 2020, which the Director of the Federal Register approved for incorporation by reference as of November 19, 2020 (85 FR 65190, October 15, 2020).

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

### Costs of Compliance

The FAA estimates that this AD affects 1,864 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

The FAA estimates the total cost per operator for the retained actions from AD 2020–21–10 to be $7,650 (90 work-hours × $85 per work-hour).

The FAA estimates the total cost per operator for the retained actions from AD 2022–07–08 to be $7,650 (90 work-hours × $85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-

hours per operator, although the agency recognizes that this number may vary from operator to operator. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate.

The FAA estimates the total cost per operator for the new actions to be $7,650 (90 work-hours × $85 per work-hour).

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

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## The Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive 2020–21–10, Amendment 39–21283 (85 FR 65190, October 15, 2020); and AD 2022–07–08, Amendment 39–21996 (87 FR 22117, April 14, 2022); and

■ b. Adding the following new airworthiness directive:

**2023–05–02 Airbus SAS:** Amendment 39–22371; Docket No. FAA–2022–1645; Project Identifier MCAI–2022–00734–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective April 18, 2023.

**(b) Affected ADs**

(1) This AD replaces AD 2020–21–10, Amendment 39–21283 (85 FR 65190, October 15, 2020) (AD 2020–21–10).

(2) This AD replaces AD 2022–07–08, Amendment 39–21996 (87 FR 22117, April 14, 2022) (AD 2022–07–08).

(3) This AD affects AD 2018–23–02, Amendment 39–19488 (83 FR 59278, November 23, 2018) (AD 2018–23–02).

**(c) Applicability**

This AD applies to Airbus SAS airplanes identified in paragraphs (c)(1) through (4) of this AD, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before February 18, 2022.

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

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

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

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

**(d) Subject**

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

**(e) Unsafe Condition**

This AD was prompted by a determination that additional new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address the risks associated with the effects of aging on airplane systems. Such effects could change system characteristics. The unsafe condition, if not addressed, could result in an increased potential for failure of certain life-limited parts, and reduced structural integrity of the airplane.

**(f) Compliance**

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

**(g) Retained Revision of the Existing Maintenance or Inspection Program From AD 2020–21–10, With No Changes**

This paragraph restates the requirements of paragraph (i) of AD 2020–21–10, with no changes. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before November 7, 2019, except for Model A319–171N airplanes: Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0034, dated February 25, 2020 (EASA AD 2020–0034). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (n) of this AD terminates the requirements of this paragraph.

**(h) Retained Exceptions to EASA AD 2020–0034, With No Changes**

This paragraph restates the exceptions specified in paragraph (j) of AD 2020–21–10, with no changes.

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2020–0034 do not apply to this AD.

(2) Paragraph (3) of EASA 2020–0034 specifies revising ''the AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, to incorporate the ''tasks and associated thresholds and intervals'' specified in paragraph (3) of EASA 2020 0034 within 90 days after November 19, 2020 (the effective date AD 2020–21–10).

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2020–0034 is at the applicable ''associated thresholds'' specified in paragraph (3) of EASA AD 2020–0034, or within 90 days after November 19, 2020 (the effective date AD 2020–21–10), whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2020–0034 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2020–0034 does not apply to this AD.

**(i) Retained Provisions for Alternative Actions and Intervals From AD 2020–21–10, With a New Exception**

This paragraph restates the requirements of paragraph (k) of AD 2020–21–10, with a new exception. Except as required by paragraph (n) of this AD, after the maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2020–0034.

**(j) Retained Revision of the Existing Maintenance or Inspection Program From AD 2022–07–08, With No Changes**

This paragraph restates the requirements of paragraph (l) of AD 2022–07–08, with no changes. Accomplishing the revision of the existing maintenance or inspection program required by paragraph (n) of this AD terminates the requirements of this paragraph.

(1) For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before October 5, 2020, except as specified in paragraph (k) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2020–0270, dated December 7, 2020 (EASA AD 2020–0270).

(2) For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after October 5, 2020, revise the existing maintenance or inspection program, as applicable, to incorporate the provision specified in paragraph (k)(7) of this AD.

**(k) Retained Exceptions to EASA AD 2020–0270, With No Changes**

This paragraph restates the exceptions specified in paragraph (m) of AD 2022–07–08, with no changes.

(1) Where EASA AD 2020–0270 refers to its effective date, this AD requires using May 19, 2022 (the effective date AD 2022–07–08).

(2) The requirements specified in paragraphs (1) and (2) of EASA AD 2020–0270 do not apply to this AD.

(3) Paragraph (3) of EASA AD 2020–0270 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after May 19, 2022 (the effective date AD 2022–07–08).

(4) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2020–0270 is at the applicable ''limitations'' as incorporated by the requirements of paragraph (3) of EASA AD 2020–0270, or within 90 days after May 19, 2022 (the effective date AD 2022–07–08), whichever occurs later.

(5) The provisions specified in paragraph (4) of EASA AD 2020–0270 do not apply to this AD.

(6) The ''Remarks'' section of EASA AD 2020–0270 does not apply to this AD.

(7) For all airplanes identified in paragraph (c) of this AD: Where the Note for Item 274000–00004–1–E of Section 4–1 in the service information referenced in EASA AD 2020–0270 specifies ''NBB carbon disc replacement'' instructions, for this AD, replace the text ''NBB carbon disc replacement can be accomplished in accordance with SB A320–27–1242 or VSB 47145–27–17,'' with ''NBB carbon disk replacement must be accomplished in accordance with SB A320–27–1242.''

**(l) Retained Provisions for Alternative Actions and Intervals AD 2022–07–08, With a New Exception**

This paragraph restates the requirements of paragraph (n) of AD 2022–07–08, with a new exception. Except as required by paragraph (n) of this AD, after the maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (*e.g.,* inspections) or intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2020–0270.

**(m) Retained Terminating Action for Certain Requirements of Paragraph (g) of This AD**

This paragraph restates the terminating action specified in paragraph (o) of AD 2022–07–08. Accomplishing the actions required by paragraph (j) of this AD terminates the airworthiness limitations section (ALS) limitation task 274000–00004–1–E for the trimmable horizontal stabilizer actuator (THSA), as required by paragraph (g) of this AD.

**(n) New Revision of the Existing Maintenance or Inspection Program**

Except as specified in paragraph (o) of this AD, comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2022–0102, dated June 8, 2022 (EASA AD 2022–0102). Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraphs (g) and (j) of this AD.

**(o) Exceptions to EASA AD 2022–0102**

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2022–0102.

(2) Paragraph (3) of EASA AD 2022–0102 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2022–0102 is at the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2022–0102, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) and (5) of EASA AD 2022–0102.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2022–0102.

**(p) New Provisions for Alternative Actions and Intervals**

After the existing maintenance or inspection program has been revised as required by paragraph (n) of this AD, no alternative actions (*e.g.,* inspections) or intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2022–0102.

**(q) New Terminating Action for Certain Requirements of AD 2018–23–02**

Accomplishing the revision of the existing maintenance or inspection program required by paragraph (n) of this AD terminates the requirements of paragraphs (g) through (k) of AD 2018–23–02 for Airbus SAS Model A318 series airplanes; Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes; Model A320–211, –212, –214, –216, –231, –232, and –233 airplanes; and Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes only.

**(r) Additional AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (s) of this AD.

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

(ii) AMOCs approved previously for AD 2020–21–10 are approved as AMOCs for the corresponding provisions of paragraphs (g) and (h) of this AD.

(iii) AMOCs approved previously for AD 2022–07–08 are approved as AMOCs for the corresponding provisions of paragraphs (j) and (k) of this AD.

(iv) AMOCs approved previously for AD 2020–21–10 are approved as AMOCs for the corresponding provisions of EASA AD 2022–0102 that are required by paragraph (n) of this AD.

(v) AMOCs approved previously for AD 2022–07–08 are approved as AMOCs for the corresponding provisions of EASA AD 2022–0102 that are required by paragraph (n) of this AD.

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

**(s) Additional Information**

For more information about this AD, contact Dan Rodina, Aerospace Engineer, Large Aircraft Section, FAA, International Validation Branch, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3225; email *dan.rodina@faa.gov*.

**(t) 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 April 18, 2023.

(i) European Union Aviation Safety Agency (EASA) AD 2022–0102, dated June 8, 2022.

(ii) [Reserved]

(4) The following service information was approved for IBR on May 19, 2022 (87 FR 22117, April 14, 2022).

(i) European Union Aviation Safety Agency (EASA) AD 2020–0270, dated December 7, 2020.

(ii) [Reserved]

(5) The following service information was approved for IBR on November 19, 2020 (85 FR 65190, October 15, 2020).

(i) European Union Aviation Safety Agency (EASA) AD 2020–0034, dated February 25, 2020.

(ii) [Reserved]

(6) For EASA ADs 2022–0102, 2020–0270, and 2020–0034, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find these EASA ADs on the EASA website at *ad.easa.europa.eu.*

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

(8) 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 March 2, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–05061 Filed 3–13–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2022–1303; Project Identifier MCAI–2022–01001–G; Amendment 39–22372; AD 2023–05–03]**

**RIN 2120–AA64**

## Airworthiness Directives; Alexander Schleicher GmbH & Co. Segelflugzeugbau Gliders

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA is superseding Airworthiness Directive (AD) 2022–14–14, which applied to all Alexander Schleicher GmbH & Co. Segelflugzeugbau Model ASW–15 gliders. AD 2022–14–14 required repetitively inspecting the wing root ribs for cracks, looseness, and damage and replacing any root rib with a crack, a loose rib or lift pin bushing, or any damage. Since the FAA issued AD 2022–14–14, the European Union Aviation Safety Agency (EASA) superseded its mandatory continuing airworthiness information (MCAI) to add all Model ASW–15B gliders to the applicability. This AD is prompted by MCAI originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. This AD retains the requirements from AD 2022–14–14 of repetitively inspecting the wing root ribs for cracks, looseness, and damage and replacing any root rib with a crack, a loose rib or lift pin bushing or any damage; and revises the applicability by adding Model ASW–15B gliders and specifying that this AD applies to all Model ASW–15 and ASW–15B gliders equipped with wooden wing root ribs. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective April 18, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 18, 2023.

The Director of the Federal Register approved the incorporation by reference of certain other publications listed in this AD as of August 25, 2022 (87 FR 43403, July 21, 2022).

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1303; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, the MCAI, 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.

*Material Incorporated by Reference:*

- For service information identified in this final rule, contact Alexander Schleicher GmbH & Co. Segelflugzeugbau, Alexander-Schleicher-Str. 1, Poppenhausen, Germany D–36163; phone: +49 (0) 06658 89–0; email: *info@alexander-schleicher.de;* website: *alexander-schleicher.de.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2022–1303.

**FOR FURTHER INFORMATION CONTACT:** Jim Rutherford, Aviation Safety Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4165; email: *jim.rutherford@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2022–14–14, Amendment 39–22119 (87 FR 43403, July 21, 2022) (AD 2022–14–14). AD 2022–14–14 applied to all serial-numbered Alexander Schleicher GmbH & Co. Segelflugzeugbau Model ASW–15 gliders. AD 2022–14–14 required repetitively inspecting the wing root ribs for cracks, looseness, and damage and replacing any root rib with a crack, a loose rib or lift pin bushing, or any damage. The FAA issued AD 2022–14–14 to detect and correct damaged root ribs.

The NPRM published in the **Federal Register** on October 26, 2022 (87 FR 64734; corrected November 10, 2022 (87 FR 67837)). The NPRM was prompted by EASA AD 2022–0146, dated July 11, 2022 (EASA AD 2022–0146) (referred to after this as ''the MCAI''), issued by EASA, which is the Technical Agent for the Member States of the European Union. The MCAI states that wing root rib damage can also affect Model ASW–15B gliders, and the Model ASW–15B as well as the ASW–15 gliders require repetitively inspecting the wing root ribs and replacing any damaged wing root ribs. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1303.

In the NPRM, the FAA proposed to retain the requirements from AD 2022–14–14 of repetitively inspecting the wing root ribs for cracks, looseness, and damage and replacing any root rib with a crack, a loose rib or lift pin bushing, or any damage; and add the Model ASW–15B gliders to the applicability.

### Discussion of Final Airworthiness Directive

### Comments

The FAA received comments from three individual commenters. The following presents the comments received on the NPRM and the FAA's response to each comment.

### Request Regarding Applicability

Three individual commenters requested that the FAA change the applicability of the proposed AD to specify that only Model ASW–15 and ASW–15B gliders equipped with

wooden wing root ribs would be affected. The commenters stated that EASA AD 2022–0146 and Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Technical Note 29, Issue II, dated May 4, 2022 (TN 29, Issue II), are for all models and serial numbers of ASW 15 gliders built with wooden wing root ribs and that in the proposed AD the FAA did not specify that only gliders equipped with wooden wing root ribs would be affected.

The FAA agrees. The FAA revised paragraph (c), Applicability, of this AD to specify Alexander Schleicher GmbH & Co. Segelflugzeugbau Model ASW–15 and ASW–15B gliders, all serial numbers, certificated in any category, equipped with wooden wing root ribs.

**Request Regarding On-Condition Costs**

An individual commenter requested that the FAA increase the proposed work-hour estimates in the NPRM for replacing all wing root ribs. The individual stated that the estimate of 8 work-hours to replace all wing root ribs is a significant underestimate.

The FAA agrees. The FAA researched the work-hour estimate for replacing all four wing root ribs and has since determined that it should be an estimate of 55 work-hours. Based on this information, the FAA revised the on-condition cost estimate in this final rule to include 55 work-hours for the replacement of all four wing root ribs.

**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, considered the comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for any changes described previously, this AD is adopted as proposed in the NPRM.

**Related Service Information Under 1 CFR Part 51**

The FAA reviewed Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Technical Note 29, Issue II, dated May 4, 2022 (TN 29, Issue II). This service information specifies replacement of wooden wing root ribs with new ribs.

This AD also requires Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Technical Note 29, dated June 28, 2021; Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Repair instruction exchange of wing root ribs according to TN 29, dated June 28, 2021; and Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Maintenance Instruction G, Issue 1, dated June 28, 2021, which the Director of the Federal Register approved for incorporation by reference as of August 25, 2022 (87 FR 43403, July 21, 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**.

**Differences Between This AD and the Service Information**

TN 29, Issue II, specifies the exchange of page 22A and page 27A of the Flight and Operations Manual for the Model ASW–15 and ASW–15B gliders, respectively, with a new version of those pages and then specifies documenting this change on page 3, Amendments, of the respective manual, and the MCAI and this AD do not.

**Costs of Compliance**

The FAA estimates that this AD affects 29 gliders 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 |
|---|---|---|---|---|
| Inspection of root ribs. | 1 work-hour × $85 per hour = $85. | Not Applicable ..... | $85 per inspection cycle ..... | $2,465 per inspection cycle. |

The FAA estimates the following costs to do any necessary replacements that would be required based on the results of the inspection. The agency has no data to determine the number of gliders that might need these replacements:

ON-CONDITION COSTS

| Action | Labor cost | Parts cost | Cost per product |
|---|---|---|---|
| Replace all four root ribs ..... | 55 work-hours × $85 per hour = $4,675 ..... | $1,000 | $5,675 |

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

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

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

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

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

### List of Subjects in 14 CFR Part 39

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

### The Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive AD 2022–14–14, Amendment 39–22119 (87 FR 43403, July 21, 2022); and

■ b. Adding the following new airworthiness directive:

**2023–05–03 Alexander Schleicher GmbH & Co. Segelflugzeugbau:** Amendment 39–22372; Docket No. FAA–2022–1303; Project Identifier MCAI–2022–01001–G.

**(a) Effective Date**

This airworthiness directive (AD) is effective April 18, 2023.

**(b) Affected ADs**

This AD replaces AD 2022–14–14, Amendment 39–22119 (87 FR 43403, July 21, 2022) (AD 2022–14–14).

**(c) Applicability**

This AD applies to Alexander Schleicher GmbH & Co. Segelflugzeugbau Model ASW–15 and ASW–15B gliders, all serial numbers, certificated in any category, equipped with wooden wing root ribs.

**(d) Subject**

Joint Aircraft System Component (JASC) Code 5712, Wing, Rib/Bulkhead.

**(e) Unsafe Condition**

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as wing root rib damage. The FAA is issuing this AD to detect and correct damaged root ribs. The unsafe condition, if not addressed, could result in reduced structural integrity of the wing assembly, which could lead to loss of control of the glider.

**(f) Compliance**

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

**(g) Required Actions**

(1) For Model ASW–15 gliders: Within 30 days after August 25, 2022 (effective date of AD 2022–14–14), and thereafter at intervals not to exceed 12 months, inspect all wing root ribs (4 places) for cracks, looseness, and damage, in accordance with the Action section in Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Maintenance Instruction G, Issue 1, dated June 28, 2021. If there is a crack in any root rib, a loose rib or lift pin bushing, or any damage, before further flight, replace the root rib in accordance with Action paragraph (B) in Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Technical Note 29, dated June 28, 2021, and steps 1 through 7 in Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Repair instruction exchange of wing root ribs according to TN 29, dated June 28, 2021; or Action paragraph (C) in Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Technical Note 29, Issue II, dated May 4, 2022, and steps 1 through 7 in Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Repair instruction exchange of wing root ribs according to TN 29, dated June 28, 2021.

(2) For Model ASW–15B gliders: Within 30 days after the effective date of this AD and thereafter at intervals not to exceed 12 months, inspect all wing root ribs (4 places) for cracks, looseness, and damage, in accordance with the Action section in Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Maintenance Instruction G, Issue 1, dated June 28, 2021. If there is a crack in any root rib, a loose rib or lift pin bushing, or any damage, before further flight, replace the root rib in accordance with Action paragraph (C) in Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Technical Note 29, Issue II, dated May 4, 2022, and steps 1 through 7 in Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Repair instruction exchange of wing root ribs according to TN 29, dated June 28, 2021.

(3) For Model ASW–15 and ASW–15B gliders: Replacing all four wing root ribs with new ribs is terminating action for the repetitive inspections required by this AD.

**(h) Alternative Methods of Compliance (AMOCs)**

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in § 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 International Validation Branch, mail it to the address identified in paragraph (i)(2) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov*. If mailing information, also submit information by email. 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 2022–0146, dated July 11, 2022, for related information. This EASA AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2022–1303.

(2) For more information about this AD, contact Jim Rutherford, Aviation Safety Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 901 Locust, Room 301, Kansas City, MO 64106; phone: (816) 329–4165; email: *jim.rutherford@faa.gov*.

**(j) 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 April 18, 2023.

(i) Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Technical Note 29, Issue II, dated May 4, 2022.

(ii) [Reserved]

(4) The following service information was approved for IBR on August 25, 2022 (87 FR 43403, July 21, 2022).

(i) Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Maintenance Instruction G, Issue 1, dated June 28, 2021.

(ii) Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Repair instruction exchange of wing root ribs according to TN 29, dated June 28, 2021.

(iii) Alexander Schleicher GmbH & Co. Segelflugzeugbau ASW 15 Technical Note 29, dated June 28, 2021.

(5) For service information identified in this AD, contact Alexander Schleicher GmbH & Co. Segelflugzeugbau, Alexander-Schleicher-Str. 1, Poppenhausen, Germany D–36163; phone: +49 (0) 06658 89–0; email: *info@alexander-schleicher.de;* website: *alexander-schleicher.de*.

(6) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. 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 March 5, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–05082 Filed 3–13–23; 8:45 am]

BILLING CODE 4910–13–P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2022–1585; Project Identifier MCAI–2022–00892–T; Amendment 39–22365; AD 2023–04–18]**

**RIN 2120–AA64**

## Airworthiness Directives; Dassault Aviation Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is superseding Airworthiness Directive (AD) 2021–03–11, which applied to all Dassault Aviation Model FALCON 2000 airplanes. AD 2021–03–11 required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD continues to require the actions in AD 2021–03–11, and also requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective April 18, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 18, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of March 31, 2021 (86 FR 11116, February 24, 2021).

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1585; 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.

*Material Incorporated by Reference:*

- For material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2022–1585.

**FOR FURTHER INFORMATION CONTACT:** Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3226; email *Tom.Rodriguez@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2021–03–11, Amendment 39–21414 (86 FR 11116, February 24, 2021) (AD 2021–03–11). AD 2021–03–11 applied to all Dassault Aviation Model FALCON 2000 airplanes. AD 2021–03–11 required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2021–03–11 to address reduced controllability of the airplane. AD 2021–03–11 specified that accomplishing the revision required by that AD terminates all requirements of AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (AD 2010–26–05) for Model FALCON 2000 airplanes only. This AD therefore continues allowing that termination.

The NPRM published in the **Federal Register** on December 19, 2022 (87 FR 77532). The NPRM was prompted by AD 2022–0135, dated July 6, 2022, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2022–0135) (referred to after this as the MCAI). The MCAI states that new or more restrictive airworthiness limitations have been developed.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2022–1585.

In the NPRM, the FAA proposed to continue to require the actions in AD 2021–03–11 and to require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, as specified in EASA AD 2022–0135. The FAA is issuing this AD to address reduced controllability of the airplane.

### Discussion of Final Airworthiness Directive

#### Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

#### Additional Changes Made to This AD

The FAA has revised paragraphs (h)(2) and (3) of this AD to clarify that the compliance time is ''within 90 days after March 31, 2021 (the effective date of AD 2021–03–11).'' In the NPRM, the FAA inadvertently specified a compliance time of ''within 90 days after the effective date of this AD.'' However, paragraphs (h)(2) and (3) of this AD are retained requirements from AD 2021–03–11, and the compliance time should be correlated to AD 2021–03–11 to clarify that these are not new requirements in this AD.

#### Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA 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 this product. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

### Related Service Information Under 1 CFR Part 51

EASA AD 2022–0135 specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This AD also requires EASA AD 2020–0113, dated May 20, 2020, which the Director of the Federal Register approved for incorporation by reference as of March 31, 2021 (86 FR 11116, February 24, 2021).

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

## Costs of Compliance

The FAA estimates that this AD affects 168 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

The FAA estimates the total cost per operator for the retained actions from AD 2021–03–11 to be $7,650 (90 work-hours × $85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. In the past, the agency has estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate.

The FAA estimates the total cost per operator for the new actions to be $7,650 (90 work-hours × $85 per work-hour).

## Authority for This Rulemaking

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

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

## Regulatory Findings

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

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

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

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

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

## List of Subjects in 14 CFR Part 39

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

## The Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2021–03–11, Amendment 39–21414 (86 FR 11116, February 24, 2021); and

■ b. Adding the following new AD:

**2023–04–18 Dassault Aviation:** Amendment 39–22365; Docket No. FAA–2022–1585; Project Identifier MCAI–2022–00892–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective April 18, 2023.

**(b) Affected ADs**

(1) This AD replaces AD 2021–03–11, Amendment 39–21414 (86 FR 11116, February 24, 2021) (AD 2021–03–11).

(2) This AD affects AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (AD 2010–26–05).

**(c) Applicability**

This AD applies to all Dassault Aviation Model FALCON 2000 airplanes, certificated in any category.

**(d) Subject**

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

**(e) Unsafe Condition**

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced controllability of the airplane.

**(f) Compliance**

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

**(g) Retained Revision of the Existing Maintenance or Inspection Program, With No Changes**

This paragraph restates the requirements of paragraph (i) of AD 2021–03–11, with no changes. Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0113, dated May 20, 2020 (EASA AD 2020–0113). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (j) of this AD terminates the requirements of this paragraph.

**(h) Retained Exceptions to EASA AD 2020–0113, With No Changes**

This paragraph restates the exceptions specified in paragraph (j) of AD 2021–03–11, with no changes.

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2020–0113 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2020–0113 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, to incorporate the ''limitations, tasks and associated thresholds and intervals'' specified in paragraph (3) of EASA AD 2020–0113 within 90 days after March 31, 2021 (the effective date of AD 2021–03–11).

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2020–0113 is at the applicable ''associated thresholds'' specified in paragraph (3) of EASA AD 2020–0113, or within 90 days after March 31, 2021 (the effective date of AD 2021–03–11), whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2020–0113 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2020–0113 does not apply to this AD.

**(i) Retained No Alternative Actions or Intervals With a New Exception**

This paragraph restates the requirements of paragraph (k) of AD 2021–03–11, with a new exception. Except as required by paragraph (j) of this AD, after the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2020–0113.

**(j) New Maintenance or Inspection Program Revision**

Except as specified in paragraph (k) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2022–0135, dated July 6, 2022 (EASA AD 2022–0135). Accomplishing the maintenance or inspection program revision required by this paragraph terminates the requirements of paragraph (g) of this AD.

**(k) Exceptions to EASA AD 2022–0135**

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2022–0135 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2022–0135 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2022–0135 is at the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2022–0135, or within 90 days after the effective date of this AD, whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2022–0135 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2022–0135 does not apply to this AD.

**(l) New Provisions for Alternative Actions and Intervals**

After the existing maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (*e.g.,* inspections), and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2022–0135.

**(m) Terminating Action for AD 2010–26–05**

Accomplishing the actions required by paragraph (g) or (j) of this AD terminates the requirements of paragraph (g) of AD 2010–26–05 for Model FALCON 2000 airplanes only.

**(n) Additional AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (o) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

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

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

**(o) Additional Information**

For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone 206–231–3226; email *Tom.Rodriguez@faa.gov.*

**(p) Material Incorporated by Reference**

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

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

(3) The following service information was approved for IBR on April 18, 2023.

(i) European Union Aviation Safety Agency (EASA) AD 2022–0135, dated July 6, 2022.

(ii) [Reserved]

(4) The following service information was approved for IBR on March 31, 2021 (86 FR 11116, February 24, 2021).

(i) European Union Aviation Safety Agency (EASA) AD 2020–0113, dated May 20, 2020.

(ii) [Reserved]

(5) For EASA ADs 2022–0135 and 2020–0113, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find these EASA ADs on the EASA website at *ad.easa.europa.eu.*

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

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

Issued on February 25, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–05090 Filed 3–13–23; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2022–1653; Project Identifier MCAI–2022–01193–T; Amendment 39–22370; AD 2023–05–01]**

**RIN 2120–AA64**

## Airworthiness Directives; De Havilland Aircraft of Canada Limited (Type Certificate Previously Held by Bombardier, Inc.) Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain De Havilland Aircraft of Canada Limited Model DHC–8–400 series airplanes. This AD was prompted by reports of flap power unit (FPU) pressure switch failures resulting in flap inoperative events. This AD requires replacing the FPU or replacing the FPU pressure switch and reidentifying the FPU. This AD also prohibits the installation of affected parts. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective April 18, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of April 18, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2022–1653; 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.

*Material Incorporated by Reference:*

- For service information identified in this final rule, contact De Havilland Aircraft of Canada Limited, Dash 8 Series Customer Response Centre, 5800 Explorer Drive, Mississauga, Ontario, L4W 5K9, Canada; telephone North America (toll-free): 855–310–1013, Direct: 647–277–5820; email *thd@dehavilland.com;* website *dehavilland.com.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2022–1653.

**FOR FURTHER INFORMATION CONTACT:** Gabriel Kim, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228–7300; email *9-avs-nyaco-cos@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 certain De Havilland Aircraft of Canada Limited Model DHC–8–400 series airplanes. The NPRM published in the **Federal Register** on December 23, 2022 (87 FR 78881). The NPRM was prompted by AD CF–2022–52, dated September 1, 2022, issued by Transport Canada, which is the aviation authority for Canada (Transport Canada AD CF–2022–52) (also referred to as the MCAI). The MCAI states there have been increasing reports of FPU pressure switch failures, part number (P/N) 150135–1 or P/N 162660–1, over the past year leading to a high number of flap inoperative events in flight and on the ground. An investigation has determined the root cause to be a deformation of the FPU pressure switch internal mechanism due to hydraulic pressure spikes. If not corrected, a failed FPU pressure switch could lead to a failure of the FPU resulting in abnormal flap landings and increased landing distances, which could require the use of emergency landing procedures and/or airfield diversions. The improved pressure switch, P/N 162660–2, has a restrictor insert in the pressure switch inlet.

In the NPRM, the FAA proposed to require replacing the FPU pressure switch or the FPU. The NPRM also proposed to prohibit the installation of affected parts. 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–2022–1653.

## Discussion of Final Airworthiness Directive

### Comments

The FAA received no comments on the NPRM or on the determination of the cost to the public.

### Explanation of Additional Changes

In the NPRM, the FAA inadvertently omitted the operational test of the wing flaps specified in Section 3.C. paragraph (2) of De Havilland Aircraft of Canada Limited Service Bulletin 84–27–75, dated June 23, 2022, including Collins Aerospace Service Bulletin 27–0029, dated June 13, 2022. The MCAI requires this step, which is important to ensure the aircraft is airworthy before it is returned to service. The FAA has therefore revised paragraphs (g)(1) and (2) of this AD to clarify that the operational test is required by this AD.

The FAA has revised paragraph (g)(2) of this AD to clarify that De Havilland Aircraft of Canada Limited Service Bulletin 84–27–75, dated June 23, 2022, including Collins Aerospace Service Bulletin 27–0029, dated June 13, 2022, is the appropriate service information for accomplishing the actions in this AD. The FAA had referred to these bulletins separately, but since they are published as one document, the FAA corrected the citation.

### Conclusion

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA 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 this product. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

### Related Service Information Under 1 CFR Part 51

The FAA reviewed De Havilland Aircraft of Canada Limited Service Bulletin 84–27–75, dated June 23, 2022, including Collins Aerospace Service Bulletin 27–0029, dated June 13, 2022. This service information specifies procedures for replacing FPU P/N C148656–1 or C148656–2 with a new FPU P/N C148656–3, or replacing FPU pressure switch P/N 150135–1 or 162660–1 within the FPU with a new pressure switch P/N 162660–2 and re-identifying the FPU as P/N C148656–3, and accomplishing an operational test of the wing flaps. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES** section.

### Costs of Compliance

The FAA estimates that this AD affects 53 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

| Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|
| Up to 6 work-hours × $85 per hour = $510 | Up to $3,000 | Up to $3,510 | Up to $186,030. |

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

## Authority for This Rulemaking

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

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

## Regulatory Findings

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:

**2023–05–01 De Havilland Aircraft of Canada Limited (Type Certificate Previously Held by Bombardier, Inc.):** Amendment 39–22370; Docket No. FAA–2022–1653; Project Identifier MCAI–2022–01193–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective April 18, 2023.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to De Havilland Aircraft of Canada Limited (Type Certificate previously held by Bombardier, Inc.) Model DHC–8–401 and –402 airplanes, certificated in any category, serial numbers 4001 and 4003 through 4633 inclusive.

**(d) Subject**

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

**(e) Unsafe Condition**

This AD was prompted by reports of flap power unit (FPU) pressure switch failures resulting in flap inoperative events. The FAA is issuing this AD to address FPU pressure switch failures. The unsafe condition, if not addressed, could result in abnormal flap landings and increased landing distances, which could require the use of emergency landing procedures and/or airfield diversions.

**(f) Compliance**

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

**(g) Requirements**

Within 8,000 flight hours or 48 months after the effective date of this AD, whichever occurs first: Do the actions specified in either paragraph (g)(1) or (2) of this AD.

(1) Replace FPU part number (P/N) C148656–1 or C148656–2 with P/N C148656–3 and do an operational test of the wing flaps in accordance with Section 3.B. paragraph (1) and Section 3.C. paragraph (2), of the Accomplishment Instructions of De Havilland Aircraft of Canada Limited Service Bulletin 84–27–75, dated June 23, 2022, including Collins Aerospace Service Bulletin 27–0029, dated June 13, 2022.

(2) Replace FPU pressure switch P/N 150135–1 or 162660–1 with P/N 162660–2, reidentify the FPU as P/N C148656–3, and do an operational test of the wing flaps in accordance with Section 3.B. paragraph (2) and Section 3.C. paragraph (2), of the Accomplishment Instructions of De Havilland Aircraft of Canada Limited Service Bulletin 84–27–75, dated June 23, 2022, including Collins Aerospace Service Bulletin 27–0029, dated June 13, 2022.

**(h) Parts Installation Prohibition**

As of the effective date of this AD, do not install a FPU having P/N C148656–1 or C148656–2 or a FPU pressure switch having P/N 150135–1 or 162660–1 on any airplane.

**(i) Additional AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228–7300. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada; or De Havilland Aircraft of Canada Limited's Transport Canada Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

**(j) Additional Information**

(1) Refer to Transport Canada AD CF–2022–52, dated September 1, 2022, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2022–1653.

(2) For more information about this AD, contact Gabriel Kim, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228–7300; email *9-avs-nyaco-cos@faa.gov*.

**(k) Material Incorporated by Reference**

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

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

(i) De Havilland Aircraft of Canada Limited Service Bulletin 84–27–75, dated June 23, 2022, including Collins Aerospace Service Bulletin 27–0029, dated June 13, 2022.

**Note 1 to paragraph (k)(2)(i):** De Havilland issued De Havilland Service Bulletin 84–27–75, dated June 23, 2022, with Collins Aerospace Service Bulletin 27–0029, dated June 13, 2022, attached as one ''merged'' file for the convenience of affected operators.

(ii) [Reserved]

(3) For service information identified in this AD, contact De Havilland Aircraft of Canada Limited, Dash 8 Series Customer Response Centre, 5800 Explorer Drive, Mississauga, Ontario, L4W 5K9, Canada; telephone North America (toll-free): 855–310–1013, Direct: 647–277–5820; email *thd@dehavilland.com;* website *dehavilland.com*.

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

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

Issued on March 2, 2023.

**Christina Underwood,**

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

[FR Doc. 2023–05060 Filed 3–13–23; 8:45 am]

BILLING CODE 4910–13–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 62

**[EPA–R01–OAR–2022–0515; FRL–10220–02–R1]**

## Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Maine; 111(d)/129 Revised State Plan for Large Municipal Waste Combustors and State Plan for Small Municipal Waste Combustors

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving the Clean Air Act (CAA) State Plan for Municipal Waste Combustor (MWC) units submitted by the Maine Department of Environmental Protection (Maine DEP). This submission includes revisions to Maine's previously approved State Plan for existing Large MWCs in response to amended emission guidelines (EGs) for Large MWCs. This submission also includes a State Plan for existing Small MWCs. Maine DEP's State Plans for Large and Small MWCs implement and enforce provisions at least as protective as the EGs applicable to these subcategories of solid waste incinerators. This action is being taken in accordance with the CAA.

**DATES:** This rule is effective on April 13, 2023. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of April 13, 2023.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2022–0515. 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, *i.e.,* 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 at *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that, if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays and facility closures due to COVID–19.

**FOR FURTHER INFORMATION CONTACT:** Shutsu Wong, Air Quality Branch, U.S. Environmental Protection Agency, EPA Region 1, 5 Post Office Square—Suite 100, (Mail Code 05–2), Boston, MA 02109–3912, tel. 617–918–1078, email *wong.shutsu@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

## Table of Contents

I. Background and Purpose
II. Final Action
III. Incorporation by Reference
IV. Statutory and Executive Order Reviews

## I. Background and Purpose

On September 26, 2022 (87 FR 58294), EPA published a Notice of Proposed Rulemaking (NPRM) for the State of Maine.

The NPRM proposed approval of the Clean Air Act State Plan revisions for existing Large MWCs and new State Plan for existing Small MWCs submitted by the Maine DEP on December 24, 2019. Maine DEP revised the provisions of 06–096 Code of Maine Regulations (CMR) Chapter 121, entitled ''Emission Limitations and Emission Testing of Resource Recovery Facilities,'' and submitted the State Plan in response to amended EGs for Large MWCs and federal standards for existing Small MWCs.[1] Maine DEP's State Plan is for implementing and enforcing provisions at least as protective as the EGs applicable to existing Large and Small MWCs.

Other specific requirements under sections 111(d) and 129 of the Clean Air Act, and the rationale for EPA's proposed action, are explained in the NPRM and will not be restated here. Only one comment was received on the NPRM which was in support of the proposed action. This comment is available within the docket for this action.

## II. Final Action

EPA is approving Maine DEP's revised State Plan for existing Large MWCs and State Plan for existing Small MWCs.

## III. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the 06–096 CMR, Chapter 121, entitled ''Emission Limitations and Emission Testing of Resource Recovery Facilities,'' effective on September 14, 2019, excluding the provisions for new Large MWCs covered in 06–096 CMR Chapter 121, Section 6., entitled ''Large Municipal Waste Combustor Units Subject to 40 CFR part 60, subpart Eb.'' This regulation being incorporated by reference revises Maine's previously approved State Plan for existing Large MWCs in response to amended EGs for Large MWCs, and includes a State Plan for existing Small MWCs. The EPA has made, and will continue to make, these documents generally available at the EPA Region 1 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). They are also available at: *https://www.regulations.gov.* This incorporation by reference has been approved by the Office of the Federal Register and the plan is federally enforceable under the CAA as of the effective date of this final rulemaking.

## IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. See Clean Air Act sections 111(d) and 129(b); 40 CFR part 60, subparts B and Cb; and 40 CFR part 62, subpart A; and 40 CFR 62.04. Thus, in reviewing state plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement

[1] 71 FR 27324 Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Large Municipal Waste Combustors and 68 FR 5158 Federal Plan Requirements for Small Municipal Waste Combustion Units Constructed On or Before August 30, 1999.

Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; 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 State Plan 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 May 15, 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, Administrative practice and procedure, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides, Waste treatment and disposal.

Dated: March 6, 2023.

**David Cash,**

*Regional Administrator, EPA Region 1.*

Part 62 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

## PART 62—APPROVAL AND PROMULGATION OF STATE PLAN 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 U—Maine

■ 2. Amend Section 62.4845 by revising paragraph (b)(4) and adding paragraphs (b)(7) and (8) and (d) to read as follows:

**§ 62.4845**

* * * * *

(b)

* * * * *

(4) Control of metals, acid gases, organic compounds and nitrogen oxide emissions from existing large municipal waste combustors with the capacity to combust greater than 250 tons per day of municipal solid waste, submitted on April 15, 1998.

* * * * *

(7) A revision to the plan controlling metals, acid gases, organic compounds and nitrogen oxide emissions from large municipal waste combustors with the capacity to combust greater than 250 tons per day of municipal solid waste, submitted on December 24, 2019 (incorporated by reference, see paragraph (d)(1) of this section).

(8) Control of metals, acid gases, organic compounds and nitrogen oxide emissions from existing small municipal waste combustors with the capacity to combust less than or equal to 250 tons per day of municipal solid waste, submitted on December 24, 2019 (incorporated by reference, see paragraph (d)(1) of this section).

* * * * *

(d) *Incorporation by reference.* The material listed in this paragraph (d) is incorporated by reference in this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the EPA and at the National Archives and Records Administration (NARA). Contact EPA at: EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square-Suite 100, Boston, MA, 617–918–1111. For information on the availability of this material at NARA, visit: *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* The material may be obtained from: State of Maine, Maine Department of Environmental Protection. 17 State House Station, 28 Tyson Drive, Augusta, Maine 04333, 207–287–7688, *www.maine.gov/dep/:*

(1) 06–096 Code of Maine Regulations: Department of Environmental Protection, Chapter 121, ''Emission Limitations and Emission Testing of Resource Recovery Facilities,'' excluding Section 6 ''Large Municipal Waste Combustor Units Subject to 40 CFR part 60, subpart Eb,'' amended September 14, 2019.

(2) [Reserved]

■ 3. Section 62.4975 is revised to read as follows:

**§ 62.4975 Identification of sources.**

(a) Penobscot Energy Recovery Company, Orrington, Maine

(b) [Reserved]

(c) ecomaine, Portland, Maine

■ 4. Add an undesignated center heading and § 62.5000 to subpart U to read as follows:

**Metals, Acid Gases, Organic Compounds and Nitrogen Oxide Emissions From Existing Municipal Waste Combustors With the Capacity To Combust Less Than or Equal to 250 Tons per Day of Municipal Solid Waste**

**§ 62.5000 Identification of sources.**

(a) Mid-Maine Waste Action Corporation, Auburn, Maine

(b) [Reserved]

[FR Doc. 2023–05020 Filed 3–13–23; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 174

**[EPA–HQ–OPP–2020–0234; FRL–10776–01–OCSPP]**

## BLB2 and AMR3 Proteins in Potato; Temporary Exemption From the Requirement of a Tolerance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes a temporary exemption from the requirement of a tolerance for residues of the BLB2 and AMR3 proteins in potato, when used as a plant-incorporated protectant (PIP) in accordance with the terms of Experimental Use Permit (EUP) No. 8971–EUP–3. J.R. Simplot Company submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act

(FFDCA), requesting the temporary tolerance exemption. This regulation eliminates the need under FFDCA to establish a maximum permissible level for residues of BLB2 and AMR3 proteins. The temporary tolerance exemption expires on March 31, 2024.

**DATES:** This regulation is effective March 14, 2023. Objections and requests for hearings must be received on or before May 15, 2023, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2020–0234, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and the OPP Docket is (202) 566–1744. Please review the visitor instructions and additional information about the docket available at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** Charles Smith, Biopesticides and Pollution Prevention Division (7511M), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1400; email address: *BPPDFRNotices@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

### *B. How can I get electronic access to other related information?*

You may access a frequently updated electronic version of 40 CFR part 174 through the Government Publishing Office's e-CFR site at *https://www.ecfr.gov/current/title-40/chapter-I/subchapter-E/part-174?toc=1.*

### *C. How can I file an objection or hearing request?*

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2020–0234 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before May 15, 2023. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2020–0234, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

## II. Background

In the **Federal Register** of June 24, 2020 (85 FR 37806) (FRL–10010–82), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 0G8830) by J.R. Simplot Company, 5369 W Irving Street, Boise, ID 83706. The petitioner requested that 40 CFR part 174 be amended by establishing a temporary exemption from the requirement of a tolerance for residues of the plant-incorporated protectants BLB2 and AMR3 proteins in potato. That document referenced a summary of the petition prepared by the petitioner J.R. Simplot Company, which is available in the docket via *https://www.regulations.gov.* There were no comments received in response to the Notice of Filing.

## III. Final Rule

### *A. EPA's Safety Determination*

Section 408(r) of FFDCA authorizes EPA to establish a temporary exemption from the requirement of a tolerance for residues covered by an experimental use permit issued under the Federal Insecticide, Fungicide, and Rodenticide Act. That section states that the provisions of section 408(c)(2) of FFDCA apply to exemptions issued under FFDCA section 408(r). Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance or tolerance exemption and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that EPA

consider ''available information concerning the cumulative effects of [a particular pesticide's] . . . residues and other substances that have a common mechanism of toxicity.''

EPA evaluated the available toxicity and exposure data on BLB2 and AMR3 proteins and considered its validity, completeness, and reliability, as well as the relationship of this information to human risk. In summary, the available data does not indicate any adverse effects due to toxicity or allergenicity of the BLB2 and AMR3 proteins. A full summary of the data upon which EPA relied and its risk assessments based on that data can be found within the document entitled ''Review of the Application for an Experimental Use Permit for Gen 3 Potatoes expressing transgenic R-proteins BLB2, AMR3 and VNT1, PVY Coat Protein Hairpin RNA and inert ingredient StmALS and associated FFDCA Petitions for the Temporary Exemption from a Tolerance for AMR3 and BLB2, as well as FFDCA Petition for the Exemption from a Tolerance for StmALS'' (Human Health Risk Assessment). This document, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES**.

Available data have demonstrated that, with regard to humans, BLB2 and AMR3 proteins are not anticipated to be toxic or allergenic via any reasonably foreseeable route of exposure. The plant-incorporated protectant (PIP) active ingredients are resistance (''R'') proteins that confer protection against potato pathogens by directly or indirectly recognizing pathogen-secreted effector proteins. This recognition leads to the activation of the hypersensitive response, which is a form of programmed cell death characterized by cytoplasmic shrinkage, chromatin condensation, mitochondrial swelling, vacuolization and chloroplast disruption. This hypersensitive response pathway involves immune signaling triggered by R proteins that is specific to plants; activated R-proteins cannot trigger cell death in mammals. Thus, BLB2 and AMR3 proteins do not have a toxic mechanism of action, but instead activate signaling cascades within the plant which invoke the plant cell death pathway to prevent growth and spread of the pathogen.

There is likely to be dietary exposure to BLB2 and AMR3 through consumption of potato-derived foods containing the proteins. However, the Agency has concluded that any potential dietary risk from the use of BLB2 and AMR3 proteins to human health is considered negligible for the following reasons. (1) As described above, the mode-of-action of BLB2 and AMR3 is specific to plants and does not affect mammalian cells. (2) Both the BLB2 and AMR3 proteins are expressed at extremely low levels in potato, which indicates very low human exposure to the proteins through the consumption of BLB2- and AMR3-expressing potatoes. (3) Bioinformatics analyses of BLB2 and AMR3 proteins revealed no homology with known toxins or allergens. (4) The source organisms for the active ingredients, *Solanum bulbocastanum* (BLB2) and *Solanum americanum* (AMR3), are not known as allergens. (5) Both proteins have a history of safe use. BLB2 originates from *S. bulbocastanum* (ornamental nightshade), a close potato relative that has 82% sequency similarity with the tomato gene Mi–1, which has a history of safe use since tomatoes have been consumed by humans for hundreds of years. Furthermore, the BLB2 protein is present in two *Solanum tuberosum* potato varieties (Toluca and Bionica) that have been conventionally bred and cultivated for food use in Europe. AMR3 originates from *S. americanum* (American black nightshade) which is cultivated for medicinal and food use, and as part of breeding programs for improved nutrition. Although some members of the *Solanum* genus have toxicity, these effects are caused by glycoalkaloids, which can cause toxicity even in the common potato, *Solanum tuberosum.* Neither BLB2 nor AMR3 are glycoalkaloids; instead, they belong to a large family of R-proteins found throughout the plant kingdom. There are hundreds to thousands of R-proteins in *S. tuberosum* and other crops which have a long history of safe consumption.

Oral exposure from ingestion of drinking water is unlikely because BLB2 and AMR3 proteins are present at very low levels within the plant cells. If AMR3 and BLB2 do enter the water column, they are expected to degrade rapidly in the presence of soil microbes, or upon normal communal water-treatment procedures. In addition, there is unlikely to be residential or non-occupational exposure given that the active ingredients are plant-incorporated protectants in potato. Therefore, the only possible route of non-occupational exposure, other than dietary, is via handling of the plants and plant products. However, BLB2 and AMR3 proteins are present in the transformed potato tissues at levels below the level of detection, resulting in minimal to negligible exposure. Furthermore, there are no risks associated with these exposure routes because bioinformatics analysis and the history of safe use have shown that the proteins are not toxic or allergenic.

Although FFDCA section 408(b)(2)(C) provides for an additional tenfold margin of safety for infants and children in the case of threshold effects, EPA has determined that there are no such effects due to the lack of toxicity and allergenicity for these PIP active ingredients. As a result, an additional margin of safety for the protection of infants and children is unnecessary.

Based upon its evaluation, EPA concludes that there is reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of the BLB2 and AMR3 proteins in potatoes. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. The Agency has arrived at this conclusion based on the mode-of-action, history of safe use, and lack of toxicity and allergenicity for the BLB2 and AMR3 proteins in potato.

*B. Analytical Enforcement Methodology*

EPA has determined that an analytical method is not required for enforcement purposes since the Agency is establishing a temporary exemption from the requirement of a tolerance without any numerical limitation. Nonetheless, the petitioner submitted a reverse transcription-quantitative polymerase chain reaction (RT-qPCR) method for detection of BLB2 and AMR3 in transformed leaves and tubers.

*C. Conclusion*

Based upon its evaluation in the Human Health Risk Assessment, EPA concludes that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of BLB2 and ARM3 proteins in potatoes. Therefore, an exemption from the requirement of a tolerance is established for residues of BLB2 and AMR3 proteins in potato when used in accordance with label directions and good agricultural practices.

## IV. Statutory and Executive Order Reviews

This action establishes an exemption from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to EPA. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is

not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001); Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997); or Executive Order 13771, entitled ''Reducing Regulations and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*) nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance exemption in this action, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes. As a result, this action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, EPA has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, EPA has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require EPA's consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

**V. Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 174**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: March 6, 2023.

**Charles Smith,**

*Director, Biopesticides and Pollution Prevention Division.*

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

## PART 174—PROCEDURES AND REQUIREMENTS FOR PLANT-INCORPORATED PROTECTANTS

■ 1. The authority citation for part 174 continues to read as follows:

**Authority:** 7 U.S.C. 136–136y; 21 U.S.C. 321(q), 346a and 371.

■ 2. Add § 174.545 to subpart W to read as follows:

**§ 174.545 BLB2 and AMR3 proteins in potato; temporary exemption from the requirement of a tolerance.**

Residues of BLB2 and AMR3 proteins in potato are temporarily exempt from the requirement of a tolerance when used as a plant-incorporated protectant in potato in accordance with the terms of Experimental Use Permit No. 8917–EUP–3. This temporary exemption from the requirement of a tolerance expires on March 31, 2024.

[FR Doc. 2023–05246 Filed 3–13–23; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2021–0519; FRL–10544–01–OCSPP]**

## Bacteriophage Active Against Pseudomonas syringae pv. syringae; Bacteriophage Active Against Xanthomonas arboricola pv. corylina; Bacteriophage Active Against Xanthomonas arboricola pv. juglandis; and Bacteriophage Active Against Xanthomonas arboricola pv. pruni; Exemptions From the Requirement of Tolerances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes exemptions from the requirement of a tolerance for residues of Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni,* in or on all food commodities when used in accordance with label directions and good agricultural practices. OmniLytics, Inc. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* under FFDCA when used in accordance with this exemption.

**DATES:** This regulation is effective March 14, 2023. Objections and requests for hearings must be received on or before May 15, 2023, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2021–0519, is available at *https://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301

Constitution Ave. NW, Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room and OPP Docket is (202) 566–1744. For the latest status information on EPA/DC services, docket access, visit *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:**

Charles Smith, Biopesticides and Pollution Prevention Division (7511M), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1400; email address: *BPPDFRNotices@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this action apply to me?*

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

### *B. How can I get electronic access to other related information?*

You may access a frequently updated electronic version of 40 CFR part 180; through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

### *C. How can I file an objection or hearing request?*

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2021–0519 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before May 15, 2023. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b), although EPA strongly encourages those interested in submitting objections or a hearing request to submit objections and hearing requests electronically. *See* Order Urging Electronic Service and Filing (April 10, 2020), *https://www.epa.gov/sites/default/files/2020-05/documents/2020-04-10_-_order_urging_electronic_service_and_filing.pdf.* At this time, because of the COVID–19 pandemic, the judges and staff of the Office of Administrative Law Judges are working remotely and not able to accept filings or correspondence by courier, personal delivery, or commercial delivery, and the ability to receive filings or correspondence by U.S. Mail is similarly limited. When submitting documents to the U.S. EPA Office of Administrative Law Judges (OALJ), a person should utilize the OALJ e-filing system at *https://yosemite.epa.gov/oa/eab/eab-alj_upload.nsf.*

Although EPA's regulations require submission via U.S. Mail or hand delivery, EPA intends to treat submissions filed via electronic means as properly filed submissions during this time that the Agency continues to maximize telework due to the pandemic; therefore, EPA believes the preference for submission via electronic means will not be prejudicial. If it is impossible for a person to submit documents electronically or receive service electronically, *e.g.,* the person does not have any access to a computer, the person shall so advise OALJ by contacting the Hearing Clerk at (202) 564–6281. If a person is without access to a computer and must file documents by U.S. Mail, the person shall notify the Hearing Clerk every time it files a document in such a manner. The address for mailing documents is U.S. Environmental Protection Agency, Office of Administrative Law Judges, Mail Code 1900R, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2021–0519, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *https://www.epa.gov/dockets/where-send-comments-epa-dockets.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

## II. Background

In the **Federal Register** of September 22, 2021 (86 FR 52624) (FRL–8792–03–OCSPP), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance exemption petition (PP 1F8907) by OmniLytics, Inc., 9075 S Sandy Parkway, Sandy, UT 84070. The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* in or on all food commodities. That notice referenced a summary of the petition prepared by the petitioner OmniLyics, Inc. and is available in the docket via *https://www.regulations.gov.* EPA received no comments in response to the notice of filing.

## III. Final Rule

### *A. EPA's Safety Determination*

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement of a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in

establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance or tolerance exemption and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that EPA consider ''available information concerning the cumulative effects of [a particular pesticide's] . . . residues and other substances that have a common mechanism of toxicity.''

EPA evaluated the available toxicological and exposure data on Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* and considered their validity, completeness, and reliability, as well as the relationship of this information to human risk. A full explanation of the data upon which EPA relied and its risk assessment based on those data can be found within the document entitled ''Human Health Risk Assessment of Bacteriophages active against *Pseudomonas syringae* pv. *syringae, Xanthomonas arboricola* pv. *corylina, Xanthomonas arboricola* pv. *juglandis,* and *Xanthomonas arboricola* pv. *pruni,* New Active Ingredients, in 67986–RN AgriPhage Nut & Stone Fruit Proposed for Registration and an Associated Petition Requesting a Tolerance Exemption'' (Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni,* Human Health Risk Assessment). This document, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES**.

The available data and information demonstrated that, with regard to humans, Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* are not anticipated to be toxic, pathogenic, or infective via any route of exposure. Significant dietary and non-occupational exposures to residues of Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* are not expected due to the inability of bacteriophage to persist when the specific bacterial hosts are not present and sensitivity to environmental conditions (*e.g.,* ultraviolet light and heat). Even if dietary and non-occupational exposures to residues of Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* were to occur, there is not a concern due to the lack of potential for adverse effects and lack of significant exposure since bacteriophage populations are expected to decrease rapidly when host bacteria are not present, since bacteriophage persist only in the presence of the specific bacterial hosts and due to environmental conditions (*e.g.,* ultraviolet light and heat). Because there are no threshold levels of concern with the toxicity, pathogenicity, or infectivity of Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni,* EPA determined that the additional margin of safety referred to as the Food Quality Protection Act Safety Factor is not necessary to protect infants and children as part of the qualitative assessment conducted.

Based upon its evaluation in the Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* Human Health Risk Assessment, which concludes that there are no potential risks of concern from aggregate exposure to Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni,* EPA determines that there is a reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni.* Therefore, exemptions from the requirement of a tolerance are established for residues of Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni,* in or on all food commodities when used in accordance with label directions and good agricultural practices.

*B. Analytical Enforcement Methodology*

An analytical method is not required for Bacteriophage active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* because EPA is establishing exemptions from the requirement of a tolerance without any numerical limitation.

*C. Conclusion*

Therefore, exemptions from the requirement of a tolerance are established for residues of Bacteriophages active against *Pseudomonas syringae* pv. *syringae,* Bacteriophage active against *Xanthomonas arboricola* pv. *corylina,* Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis,* and Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* in or on all food commodities when used in accordance with label directions and good agricultural practices.

## IV. Statutory and Executive Order Reviews

This action establishes tolerance exemptions under FFDCA section 408(d) in response to a petition submitted to EPA. The Office of

Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance exemptions in this action, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes. As a result, this action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, EPA has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, EPA has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require EPA's consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (15 U.S.C. 272 note).

## V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

## List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: March 6, 2023.

**Edward Messina,**

*Director, Office of Pesticide Programs.*

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

## PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Add §§ 180.1399, 180.1400, 180.1401, and 180.1402 to subpart D to read as follows:

* * * * *

Sec.

180.1399 Bacteriophage active against *Pseudomonas syringae* pv. *syringae;* exemption from the requirement of a tolerance.

180.1400 Bacteriophage active against *Xanthomonas arboricola* pv. *corylina;* exemption from the requirement of a tolerance.

180.1401 Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis;* exemption from the requirement of a tolerance.

180.1402 Bacteriophage active against *Xanthomonas arboricola* pv. *pruni;* exemption from the requirement of a tolerance.

### § 180.1399 Bacteriophage active against *Pseudomonas syringae* pv. *syringae;* exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of Bacteriophage active against *Pseudomonas syringae* pv. *syringae* in or on all food commodities when used in accordance with label directions and good agricultural practices.

### § 180.1400 Bacteriophage active against *Xanthomonas arboricola* pv. *corylina;* exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of Bacteriophage active against *Xanthomonas arboricola* pv. *corylina* in or on all food commodities when used in accordance with label directions and good agricultural practices.

### § 180.1401 Bacteriophage active against *Xanthomonas arboricola* pv. *juglandis;* exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of Bacteriophage active against *Xanthomonas arboricola* pv. *juglandi* in or on all food commodities when used in accordance with label directions and good agricultural practices.

### § 180.1402 Bacteriophage active against *Xanthomonas arboricola* pv. *pruni;* exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for residues of Bacteriophage active against *Xanthomonas arboricola* pv. *pruni* in or on all food commodities when used in accordance with label directions and good agricultural practices.

[FR Doc. 2023–05003 Filed 3–13–23; 8:45 am]

BILLING CODE 6560–50–P

# Proposed Rules

Federal Register
Vol. 88, No. 49
Tuesday, March 14, 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.

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 50

**[NRC–2018–0291]**

**RIN 3150–AK23**

### American Society of Mechanical Engineers Code Cases and Update Frequency; Correction

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Proposed rule; correction.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is correcting a proposed rule that was published in the **Federal Register** on March 6, 2023, regarding changes to its regulations to incorporate by reference proposed revisions of three regulatory guides, which would approve new, revised, and reaffirmed code cases published by the American Society of Mechanical Engineers. This action is necessary to make corrections in the estimated burden for the information collection.

**DATES:** This correction is effective March 14, 2023.

**ADDRESSES:** Please refer to Docket ID NRC–2018–0291 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2018–0291. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.*
- *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.
- *Mail Comments for the Proposed Information Collection:* FOIA, Library, and Information Collections Branch, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 or to the OMB reviewer at: OMB Office of Information and Regulatory Affairs (3150–0011), Attn: Desk Officer for the Nuclear Regulatory Commission, 725 17th Street NW, Washington, DC 20503; email: *oira_submission@omb.eop.gov.*

**FOR FURTHER INFORMATION CONTACT:** Dennis Andrukat, Office of Nuclear Material and Safeguards, telephone: 301–415–3561, email: *Dennis.Andrukat@nrc.gov* and Bruce Lin, Office of Nuclear Regulatory Research, telephone: 301–415–2446, email: *Bruce.Lin@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

**SUPPLEMENTARY INFORMATION:** The NRC may post materials related to this document, including public comments, on the Federal rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2018–0291. In addition, the Federal rulemaking website allows members of the public to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) navigate to the docket folder (NRC–2018–0291); (2) click the ''Subscribe'' link; and (3) enter an email address and click on the ''Subscribe'' link.

The NRC is announcing the following corrected language to the proposed rule published at 88 FR 13717. On page 13729, in the third column, the number of responses for the information collection is provided, ''An estimate of the number of annual responses: 1.32 (0.66 reporting and 0.66 recordkeeping)'' should read ''An estimate of the number of annual responses: 1.66 (0.66 reporting and 1 recordkeeping)''. On page 13729, in the third column, the number of respondents for the information collection is provided, ''The estimated number of annual respondents: 0.66'' should read ''The estimated number of annual respondents: 1''. On page 13729, in the third column, the estimate of the total number of hours is provided, ''An estimate of the total number of hours needed annually to comply with the information collection requirement or request: 158.6'' should read ''An estimate of the total number of hours needed annually to comply with the information collection requirement or request: 162''.

Dated: March 9, 2023.

For the Nuclear Regulatory Commission.

**Cindy K. Bladey,**

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

[FR Doc. 2023–05200 Filed 3–13–23; 8:45 am]

BILLING CODE 7590–01–P

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### 14 CFR Parts 259, 260, 399

**[Docket No. DOT–OST–2022–0089]**

**RIN 2105–AF04**

### Airline Ticket Refunds and Consumer Protections

**AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).

**ACTION:** Public hearing; reopen comment period.

**SUMMARY:** This notice announces a virtual public hearing on certain issues related to the U.S. Department of Transportation's Notice of Proposed Rulemaking on Airline Ticket Refunds and Consumer Protections. By this notice, the virtual public hearing on this rulemaking, originally scheduled for March 14, 2023, is rescheduled to March 21, 2023. Through this notice, the Department is also reopening the

comment period for this rulemaking from March 21 through March 28, 2023.

**DATES:** The virtual hearing will be held on March 21, 2023, from 10 a.m. to 5 p.m. Eastern Time. The hearing is open to the public, subject to any technical and/or capacity limitations. Requests to attend the hearing must be submitted to *https://usdot.zoomgov.com/webinar/register/WN_qIdrspjdTPexlvXSL5YNXg.* We encourage interested parties to register by Thursday, March 16, 2023. Communication Access Real-time Translation (CART) and sign language interpretation will be provided during the hearing. Requests for additional accommodations because of a disability must be received at *clereece.kroha@dot.gov* by Thursday, March 16, 2023.

**ADDRESSES:** The virtual hearing will be open to the public and held via the Zoom Webinar Platform. Virtual attendance information will be provided upon registration. An agenda will be available on the Department's Office of Aviation Consumer Protection website at *https://www.transportation.gov/airconsumer/latest-news* in advance of the hearing.

**FOR FURTHER INFORMATION CONTACT:** To register and attend this virtual hearing, please use the link: *https://usdot.zoomgov.com/webinar/register/WN_qIdrspjdTPexlvXSL5YNXg.* Attendance is open to the public subject to any technical and/or capacity limitations. For further information, please contact Clereece Kroha, Senior Trial Attorney, by email at *clereece.kroha@dot.gov* or by phone at (202) 366–9041.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On August 22, 2022, the U.S. Department of Transportation (DOT or Department) published in the **Federal Register** a notice of proposed rulemaking (NPRM) that proposes to codify its longstanding interpretation that it is an unfair business practice for a U.S. air carrier, a foreign air carrier, or a ticket agent to refuse to provide requested refunds to consumers when a carrier has cancelled or made a significant change to a scheduled flight to, from, or within the United States, and consumers found the alternative transportation offered by the carrier or the ticket agent to be unacceptable (87 FR 51550). The NPRM proposes to define, for the first time, the terms significant change and cancellation. It would also require U.S. and foreign airlines and ticket agents to inform consumers that they are entitled to a refund if that is the case before making an offer for travel credits, vouchers, or other compensation in lieu of refunds. The Department further proposes to require that U.S. and foreign air carriers and ticket agents provide non-expiring travel vouchers or credits to consumers holding non-refundable tickets for scheduled flights to, from, or within the United States who are unable to travel as scheduled in certain circumstances related to a serious communicable disease. If the carrier or ticket agent received significant financial assistance from the government because of a public health emergency, the Department proposes to require U.S. and foreign air carriers and ticket agents provide refunds, in lieu of non-expiring travel vouchers or credits. The NPRM proposes to allow carriers and ticket agents to require consumers provide evidence to support their assertion of entitlement to a travel voucher, credit, or refund. The comment period for the NPRM, which was extended for approximately 4 weeks in response to a request for additional opportunity to comment,[1] closed on December 16, 2022.

On December 16, 2022, Airlines for America (A4A) and International Air Transport Association (IATA) (collectively ''Petitioners'') filed a petition to request a public hearing on the NPRM pursuant to the Department's regulation on rulemakings relating to unfair and deceptive practices, 14 CFR 399.75.[2] The Petitioners specifically raise three issues regarding the NPRM and request that these issues be addressed in the hearing. For each issue, Petitioners argue that it meets the threshold set forth in section 399.75 for granting a public hearing because the underlying proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other factual issues that are genuinely in dispute; because the ordinary public comment process is unlikely to provide an adequate examination of the issue to permit a fully informed judgement; because the resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule; because the requested hearing on the issue would advance the consideration of the proposed rule and the General Counsel's ability to make the rulemaking determinations required by the Department's regulation; and because granting the petition would not unduly delay the rulemaking.

By a notice dated March 3, 2023, the Department granted the requests for a public hearing and originally scheduled the hearing for March 14, 2023.[3] The Department noted that the scope of the hearing would be limited to the factual issues specified in the March 3 notice. On March 6, 2023, A4A requested that the public hearing be rescheduled and for additional explanation of the hearing procedure. A4A requested that the hearing be rescheduled by two weeks, stating that the five business days provided for the hearing was insufficient to identify speakers and to compile data responsive to the subjects presented in the March 3 notice. A4A also stated that it would have difficulty finding participants due to the hearing being scheduled during the Spring Break season. A4A noted that scheduling this hearing in close proximity (within two days) of a DOT public hearing on a different rulemaking[4] is an unreasonable expectation for stakeholders who must prepare for both hearings.

A4A also reiterated its request for a neutral hearing officer to preside over the hearing, expressing its disagreement with the appointment of Ms. Blane Workie, the Department's Assistant General Counsel for the Office of Aviation Consumer Protection and the Department's designated Aviation Consumer Advocate. On March 8, 2023, IATA wrote to express support for A4A's requests.

## II. Rescheduling of Public Hearing

After careful consideration of the points raised by A4A, the Department has decided to reschedule its public hearing on the Airline Ticket Refunds and Consumer Protections NPRM to March 21, 2023. While the Department was surprised to learn that the party that had requested the public hearing was unprepared to present views on the topics for which they had requested the hearing, the Department wants to ensure that stakeholders, including A4A, have an adequate opportunity to be heard on this rulemaking and for this reason, has determined that a seven-day extension to assist with preparation for the hearing is reasonable. As part of this rescheduling, the length of the hearing will also be extended to ensure adequate time is afforded to those who wish to comment. The hearing will be held from 10 a.m. to 5 p.m. ET. As noted in Section IV of this notice, if all participants have expressed their views prior to the scheduled 5 p.m. end time,

[1] 87 FR 68944 (Nov. 17, 2022).

[2] See, *Airlines for America and the International Air Transport Association Petition for Hearing, https://www.regulations.gov/comment/DOT-OST-2022-0089-5296.*

[3] 88 FR 13387.

[4] 88 FR 13389.

the Department may end the hearing prior to 5 p.m.

### III. Agenda, Hearing Officer, and Post-Hearing Actions

The Department has considered A4A's request for the appointment of a different hearing officer and has decided to retain the appointment of Blane Workie as the designated Hearing Officer. The Department notes that the Hearing Officer's role is to preside over the hearing. In that regard, Ms. Workie's appointment is appropriate because: (1) she is a career civil servant who will execute this role in a neutral, fair, and professional manner; (2) her responsibilities as an Aviation Consumer Advocate are those that she has had as an Assistant General Counsel of the Office of the Aviation Consumer Protection and such responsibilities do not make her biased; and (3) the Hearing Officer's role is to conduct the meeting using generally accepted meeting management techniques and to not serve as a decisionmaker. As stated in the Department's regulations in 14 CFR 399.75, the General Counsel considers the record of the hearing and makes a reasoned determination whether to terminate the rulemaking, proceed with the rulemaking as proposed, or modify the proposed rule.

The regulations further require the General Counsel to explain, in an appropriate rulemaking document published in the **Federal Register**, the rationale for the post-hearing decision made by the General Counsel. The rationale for the post-hearing decision made by the General Counsel will be explained in any final rule or other appropriate rulemaking document issued by the Department for this action.

### IV. Public Participation and Procedures

The March 21, 2023, hearing will begin at 10 a.m. ET, and the Department will provide time for opening remarks by the Hearing Officer. The meeting will then transition to public comments and presentations. Any oral comments presented should be limited to the subjects described in the March 3 notice and be brief so that all participants will have an opportunity to speak. If a meeting participant wishes to speak on a particular topic identified in the March 3, 2023, notice,[5] the participant must register in advance to speak on the topic. We ask individuals requesting to speak to specify the length of time that they would like to have allotted to them. Based on the number of participants who register to speak on a particular topic, the Department will allot time to individual speakers in a way that maximizes each speaker's ability to present their views and to ensure a wide variety of perspectives. The Hearing Officer may ask clarifying questions during the hearing but will otherwise reserve speaking time after opening remarks for meeting participants. The intent of the hearing is to ensure that the Department is able to hear from petitioners and other interested parties regarding the issues raised in the petition. If the volume of requests for oral comments received and any additional comments, responses, and/or presentations that participants may wish to make is such that all participants have expressed their views prior to the scheduled 5 p.m. end time, the Department may end the hearing prior to 5 p.m.

Individual members of the public who wish to present oral comments must notify the Department of Transportation, no later than Thursday, March 16 via the meeting's registration link and specify in the registration those topics on which they wish to provide comments. All written materials (*e.g.,* PowerPoint presentations) presented at the hearing will be made part of the meeting's record.

As discussed in Section V of this notice and consistent with the requirement of 14 CFR 399.75, the Department plans to reopen the comment period for this rulemaking on March 21, 2023, the date of the hearing. The comment period will remain open for seven (7) days, through March 28, 2023. Interested parties who wish to file statements or comments that are specifically related to the subject(s) discussed at the hearing may submit their written comments electronically to the NPRM Docket (DOT–OST–2022–0089).

After the hearing and after the record of the hearing is closed, the hearing officer will place on the rulemaking docket minutes of the hearing reflecting the evidence and arguments presented on the issues.

### V. Reopening of Public Comment Period

Consistent with the procedural requirement under section 14 CFR 399.75, which provides that interested parties shall be given an opportunity to file statements or comments after a hearing on the proposed regulation, the Department is reopening the comment period for the NPRM from March 21 through March 28, 2023. New comments submitted to the Docket should pertain to subjects discussed in the petition for hearing and during the March 21, 2023, hearing.

### VI. Viewing Documents

Documents associated with the NPRM on Enhancing Transparency of Airline Ancillary Service Fees may be accessed in the rulemaking Docket (DOT–OST–2022–0089). Dockets may be accessed at *https://www.regulations.gov.* After entering the relevant docket number click the link to ''Open Docket Folder'' and choose the document to review.

Signed in Washington, DC, on this 9th day of March 2023.

**John E. Putnam,**

*General Counsel, U.S. Department of Transportation.*

[FR Doc. 2023–05167 Filed 3–13–23; 8:45 am]

BILLING CODE 4910–9X–P

[5] *https://www.govinfo.gov/content/pkg/FR-2023-03-03/pdf/2023-04494.pdf.*

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### 14 CFR Part 399

**[Docket No. DOT–OST–2022–0109]**

**RIN 2105–AF10**

## Enhancing Transparency of Airline Ancillary Service Fees

**AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).

**ACTION:** Public hearing. Reopen comment period.

**SUMMARY:** This Notice announces a virtual public hearing on certain issues related to the U.S. Department of Transportation's Notice of Proposed Rulemaking on Enhancing Transparency of Airline Ancillary Service Fees. By this Notice, the virtual public hearing on this rulemaking, originally scheduled for March 16, 2023, is rescheduled to March 30, 2023. Through this notice, the Department also reopens the comment period for the rulemaking and will accept comments through April 6, 2023.

**DATES:** The virtual hearing will be held on March 30, 2023, from 9 a.m. to 5 p.m. Eastern Time. The hearing is open to the public, subject to any technical and/or capacity limitations. Requests to attend the hearing must be submitted to *https://usdot.zoomgov.com/webinar/register/WN_MSHu2poARNCKM8vI4-q5mQ.* We encourage interested parties to register by Monday, March 27, 2023. Communication Access Real-time Translation (CART) and sign language interpretation will be provided during the hearing. Requests for additional accommodations because of a disability must be received at *ryan.patanaphan@dot.gov* by Monday, March 27, 2023.

**ADDRESSES:** The virtual hearing will be open to the public and held via the Zoom Webinar Platform. Virtual attendance information will be provided upon registration. An agenda will be available on the Department's Office of Aviation Consumer Protection website at *https://www.transportation.gov/airconsumer/latest-news* in advance of the hearing.

**FOR FURTHER INFORMATION CONTACT:** To register and attend this virtual hearing, please use the link: *https://usdot.zoomgov.com/webinar/register/WN_MSHu2poARNCKM8vI4-q5mQ.* Attendance is open to the public subject to any technical and/or capacity limitations. For further information, please contact Ryan Patanaphan, Senior Trial Attorney, by email at *ryan.patanaphan@dot.gov* or by phone at (202) 366–9180.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On October 20, 2022, the U.S. Department of Transportation (DOT or Department) published in the **Federal Register** a notice of proposed rulemaking (NPRM) that proposed several disclosure requirements to enhance the transparency of ancillary service fees so consumers know the true cost of air travel early in the purchasing process. (87 FR 63718). In the NPRM, the Department proposed to require U.S. air carriers, foreign air carriers, and ticket agents to clearly disclose passenger-specific or itinerary-specific baggage fees, change fees, and cancellation fees to consumers whenever fare and schedule information is provided to consumers for flights to, within, and from the United States. The Department also proposed requiring similar disclosures for fees for a child 13 or under to be seated adjacent to an accompanying adult, as well as the transactability of such seating fees. To ensure ticket agents could provide the proposed disclosures, the NPRM proposed requiring carriers to provide useable, current, and accurate information regarding fees to ticket agents that sell or display the carrier's fare and schedule information. The NPRM also proposed an implementation and compliance period of six months from the date of a potential final rule.

The NPRM provided for a comment period of 60 days after publication of the NPRM in the **Federal Register**, *i.e.,* December 19, 2022. In response to a request for additional opportunity to comment, the Department extended the comment period for an additional 35 days to January 23, 2023.[1] The Department subsequently received a request to further extend the comment period on the basis that the requestor was not able to view the January 12, 2023, meeting of the Aviation Consumer Protection Advisory Committee meeting when it occurred and that as of the time the request for extension was submitted, the meeting materials had not been posted to the docket. The Department declined to extend the comment period based on that request. (88 FR 4923 (Jan. 26, 2023)). The Department received another request for additional time to provide comments on the NPRM, based primarily on technological and interface issues identified by the petitioner. The Department posted a notice stating that it was considering whether to grant that request and would publish its determination in the **Federal Register** (See *https://www.transportation.gov/airconsumer/AncillaryFeeNPRM-Procedural-Information-January23-2023.*) As discussed in Section V. of this notice, the Department has determined to grant the Travelers United request for additional time to submit comments.

On January 23, 2023, multiple commenters petitioned the Department for a public hearing on the NPRM pursuant to the Department's regulation on rulemakings relating to unfair and deceptive practices, 14 CFR 399.75.[2] Airlines for America raised two questions in its petition: whether consumers are or are likely to be substantially injured or are misled by airlines' current disclosures of ancillary service fees; and whether disclosures of itinerary-specific ancillary fees at the time of first search will result in the display of incomplete or inapplicable ancillary fee information, cause consumer confusion, and distort the marketplace. The Travel Technology Association (Travel Tech) states in its petition that there is a fundamental disputed factual issue as to whether the proposed display requirements would benefit or harm consumers. Travel Tech also believes that the proposed disclosures are technically infeasible and has requested a hearing to discuss these concerns as well as the Department's proposed time frame for compliance. In its comment on the NPRM, Google LLC also requested a hearing based on its assertion that the Department's analysis was flawed and that it was deficient in providing its complaint-based evidence justifying the rulemaking. In arguing that a hearing is in the public interest pursuant to 14 CFR 399.75, Airlines for America and Travel Tech assert that the underlying proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other factual issues that are genuinely in dispute; the ordinary public comment process is unlikely to provide an adequate examination of the issue to permit a fully informed judgement; the resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule; the requested hearing on the issue would advance the consideration of the proposed rule and the General Counsel's ability to make the rulemaking determinations required by the Department's regulation; and a hearing will not unreasonably delay completion of this rulemaking.

By a notice dated March 3, 2023, the Department granted the requests for a public hearing and originally scheduled the hearing for March 16, 2023.[3] The Department noted that the scope of the hearing would be limited to the factual issues specified in the March 3 notice. On March 6, 2023, Airlines for America (A4A) and the Travel Technology Association (Travel Tech) requested that the public hearing be rescheduled and for additional explanation of the hearing procedures. Both organizations requested that the hearing be postponed for one month until April 17, 2023, stating that the fifteen days' notice (or ten business days, per A4A's request) provided for the hearing was insufficient to identify speakers and to compile data responsive to the subjects presented in the March 3 notice. A4A also stated that it would have difficulty finding participants due to the hearing being scheduled during the Spring Break season. Both organizations also noted that a public hearing on the Airline Ticket Refunds and Consumer Protections NPRM had been scheduled for March 14,[4] giving them inadequate time to prepare for the March 16 hearing on the NPRM on ancillary fees.

A4A also reiterated its request for a neutral hearing officer to preside over the hearing, expressing its disagreement with the appointment of Blane Workie, the Department's Assistant General Counsel for the Office of Aviation Consumer Protection and the Department's designated Aviation Consumer Advocate. On March 8, 2023, the International Air Transport

[1] 87 FR 77765 (Dec. 20, 2022).

[2] See, *e.g.,* petitions for hearing from Airlines for America, *https://www.regulations.gov/comment/DOT-OST-2022-0109-0091,* the Travel Technology Association, *https://www.regulations.gov/comment/DOT-OST-2022-0109-0239,* and Google LLC, *https://www.regulations.gov/comment/DOT-OST-2022-0109-0088.*

[3] 88 FR 13389.

[4] 88 FR 13387.

Association (IATA) wrote to express support for A4A and Travel Tech's requests.

## II. Rescheduling of Public Hearing

After careful consideration of the points raised by A4A and Travel Tech, the Department has decided to reschedule its public hearing on the Enhancing Transparency of Airline Ancillary Service Fees NPRM to March 30, 2023. While the Department was surprised to learn that the parties that had requested the public hearing were unprepared to present views on the topics for which they had requested the hearing, the Department wants to ensure that stakeholders, including the petitioners, have an adequate opportunity to be heard on this rulemaking and for this reason, has determined that a 14-day extension to assist with preparation for the hearing is reasonable. As part of this rescheduling, the length of the hearing will also be extended to ensure adequate time is afforded to those who wish to comment. The hearing will be held from 9 a.m. to 5 p.m. ET. As noted in Section IV of this notice, if all participants have expressed their views prior to the scheduled 5 p.m. end time, the Department may end the hearing prior to 5 p.m.

## III. Agenda, Hearing Officer, and Post-Hearing Actions

The Department has considered A4A's request for the appointment of a different hearing officer and has decided to retain the appointment of Blane Workie as the designated Hearing Officer. The Department notes that the Hearing Officer's role is to preside over the hearing. In that regard, Ms. Workie's appointment is appropriate because: (1) she is a career civil servant who will execute this role in a neutral, fair, and professional manner; (2) her responsibilities as an Aviation Consumer Advocate are those that she has had as an Assistant General Counsel of the Office of the Aviation Consumer Protection and such responsibilities do not make her biased; and (3) the Hearing Officer's role is to conduct the meeting using generally accepted meeting management techniques and to not serve as a decisionmaker. As stated in the Department's regulations in 14 CFR 399.75, the General Counsel considers the record of the hearing and makes a reasoned determination whether to terminate the rulemaking, proceed with the rulemaking as proposed, or modify the proposed rule.

The regulations further require the General Counsel to explain, in an appropriate rulemaking document published in the **Federal Register**, the rationale for the post-hearing decision made by the General Counsel. The rationale for the post-hearing decision made by the General Counsel will be explained in any final rule or other appropriate rulemaking document issued by the Department for this action.

## IV. Public Participation and Procedures

The March 30, 2023, hearing will begin at 9 a.m. ET, and the Department will provide time for opening remarks by the Hearing Officer. The meeting will then transition to public comments and presentations. Any oral comments presented should be limited to the subjects described in the March 3 Notice and be brief so that all participants will have an opportunity to speak. If a meeting participant wishes to speak on a particular topic identified in the March 3, 2023 notice,[5] the participant must register in advance to speak on that topic. We ask individuals requesting to speak to specify the length of time that they would like to have allotted to them. Based on the number of participants who register to speak on a particular topic, the Department will allot time to individual speakers in a way that maximizes each speaker's ability to present their views and to ensure a wide variety of perspectives. The Hearing Officer may ask clarifying questions during the hearing but will otherwise reserve speaking time after opening remarks for meeting participants. The intent of the hearing is to ensure that the Department is able to hear from petitioners and other interested parties regarding the issues raised in the petition. If the volume of requests for oral comments received and any additional comments, responses, and/or presentations that participants may wish to make is such that all participants have expressed their views prior to the scheduled 5 p.m. end time, the Department may end the hearing prior to 5 p.m.

Individual members of the public who wish to present oral comments must notify the Department of Transportation, no later than Monday, March 27 via the meeting's registration link and specify in the registration those topics on which they wish to provide comments. All written materials (*e.g.,* PowerPoint presentations) presented at the hearing will be made part of the meeting's record.

As discussed in Section V. of this notice, and consistent with the requirement of 14 CFR 399.75, the Department plans to reopen the comment period for this rulemaking. The comment period will remain open through April 6, 2023. Interested parties who wish to file statements or comments that are specifically related to the subject(s) discussed at the hearing may submit their written comments electronically to the NPRM Docket (DOT–OST–2022–0109).

After the hearing and after the record of the hearing is closed, the hearing officer will place on the rulemaking docket minutes of the hearing reflecting the evidence and arguments presented on the issues.

## V. Reopening of Public Comment Period

Consistent with the procedural requirement under section 14 CFR 399.75, which provides that interested parties shall be given an opportunity to file statements or comments after a hearing on the proposed regulation, and in granting the Travelers United request for additional time to submit comments, the Department is reopening the comment period for the NPRM from March 14, 2023 through April 6, 2023. The Department will consider any comments received from publication of the NPRM through April 6, 2023 to be timely filed. New comments submitted to the Docket may include, but need not be limited to, subjects discussed in the petition for hearing and during the March 30, 2023 hearing.

## VI. Viewing Documents

Documents associated with the NPRM on Enhancing Transparency of Airline Ancillary Service Fees may be accessed in the rulemaking Docket (DOT–OST–2022–0109). Dockets may be accessed at *https://www.regulations.gov.* After entering the relevant docket number click the link to ''Open Docket Folder'' and choose the document to review.

Signed in Washington, DC, on this 9th day of March 2023.

**John E. Putnam,**

*General Counsel, U.S. Department of Transportation.*

[FR Doc. 2023–05165 Filed 3–13–23; 8:45 am]

BILLING CODE 4910–9X–P

[5] 88 FR 13389, available at *https://www.federalregister.gov/documents/2023/03/03/2023-04510/enhancing-transparency-of-airline-ancillary-service-fees.*

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 165**

**[Docket Number USCG–2023–0059]**

**RIN 1625–AA11**

## Regulated Navigation Area; Hampton Roads, VA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is proposing to amend the Chesapeake Bay entrance and Hampton Roads, VA and adjacent waters—Regulated Navigation Area.

Officially codified in 2003, the need for this review and update of the Regulated Navigation Area has been prompted by changes in the organizational structure, responsibilities, and shipboard requirements over the last 20 years. The Coast Guard is proposing to remove outdated or redundant language and requirements, including those related to port security. This action will provide administrative changes and amend vessel reporting requirements operating within the Regulated Navigation Area during Maritime Security Level 1. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must be received by the Coast Guard on or before April 13, 2023.

**ADDRESSES:** You may submit comments identified by docket number USCG–2023–0059 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email LCDR Ashley Holm, Sector Virginia Waterways Management Division, U.S. Coast Guard; telephone 757–668–5581, email *Ashley.E.Holm@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

### I. Table of Abbreviations

AIS Automatic Identification System
CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
JEBLCFS Joint Expeditionary Base Little Creek-Fort Story
JHOC Joint Harbor Operations Center
MARSEC US Coast Guard Maritime Security Level
NPRM Notice of Proposed Rulemaking
§ Section
PWSA Ports and Waterways Safety Act
RNA Regulated Navigation Area
U.S.C. United States Code
USCG United States Coast Guard

### II. Background, Purpose, and Legal Basis

*Background*

The Chesapeake Bay entrance and Hampton Roads, VA and adjacent waters—Regulated Navigation Area (RNA) was established on June 12, 2003, following the terrorist attacks on September 11, 2001. The U.S. Coast Guard utilized its authority through the Port and Waterways Safety Act (PWSA) to urgently establish RNAs in many of the major ports throughout the United States to control vessel traffic within a port by specifying times of vessel entry, movement, or departure to, from, within, or through ports, harbors, or other waters. The Chesapeake Bay entrance and Hampton Roads, VA and adjacent waters—Regulated Navigation Area was first codified as a final rule in 68 FR 35172 (June 12, 2003) and was reformatted in 72 FR 17409 (April 9, 2007). Since the implementation of the RNA, the Captain of the Port of Virginia has had the responsibility and the authority to control vessels within the RNA to protect port infrastructure, port security, and safety of the waterway.

In the twenty years since the establishment of this RNA, updates to Coast Guard nomenclature and port security requirements have made language in this RNA obsolete.

*Purpose*

The purpose of this proposal is to remove such outdated or redundant language and requirements within the original rule to make the rule easier to understand and comply with. In order to ensure the RNA continues to serve its purpose and provide safety and security for the port, the Coast Guard is proposing this rulemaking to better align with modern commercial and naval operations in the port, while minimizing the impact to the maritime community.

*Legal Authority*

The Coast Guard proposes this rulemaking under authority in 46 U.S.C. 70041 (previously 33 U.S.C. 1231).

### III. Discussion of Proposed Rule

The proposed rule will make administrative revisions to update certain names and language as well as amend port security requirements. Below we provide a description and reasoning for each revision being made. All other sections not mentioned shall remain unchanged.

33 CFR 165.501(b)—Definitions

The Coast Guard proposes revising the definition for *Designated representative of the Captain of the Port* in paragraph (b) of 33 CFR 165.501 to no longer include ''Joint Harbor Operations Center Watchstander''. Previously assigned active-duty Navy sailors worked within the Sector Virginia Command Center, formerly called the Joint Harbor Operations Center (JHOC). In 2010, the JHOC was disestablished.

33 CFR 165.501(c)—Applicability

The Coast Guard proposes to expand the exemption in paragraph (c) to include vessels engaged in ''search and rescue'' operations. Following the requirements of this rule is impracticable for these type of operations, as they would impede or slow operations hindering the chances of a successful rescue.

33 CFR 165.501(d)—Regulations

The Coast Guard proposes to update paragraph (d) to reflect name changes in Naval Commands located within the RNA. In paragraph (d)(1)(iii) ''Commander, Naval Amphibious Base Little Creek'' is now named, ''Commander, Joint Expeditionary Base Little Creek-Fort Story (JEBLCFS)''. The Joint Expeditionary Base is comprised of the former Naval Amphibious Base Little Creek and the Army Post of Fort Story, which were merged under a single command on October 1, 2009.

In paragraph (d)(6) the requirement for 'navigational charts' is removed as this is redundant to vessel requirements already enforced by in 33 CFR 164.33.

In paragraph (d)(9) the stipulation is added so that the paragraph only applies when the Commandant or Captain of the Port sets MARSEC level 2 or 3. The requirements of this provision are no longer necessary at MARSEC level 1 as a result of current Automatic Identification System (AIS) carriage regulations and Notice of Arrival regulations enforced by 33 CFR Subpart C. The requirements are still in effect during times of heightened security and have been modified to reflect such.

The removal of paragraph (d)(9)(ii) is necessary as this requirement is redundant to the regulations found in 33 CFR Subchapter H, Maritime Security, and conflicts with established regulations governing other Federal Agencies. In paragraph (d)(9)(iv) ''Joint Harbor Operations Center'' has been

removed as it has since been disestablished.

Finally, language in paragraph (f)(1) is amended to give the Captain of the Port maximum authority and discretion permitted by law to order the movement of a vessel or vessels out of concern for all hazards, whether safety or security in nature: prohibit entry, restrict or direct movement within, or order departure from the RNA. This will allow the Coast Guard to readily fulfil its role of public and port safety during emergent situations within the RNA.

## IV. Regulatory Analyses

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

### *A. Regulatory Planning and Review*

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

This regulatory action determination is based on the reasoning that this proposal makes only minor amendments to an established rule and does not alter its original intent purpose. The revisions proposed here would not significantly change the requirements or behavior of vessels in the RNA and would have little to no economic impact.

### *B. Impact on Small Entities*

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

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

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

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

### *C. Collection of Information*

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

### *D. Federalism and Indian Tribal Governments*

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

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

### *E. Unfunded Mandates Reform Act*

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

### *F. Environment*

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves minor administrative amendments to the text of the existing Hampton Roads RNA. These proposed revisions made in this rule making would not significantly, if at all, differ from the present impact the Hampton Roads RNA has on the environment which was determined to be not significantly impactful. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A preliminary Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

### *G. Protest Activities*

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

## V. Public Participation and Request for Comments

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

We encourage you to submit comments through the Federal eRulemaking Portal at *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

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

Documents mentioned in this NPRM as being available in the docket, and public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website's instructions. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive. If you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

## List of Subjects in 33 CFR Part 165

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

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

## PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

**Authority:** 46 U.S.C. 70034, 70051; 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. Revise § 165.501 to read as follows:

### § 165.501 Chesapeake Bay entrance and Hampton Roads, VA and adjacent waters—Regulated Navigation Area.

(a) *Location.* The waters enclosed by the shoreline and the following lines are a Regulated Navigation Area:

(1) *Offshore Zone.* A line drawn due East from the mean low water mark at the North Carolina and Virginia border at latitude 36°33′03″ N, longitude 75°52′00″ W, to the Territorial Seas boundary line at latitude 36°33′05″ N, longitude 75°36′51″ W, thence generally Northeastward along the Territorial Seas boundary line to latitude 38°01′39″ N, longitude 74°57′18″ W, thence due West to the mean low water mark at the Maryland and Virginia border at latitude 38°01′39″ N, longitude 75°14′30″ W, thence South along the mean low water mark on the Virginia coast, and eastward of the Colregs Demarcation Lines across Chincoteague Inlet, Assawoman Inlet, Gargathy Inlet, Metompkin Inlet, Wachapreague Inlet, Quinby Inlet, Great Machipongo Inlet, Sand Shoal Inlet, New Inlet, Ship Shoal Inlet and Little Inlet, to the Colregs Demarcation Line across the mouth of Chesapeake Bay, continuing south along the Virginia low water mark and eastward of the Colregs Demarcation Line across Rudee Inlet to the point of beginning. All positions reference NAD 83.

(2) *Inland zone.* The waters enclosed by the shoreline and the following lines:

(i) A line drawn across the entrance to Chesapeake Bay between Wise Point and Cape Charles Light, and then continuing to Cape Henry Light.

(ii) A line drawn across the Chesapeake Bay between Old Point Comfort Light and Cape Charles City Range ''A'' Rear Light.

(iii) A line drawn across the James River along the eastern side of U.S. Route 17 highway bridge, between Newport News and Isle of Wight County, Virginia.

(iv) A line drawn across Chuckatuck Creek along the northern side of the north span of the U.S. Route 17 highway bridge, between Isle of Wight County and Suffolk, Virginia.

(v) A line drawn across the Nansemond River along the northern side of the Mills Godwin (U.S. Route 17) Bridge, Suffolk, Virginia.

(vi) A line drawn across the mouth of Bennetts Creek, Suffolk, Virginia.

(vii) A line drawn across the Western Branch of the Elizabeth River along the eastern side of the West Norfolk Bridge, Portsmouth, Virginia.

(viii) A line drawn across the Southern Branch of the Elizabeth River along the northern side of the I–64 highway bridge, Chesapeake, Virginia.

(ix) A line drawn across the Eastern Branch of the Elizabeth River along the western side of the west span of the Campostella Bridge, Norfolk, Virginia.

(x) A line drawn across the Lafayette River along the western side of the Hampton Boulevard Bridge, Norfolk, Virginia.

(xi) A line drawn across Little Creek along the eastern side of the Ocean View Avenue (U.S. Route 60) Bridge, Norfolk, Virginia.

(xii) A line drawn across Lynnhaven Inlet along the northern side of Shore Drive (U.S. Route 60) Bridge, Norfolk, Virginia.

(b) *Definitions.* In this section:

*CBBT* means the Chesapeake Bay Bridge Tunnel.

*Coast Guard Patrol Commander* is a Coast Guard commissioned, warrant or petty officer who has been designated by the Commander, Coast Guard Sector Virginia.

*Designated representative of the Captain of the Port* means a person, including the command duty officer at Coast Guard Sector Virginia or the Coast Guard or Navy Patrol Commander who has been authorized by the Captain of the Port to act on his or her behalf and at his or her request to carry out such orders and directions as needed. All patrol vessels shall display the Coast Guard Ensign at all times when underway.

*I–664 Bridge Tunnel* means the Monitor Merrimac Bridge Tunnel.

*Inland waters* means waters within the COLREGS Line of Demarcation.

*Thimble Shoal Channel* consists of the waters bounded by a line connecting Thimble Shoal Channel Lighted Bell Buoy 1TS, thence to Thimble Shoal Lighted Gong Buoy 17, thence to Thimble Shoal Lighted Buoy 19, thence to Thimble Shoal Lighted Buoy 21, thence to Thimble Shoal Lighted Buoy 22, thence to Thimble Shoal Lighted Buoy 18, thence to Thimble Shoal Lighted Buoy 2, thence to the beginning.

*Thimble Shoal North Auxiliary Channel* consists of the waters in a rectangular area 450 feet wide adjacent to the north side of Thimble Shoal Channel, the southern boundary of which extends from Thimble Shoal Channel Lighted Buoy 2 to Thimble Shoal Lighted Buoy 18.

*Thimble Shoal South Auxiliary Channel* consists of the waters in a rectangular area 450 feet wide adjacent to the south side of Thimble Shoal Channel, the northern boundary of which extends from Thimble Shoal Channel Lighted Bell Buoy 1TS, thence to Thimble Shoal Lighted Gong Buoy 17, thence to Thimble Shoal Lighted

Buoy 19, thence to Thimble Shoal Lighted Buoy 21.

(c) *Applicability.* This section applies to all vessels operating within the Regulated Navigation Area, including naval and public vessels, except vessels that are engaged in the following operations:

(1) Law enforcement.

(2) Search and rescue.

(3) Servicing aids to navigation.

(4) Surveying, maintenance, or improvement of waters in the Regulated Navigation Area.

(d) *Regulations:*

(1) *Anchoring restrictions.* No vessel over 65 feet long may anchor or moor in the inland waters of the Regulated Navigation Area outside an anchorage designated in § 110.168 of this title, with these exceptions:

(i) The vessel has the permission of the Captain of the Port.

(ii) Only in an emergency, when unable to proceed without endangering the safety of persons, property, or the environment, may a vessel anchor in a channel.

(iii) A vessel may not anchor within the confines of Little Creek Harbor, Desert Cove, or Little Creek Cove without the permission of the Captain of the Port or designated representative. The Captain of the Port shall consult with the Commander, Joint Expeditionary Base Little Creek-Fort Story, before granting permission to anchor within this area.

(2) *Anchoring detail requirements.* A self-propelled vessel over 100 gross tons, which is equipped with an anchor or anchors (other than a tugboat equipped with bow fenderwork of a type of construction that prevents an anchor being rigged for quick release), that is underway within two nautical miles of the CBBT or the I–664 Bridge Tunnel shall station its personnel at locations on the vessel from which they can anchor the vessel without delay in an emergency.

(3) *Secondary towing rig requirements on inland waters.*

(i) A vessel over 100 gross tons may not be towed in the inland waters of the Regulated Navigation Area unless it is equipped with a secondary towing rig, in addition to its primary towing rig, that:

(A) Is of sufficient strength for towing the vessel.

(B) Has a connecting device that can receive a shackle pin of at least two inches in diameter.

(C) Is fitted with a recovery pickup line led outboard of the vessel's hull.

(ii) A tow consisting of two or more vessels, each of which is less than 100 gross tons, that has a total gross tonnage that is over 100 gross tons, shall be equipped with a secondary towing rig between each vessel in the tow, in addition to its primary towing rigs, while the tow is operating within this Regulated Navigation Area. The secondary towing rig must:

(A) Be of sufficient strength for towing the vessels.

(B) Have connecting devices that can receive a shackle pin of at least two inches in diameter.

(C) Be fitted with recovery pickup lines led outboard of the vessel's hull.

(4) *Thimble Shoals Channel controls.*

(i) A vessel drawing less than 25 feet may not enter the Thimble Shoal Channel, unless the vessel is crossing the channel. Masters should consider the squat of their vessel based upon vessel design and environmental conditions. Channel crossings shall be made as perpendicular to the channel axis as possible.

(ii) Except when crossing the channel, a vessel in the Thimble Shoal North Auxiliary Channel shall proceed in a westbound direction.

(iii) Except when crossing the channel, a vessel in the Thimble Shoal South Auxiliary Channel shall proceed in an eastbound direction.

(5) *Restrictions on vessels with impaired maneuverability—*

(i) *Before entry.* A vessel over 100 gross tons, whose ability to maneuver is impaired by heavy weather, defective steering equipment, defective main propulsion machinery, or other damage, may not enter the Regulated Navigation Area without the permission of the Captain of the Port.

(ii) *After entry.* A vessel over 100 gross tons, which is underway in the Regulated Navigation Area, that has its ability to maneuver become impaired for any reason, shall, as soon as possible, report the impairment to the Captain of the Port.

(6) *Requirements for navigation charts, radars, and pilots.* No vessel over 100 gross tons may enter the Regulated Navigation Area, unless it has on board:

(i) Corrected paper or electronic charts of the Regulated Navigation Area.

(ii) An operative radar during periods of reduced visibility;

(iii) When in inland waters, a pilot or other person on board with previous experience navigating vessels on the waters of the Regulated Navigation Area.

(7) *Emergency procedures.*

(i) Except as provided in paragraph (d)(7)(ii) of this section, in an emergency any vessel may deviate from the regulations in this section to the extent necessary to avoid endangering the safety of persons, property, or the environment.

(ii) A vessel over 100 gross tons with an emergency that is located within two nautical miles of the CBBT or I–664 Bridge Tunnel shall notify the Captain of the Port of its location and the nature of the emergency, as soon as possible.

(8) *Vessel speed limits—*

(i) *Little Creek.* A vessel may not proceed at a speed over five knots between the Route 60 Bridge and the mouth of Fishermans Cove (Northwest Branch of Little Creek).

(ii) *Southern Branch of the Elizabeth River.* A vessel may not proceed at a speed over six knots between the junction of the Southern and Eastern Branches of the Elizabeth River and the Norfolk and Portsmouth Belt Line Railroad Bridge between Chesapeake and Portsmouth, Virginia.

(iii) *Norfolk Harbor Reach.* Nonpublic vessels of 300 gross tons or more may not proceed at a speed over 10 knots between the Elizabeth River Channel Lighted Gong Buoy 5 of Norfolk Harbor Reach (southwest of Sewells Point) at approximately 36°58′00″ N, 076°20′00″ W, and gated Elizabeth River Channel Lighted Buoys 17 and 18 of Craney Island Reach (southwest of Norfolk International Terminal at approximately 36°54′17″ N, and 076°20′11″ W.

(9) *Port security requirements.* This paragraph shall only apply when the Commandant or the Captain of the Port sets MARSEC Level 2 or 3, as detailed in 33 CFR part 101, for any area, operation, or industry within the Regulated Navigation Area. Vessels in excess of 300 gross tons, including tug and barge combinations in excess of 300 gross tons (combined), shall not enter the Regulated Navigation Area, move within the Regulated Navigation Area, or be present within the Regulated Navigation Area, unless they comply with the following requirements:

(i) Obtain authorization to enter the Regulated Navigation Area from the designated representative of the Captain of the Port prior to entry. All vessels entering or remaining in the Regulated Navigation Area may be subject to a Coast Guard boarding.

(ii) Report any departure from or movement within the Regulated Navigation Area to the designated representative of the Captain of the Port prior to getting underway.

(iii) The designated representative of the Captain of the Port is the Sector Command Center (SCC) which shall be contacted on VHF–FM channel 12, or by calling (757) 668–5555.

(iv) In addition to the authorities listed in this part, this paragraph is

promulgated under the authority under 46 U.S.C. 70116.

(e) *Waivers.*

(1) The Captain of the Port may, upon request, waive any regulation in this section.

(2) An application for a waiver must state the need for the waiver and describe the proposed vessel operations.

(f) *Control of vessels within the regulated navigation area.*

(1) When necessary to avoid hazard to vessel traffic, facility or port infrastructure, or the public, the Captain of the Port may prohibit entry into the regulated area, direct the movement of a vessel or vessels, or issue orders requiring vessels to anchor or moor in specific locations.

(2) If needed for the maritime, commercial or safety and security interests of the United States, the Captain of the Port may direct a vessel or vessels to move from its current location to another location within the Regulated Navigation Area, or to leave the Regulated Navigation Area completely.

(3) The master of a vessel within the Regulated Navigation Area shall comply with any orders or directions issued to the master's vessel by the Captain of the Port.

Dated: March 6, 2023.

**Shannon N. Gilreath,**

*Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.*

[FR Doc. 2023–04864 Filed 3–13–23; 8:45 am]

BILLING CODE 9110–04–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R05–OAR–2022–0744; FRL–10682–01–R5]**

## Air Plan Approval; Illinois; Second Maintenance Plan for 1997 Ozone NAAQS; Jersey County Portion of St. Louis Missouri-Illinois Area

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve, as a revision to the Illinois State Implementation Plan (SIP), the state's plan for maintaining the 1997 ozone National Ambient Air Quality Standard (NAAQS or standard) through 2032 in the St. Louis, MO-IL area. The original St. Louis nonattainment area for the 1997 ozone standard included Jersey, Madison, Monroe, and St. Clair Counties in Illinois and Franklin, Jefferson, St. Charles and St. Louis Counties and St. Louis City in Missouri. The SIP submitted by the Illinois Environmental Protection Agency (IEPA) on August 24, 2022, addresses the second maintenance plan required for Jersey County, Illinois.

**DATES:** Comments must be received on or before April 13, 2023.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R05–OAR–2022–0744 at *https://www.regulations.gov,* or via email to *arra.sarah@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www2.epa.gov/dockets/commenting-epa-dockets.*

**FOR FURTHER INFORMATION CONTACT:** Kathleen D'Agostino, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *dagostino.kathleen@epa.gov.* The EPA Region 5 office is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19.

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

### I. Summary of EPA's Proposed Action

EPA is proposing to approve, as a revision to the Illinois SIP, an updated 1997 ozone NAAQS maintenance plan for Jersey County in the St. Louis, MO-IL area. The maintenance plan is designed to keep the St, Louis area in attainment of the 1997 ozone NAAQS through 2032.

### II. Background

Ground-level ozone is formed when oxides of nitrogen ($NO_X$) and volatile organic compounds (VOC) react in the presence of sunlight. These two pollutants are referred to as ozone precursors. Scientific evidence indicates that adverse public health effects occur following exposure to ozone.

In 1979, under section 109 of the Clean Air Act (CAA), EPA established primary and secondary NAAQS for ozone at 0.12 parts per million (ppm), averaged over a 1-hour period. *See* 44 FR 8202 (February 8, 1979). On July 18, 1997, EPA revised the primary and secondary NAAQS for ozone to set the acceptable level of ozone in the ambient air at 0.08 ppm, averaged over an 8-hour period. *See* 62 FR 38856 (July 18, 1997).[1] EPA set the 8-hour ozone NAAQS based on scientific evidence demonstrating that ozone causes adverse health effects at lower concentrations and over longer periods of time than was understood when the pre-existing 1-hour ozone NAAQS was set.

Following promulgation of a new or revised NAAQS, EPA is required by the CAA to designate areas throughout the nation as attaining or not attaining the NAAQS. On April 15, 2004 (69 FR 23857), EPA designated the St. Louis area as nonattainment for the 1997 ozone NAAQS, and the designations became effective on June 15, 2004. Under the CAA, states are also required to adopt and submit SIPs to implement, maintain, and enforce the NAAQS in designated nonattainment areas and throughout the state.

When a nonattainment area has three years of complete, certified air quality data that have been determined to attain the 1997 ozone NAAQS, and the area has met other required criteria described in section 107(d)(3)(E) of the CAA, the

[1] In March 2008, EPA completed another review of the primary and secondary ozone standards and tightened them further by lowering the level for both to 0.075 ppm. 73 FR 16436 (March 27, 2008). Additionally, in October 2015, EPA completed a review of the primary and secondary ozone standards and tightened them by lowering the level for both to 0.70 ppm. 80 FR 65292 (October 26, 2015).

state can submit to EPA a request to be redesignated to attainment, referred to as a ''maintenance area''.[2] One of the criteria for redesignation is to have an approved maintenance plan under CAA section 175A. The maintenance plan must demonstrate that the area will continue to maintain the standard for the period extending 10 years after redesignation, and it must contain such additional measures as necessary to ensure maintenance and such contingency provisions as necessary to assure that violations of the standard will be promptly corrected. At the end of the eighth year after the effective date of the redesignation, the state must also submit a second maintenance plan to ensure ongoing maintenance of the standard for an additional ten years. *See* CAA section 175A.

EPA has published long-standing guidance for states on developing maintenance plans.[3] The Calcagni Memorandum provides that states may generally demonstrate maintenance by either performing air quality modeling to show that the future mix of sources and emission rates will not cause a violation of the NAAQS or by showing that future emissions of a pollutant and its precursors will not exceed the level of emissions during a year when the area was attaining the NAAQS (*i.e.,* attainment year inventory). *See* Calcagni Memorandum at 9.

On May 26, 2010, IEPA submitted to EPA a request to redesignate the Illinois portion of the St. Louis area to attainment for the 1997 ozone NAAQS.[4] This submittal included, as a revision to the Illinois SIP, a plan to provide for maintenance of the 1997 ozone NAAQS in the St. Louis area through 2025. EPA approved the maintenance plan for the Illinois portion of the St. Louis area and redesignated the area to attainment for the 1997 ozone NAAQS on June 12, 2012 (77 FR 34819).

Under CAA section 175A(b), states must submit a revision to the first maintenance plan eight years after redesignation to provide for maintenance of the NAAQS for ten additional years following the end of the first 10-year period. EPA's final implementation rule for the 2008 ozone NAAQS revoked the 1997 ozone NAAQS and stated that one consequence of revocation was that areas that had been redesignated to attainment (*i.e.,* maintenance areas) for the 1997 standard no longer needed to submit second 10-year maintenance plans under CAA section 175A(b).[5] However, in *South Coast Air Quality Management District* v. *EPA*[6] (South Coast II), the D.C. Circuit vacated EPA's interpretation that, because of the revocation of the 1997 ozone standard, second maintenance plans were not required for ''orphan maintenance areas,'' *i.e.,* areas that had been redesignated to attainment for the 1997 NAAQS and were designated attainment for the 2008 ozone NAAQS. Thus, states with these ''orphan maintenance areas'' under the 1997 ozone NAAQS must submit maintenance plans for the second maintenance period.

When areas were designated under the 2008 ozone NAAQS, Jersey County, Illinois was not included in the St. Louis, MO-IL nonattainment area. Therefore, Jersey County is considered an orphan maintenance area requiring a second maintenance plan. Accordingly, on August 24, 2022, IEPA submitted a second maintenance plan for Jersey County that shows that the St. Louis area is expected to remain in attainment of the 1997 ozone NAAQS through 2032, *i.e.,* through the end of the full 20-year maintenance period.

## III. EPA's Evaluation of the Illinois SIP Submittal

### *A. Second Maintenance Plan*

Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the maintenance plan must demonstrate continued attainment of the NAAQS for at least 10 years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the state must submit a revised maintenance plan which demonstrates that attainment of the NAAQS will continue for an additional 10 years beyond the initial 10-year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures, as EPA deems necessary, to assure prompt correction of the future NAAQS violation.

The Calcagni Memorandum provides further guidance on the content of a maintenance plan, explaining that a maintenance plan should address five elements: (1) an attainment emission inventory; (2) a maintenance demonstration; (3) a commitment for continued air quality monitoring; (4) a process for verification of continued attainment; and (5) a contingency plan.

On August 24, 2022, IEPA submitted, as a SIP revision, a plan to provide for maintenance of the 1997 ozone standard in the St. Louis area through 2032, more than 20 years after the effective date of the redesignation to attainment. As discussed below, EPA proposes to find that IEPA's second maintenance plan includes the necessary components and to approve the maintenance plan as a revision to the Illinois SIP.

#### 1. Attainment Inventory

The CAA section 175A maintenance plan approved by EPA for the first 10-year period included an attainment inventory for the St. Louis area that reflected typical summer day VOC and $NO_X$ emissions in 2008. In addition, because the St. Louis area continued to monitor attainment of the 1997 ozone NAAQS in 2014, 2014 is an appropriate year to use for an attainment year inventory. IEPA is using the State's previously compiled 2014 summer day emissions inventory as the basis for the attainment inventory presented in Tables 1 and 2, below. Data compiled for this inventory were submitted to EPA and used in the EPA 2014 version 7.0 modeling platform.[7] These data are derived from the 2014 National Emissions Inventory version 2.

[2] Section 107(d)(3)(E) of the CAA sets out the requirements for redesignation. They include attainment of the NAAQS, full approval of the SIP under section 110(k) of the CAA, determination that improvement in air quality is a result of permanent and enforceable reductions in emissions, demonstration that the state has met all applicable section 110 and part D requirements, and a fully approved maintenance plan under CAA section 175A.

[3] ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (the ''Calcagni Memorandum'').

[4] IEPA supplemented this submittal on September 16, 2011.

[5] *See* 80 FR 12315 (March 6, 2015).

[6] 882 F.3d 1138 (D.C. Cir. 2018).

[7] The inventory documentation for this modeling platform can be found here: *https://www.epa.gov/air-emissions-modeling/2014-version-70-platform.*

TABLE 1—ST. LOUIS AREA TYPICAL SUMMER DAY VOC EMISSIONS FOR ATTAINMENT YEAR 2014

[Tons/day (tpd)]

| County | Point | Area | On-road | Nonroad | Total |
|---|---|---|---|---|---|
| Illinois: | | | | | |
| Jersey | 0.03 | 1.22 | 0.52 | 2.10 | 3.87 |
| Madison | 7.52 | 9.41 | 4.85 | 3.86 | 25.64 |
| Monroe | 0.10 | 1.72 | 0.63 | 1.03 | 3.48 |
| St. Clair | 1.76 | 7.93 | 4.63 | 2.58 | 16.90 |
| Total | 9.41 | 20.28 | 10.63 | 9.57 | 49.89 |
| Missouri: | | | | | |
| Franklin | 2.08 | 5.80 | 2.57 | 2.91 | 13.36 |
| Jefferson | 1.91 | 5.44 | 4.65 | 2.72 | 14.72 |
| St. Charles | 4.12 | 11.50 | 7.75 | 5.25 | 28.62 |
| St. Louis City | 2.88 | 11.19 | 4.23 | 2.92 | 21.22 |
| St. Louis | 2.87 | 35.88 | 73.21 | 19.61 | 131.57 |
| Total | 13.86 | 69.81 | 92.41 | 33.41 | 209.49 |
| Area total | 23.27 | 90.09 | 103.04 | 42.98 | 259.38 |

TABLE 2—ST. LOUIS AREA TYPICAL SUMMER DAY $NO_X$ EMISSIONS FOR ATTAINMENT YEAR 2014

[tpd]

| County | Point | Area | On-road | Nonroad | Total |
|---|---|---|---|---|---|
| Illinois: | | | | | |
| Jersey | 0.00 | 0.09 | 1.08 | 2.87 | 4.04 |
| Madison | 21.39 | 0.83 | 13.05 | 9.29 | 44.56 |
| Monroe | 0.48 | 0.15 | 1.62 | 8.01 | 10.26 |
| St. Clair | 1.42 | 0.55 | 12.27 | 7.32 | 21.56 |
| Total | 23.29 | 1.62 | 28.22 | 27.49 | 80.42 |
| Missouri: | | | | | |
| Franklin | 21.13 | 0.46 | 8.00 | 5.24 | 34.83 |
| Jefferson | 17.96 | 0.42 | 12.87 | 3.04 | 34.29 |
| St. Charles | 21.05 | 0.89 | 19.68 | 7.40 | 49.02 |
| St. Louis City | 4.78 | 0.93 | 10.92 | 5.23 | 21.86 |
| St. Louis | 16.79 | 3.76 | 118.61 | 17.53 | 156.69 |
| Total | 81.71 | 6.47 | 170.08 | 38.44 | 296.69 |
| Area total | 105.00 | 8.09 | 198.30 | 65.93 | 377.11 |

2. Maintenance Demonstration

IEPA is demonstrating maintenance through 2032 by showing that future emissions of VOC and $NO_X$ for the St. Louis area remain at or below attainment year emission levels. 2032 is an appropriate maintenance year because it is 10 years beyond the first 10-year maintenance period. Jersey County point and area source emissions were projected to 2032 from the U.S. EPA 2011 version 6.3 modeling platform.[8] The relevant inventory scenario names are ''2014fd'' and ''2028el.'' The 2028 scenario was used to support past air quality modeling to support the regional haze program. Since this data set only grew emissions to 2028, IEPA assumed that emissions would keep growing at the same rate out to 2032. Jersey County on-road mobile source emissions for 2013 were calculated using MOVES 2014a using the same inputs for 2014. The vehicle population and vehicle miles traveled were grown from 2014 to 2032 using a growth rate of 1.5% per year.[9] Jersey County nonroad mobile source emissions, not including aircraft, commercial marine vessels, and locomotives, were calculated using MOVES 2014a. Emissions for aircraft, commercial marine vessels, and locomotives were grown 2% per year.

For the other counties in the St. Louis area, the emissions for 2032 were assumed to be the same as the 2030 emissions identified in the document ''Maintenance Plan for the Illinois Portion of the Metro-East St. Louis Ozone Nonattainment Area for the 2008 8-Hour Ozone Standard (AQPSTR 16–05),'' which was submitted as part of the redesignation submittal for the St. Louis area under the 2008 ozone NAAQS. As emissions have been shown to be decreasing, this is a conservative assumption. Emissions for point and area source sectors, as well as nonroad mobile categories not calculated by the MOVES model, were projected to 2030 using data from EPA's Air Emissions Modeling platform (2011v6.2) inventories for years 2011, 2017 and 2025. On-road and nonroad mobile source emissions were calculated for 2020 and 2030 using the MOVES2014a model.

[8] The inventory documentation for this platform can be found here: *https://www.epa.gov/air-emissions-modeling/2011-version-63-platform.*

[9] MOVES 2014a was the current mobile model when Illinois developed the second maintenance plan and posted it for public comment in June 2019.

The 2032 summer day emissions inventory for the St. Louis area is summarized in Tables 3 and 4, below. Table 5 documents changes in VOC and $NO_X$ emissions in both Jersey County and the entire St. Louis area between 2014 and 2032.

TABLE 3—ST. LOUIS AREA TYPICAL SUMMER DAY VOC EMISSIONS FOR MAINTENANCE YEAR 2032

[tpd]

| County | Point | Area | On-road | Nonroad | Total |
|---|---|---|---|---|---|
| Illinois: | | | | | |
| Jersey | 0.03 | 1.18 | 0.18 | 0.49 | 1.88 |
| Madison | 6.75 | 8.90 | 1.79 | 2.64 | 20.08 |
| Monroe | 0.09 | 1.66 | 0.25 | 0.51 | 2.51 |
| St. Clair | 1.69 | 7.49 | 1.72 | 1.40 | 12.84 |
| Total | 8.56 | 19.23 | 3.94 | 5.58 | 37.31 |
| Missouri: | | | | | |
| Franklin | 2.52 | 3.36 | 2.40 | 3.31 | 11.59 |
| Jefferson | 1.63 | 7.48 | 4.24 | 3.12 | 16.47 |
| St. Charles | 3.34 | 11.21 | 6.73 | 6.23 | 27.51 |
| St. Louis City | 3.59 | 12.04 | 4.46 | 3.38 | 23.47 |
| St. Louis | 3.50 | 38.68 | 20.17 | 22.99 | 85.34 |
| Total | 14.58 | 72.77 | 38.00 | 39.03 | 164.38 |
| Area total | 23.14 | 92.00 | 41.94 | 44.61 | 201.69 |

TABLE 4—ST. LOUIS AREA TYPICAL SUMMER DAY $NO_X$ EMISSIONS FOR MAINTENANCE YEAR 2032

[tpd]

| County | Point | Area | On-road | Nonroad | Total |
|---|---|---|---|---|---|
| Illinois: | | | | | |
| Jersey | 0.00 | 0.09 | 0.27 | 2.86 | 3.22 |
| Madison | 14.57 | 0.82 | 1.79 | 4.30 | 15.11 |
| Monroe | 0.93 | 0.15 | 0.25 | 3.56 | 4.22 |
| St. Clair | 1.43 | 0.54 | 1.72 | 3.45 | 8.73 |
| Total | 16.93 | 18.14 | 4.03 | 14.17 | 31.28 |
| Missouri: | | | | | |
| Franklin | 30.92 | 2.20 | 3.22 | 1.97 | 38.31 |
| Jefferson | 27.72 | 0.88 | 2.73 | 2.32 | 33.65 |
| St. Charles | 8.87 | 1.81 | 4.34 | 5.88 | 20.90 |
| St. Louis City | 3.82 | 2.70 | 2.18 | 2.80 | 11.50 |
| St. Louis | 21.75 | 5.44 | 13.10 | 16.93 | 57.22 |
| Total | 93.08 | 13.03 | 25.57 | 29.90 | 161.58 |
| Area total | 110.01 | 14.63 | 32.55 | 44.07 | 201.26 |

TABLE 5—CHANGE IN TYPICAL SUMMER DAY VOC AND $NO_X$ EMISSIONS IN JERSEY COUNTY AND IN THE ENTIRE ST. LOUIS AREA BETWEEN 2014 AND 2032

[tpd]

| Source category | VOC | | | $NO_X$ | | |
|---|---|---|---|---|---|---|
| | 2014 | 2032 | Net change (2014–2032) | 2014 | 2032 | Net change (2014–2032) |
| Jersey County: | | | | | | |
| Point | 0.03 | 0.03 | 0.00 | 0.00 | 0.00 | 0.00 |
| Area | 1.22 | 1.18 | −0.04 | 0.09 | 0.09 | 0.00 |
| On-road | 0.52 | 0.18 | −0.34 | 1.08 | 0.27 | −0.81 |
| Nonroad | 2.10 | 0.49 | −1.61 | 2.87 | 2.86 | −0.01 |
| Total | 3.87 | 1.88 | −1.99 | 4.04 | 3.22 | −0.82 |
| Entire Area: | | | | | | |
| Point | 23.27 | 23.14 | −0.13 | 105.00 | 110.01 | 5.01 |
| Area | 90.09 | 92.00 | 1.91 | 8.09 | 14.63 | 6.54 |
| On-road | 103.04 | 41.94 | −61.10 | 198.30 | 32.55 | −165.75 |

TABLE 5—CHANGE IN TYPICAL SUMMER DAY VOC AND $NO_X$ EMISSIONS IN JERSEY COUNTY AND IN THE ENTIRE ST. LOUIS AREA BETWEEN 2014 AND 2032—Continued

[tpd]

| Source category | VOC | | | $NO_X$ | | |
|---|---|---|---|---|---|---|
| | 2014 | 2032 | Net change (2014–2032) | 2014 | 2032 | Net change (2014–2032) |
| Nonroad | 42.98 | 44.61 | 1.63 | 65.93 | 44.07 | −21.86 |
| Total | 259.38 | 201.69 | −57.69 | 377.11 | 201.26 | −175.85 |

In summary, the maintenance demonstration for Jersey County shows maintenance of the 1997 ozone standard by providing emissions information to support the demonstration that future emissions of $NO_X$ and VOC will remain at or below 2014 emission levels in both Jersey County and the entire St. Louis area when taking into account both future source growth and implementation of future controls. Table 5 shows VOC and $NO_X$ emissions in Jersey County are projected to decrease by 1.99 tpd and 0.82 tpd, respectively, between 2014 and 2032. Similarly, VOC and $NO_X$ emissions in in the entire area are projected to decrease by 57.69 tpd and 175.85 tpd, respectively, between 2014 and 2032.

3. Continued Air Quality Monitoring

In its submittal, IEPA commits to continue monitoring ozone levels according to an EPA approved monitoring plan, as required to ensure maintenance of the ozone NAAQS. Should changes in the location of an ozone monitor become necessary, IEPA commits to work with EPA to ensure the adequacy of the monitoring network. IEPA remains obligated to meet monitoring requirements and continues to quality assure monitoring data in accordance with 40 CFR part 58, and to enter all data into the Air Quality System in accordance with Federal guidelines.

4. Verification of Continued Attainment

IEPA has the legal authority to enforce and implement the requirements of the maintenance plan for the St. Louis area. This includes the authority to adopt, implement, and enforce any subsequent emission control measures determined to be necessary to correct future ozone attainment problems.

Verification of continued attainment is accomplished through operation of the ambient ozone monitoring network and the periodic update of the area's emissions inventory. IEPA will continue to operate an approved ozone monitoring network in the St. Louis area. There are no plans to discontinue operation of, relocate, or otherwise change the existing ozone monitoring network other than through revisions in the network approved by EPA.

In addition, to track future levels of emissions, IEPA will continue to develop and submit to EPA updated emission inventories for all source categories at least once every three years, consistent with the requirements of 40 CFR part 51, subpart A, and in 40 CFR 51.122. The Consolidated Emissions Reporting Rule (CERR) was promulgated by EPA on June 10, 2002 (67 FR 39602). The CERR was replaced by the Annual Emissions Reporting Requirements on December 17, 2008 (73 FR 76539). IEPA will also continue to implement the annual emissions reporting rule contained in 35 Illinois Administrative Code Part 254.

5. Contingency Plan

Section 175A of the CAA requires that the state adopt a maintenance plan, as a SIP revision, that includes such contingency measures as EPA deems necessary to ensure that the state will promptly correct a violation of the NAAQS that occurs after redesignation of the area to attainment of the NAAQS. The maintenance plan must identify: the contingency measures to be considered and, if needed for maintenance, adopted and implemented; a schedule and procedure for adoption and implementation; and a time limit for action by the state. The state should also identify specific indicators to be used to determine when the contingency measures need to be considered, adopted, and implemented. The maintenance plan must include a commitment that the state will implement all measures with respect to the control of the pollutant that were contained in the SIP before redesignation of the area to attainment in accordance with section 175A(d) of the CAA. *See* Calcagni Memorandum at 12–13.

As required by section 175A of the CAA, Illinois has adopted a contingency plan for the St. Louis area to address possible future ozone air quality problems. The contingency plan adopted by Illinois has two levels of response, a Level I response and a Level II response.

In IEPA's plan, a Level I response will be triggered when either an annual fourth high monitored value of 0.084 ppm or higher is monitored within the maintenance area, or the $NO_X$ or VOC emissions inventories in the Illinois portion of the area increase more than 5% above the levels included in the 2014 emissions inventories. A Level I response will consist of Illinois evaluating air quality or determining if adverse emissions trends are likely to continue. Illinois will determine what and where controls may be required as well as the level of emissions reductions needed to avoid a violation of the NAAQS. The study must be completed within 9 months, with adoption of necessary control measures within 18 months of the determination.

In IEPA's plan, a Level II response is triggered by a violation of the ozone NAAQS at any monitoring site in the St. Louis area. In the event that a Level II response is triggered, within 6 months, IEPA will conduct an analysis to determine appropriate measures to address the cause of the violation. Selected measures will be implemented within 18 months of the violation.

IEPA included the following list of potential contingency measures in its maintenance plan:

1. $NO_X$ reasonably available control technology;
2. National Emission Standards for Hazardous Air Pollutants risk and technology review: petroleum refineries 40 CFR part 63, subparts CC and UUU;
3. New Source Performance Standards—petroleum refineries 40 CFR part 60, subpart Ja;
4. Conversion of coal-fired Electric Generating Units to natural gas and from baseload units to intermittent units;
5. Broader geographic applicability of existing measures;
6. Oil and gas sector emissions guidelines;
7. Implementation of OTC model rules for above ground storage tanks;

8. Continued phasing in of 2017 light-duty vehicle Green House Gas (GHG) and corporate average fuel economy standards;

9. Tier 3 vehicle emissions and fuel economy standards;

10. Mobile source air toxics rule;

11. High-enhanced Vehicle Emissions Inspection and Maintenance (On-Board Diagnostic II);

12. Federal railroad/locomotive standards;

13. Federal commercial marine vessel engine standards;

14. Heavy-duty vehicle GHG rules;

15. Regulations on the sale of aftermarket catalytic converters;

16. Standards and limitations for organic material emissions for area sources (consumer and commercial products and architectural and industrial maintenance coatings rule);

17. Current California commercial and consumer products—aerosol adhesive coatings, dual purpose air freshener/disinfectants, etc.

To qualify as a contingency measure, emissions reductions from that measure must not be factored into the emissions projections used in the maintenance plan.

EPA has concluded that Illinois' maintenance plan adequately addresses the five basic components of a maintenance plan: an attainment emission inventory, a maintenance demonstration, a commitment for continued air quality monitoring, a process for verification of continued attainment, and a contingency plan. Thus, EPA proposes to find that the maintenance plan SIP revision submitted by IEPA for the St. Louis area meets the requirements of section 175A of the CAA.

*B. Transportation Conformity*

Transportation conformity is required by section 176(c) of the CAA. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS (CAA section 176(c)(1)(B)). EPA's conformity rule at 40 CFR part 93 requires that transportation plans, programs, and projects conform to SIPs and establish the criteria and procedures for determining whether they conform. The conformity rule generally requires a demonstration that emissions from the Regional Transportation Plan and the Transportation Improvement Program (TIP) are consistent with the motor vehicle emissions budget (Budget) contained in the control strategy SIP revision or maintenance plan (40 CFR 93.101, 93.118, and 93.124). A Budget is defined as ''that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions'' (40 CFR 93.101).

However, the South Coast II court decision upheld EPA's revocation of the 1997 ozone NAAQS, which was effective on April 6, 2015. EPA's current transportation conformity regulation requires a regional emissions analysis only during the time period beginning one year after a nonattainment designation for a particular NAAQS until the effective date of revocation of that NAAQS (40 CFR 93.109(c)). Therefore, pursuant to the conformity regulation, a regional emissions analysis using Budgets is not required for conformity determinations for the 1997 ozone NAAQS because that NAAQS has been revoked (80 FR 12264). As no regional emissions analysis is required for the St. Louis area for the 1997 ozone NAAQS, transportation conformity for the 1997 ozone NAAQS can be demonstrated for transportation plans and TIPs by showing that the remaining criteria contained in Table 1 in 40 CFR 93.109, and 40 CFR 93.108 have been met. As noted previously, EPA is proposing to find that the projected emissions inventory is consistent with maintenance of the 1997 ozone standard.

## IV. What action is EPA taking?

Under sections 110(k) and 175A of the CAA and for the reasons set forth above, and based on IEPA's representations and commitments set forth above, EPA is proposing to approve the Jersey County second maintenance plan for the 1997 ozone NAAQS, submitted by IEPA on August 24, 2022, as a revision to the Illinois SIP. The second maintenance plan is designed to keep the St. Louis area in attainment of the 1997 ozone NAAQS through 2032.

## V. Statutory and Executive Order Reviews

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

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

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

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Volatile organic compounds.

Dated: March 9, 2023.

**Debra Shore,**

*Regional Administrator, Region 5.*

[FR Doc. 2023–05175 Filed 3–13–23; 8:45 am]

**BILLING CODE 6560–50–P**

## GENERAL SERVICES ADMINISTRATION

### 41 CFR Parts 302–4 and 302–9

**[FTR Case 2022–03; Docket No. GSA–FTR–2022–0013, Sequence No. 1]**

**RIN 3090–AK64**

## Federal Travel Regulation; Alternative Fuel Vehicle Usage During Relocations

**AGENCY:** Office of Government-Wide Policy (OGP), General Services Administration (GSA).

**ACTION:** Proposed rule.

**SUMMARY:** Consistent with the Executive Order (E.O.) on *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability,* GSA is proposing to amend the Federal Travel Regulation (FTR) to allow agencies greater flexibility for authorizing shipment of a relocating employee's alternative fuel-based privately-owned vehicle.

**DATES:** Submit comments in writing on or before May 15, 2023.

**ADDRESSES:** Submit comments in response to FTR case 2022–03 to: *Regulations.gov: https://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''FTR Case 2022–03''. Select the link ''Comment Now'' that corresponds with FTR Case 2022–03. Follow the instructions provided at the ''Comment Now'' screen. Please include your name, company name (if any), and ''FTR Case 2022–03'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

*Instructions:* Please submit comments only and cite FTR Case 2022–03, in all correspondence related to this case. Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ed Davis, Program Analyst, Office of Government-wide Policy, at 202–669–1653 or *travelpolicy@gsa.gov.* For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite ''FTR Case 2022–03.''

**SUPPLEMENTARY INFORMATION:**

### I. Background

Consistent with the goals of achieving a carbon pollution-free electricity sector by 2035 and net-zero emissions economy-wide by no later than 2050 as stated in E.O. 14057, *Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability,* GSA is proposing to amend its relocation policy to apply to privately-owned vehicles (POV) that use alternative fuel, such as electric or hydrogen. As more Federal employees choose to purchase or lease alternative fuel vehicles (AFVs), GSA is proposing the changes to support adoption of these vehicles that reduce greenhouse gas emissions and provide greater flexibilities to ensure employees who own AFVs will not be disadvantaged or inconvenienced in the event they relocate on behalf of the government. Currently, owning an AFV may disadvantage Federal employees when relocating to a new duty station due to limitations that may affect the driving range of these vehicles.

GSA designed current relocation regulations for internal combustion engine (ICE) POVs, which are easily capable of averaging a distance of 300 miles per calendar day during en route travel. This is the distance requirement currently in place in the FTR and is considered the reasonable minimum driving distance per calendar day when a POV is used for permanent change of station en route travel. As technology improves, more AFVs will be able to meet the distance requirements for employees who relocate at the convenience of the government. However, not all current AFVs are able to meet this distance requirement.

By the time an AFV travels 300 miles, it could take longer than a day or require a circuitous route depending on fueling availability along the route to the new permanent duty station. While the Bipartisan Infrastructure Law (Pub. L. 117–58) is designed to spur the development of nearly 500,000 charging stations in 5 years (up from current estimates of 100,000 charging stations), the infrastructure in place today may not meet the needs of the relocating employee with an AFV. One focus of this law is to develop Level 3 charging stations (with a charging rate of under 45 minutes versus the up to 5 hours for a Level 2 station).

While an agency's determination of whether to authorize shipment of an employee's internal combustion engine (ICE) POV is straightforward, the determination for AFVs is not so clear. Currently, an employee must be relocating 600 miles or more for an agency to consider shipping their ICE POV (and then, the employee would use the agency chosen transportation method to reach their destination). Agency considerations for authorization of POV transportation within the continental U.S. (CONUS) largely weigh cost considerations and do not account for the employee's ability to expediently drive their alternative fuel POV to the new permanent duty station if shipment is not authorized.

Many factors need consideration before the agency decides whether to ship a relocating employee's AFV POV or authorize another method of transportation. Agencies should consider the types of fueling stations available and where those stations are located before deciding whether to authorize POV shipment. Information to help with this task can be found at the Department of Energy Alternative Fuels Center (*afdc.energy.gov*). For example, with electric vehicles, if lower level (slower) charging stations are all that are available en route to a relocation destination, extra time and per diem may need to be authorized for the employee to drive their POV to the new official station (if determined to be advantageous to the Government). Further, agencies would need to consider whether to authorize a different route as officially necessary for the POV to recharge. Currently, hydrogen-powered vehicles are mainly driven in California where the large majority of this type of fueling station exists; limited fueling stations exist outside of the state. Moreover, electric cars have various range capabilities that they can travel after charging, and ranges could be reduced if the car is traveling at highway speeds or in cold weather, among other factors.

In short, this means that agency determination of whether to ship a relocating employee's POV is much more complicated for AFVs than for ICE vehicles. These proposed changes would provide agencies with additional factors to help determine whether or not shipping an employee's AFV is more cost-effective and advantageous to the Government than authorizing the employee to drive their POV to the new official station.

The costs of these changes would be minimal because currently only a small percentage of POVs require alternative fuel (these determinations are not

needed for hybrid vehicles that do not plug in as they do not have to use alternative fuel; they can rely solely on gasoline). Although a small but increasing percentage of current relocations involve AFVs and the range capabilities and infrastructure for refueling these vehicles is improving, the rate of future range improvements in AFVs is unknown.

## II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) has determined that this proposed rule will be a significant regulatory action and, therefore, is subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993.

## IV. Regulatory Flexibility Act

GSA does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because it applies only to Federal agencies and employees. Therefore, an Initial Regulatory Flexibility Analysis was not performed.

## V. Regulatory Impact Analysis

This is a significant regulatory action under E.O. 12866. There are an average of 31,423 domestic and international relocations per year across the Federal Government.[1] However, this data does not differentiate between relocations within CONUS and outside the continental U.S. (OCONUS). This proposed rule only impacts relocations within the CONUS. In order to estimate the number of relocations within the CONUS, GSA subtracted the number of extended storage relocations because those reflect when Federal employees are relocated OCONUS. GSA calculated an average of 8,561 relocations OCONUS per year across the Federal Government. Therefore, GSA calculated a yearly average of 22,862 (= 31,423 − 8,561) relocations within the CONUS.

GSA notes that Federal agencies are not required to track relocation data regarding types of POVs. The estimates used for this economic analysis is based upon a small number of Federal agency inputs and overall U.S. population trends in alternative fuel POVs. GSA received an estimate of 3 percent alternative fuel POVs from across the Federal agencies.

GSA calculated an average of 685 (= 22,862 × 0.03) alternative fuel POV relocations per year by taking 3 percent of the average number of domestic relocations, and then estimated $150 in additional shipping cost per vehicle for the first two years.

Therefore, GSA calculated the total estimated annual cost for the first two years to be $102,750 (= 685 vehicles × $150 per vehicle).

GSA received an estimated 1 percent alternative fuel privately owned vehicle ownership increase from across the Federal agencies based upon a small number of Federal agency inputs and overall U.S. population trends in alternative fuel vehicle ownership.

| Year | Annual number of EV moves | Additional cost per move | Total annual added cost |
|---|---|---|---|
| 1 through 2 | 685 (3 percent of Annual Moves) | $150 | $102,750. |
| 3 through 4 | 691 (Assuming 1.01 percent increase) | 150 | 103,650. |
| 5 through 6 | 697 (Assuming 1.01 percent increase) | 150 | 104,550. |
| 7 through 8 | 703 (Assuming 1.01 percent increase) | 150 | 105,450. |
| 9 through 10 | 710 (Assuming 1.01 percent increase) | 150 | 106,500. |
| 1 through 10 Totals | 6,972 Total Moves | 150 | $1,045,800 Total Cost for 10 Years. |

## VI. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FTR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

## List of Subjects in 41 CFR Part 302–4 and 302–9

Government employees, Travel and transportation expenses.

**Krystal J. Brumfield,**

*Associate Administrator, Office of Government-wide Policy, General Services Administration.*

For the reasons set forth in the preamble, GSA proposes to amend 41 CFR parts 302–4 and 302–9 as set forth below:

## PART 302–4—ALLOWANCES FOR SUBSISTENCE AND TRANSPORTATION

■ 1. The authority citation for part 302–4 continues to read as follows:

**Authority:** 5 U.S.C. 5738; 20 U.S.C. 905(a); E.O. 11609, 36 FR 13747, 3 CFR, 1971–1975 Comp., p. 586.

■ 2. Amend § 302–4.201 by revising the third sentence to read as follows:

### § 302–4.201 How are my authorized en route travel days and per diem determined for relocation travel?

* * * An exception to the daily minimum driving distance may be made when delay is beyond control of the employee, such as when it results from acts of God or restrictions by Governmental authorities; when the employee is an individual with a disability, as defined by section 501 of the Rehabilitation Act of 1973 and its implementing regulations or has special needs; when the employee's alternative fuel POV cannot meet the daily minimum driving distance due to

[1] Business Travel and Relocation Dashboard: *https://d2d.gsa.gov/report/business-travel-and-relocation-dashboard.*

legitimate vehicle range capability and fueling availability limitations; or for other reasons acceptable to the agency.

■ 3. Revise § 302–4.401 to read as follows:

**§ 302–4.401 Are there exceptions to this daily minimum?**

Yes, your agency may authorize exceptions to the daily minimum driving distance when there is a delay beyond your control such as acts of God, restrictions by Governmental authorities, other acceptable reasons (*e.g.,* the employee is an individual with a disability or has special needs, or legitimate alternative fuel vehicle range capability and fueling availability limitations). Your agency must have a designated approving official authorize the exception.

■ 4. Revise § 302–4.704 to read as follows:

**§ 302–4.704 Must we require a minimum driving distance per day?**

Yes, you must establish a minimum driving distance not less than an average of 300 miles per day. However, an exception to the daily minimum driving distance may be made when the delay is:

(a) Beyond control of the employee, *e.g.,* results from acts of God or restrictions by Government authorities;

(b) Due to a disability or special need;

(c) Due to legitimate vehicle range capability and fueling availability limitations of the employee's alternative fuel POV; or

(d) For other reasons acceptable to you.

## PART 302–9—ALLOWANCES FOR TRANSPORTATION AND EMERGENCY OR TEMPORARY STORAGE OF A PRIVATELY OWNED VEHICLE

■ 5. The authority citation for part 302–9 continues to read as follows:

**Authority:** 5 U.S.C. 5737a; 5 U.S.C. 5738; 20 U.S.C. 905(a); E.O. 11609, as amended, 3 CFR 1971–1975 Comp., p. 586.

■ 6. Amend § 302–9.4 by adding a sentence to the end of the section to read as follows:

**§ 302–9.4 What are the purposes of the allowance for transportation of a POV?**

* * * For example, your agency may determine that it is both advantageous and cost effective to the Government to allow for transportation of an alternative fuel POV which would be impractical to drive a long distance to the new official station due to legitimate vehicle range capability and fueling availability limitations, but has practical use once at the new official station.

■ 7. Amend § 302–9.301 by revising paragraph (e) to read as follows:

**§ 302–9.301 Under what conditions may my agency authorize transportation of my POV within CONUS?**

* * * * *

(e) The distance that the POV is to be shipped is 600 miles or more. An exception to the 600-mile or more distance requirement may be made for legitimate alternative fuel vehicle range capability and fueling availability limitations.

■ 8. Amend § 302–9.606 by revising paragraph (f) to read as follows:

**§ 302–9.606 What must we consider in determining whether transportation of a POV within CONUS is cost effective?**

* * * * *

(f) The distance that the POV is to be shipped is 600 miles or more. An exception to the 600-mile distance requirement may be made for legitimate alternative fuel vehicle range capability and fueling availability limitations.

[FR Doc. 2023–04819 Filed 3–13–23; 8:45 am]

BILLING CODE 6820–14–P

## FEDERAL COMMUNICATIONS COMMISSION

## 47 CFR Part 73

**[MB Docket No. 23–79; RM–11947; DA 23–160; FR ID 130305]**

## Television Broadcasting Services Kalispell, Montana

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission has before it a petition for rulemaking filed by Sinclair Media Licensee, LLC (Petitioner), the licensee of KCFW–TV, channel 9, Kalispell, Montana. The Petitioner requests the substitution of channel 17 for channel 9 at Kalispell in the Table of Allotments.

**DATES:** Comments must be filed on or before April 13, 2023 and reply comments on or before April 28, 2023.

**ADDRESSES:** Federal Communications Commission, Office of the Secretary, 45 L Street NE, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the Petitioner as follows: Paul Cicelski, Esq., Lerman Senter PLLC, 2001 L Street NW, Washington, DC 20036.

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

**SUPPLEMENTARY INFORMATION:** In support, the Petitioner states that the Station has a long history of severe reception problems as a result of its operation on a VHF channel. The Petitioner further states that the Commission has recognized that VHF channels pose challenges for their use in providing digital television service, including propagation characteristics that allow undesired signals and noise to be receivable at relatively far distances and result in large variability in the performance of indoor antennas available to viewers with most antennas performing very poorly on high VHF channels. According to the Petitioner, KCFW–TV ''has received numerous complaints from viewers unable to receive that Station's over-the-air signal, despite being able to receive signals from other local stations.'' Petitioner asserts that its channel substitution proposal will serve the public in by resolving the over-the-air reception problems and enhancing viewer reception in KCFW–TV's service area. An analysis provided by the Petitioner using the Commission's *TVStudy* software tool indicates that all but approximately 75 persons will continue to receive the signal, a number the Petitioner asserts is *de minimis*. Furthermore, in addition to maintaining full coverage of its community of license, Petitioner notes that the proposed change to channel 17 will result in a predicted increase in service to more than 38,000 persons.

This is a synopsis of the Commission's *Notice of Proposed Rulemaking,* MB Docket No. 23–79; RM–11947; DA 23–160, adopted March 1, 2023, and released March 1, 2023. The full text of this document is available for download at *https://www.fcc.gov/edocs*. To request materials in accessible formats (braille, large print, computer diskettes, or audio recordings), please send an email to *FCC504@fcc.gov* or call the Consumer & Government Affairs Bureau at (202) 418–0530 (VOICE), (202) 418–0432 (TTY).

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

Members of the public should note that all *ex parte* contacts are prohibited

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

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

**List of Subjects in 47 CFR Part 73**

Television.

Federal Communications Commission.

**Thomas Horan,**

*Chief of Staff, Media Bureau.*

**Proposed Rule**

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

## PART 73—RADIO BROADCAST SERVICES

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

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

**§ 73.622 [Amended]**

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

**§ 73.622 Table of allotments.**

* * * * *

(j) * * *

| Community | Channel No. |
|---|---|
| * * * * * | |
| **MONTANA** | |
| * * * * * | |
| Kalispell | *15, 17 |
| * * * * * | |

[FR Doc. 2023–05117 Filed 3–13–23; 8:45 am]

**BILLING CODE 6712–01–P**

# Notices

Federal Register
Vol. 88, No. 49
Tuesday, March 14, 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

### 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 April 13, 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 particular 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.

### Animal and Plant Health Inspection Service

*Title:* Tuberculosis.

*OMB Control Number:* 0579–0146.

*Summary of Collection:* The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. The Secretary may also prohibit or restrict import or export of any animal or related material if necessary, to prevent the spread of any livestock or poultry pest or disease. The AHPA is contained in Title X, Subtitle E, Sections 10401–18 of Public Law 107–171, May 13, 2002, of the Farm Security and Rural Investment Act of 2002.

Disease prevention is the most effective method for maintaining a healthy animal population and enhancing the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS), Veterinary Services' (VS) ability to allow U.S. animal producers to compete in the world market of animal and animal product trade.

The APHIS bovine tuberculosis (TB) regulations in Title 9, Code of Federal Regulations (9 CFR), Part 77, provide for the assignment of State TB risk classifications, the creation of TB risk status zones within the same State, and for the conduct of tests before regulated animals are permitted to move interstate. This system enhances the ability of States to move healthy, TB-free cattle, bison, and captive cervids interstate as well as internationally. Additionally, this zoning/testing system enhances the effectiveness of APHIS' TB Eradication Program by decreasing the likelihood that infected animals will be moved interstate or internationally. Both types of actions prevent the spread of TB and provide mechanisms to help VS trace, locate, and eradicate any outbreaks that occur.

*Need and Use of the Information:* APHIS will collect reports, requests, forms, certificates, plans, MOUs, permits, and records for zoning, testing, and animal movement. Without the information, APHIS would not be able to operate an effective bovine tuberculosis surveillance, containment, and eradication program.

*Description of Respondents:* Business or other for-profit; State, Local or Tribal Government.

*Number of Respondents:* 1,053.

*Frequency of Responses:* Recordkeeping; Reporting: On occasion.

*Total Burden Hours:* 56,036.

### Animal and Plant Health Inspection Service

*Title:* Importation of Pork-Filled Pasta.

*OMB Control Number:* 0579–0214.

*Summary of Collection:* The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, and eradicate pests or diseases of livestock or poultry. The AHPA is contained in Title X, Subtitle E, Sections 10401–18 of Public Law 107–171, May 13, 2002, the Farm Security and Rural Investment Act of 2002 [7 U.S.C. 8301 et. seq.] The Animal and Plant Health Inspection Service (APHIS) is responsible for protecting the health of our Nation's livestock and poultry populations by preventing the introduction and interstate spread of serious diseases and pests of livestock and for eradicating such diseases from the United States when feasible. Swine Vesicular Disease (SVD) is a highly contagious disease that resists both environmental factors and common disinfectants. SVD rarely results I mortality in infected swine and does not cause severe production losses. However, the disease can have a major economic impact since eradication if costly and SVD-free regions often prohibit imports of swine, pork, and pork products from affected regions.

*Need and Use of the Information:* A certificate must be completed and signed by the issuing official, and contains such information as the origin of the meat used in the product, the name and location of the facility that processed the product, and the product's intended destination. APHIS regulations contain specific requirement for the processing, recordkeeping, and certification procedures for pork-filled pasta products exported to the United States from SVD-affect regions. Without the information, it would significantly cripple APHIS' ability to ensure that pork-filled pasta from certain regions poses a minimal risk of introducing SVD into the United States.

*Description of Respondents:* Business or other for-profit; and Federal Government.

*Number of Respondents:* 2.

*Frequency of Responses:* Recordkeeping; Reporting: On occasion.

*Total Burden Hours:* 5.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2023–05187 Filed 3–13–23; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Nez Perce-Clearwater National Forests; Idaho; Clearwater National Forest Travel Planning

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare a supplemental environmental impact statement.

**SUMMARY:** The United States Department of Agriculture, Forest Service (''Forest Service''), is giving notice of its intent to prepare a supplemental environmental impact statement (SEIS) to the 2012 Clearwater National Forest Travel Planning Final Environmental Impact Statement for the Clearwater National Forest in the Nez Perce-Clearwater National Forests in Idaho. The SEIS will address travel plan compliance with Forest Plan standards for elk habitat and analyze a potential plan amendment for elk habitat effectiveness, apply the minimization criteria for National Forest System trails, and analyze the effects of designating the Fish Lake Trail for motor vehicle use.

**DATES:** The Forest Service is not seeking comments at this time. The draft SEIS will be published for public comment as required by 40 CFR 1503.1. Notice of the Draft SEIS will be published for public comment in the **Federal Register** and on the Nez Perce-Clearwater National Forests' project website, as well as in other local media. The comment period for the draft SEIS will be 45 days from the date of publication in the **Federal Register** of the notice of availability of the draft SEIS for public comment. The Forest Service anticipates that the draft SEIS will be available for public review in the summer of 2023.

**ADDRESSES:** Nez Perce-Clearwater National Forests, 1008 Highway 64, Kamiah, Idaho 83536.

**FOR FURTHER INFORMATION CONTACT:** Andrew Skowlund, North Fork District Ranger, 208–476–4541, or *andrew.skowlund@usda.gov.*

Individuals who use telecommunication devices for the deaf or hearing-impaired may call the Federal Information Relay Service at 800–877–8339, 24 hours a day, every day of the year, including holidays.

**SUPPLEMENTARY INFORMATION:** The SEIS will supplement the Clearwater National Forest Travel Planning Final EIS, published in the **Federal Register** January 2012, EIS No. 20120013, to comply with the court's remand order in *Friends of the Clearwater* v. *United States Forest Service,* No. 13–CV–515–ELJ (D. Idaho, Mar. 11, 2015) (''*FOC I*'') and *Friends of the Clearwater* v. *Probert,* No. 3:21–cv–00056–BLW (D. Idaho Mar. 12, 2022), final judgment entered on Dec. 1, 2022 (''*FOC II*''). The Final Record of Decision for the Clearwater National Forest Travel Planning was signed in November 2011. The Final Record of Decision for the Clearwater National Forest Travel Planning—for Recommended Wilderness Areas (Management Area B2) was signed in October 2017.

The Forest Supervisor of the Nez Perce-Clearwater National Forests will issue a new record of decision (ROD) after evaluating the SEIS and public comments. An objection period for the new ROD will be provided, consistent with 36 CFR part 218 and/or 36 CFR part 219.

#### Purpose and Need for the Proposed Action

The overall purpose of the 2012 Clearwater National Forest Travel Planning FEIS is to analyze designation of motor vehicle use within the 1,827,380-acre Clearwater National Forest portion of the Nez Perce-Clearwater National Forests.

#### Proposed Action

The proposed action is to issue a record of decision based on an analysis of consistency of motor vehicle use designations with applicable land management plan standards for elk habitat effectiveness and an analysis of a potential land management plan amendment for elk habitat effectiveness, as well as application of the minimization criteria for designation of National Forest System trails for motor vehicle use. The record of decision will determine whether or not to designate the Fish Lake Trail for motor vehicle use.

#### Expected Impacts

The Forest Service will evaluate the potential impacts of the Clearwater National Forest Travel Plan on elk habitat effectiveness and the potential impacts of any proposed land management plan amendment related to elk habitat effectiveness standards. Potential impacts related to motor vehicle use of the Fish Lake Trail will also be analyzed.

#### Responsible Official

Cheryl F. Probert, Nez Perce-Clearwater Forest Supervisor, Nez Perce-Clearwater National Forests Supervisor's Office, 1008 Highway 64, Kamiah, Idaho 83536.

#### Comments and Objection Process

A notice of intent was published in the **Federal Register** November 28, 2007, which initiated the scoping period for the Clearwater National Forest Travel Planning EIS. On November 13, 2007, a legal notice announcing the proposed action was published in the *Lewiston Morning Tribune,* the Clearwater National Forest's newspaper of record, initiating the 45-day scoping period. To provide ample opportunity for all interested parties to comment on the proposal, the scoping period was extended through February 2008. In accordance with 40 CFR 1502.9(d)(3), there will be no scoping conducted for this SEIS. The Forest Service will be seeking comments on the draft SEIS and participation in the objection process. Details about the draft SEIS will sent through GovDelivery. To sign up for GovDelivery and take advantage of electronic notifications, visit the Clearwater National Forest Travel Planning web page at *https://www.fs.usda.gov/project/?project=17992,* click on the link Subscribe to Email Updates under the Get Connected menu on the right hand side of the project web page, enter your email address, and click submit.

#### Nature of Decision To Be Made

The decision following the supplemental analysis will address both prior decisions for the Clearwater Travel Plan and the Clearwater Travel Plan for Recommended Wilderness. As part of the decision following this analysis, the responsible official will decide whether summer motor vehicle use should be allowed on the Fish Lake Trail. The responsible official may also consider a land management plan amendment for elk habitat.

#### Substantive Provisions

In accordance with 36 CFR 219.6, when evaluating an amendment for a land management plan, ''the responsible official has the discretion to determine the scope, scale, and timing of an assessment. . . .'' Per 36 CFR 219.13(b)(5), the responsible official shall ''[d]etermine which specific

substantive requirement(s) within 219.8 through 219.11 are directly related to the plan direction being added, modified, or removed by the amendment and apply such requirement(s) within the scope and scale of the amendment.'' The relevant substantive requirements have not been determined for the potential land management plan amendment.

Dated: March 8, 2023.

**Troy Heithecker,**

*Associate Deputy Chief, National Forest System.*

[FR Doc. 2023–05146 Filed 3–13–23; 8:45 am]

**BILLING CODE 3411–15–P**

## DEPARTMENT OF COMMERCE

## Foreign-Trade Zones Board

**[S–45–2023]**

## Foreign-Trade Zone 15—Kansas City, Missouri; Application for Expansion of Subzone 15E; Kawasaki Motors Manufacturing Corp., USA; Maryville, Missouri

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Greater Kansas City Foreign-Trade Zone, Inc., grantee of FTZ 15, requesting an expansion of Subzone 15E on behalf of Kawasaki Motors Manufacturing Corp., USA, located in Maryville, Missouri. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on March 9, 2023.

Subzone 15E was approved on November 27, 1989 (Board Order 454, 54 FR 50257, December 5, 1989). Production authority was expanded on January 20, 1999 (Board Order 1014, 64 FR 5765, February 5, 1999), on July 29, 2002 (Board Order 1239, 67 FR 51535, August 8, 2022) and on August 27, 2009 (Board Order 1643, 74 FR 46087–46088, September 8, 2009). The subzone currently consists of 113 acres located on U.S. Highway 71 in Maryville (Site 1).

The applicant is requesting authority to expand the subzone to include an additional site: Proposed Site 2 (18.47 acres)—2501 Boonslick Drive, Boonville. The existing subzone and the proposed site would be subject to the existing activation limit of FTZ 15. No additional authorization for production activity has been requested at this time.

In accordance with the FTZ Board's regulations, Camille Evans of the FTZ Staff is designated examiner to review the application and make 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 April 24, 2023. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to May 8, 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: March 9, 2023.

**Elizabeth Whiteman,**

*Acting Executive Secretary.*

[FR Doc. 2023–05171 Filed 3–13–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

## Foreign-Trade Zones Board

**[B–53–2022]**

## Foreign-Trade Zone (FTZ) 126; Authorization of Production Activity; Tesla, Inc.; (Battery Products, Electric Motors, and Energy Storage Products); McCarren and Sparks, Nevada

On November 9, 2022, Tesla, Inc. submitted a notification of proposed production activity to the FTZ Board for its facilities within Subzone 126D, in McCarren and Sparks, Nevada.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (87 FR 71298, November 22, 2022). On March 9, 2023, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: March 9, 2023.

**Elizabeth Whiteman,**

*Acting Executive Secretary.*

[FR Doc. 2023–05172 Filed 3–13–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

## Foreign-Trade Zones Board

**[B–20–2023]**

## Foreign-Trade Zone (FTZ) 155, Notification of Proposed Production Activity; Caterpillar Inc.; (Construction and Earth Moving Machines); Victoria, Texas

Caterpillar Inc. submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Victoria, Texas, within FTZ 155. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on March 6, 2023.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status material(s)/component(s) and specific finished product(s) described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via *www.trade.gov/ftz.* The proposed finished product(s) and material(s)/component(s) would be added to the production authority that the Board previously approved for the operation, as reflected on the Board's website.

The proposed finished products include front-end shovel loaders, landfill compactors, and wheel dozers (duty rates are duty-free).

The proposed foreign-status materials and components include: additives (coolant; hydraulic oil); refrigerants; diesel exhaust fluids; polyester-based paints; lubricant oils; rust preventative coatings; plastic components (seals; tapes; storage envelopes and protective covers; knobs; handles; latches; thrust discs; covers for connectors; shields for engines; hoses and hose assemblies); rubber components (tires; tires with steel rims); paper labels; man-made fiber ribbons; nylon protective sleeves for wire harnesses; polyester components (protective sleeves for sensors; webbing straps with plates); felt filters for water pumps; steel components (gaskets; slugs; flanges; couplings; elbows; connectors; cables; chains; wire links; fastener block bosses; brackets for wiring; support assemblies; angles for frame assemblies; baffles; blocks (for: tanks; hardware; arms; fasteners; bumpers; frames of machines); bearing caps; channels for frames; columns for frames; covers for valve mountings; drawbars; elbows and elbow assemblies for turbo lines; tube fillers and filler

assemblies for tanks; frames and frame assemblies (for: batteries; engines; rippers); grills for radiators; assembly guards (yoke; tilt); door gussets; platform gussets; hitches and hitch assemblies; steering links for chassis frames; panels and panel assemblies; pins and pin assemblies for machines and machine frames; plates and plate assemblies (for machines and machine frames; doors; filter mounts; tanks; turn stops; valve mounts; ground plate assemblies; pin assemblies); posts for guardrails; rails and rail assemblies; screens and screen assemblies; clutch sleeves; spacers; tubes and tube assemblies; yokes and yoke assemblies; walkway handrails for machine frames; plates for adjusters; brackets); ceramic substrates for catalyst filters; mirrors; silicone and glass fiber insulation; iron components (slugs; flanges; couplings; elbows; connectors; cables; chains); metal components (ring seals; rivets); connectors (spring hose; electrical); copper components (tubes; insert fasteners; drain plugs); brass insert fasteners; taperlock studs; exhaust bellows; pump components (accumulators; spacers; sleeves; manifolds; covers); motor mufflers; winches; onboard in-cab printers; breaker bars; pneumatic hand-held lubricating pumps; balls for ball bearings; transmission shaft axles; shaft joints (universal; input); power train generators; antennas for tire monitoring systems; digital cameras installed on machines; radar detector sensors; capacitors; resistors; electronic controls; LED lamps; transistors; wire harnesses; brakes; brake axles; axles; axle components (spacers; washers; rings; pinions; retainers; housings; gears; cases; brake fluid tubes; drum wheels); radiators; radiator components (cores; tanks; sheets); mufflers; exhaust pipes; clutches; clutch components (pistons; plates; friction discs; housings); assemblies (tube; coupling; push button; core; crossmember; elbow tube for water lines; line; mount; platform; shaft; support; diesel exhaust fluid manifold; cushion; brush); couplings; adapters; adapter components (clutches; hoses); drive bearings; brackets and bracket assemblies; bushings; cage bearings; fuel caps and cap assemblies; cast iron components (hitch caps; covers for hydraulic tanks); core clutch discs; covers for oil lines; aluminum radiator elbows; guards (powertrain; radiator); hubs and hub assemblies; hub impellers; magnets; rebound pads; steel and iron bearing retainers; stainless steel components (rods for adjusters; sheets and sheet assemblies for chassis frames and radiators; shields and shield assemblies for exhaust and exhaust turbochargers); shafts (powertrain; brake); silicone wire heater sleeves; steel and aluminum tanks and tank assemblies; mounting components (group wiring; brackets; supports; clamps); frame locks; ring magnets; cab seats for machines; control support knobs; plates (for: bracket assemblies; machine seats); support arms; pins for machines and frames; adjuster controls; and, flood lamps and lights for machines (duty rate ranges from duty-free to 7.9%). The request indicates that certain materials/components are subject to duties under section 232 of the Trade Expansion Act of 1962 (section 232) or section 301 of the Trade Act of 1974 (section 301), depending on the country of origin. The applicable section 232 and section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is April 24, 2023.

A copy of the notification will be available for public inspection in the ''Online FTZ Information System'' section of the Board's website.

For further information, contact Juanita Chen at *juanita.chen@trade.gov.*

Dated: March 8, 2023.

**Elizabeth Whiteman,**

*Acting Executive Secretary.*

[FR Doc. 2023–05150 Filed 3–13–23; 8:45 am]

**BILLING CODE 3510–DS–P**

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## DEPARTMENT OF COMMERCE

### International Trade Administration

### Initiation of Antidumping and Countervailing Duty Administrative Reviews

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

**SUMMARY:** The Department of Commerce (Commerce) has received requests to conduct administrative reviews of various antidumping duty (AD) and countervailing duty (CVD) orders with January anniversary dates. In accordance with Commerce's regulations, we are initiating those administrative reviews.

**DATES:** Applicable March 14, 2023.

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

**SUPPLEMENTARY INFORMATION:**

#### Background

Commerce has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various AD and CVD orders with January anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting time.

#### Notice of No Sales

With respect to antidumping administrative reviews, if a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (POR), it must notify Commerce within 30 days of publication of this notice in the **Federal Register**. All submissions must be filed electronically at *https://access.trade.gov,* in accordance with 19 CFR 351.303.[1] Such submissions are subject to verification, in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy must be served on every party on Commerce's service list.

#### Respondent Selection

In the event Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, except for the administrative review of the AD order on wooden bedroom furniture from the People's Republic of China (China), Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the POR. We intend to place the CBP data on the record within five days of publication of the initiation notice and to make our decision regarding respondent selection within 35 days of publication of the initiation **Federal Register** notice. Comments regarding the CBP data and respondent selection should be submitted within seven days after the placement of the CBP data on the record of this review. Parties wishing to submit rebuttal comments should submit those comments within five days after the deadline for the initial comments.

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

In the event Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act, the following guidelines regarding collapsing of companies for purposes of respondent selection will apply. In general, Commerce has found that determinations concerning whether particular companies should be ''collapsed'' (*e.g.,* treated as a single entity for purposes of calculating AD rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this AD proceeding (*e.g.,* investigation, administrative review, new shipper review, or changed circumstances review). For any company subject to this review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection.

Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete the Quantity and Value (Q&V) Questionnaire for purposes of respondent selection, in general, each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where Commerce considered collapsing that entity, complete Q&V data for that collapsed entity must be submitted.

**Respondent Selection—Wooden Bedroom Furniture From China**

In the event that Commerce limits the number of respondents individually examined in the administrative review of the AD order on wooden bedroom furniture from China, for purposes of the January 1, 2022, through December 31, 2022, POR, Commerce intends to select respondents based on volume data contained in responses to a Q&V Questionnaire. All parties under review are hereby notified that they must timely respond to the Q&V Questionnaire. Commerce's Q&V Questionnaire, along with certain additional questions, will be available in a document package at *https://access.trade.gov/Resources/prc-WBF-document-Package.pdf* on the date that this notice is published in the **Federal Register**. Responses to the Q&V Questionnaire must be filed with the respondents' Separate Rate Application or Separate Rate Certification (see the Separate Rates section below) and their responses to the additional questions, and must be received by Commerce by no later than 30 days after publication of this notice in the **Federal Register**. Please be advised that due to the time constraints imposed by the statutory and regulatory deadlines for completing AD administrative reviews, Commerce does not intend to grant any extensions for the submission of responses to the Q&V Questionnaire.

**Deadline for Withdrawal of Request for Administrative Review**

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

**Deadline for Particular Market Situation Allegation**

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

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

**Separate Rates**

In proceedings involving non-market economy (NME) countries, Commerce begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single AD deposit rate. It is Commerce's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, Commerce analyzes each entity exporting the subject merchandise. In accordance with the separate rates criteria, Commerce assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a Separate Rate Application or Certification, as described below. In addition, all firms that wish to qualify for separate rate status in the administrative review of the AD order on wooden bedroom furniture from China, must complete, as appropriate, either a Separate Rate Application or Certification, and respond to the additional questions and the Q&V Questionnaire at *https://access.trade.gov/Resources/prc-WBF-document-Package.pdf.*

For these administrative reviews, in order to demonstrate separate rate eligibility, Commerce requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding

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

in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on Commerce's website at *https://access.trade.gov/Resources/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice.

For the administrative review of the AD order on wooden bedroom furniture from China, Separate Rate Certifications, as well as a response to the additional questions and the Q&V Questionnaire in the document package, are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [3] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[4] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Application will be available on Commerce's website at *https://access.trade.gov/Resources/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Application, refer to the instructions contained in the application. Separate Rate Applications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. For the administrative review of the AD order on wooden bedroom furniture from China, Separate Rate Applications, as well as a response to the additional questions and the Q&V Questionnaire in the document package, are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

Exporters and producers must file a timely Separate Rate Application or Certification if they want to be considered for individual examination. Furthermore, exporters and producers who submit a Separate Rate Application or Certification and subsequently are selected as mandatory respondents will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Furthermore, this notice constitutes public notification to all firms for which an administrative review of the AD order on wooden bedroom furniture from China has been requested, that are seeking separate rate status in the review, that they must submit a timely Separate Rate Application or Certification (as appropriate) as described above, and a timely response to the additional questions and the Q&V Questionnaire in the document package in order to receive consideration for separate-rate status. In other words, Commerce will not give consideration to any timely Separate Rate Application or Certification made by parties who failed to respond in a timely manner to the additional questions and the Q&V Questionnaire. All information submitted by respondents in the administrative review of the AD order on wooden bedroom furniture from China is subject to verification. As noted above, the Separate Rate Application and the Separate Rate Certification will be available on Commerce's website and the additional questions and the Q&V Questionnaire will be available at *https://access.trade.gov/Resources/prc-WBF-document-Package.pdf* on the date of publication of this notice in the **Federal Register**.

**Initiation of Reviews**

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following AD and CVD orders and findings. We intend to issue the final results of these reviews not later than January 31, 2023.

| | Period to be reviewed |
|---|---|
| **AD Proceedings** | |
| CANADA: Softwood Lumber, A–122–857 | 1/1/22–12/31/22 |
| 10104704 Manitoba Ltd O/A Woodstock Forest Product | |
| 1074712 BC Ltd.; Quadra Cedar | |
| 5214875 Manitoba Ltd. | |
| 54 Reman | |
| 752615 B.C Ltd, Fraserview Remanufacturing Inc, DBA Fraserview Cedar Products. | |
| 9224–5737 Quebec Inc. (a.k.a. A.G. Bois) | |
| AA Trading Ltd. | |
| Absolute Lumber Products Ltd. | |
| Adwood Manufacturing Ltd. | |
| AJ Forest Products Ltd. | |
| Aler Forest Products Ltd. | |
| All American Forest Products Inc. | |
| Alpa Lumber Mills Inc. | |
| Andersen Pacific Forest Products Ltd. | |
| Anglo American Cedar Products Ltd.; Anglo-American Cedar Products Ltd. | |
| Antrim Cedar Corporation | |

[3] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently completed segment of the proceeding in which they participated.

[4] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

| | Period to be reviewed |
|---|---|
| Aquila Cedar Products Ltd. | |
| Arbec Lumber Inc.; Arbec Bois Doeuvre Inc. | |
| Aspen Pacific Industries Inc. | |
| Aspen Planers Ltd. | |
| B&L Forest Products Ltd. | |
| B.B. Pallets Inc.; Les Palettes B.B. Inc. | |
| Babine Forest Products Limited | |
| Bakerview Forest Products Inc. | |
| Bardobec Inc. | |
| Barrette-Chapais Ltee | |
| BarretteWood Inc. | |
| Benoît & Dionne Produits Forestiers Ltee; Benoît & Dionne Forest Products Ltd. | |
| Best Quality Cedar Products Ltd. | |
| Blanchet Multi Concept Inc. | |
| Blanchette & Blanchette Inc. | |
| Bois Aise de Montreal Inc. | |
| Bois Bonsaï Inc. | |
| Bois Daaquam Inc.; Daaquam Lumber Inc. | |
| Bois D'oeuvre Cedrico Inc.; Cedrico Lumber Inc. | |
| Bois et Solutions Marketing SPEC, Inc.; SPEC Wood & Marketing Solution; SPEC Wood and Marketing Solutions Inc. | |
| Bois Weedon Inc. | |
| Boisaco Inc. | |
| Boscus Canada Inc. | |
| Boucher Bros. Lumber Ltd. | |
| BPWood Ltd. | |
| Bramwood Forest Inc. | |
| Brink Forest Products Ltd. | |
| Brunswick Valley Lumber Inc. | |
| Burrows Lumber (CD) Ltd., Theo A. Burrows Lumber Company Limited | |
| Busque & Laflamme Inc. | |
| Campbell River Shake & Shingle Co. Ltd. | |
| Canada Pallet Corp. | |
| Canadian Bavarian Millwork & Lumber Ltd. | |
| Canadian Forest Products Ltd.; Canfor Wood Products Marketing Ltd.; Canfor Corporation | |
| Canasia Forest Industries Ltd. | |
| Canyon Lumber Company Ltd. | |
| Careau Bois inc. | |
| CarlWood Lumber Ltd. | |
| Carrier & Begin Inc. | |
| Carrier Forest Products Ltd. | |
| Carrier Lumber Ltd. | |
| Carter Forest Products Inc. | |
| Cedar Island Forest Products Ltd. | |
| Cedar Valley Holdings Ltd. | |
| Cedarcoast Lumber Products | |
| Cedarland Forest Products Ltd. | |
| Cedarline Industries Ltd. | |
| Central Alberta Pallet Supply | |
| Central Cedar Ltd. | |
| Central Forest Products Inc. | |
| Centurion Lumber Ltd. | |
| Chaleur Forest Products Inc. | |
| Chaleur Forest Products LP | |
| Channel-ex Trading Corporation | |
| CHAP Alliance, Inc. | |
| Clair Industrial Development Corp. Ltd. | |
| Clermond Hamel Ltee | |
| CLG Enterprises Inc. | |
| CNH Products Inc. | |
| Coast Clear Wood Ltd. | |
| Coast Mountain Cedar Products Ltd. | |
| Columbia River Shake & Shingle Ltd./Teal Cedar Products Ltd., DBA the Teal Jones Group. | |
| Commonwealth Plywood Co. Ltd. | |
| Comox Valley Shakes Ltd. (2019); A.K.A. Comox Valley Shakes (2019) Ltd. | |
| Conifex Fibre Marketing Inc. | |
| Coulson Manufacturing Ltd. | |
| Cowichan Lumber Ltd. | |
| CS Manufacturing Inc. (dba Cedarshed) | |
| CWP—Industriel Inc. | |
| CWP—Montreal Inc. | |
| D & D Pallets Ltd. | |
| Dakeryn Industries Ltd. | |

| | Period to be reviewed |
|---|---|
| Decker Lake Forest Products Ltd. | |
| Deep Cove Forest Products, Inc. | |
| Delco Forest Products Ltd. | |
| Delta Cedar Specialties Ltd. | |
| Devon Lumber Co. Ltd. | |
| DH Manufacturing Inc. | |
| Direct Cedar Supplies Ltd. | |
| Distribution Rioux Inc. | |
| Doubletree Forest Products Ltd. | |
| Downie Timber Ltd. | |
| Dunkley Lumber Ltd. | |
| EACOM Timber Corporation | |
| East Fraser Fiber Co. Ltd. | |
| Edgewood Forest Products Inc. | |
| Elrod Cartage Ltd. | |
| ER Probyn Export Ltd. | |
| Falcon Lumber Ltd. | |
| Fontaine Inc. | |
| Foothills Forest Products Inc. | |
| Forest Products Mauricie LP; Societe en commandite Scierie Opitciwan; Resolute Growth Canada Inc.; Resolute FP Canada Inc.; Resolute-LP Engineered Wood Larouche Inc.; Resolute-LP Engineered Wood St-Prime Limited Partnership | |
| Fort St. James Forest Products Limited Partnership | |
| Fraser Specialty Products Ltd. | |
| FraserWood Industries Ltd. | |
| Furtado Forest Products Ltd. | |
| Galloway Lumber Company Ltd. | |
| Glandell Enterprises Inc. | |
| Goldband Shake & Shingle Ltd. | |
| Goldwood Industries Ltd. | |
| Goodfellow Inc. | |
| Gorman Bros. Lumber Ltd. | |
| Greendale Industries Inc. | |
| GreenFirst Forest Products (QC) Inc. | |
| GreenFirst Forest Products Inc. | |
| Greenwell Resources Inc. | |
| Griff Building Supplies Ltd. | |
| Groupe Crete Chertsey Inc. | |
| Groupe Crete Division St-Faustin Inc. | |
| Groupe Lebel Inc. | |
| Groupe Lignarex Inc. | |
| H.J. Crabbe & Sons Ltd. | |
| Haida Forest Products Ltd. | |
| Halo Sawmill, a division of Delta Cedar Specialties Ltd.; Halo Sawmill Manufacturing Limited Partnership | |
| Hampton Tree Farms, LLC (dba Hampton Lumber Sales Canada) | |
| Hornepayne Lumber LP | |
| Hudson Mitchell & Sons Lumber Inc. | |
| Hy Mark Wood Products Inc. | |
| Imperial Cedar Products Ltd. | |
| Independent Building Materials Distribution Inc. | |
| Interfor Corporation | |
| Interfor Sales & Marketing Ltd. | |
| Intertran Holdings Ltd. (dba Richmond Terminal) | |
| Island Cedar Products Ltd. | |
| Ivor Forest Products Ltd. | |
| J&G Log Works Ltd. | |
| J.D. Irving, Limited | |
| J.H. Huscroft Ltd. | |
| Jan Woodlands (2001) Inc. | |
| Jasco Forest Products Ltd. | |
| Jazz Forest Products Ltd. | |
| Jhajj Lumber Corporation | |
| Kalesnikoff Lumber Co. Ltd. | |
| Kan Wood Ltd. | |
| Kebois Ltee; Kebois Ltd. | |
| Kelfor Industries Ltd. | |
| Kermode Forest Products Ltd. | |
| Keystone Timber Ltd. | |
| La Crete Sawmills Ltd. | |
| Lafontaine Lumber Inc. | |
| Langevin Forest Products Inc. | |
| Lecours Lumber Co. Limited | |
| Leisure Lumber Ltd. | |

| | Period to be reviewed |
|---|---|
| Les Bardeaux Lajoie Inc. | |
| Les Bois d'oeuvre Beaudoin Gauthier Inc. | |
| Les Bois Martek Lumber | |
| Les Bois Traites M.G. Inc. | |
| Les Chantiers de Chibougamau Ltee; Les Chantiers de Chibougamau Ltd. | |
| Les Industries P.F. Inc. | |
| Les Produits Forestiers D&G Ltee; D&G Forest Products Ltd. | |
| Les Produits Forestiers Sitka Inc. (a.k.a. Sitka Forest Products Inc.) | |
| Leslie Forest Products Ltd. | |
| Lignum Forest Products LLP | |
| Linwood Homes Ltd. | |
| Lonestar Lumber Inc. | |
| Lulumco Inc. | |
| Lumber Assets Holding LP | |
| Madera Forest Products INC | |
| Magnum Forest Products Ltd. | |
| Maibec Inc. | |
| Mainland Sawmill, a division of Terminal Forest Products | |
| Manitou Forest Products Ltd. | |
| Manning Forest Products Ltd.; Sundre Forest Products Inc.; Blue Ridge Lumber Inc.; West Fraser Mills Ltd. | |
| Marcel Lauzon Inc. | |
| Marwood Ltd. | |
| Materiaux Blanchet Inc. | |
| Metrie Canada Ltd. | |
| Mid Valley Lumber Specialties Ltd. | |
| Midway Lumber Mills Ltd. | |
| Mill & Timber Products Ltd. | |
| Millar Western Forest Products Ltd. | |
| Mirax Lumber Products Ltd. | |
| Mobilier Rustique (Beauce) Inc. | |
| Modern Terminal Ltd. | |
| Monterra Lumber Mills Limited | |
| Morwood Forest Products Inc. | |
| Multicedre Ltee | |
| Murray Brothers Lumber Company Ltd. | |
| Nagaard Sawmill Ltd. | |
| Nakina Lumber Inc. | |
| National Forest Products Ltd. | |
| Nicholson and Cates Ltd. | |
| Nickel Lake Lumber | |
| Norsask Forest Products Inc. | |
| Norsask Forest Products Limited Partnership | |
| North American Forest Products Ltd. (located in Abbotsford, British Columbia) | |
| North American Forest Products Ltd. (located in Saint-Quentin, New Brunswick) | |
| North Enderby Timber Ltd. | |
| Northland Forest Products Ltd. | |
| NSC Lumber Ltd. | |
| Oakwood Manufacturing A Division of Weston Forest Products Inc. | |
| Olympic Industries Inc. | |
| Olympic Industries ULC | |
| Oregon Canadian Forest Products; Oregon Canadian Forest Products Inc. | |
| Pacific Coast Cedar Products Ltd. | |
| Pacific Lumber Remanufacturing Inc. | |
| Pacific NorthWest Lumber Ltd. | |
| Pacific Pallet Ltd. | |
| Pacific Western Wood Works Ltd. | |
| PalletSource Inc. | |
| Parallel Wood Products Ltd. | |
| Partap Forest Products Ltd. | |
| Partap Industries | |
| Pat Power Forest Products Corporation | |
| Peak Industries (Cranbrook) Ltd. | |
| Phoenix Forest Products Inc. | |
| Pine Ideas Ltd. | |
| Pioneer Pallet & Lumber Ltd. | |
| Porcupine Wood Products Ltd. | |
| Portbec Forest Products Ltd.; Les Produits Forestiers Portbec Ltee | |
| Power Wood Corp. | |
| Precision Cedar Products Corp. | |
| Produits Forestiers Petit Paris Inc. | |
| Produits Matra Inc.; Sechoirs de Beauce Inc. | |
| Promobois G.D.S. Inc. | |
| R.A. Green Lumber Ltd. | |

| | Period to be reviewed |
|---|---|
| Rembos Inc. | |
| Rene Bernard Inc. | |
| Rick Dubois | |
| Rielly Industrial Lumber Inc. | |
| River City Remanufacturing Inc. | |
| S&R Sawmills Ltd. | |
| S&W Forest Products Ltd. | |
| San Group | |
| San Industries Ltd. | |
| Sapphire Lumber Company | |
| Sawarne Lumber Co. Ltd. | |
| Scierie Alexandre Lemay & Fils Inc. | |
| Scierie St-Michel Inc. | |
| Scierie West Brome Inc. | |
| Scott Lumber Sales; Scott Lumber Sales Ltd. | |
| Shakertown Corp. | |
| Sigurdson Forest Products Ltd. | |
| Silvaris Corporation | |
| Sinclar Group Forest Products Ltd. | |
| Skana Forest Products Ltd. | |
| Skeena Sawmills Ltd. | |
| Smart Wood Forest Products Ltd. | |
| Smartlam LLC | |
| Sonora Logging Ltd. | |
| Source Forest Products | |
| South Beach Trading Inc. | |
| South Coast Reman Ltd.; Southcoast Millwork Ltd. | |
| South Fraser Container Terminals | |
| Specialiste du Bardeau de Cedre Inc.; Specialiste du Bardeau de Cedre Inc. (SBC) | |
| Spruceland Millworks Inc. | |
| Star Lumber Canada Ltd. | |
| Suncoast Industries Inc. | |
| Suncoh Custom Lumber Ltd. | |
| Sundher Timber Products Inc. | |
| Surplus G Rioux | |
| Surrey Cedar Ltd. | |
| Swiftwood Forest Products Ltd. | |
| T&P Trucking Ltd. | |
| T.G. Wood Products | |
| Taan Forest Limited Partnership (a.k.a. Taan Forest Products) | |
| Taiga Building Products Ltd. | |
| Tall Tree Lumber Company | |
| Temrex Forest Products LP; Produits Forestiers Temrex S.E.C. | |
| Tenryu Canada Corporation | |
| Terminal Forest Products Ltd. | |
| The Wood Source Inc. | |
| Tolko Industries Ltd.; Tolko Marketing and Sales Ltd.; Gilbert Smith Forest Products Ltd. | |
| Top Quality Lumber Ltd. | |
| Trans-Pacific Trading Ltd. | |
| Triad Forest Products Ltd. | |
| Twin Rivers Paper Co. Inc. | |
| Tyee Timber Products Ltd. | |
| Universal Lumber Sales Ltd. | |
| Usine Sartigan Inc. | |
| Vaagen Fibre Canada ULC | |
| Valley Cedar 2 Inc. | |
| Vancouver Specialty Cedar Products Ltd. | |
| Vanderhoof Specialty Wood Products Ltd. | |
| Vanderwell Contractors (1971) Ltd. | |
| Visscher Lumber Inc. | |
| W.I. Woodtone Industries Inc. | |
| Waldun Forest Product Sales Ltd. | |
| Watkins Sawmills Ltd. | |
| West Bay Forest Products Ltd. | |
| West Coast Panel Cutters | |
| Western Forest Products Inc. | |
| Western Lumber Sales Limited | |
| Western Timber Products, Inc. | |
| Westminster Industries Ltd. | |
| Weston Forest Products Inc. | |
| Westrend Exteriors Inc | |
| Weyerhaeuser Co. | |
| White River Forest Products L.P. | |

| | Period to be reviewed |
|---|---|
| Winton Homes Ltd. | |
| Woodline Forest Products Ltd. | |
| Woodstock Forest Products | |
| Woodtone Specialties Inc. | |
| WWW Timber Products Ltd. | |
| GERMANY: Forged Steel Fluid End Blocks, A–428–847 | 1/1/22–12/31/22 |
| BGH Edelstahl Siegen GmbH | |
| Buderus Edelstahl GmbH | |
| Deutsche Edelstahlwerke GmbH | |
| Saarschmiede GmbH Freiformschmiede | |
| Schmiedewerke Gröditz GmbH | |
| voestalpine Böhler Group | |
| GERMANY: Thermal Paper,[5] A–428–850 | 5/12/21–10/31/22 |
| INDIA: Polyester Textured Yarn, A–533–885 | 1/1/22–12/31/22 |
| Reliance Industries Limited | |
| ITALY: Forged Steel Fluid End Blocks, A–475–840 | 1/1/22–12/31/22 |
| Acciaierie Bertoli Safau S.p.A. | |
| ASFO S.p.A. | |
| Cogne Acciai Speciali S.p.A. | |
| Ellena S.p.A. | |
| Fomas S.p.A. | |
| Forge Monchieri S.p.A. | |
| Forgiatura Morandini S.r.l. | |
| Forgital Italy S.p.A. | |
| Galperti Group | |
| IMER International S.p.A. | |
| I.M.E.S. S.p.A | |
| Industria Meccanica e Stampaggio S.p.A. | |
| Lucchini Mame Forge S.p.A. | |
| Mimest S.p.A. | |
| Ofar S.p.A. | |
| Officine Galperti S.p.A. | |
| Officine Meccaniche Roselli S.r.l. | |
| P. Technologies S.r.l. | |
| Poclain Hydraulics Indistriale S.r.l. | |
| Poppi Ugo Euroforge S.p.A. | |
| Riganti S.p.A. | |
| Ringmill S.p.A. | |
| Siderforgerossi Group S.p.A. | |
| THAILAND: Prestressed Concrete Steel Wire Strand, A–549–820 | 1/1/22–12/31/22 |
| The Siam Industrial Wire Co., Ltd. | |
| THE PEOPLE'S REPUBLIC OF CHINA: Carbon and Certain Alloy Steel Wire Rod, A–570–012 | 1/1/22–12/31/22 |
| Anshan Iron & Steel Group Corp. | |
| Anyang Iron & Steel Group Co., Ltd | |
| Baoshan Iron & Steel Co., Ltd | |
| Baotou Iron and Steel (Group) Co., Ltd | |
| Beijing Jianlong Heavy Industry Group Co., Ltd. | |
| Beijing Ju Xiang Ze Trading Co. Ltd. | |
| Beitai Iron & Steel Group Co., Ltd | |
| Bekaert Binjiang Steel Cord Co., Ltd. | |
| Chongqing Iron and Steel (Group) Co., Ltd. | |
| Dezhou Hualude Hardware Products Co., Ltd. | |
| Dingzhou Xingkai Metal Products | |
| Fugang Group | |
| Goldenluck Imp. & Exp. (Ningbo Hai Shu) Co., Ltd. | |
| Guangxi Liuzhou Iron and Steel (Group) Company | |
| Handan Iron & Steel Group Co., Ltd | |
| Hangzhou Iron & Steel Group Company | |
| Hebei Best Hardware And Mesh Co | |
| Hebei Iron & Steel Group Co., Ltd. | |
| Hebei Leeter Imp. & Exp. Co., Ltd. | |
| Hebei Xinjin Iron and Steel Co., Ltd | |
| Henan Jiyuan Iron & Steel Group Co., Ltd | |
| Hongxin Tianjin Iron & Steel Group Co., Ltd | |
| Hunan Valin Xiangtan Iron & Steel Co., Ltd (XISC) | |
| Jiangsu Shagang Group Co., Ltd | |
| Jiangsu Weixi Group Company | |
| Jiangsu Yonggang Iron & Steel Group Co., Ltd | |
| Jiangxi Pingxiang Iron and Steel (PXSteel) Industrial Co. Ltd. | |
| Jiangyin HiTech Industrial Co., Ltd. | |
| Jiangyin Xing Cheng Special Steel Works Co., Ltd. | |
| Jiangyou Longhai Special Steel Co., Ltd. | |
| Jinxi Group | |

| | Period to be reviewed |
|---|---|
| Jiuquan Iron & Steel (Group) Co., Ltd (JISCO) | |
| Laiwu Iron and Steel Group. Co., Ltd. | |
| Leader Innovations Ltd | |
| Ling Yuan Iron and Steel Group Co., Ltd. | |
| M And M Industries Co., Ltd. | |
| Maanshan Iron & Steel Co., Ltd | |
| Nanjing Iron and Steel United Co., Ltd. | |
| Nantong Dingxin Metal Products Co | |
| Ningbo Sunburst International Trading Co., Ltd. | |
| Qingdao Haineng Hardware Products Co. | |
| Qingdao Iron & Steel Group Co. | |
| Renogy Suzhou Co., Ltd. | |
| Rizhao Steel Group | |
| Shaanxi Longmen Iron & Steel (Group) Co., Ltd | |
| Shandong Iron and Steel Group Co., Ltd. | |
| Shanghai (Shanghi) Jisco International Trade | |
| Shanxi Jincheng Steel Holding | |
| Shanxi Zhongyang Iron and Steel Co., Ltd. | |
| Shougang Changzhi Steel Co. Ltd. | |
| Shougang Group | |
| Sisor Commodity Co., Ltd. | |
| Tangshan Guofeng Iron & Steel Co. Ltd. | |
| Tangshan Iron and Steel Group Company Limited (Hesteel Group) | |
| Tempo International Industry Co., Ltd. | |
| Tewoo Jiujiang International Trade | |
| Tianjin Rockcheck Steel Group Co., Ltd. | |
| Tianjin Tiantie Metallurgical Group | |
| Tianjin Tiantie Zhaer Steel Production Co., Ltd | |
| Tianjin Wenyunxing Steel Trading Co. | |
| Tonghua Steel Group | |
| Weifang Special Steel Group Co., Ltd | |
| Wu'an Yuhua Steel Co., Ltd. | |
| Wuhan Iron & Steel Co., Ltd. | |
| Xilin Iron & Steel Group | |
| Xingtai Iron & Steel Co., Ltd | |
| Xinyu Iron & Steel Co., Ltd | |
| Xuanhua Iron & Steel Group | |
| Zhejiang Materials Industry International Co., Ltd. | |
| THE PEOPLE'S REPUBLIC OF CHINA: Certain Hardwood Plywood Products, A–570–051 | 1/1/22–12/31/22 |
| An An Plywood Joint Stock Company | |
| Anhui Hoda Wood Co., Ltd. | |
| Arrow Forest International Co., Ltd. | |
| BAC Son Woods Processing Joint Stock Company | |
| Bao Yen MDF Joint Stock Company | |
| Bergey (Tianjin) International Co., Ltd. | |
| BHL Thai Nguyen Corp. | |
| BHL Vietnam Investment and Development | |
| Cam Lam Vietnam Joint Stock Company | |
| Camlam Vietnam Joint Stock Company | |
| Celtic Co., Ltd. | |
| Chengxinli Wood Co Ltd of Lanshan | |
| China Friend Limited | |
| China National United Forestry Co. | |
| Cong Ty TNHH Greatriver Wood | |
| Cosco Star International Co., Ltd. | |
| Dong Tam Production Trading Company Limited | |
| Dongguan Lingfeng Wood Industry Co. | |
| Eagle Industries Company Limited | |
| Feixian Wanda Wood Factory | |
| Fulin Wood Import Export Company Limited | |
| Golden Bridge Industries Pte. Ltd. | |
| Govina Investment Joint Stock Company | |
| Greatriver Wood Co., Ltd. | |
| Greatwood Company Limited | |
| Greatwood Hung Yen Joint Stock Company | |
| Greatwood Joint Stock Company | |
| Greentech Investment Co., Ltd. | |
| Groll Ply and Cabinetry | |
| Groll Ply and Cabinetry Co., Ltd. | |
| Hai Hien Bamboo Wood Joint Stock Company | |
| Happy Wood Industrial Group Co., Ltd. | |
| Her Hui Wood (Vietnam) Co., Ltd. | |
| High Hope Zhongding Corporation | |

| | Period to be reviewed |
|---|---|
| Hoang LAM Plywood Joint Stock Co. | |
| Hunan Fuxi International Trade Co., Ltd. | |
| Huong Son Wood Group Co., Ltd. | |
| Innovgreen Thanh Hoa Co. Ltd. | |
| Jiangsu High Hope Arser Co. Ltd. | |
| Jiaxing Hengtong Wood Co., Ltd. | |
| Lechenwood Viet Nam Company Limited | |
| Lechenwood Vietnam Company Limited | |
| Lianyungang Yuantai International Trade Co., Ltd. | |
| Linwood Vietnam Co. Ltd. | |
| Linyi Chengen Import and Export Co., Ltd. | |
| Linyi City Dongfang Fukai Wood Industry Co., Ltd. | |
| Linyi City Dongfang Jinxin Economic & Trade Co., Ltd. | |
| Linyi Dongstar Import & Export Co., Ltd. | |
| Linyi Evergreen Wood Co., Ltd. | |
| Linyi Glary Plywood Co., Ltd. | |
| Linyi Highwise International Trade Co., Ltd. | |
| Linyi Huasheng Yongbin Wood Co., Ltd. | |
| Linyi Jiahe Wood Industry Co., Ltd. | |
| Linyi Sanfortune Wood Co., Ltd. | |
| Linyi Yachen Wood Co., Ltd. | |
| Long Dat Import and Export Production Company | |
| Long LUU Plywood Production Co., Ltd. | |
| Long Phat Construction Investment and Trade Joint Stock Company | |
| Pingyi Jinniu Wood Co., Ltd. | |
| Pizhou Dayun Import and Export Trade Co., Ltd. | |
| Pizhou Jiangshan Wood Co., Ltd | |
| Pizhou Ouyme Import & Export Trade Co., Ltd. | |
| Plywood Sunshine Co., Ltd. | |
| Plywood Sunshine Ltd. Co. | |
| Qingdao Top P&Q International Corp. | |
| Quang Phat Wood Joint Stock Company | |
| Quang Phat Woods JSC | |
| Quoc Thai Forest Import Export Limited Company | |
| Quoc Thai Forestry Import Export Limited Company | |
| Rongjia Woods Vietnam Company Limited | |
| Shandong Dongfang Bayley Wood Company | |
| Shandong Fangsi Import and Export Co. | |
| Shandong Good Wood Imp and Exp Co. | |
| Shandong Jinhua International Trading Co. | |
| Shandong Junke Import & Export Trade Co., Ltd. | |
| Shandong Wood Home Trading Co., Ltd. | |
| Shanghai Brightwood Trading Co., Ltd. | |
| Shanghai Futuwood Trading Co., Ltd. | |
| Shanghai Luli Trading Co., Ltd. | |
| Shenzhen Yumei Trading Co., Ltd | |
| Shouguang Wanda Wood Co., Ltd. | |
| Star Light Multimedia Co., Ltd. | |
| Sumec Huongson Wood Group Co. Ltd. | |
| Sumec International Technology Co., | |
| Suqian Hopeway International Trade Co., Ltd. | |
| Suzhou Oriental Dragon Import and Export Co., Ltd. | |
| Tan Tien Co. Ltd. | |
| TEKCOM Corporation | |
| Thang Long Wood Panel Company | |
| Thang Long Wood Panel Company Ltd. | |
| Thanh Hoa Stone Export Company | |
| TL Trung Viet Company Limited | |
| Truong Son North Construction JSC | |
| VietBac Plywood LLC | |
| Vietind Co. Ltd. | |
| Vietnam Golden Timber Company Limited | |
| Vietnam Zhongjia Wood Co., Ltd | |
| Win Faith Trading | |
| Win Faith Trading Limited | |
| Xuzhou Emmet Import and Export Trade | |
| Xuzhou Jiangheng Wood Products Co., Ltd. | |
| Xuzhou Jiangyang Wood Industries Co., Ltd. | |
| Xuzhou Shelter Imp & Exp Co., Ltd. | |
| Xuzhou Shengping Imp. and Exp. Co., Ltd. | |
| Xuzhou Timber International Trade Co., Ltd. | |
| Yangzhou Hanov International Co., Ltd. | |
| Yishui Win-Win Wood Co., Ltd. | |

| | Period to be reviewed |
|---|---|
| Zhejiang Dehua TB Import & Export Co., Ltd. | |
| THE PEOPLE'S REPUBLIC OF CHINA: Potassium Permanganate, A–570–001 | 1/1/22–12/31/22 |
| Chongqing Changyuan Group Limited | |
| Chongqing Changyuan Chemical Corporation Limited | |
| Pacific Accelerator Limited | |
| THE PEOPLE'S REPUBLIC OF CHINA: Wooden Bedroom Furniture, A–570–890 | 1/1/22–12/31/22 |
| Dongguan Chengcheng Furniture Co., Ltd. | |
| Eurosa (Kunshan) Co., Ltd.; Eurosa Furniture Co., (PTE) Ltd. | |
| Golden Lion International Trading Ltd.; Shenzhen Jiafa High Grade Furniture Co., Ltd. | |
| Golden Well International (HK), Ltd. | |
| Guangzhou Maria Yee Furnishings Ltd.; Pyla HK Ltd. | |
| Jiangmen Kinwai International Furniture Co., Ltd. | |
| Jiangmen Kinwai Furniture Decoration Co., Ltd. | |
| Jiangsu Xiangsheng Bedtime Furniture Co., Ltd. | |
| Jiangsu Yuexing Furniture Group Co., Ltd. | |
| Nanhai Jiantai Woodwork Co. Ltd.; Fortune Glory Industrial, Ltd. (HK Ltd.) | |
| Perfect Line Furniture Co., Ltd. | |
| PuTian JingGong Furniture Co., Ltd. | |
| Shenyang Shining Dongxing Furniture Co., Ltd. | |
| Shenzhen New Fudu Furniture Co., Ltd. | |
| Shenzhen Wonderful Furniture Co., Ltd. | |
| Tradewinds Furniture Ltd. (successor-in-interest to Nanhai Jiantai Woodwork Co.); Fortune Glory Industrial Ltd. (H.K. Ltd.) | |
| VidaXL Ningbo Industry Co., Ltd. | |
| Wuxi Yushea Furniture Co., Ltd. | |
| Yeh Brothers World Trade Inc. | |
| Zhangjiagang Daye Hotel Furniture Co. Ltd. | |
| Zhangzhou Guohui Industrial & Trade Co. Ltd. | |
| Zhangzhou XYM Furniture Product Co., Ltd. | |
| Zhejiang Tianyi Scientific & Educational Equipment Co., Ltd. | |
| Zhongshan Fookyik Furniture Co., Ltd. | |
| Zhongshan Golden King Furniture Industrial Co., Ltd. | |
| Zhoushan For-Strong Wood Co., Ltd. | |
| THE PEOPLE'S REPUBLIC OF CHINA: The People's Republic of China: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules,[6] A–570–979 | 12/1/21–11/30/22 |
| **CVD Proceedings** | |
| CANADA: Softwood Lumber, C–122–858 | 1/1/22–12/31/22 |
| 0752615 B.C Ltd; Fraserview Remanufacturing Inc, DBA Fraserview Cedar Products | |
| 10104704 Manitoba Ltd O/A Woodstock Forest Products | |
| 1074712 BC Ltd. (Quadra Cedar) | |
| 5214875 Manitoba Ltd.; AM Lumber Brokerage | |
| 54 Reman | |
| 9224–5737 Quebec Inc. (a.k.a. A.G. Bois) | |
| AA Trading Ltd. | |
| Absolute Lumber Products, Ltd. | |
| Adwood Manufacturing Ltd. | |
| AJ Forest Products Ltd. | |
| Aler Forest Products, Ltd. | |
| All American Forest Products Inc. | |
| Alpa Lumber Mills Inc. | |
| Andersen Pacific Forest Products Ltd. | |
| Anglo-American Cedar Products, Ltd. | |
| Antrim Cedar Corporation | |
| Aquila Cedar Products Ltd. | |
| Arbec Lumber Inc. (a.k.a. Arbec Bois Doeuvre Inc.) | |
| Aspen Pacific Industries Inc. | |
| Aspen Planers Ltd. | |
| B&L Forest Products Ltd. | |
| B.B. Pallets Inc. (a.k.a. Les Palettes B.B. Inc.) | |
| Babine Forest Products Limited | |
| Bakerview Forest Products Inc. | |
| Bardobec Inc. | |
| Barrette-Chapais Ltee | |
| BarretteWood Inc. | |
| Benoit & Dionne Produits Forestiers Ltee (a.k.a. Benoit & Dionne Forest Products Ltd.) | |
| Best Quality Cedar Products Ltd. | |
| Blanchet Multi Concept Inc. | |
| Blanchette & Blanchette Inc. | |
| Bois Aise de Montreal Inc. | |
| Bois Bonsai Inc. | |
| Bois D'oeuvre Cedrico Inc. (a.k.a. Cedrico Lumber Inc.) | |
| Bois Daaquam inc. (a.k.a. Daaquam Lumber Inc.) | |

| | Period to be reviewed |
|---|---|
| Bois et Solutions Marketing SPEC, Inc. (a.k.a. SPEC Wood & Marketing Solution or SPEC Wood and Marketing Solutions Inc.) | |
| Bois Weedon Inc. | |
| Boisaco Inc. | |
| Boscus Canada Inc. | |
| Boucher Bros. Lumber Ltd. | |
| BPWood Ltd. | |
| Bramwood Forest Inc. | |
| Brink Forest Products Ltd. | |
| Brunswick Valley Lumber Inc. | |
| Burrows Lumber (CD) Ltd.; Theo A. Burrows Lumber Company Limited | |
| Busque & Laflamme Inc. | |
| Campbell River Shake & Shingle Co., Ltd. | |
| Canada Pallet Corp. | |
| Canadian Bavarian Millwork & Lumber Ltd. | |
| Canadian Forest Products, Ltd.; Canfor Corporation; Canfor Wood Products Marketing, Ltd. | |
| Canasia Forest Industries Ltd. | |
| Canyon Lumber Company, Ltd. | |
| Careau Bois Inc. | |
| CarlWood Lumber Ltd. | |
| Carrier & Begin Inc. | |
| Carrier Forest Products Ltd. | |
| Carrier Lumber Ltd. | |
| Carter Forest Products Inc. | |
| Cedar Island Forest Products Ltd. | |
| Cedar Valley Holdings Ltd. | |
| Cedarcoast Lumber Products | |
| Cedarland Forest Products Ltd. | |
| Cedarline Industries Ltd. | |
| Central Alberta Pallet Supply | |
| Central Cedar Ltd. | |
| Central Forest Products Inc. | |
| Centurion Lumber Ltd. | |
| Chaleur Forest Products Inc. | |
| Chaleur Forest Products LP | |
| Channel-ex Trading Corporation | |
| CHAP Alliance Inc. | |
| Clair Industrial Development Corp. Ltd | |
| Clermond Hamel Ltee | |
| CLG Enterprises Inc. | |
| CNH Products Inc. | |
| Coast Clear Wood Ltd. | |
| Coast Mountain Cedar Products Ltd. | |
| Columbia River Shake & Shingle Ltd.; Teal Cedar Products Ltd., dba The Teal Jones Group | |
| Commonwealth Plywood Co. Ltd. | |
| Comox Valley Shakes (2019) Ltd. | |
| Conifex Fibre Marketing Inc. | |
| Coulson Manufacturing Ltd. | |
| Cowichan Lumber Ltd. | |
| CS Manufacturing Inc., dba Cedarshed | |
| CWP Industriel Inc. (a.k.a. CWP—Industriel Inc.) | |
| CWP—Montreal inc. | |
| D & D Pallets Ltd. | |
| Dakeryn Industries Ltd. | |
| Decker Lake Forest Products Ltd. | |
| Deep Cove Forest Products, Inc. | |
| Delco Forest Products Ltd. | |
| Delta Cedar Specialties Ltd. | |
| Devon Lumber Co. Ltd. | |
| DH Manufacturing Inc. | |
| Direct Cedar Supplies Ltd. | |
| Distribution Rioux Inc. | |
| Doubletree Forest Products Ltd. | |
| Downie Timber Ltd. | |
| Dunkley Lumber Ltd. | |
| EACOM Timber Corporation | |
| East Fraser Fiber Co. Ltd. | |
| Edgewood Forest Products Inc. | |
| Elrod Cartage Ltd. | |
| ER Probyn Export Ltd. | |
| Falcon Lumber Ltd. | |
| Fontaine Inc.; Gestion Natanis Inc.; Les Placements Jean-Paul Fontaine Ltee; Placements Nicolas Fontaine Inc. | |
| Foothills Forest Products Inc. | |

| | Period to be reviewed |
|---|---|
| Fort St. James Forest Products Limited Partnership | |
| Fraser Specialty Products Ltd. | |
| FraserWood Industries Ltd. | |
| Furtado Forest Products Ltd. | |
| Galloway Lumber Company Ltd. | |
| Gilbert Smith Forest Products Ltd. | |
| Glandell Enterprises Inc. | |
| Goldband Shake & Shingle Ltd. | |
| Goldwood Industries Ltd. | |
| Goodfellow Inc. | |
| Gorman Bros. Lumber Ltd. | |
| Greendale Industries Inc. | |
| GreenFirst Forest Products (QC) Inc. | |
| Greenwell Resources Inc. | |
| Griff Building Supplies Ltd. | |
| Groupe Crete Chertsey Inc. | |
| Groupe Crete Division St-Faustin Inc. | |
| Groupe Lebel Inc. | |
| Groupe Lignarex Inc. | |
| H.J. Crabbe & Sons Ltd. | |
| Haida Forest Products Ltd. | |
| Halo Sawmill Manufacturing Limited Partnership | |
| Hampton Tree Farms, LLC, dba Hampton Lumber Sales Canada | |
| Hornepayne Lumber LP | |
| Hudson Mitchell & Sons Lumber Inc. | |
| Hy Mark Wood Products Inc. | |
| Imperial Cedar Products, Ltd. | |
| Independent Building Materials Distribution Inc. | |
| Interfor Corporation | |
| Interfor Sales & Marketing Ltd. | |
| Intertran Holdings Ltd., dba Richmond Terminal | |
| Island Cedar Products Ltd | |
| Ivor Forest Products Ltd. | |
| J&G Log Works Ltd. | |
| J.D. Irving, Limited; Irving Paper Limited; Miramichi Timber Holdings Limited; Rothesay Paper Holdings Ltd.; St. George Pulp & Paper Limited; The New Brunswick Railway Company | |
| J.H. Huscroft Ltd. | |
| Jan Woodlands (2001) Inc. | |
| Jasco Forest Products Ltd. | |
| Jazz Forest Products Ltd. | |
| Jhajj Lumber Corporation | |
| Kalesnikoff Lumber Co. Ltd. | |
| Kan Wood, Ltd. | |
| Kebois Ltee/Ltd | |
| Kelfor Industries Ltd. | |
| Kermode Forest Products Ltd. | |
| Keystone Timber Ltd. | |
| L'Atelier de Readaptation au travil de Beauce Inc. | |
| La Crete Sawmills Ltd. | |
| Lafontaine Lumber Inc. | |
| Langevin Forest Products Inc. | |
| Lecours Lumber Co. Limited | |
| Leisure Lumber Ltd. | |
| Les Bardeaux Lajoie Inc. | |
| Les Bois d'oeuvre Beaudoin Gauthier Inc. | |
| Les Bois Martek Lumber | |
| Les Bois Traites M.G. Inc. | |
| Les Chantiers de Chibougamau Ltd./Ltee | |
| Les Industries P.F. Inc. | |
| Les Produits Forestiers D&G Ltee (a.k.a. D&G Forest Products Ltd.); Le Groupe Gesco-Star Ltee; Les Produits Forestiers Portbec Ltee; Les Produits Forestiers Startrees Ltee | |
| Les Produits Forestiers Sitka Inc. (a.k.a. Sitka Forest Products Inc.) | |
| Leslie Forest Products Ltd. | |
| Lignum Forest Products LLP | |
| Linwood Homes Ltd. | |
| Lonestar Lumber Inc. | |
| Lulumco Inc. | |
| Madera Forest Products INC | |
| Magnum Forest Products, Ltd. | |
| Maibec Inc. | |
| Mainland Sawmill, a division of Terminal Forest Products Ltd. | |
| Manitou Forest Products Ltd | |
| Marcel Lauzon Inc.; Placements Marcel Lauzon Ltee; Investissements LRC Inc. | |

| | Period to be reviewed |
|---|---|
| Marwood Ltd. | |
| Materiaux Blanchet Inc. | |
| Metrie Canada Ltd. | |
| Mid Valley Lumber Specialties Ltd. | |
| Midway Lumber Mills Ltd. | |
| Mill & Timber Products Ltd. | |
| Millar Western Forest Products Ltd. | |
| Mirax Lumber Products Ltd. | |
| Mobilier Rustique (Beauce) Inc.; J.F.S.R. Inc.; Gestion C.A. Rancourt Inc.; Gestion J.F. Rancourt Inc.; Gestion Suzie Rancourt Inc.; Gestion P.H.Q. Inc.; 9331–3419 Quebec Inc.; 9331–3468 Quebec Inc.; SPQ Inc. | |
| Modern Terminal Ltd. | |
| Monterra Lumber Mills Limited | |
| Morwood Forest Products Inc. | |
| Multicedre ltee | |
| Murray Brothers Lumber Company Ltd | |
| Nagaard Sawmill Ltd. | |
| Nakina Lumber Inc. | |
| National Forest Products Ltd. | |
| Nicholson and Cates Ltd. | |
| NorSask Forest Products Inc. | |
| NorSask Forest Products Limited Partnership; | |
| North American Forest Products Ltd. (located in Abbotsford, British Columbia) | |
| North American Forest Products Ltd. (located in Saint-Quentin, New Brunswick); Parent-Violette Gestion Ltee; Le Groupe Parent Ltee | |
| North Enderby Timber Ltd. | |
| Northland Forest Products Ltd. | |
| NSC Lumber Ltd. | |
| Oakwood Manufacturing, A Division of Weston Forest Products Inc. | |
| Olympic Industries, Inc.; Olympic Industries Inc-Reman Code; Olympic Industries ULC; Olympic Industries ULC-Reman; Olympic Industries ULC-Reman Code | |
| Oregon Canadian Forest Products Inc., dba Oregon Canadian Forest Products | |
| Pacific Coast Cedar Products Ltd. | |
| Pacific Lumber Remanufacturing Inc. | |
| Pacific NorthWest Lumber Ltd. | |
| Pacific Pallet, Ltd. | |
| Pacific Western Wood Works Ltd. | |
| PalletSource Inc. | |
| Parallel Wood Products Ltd. | |
| Partap Forest Products Ltd. | |
| Partap Industries | |
| Pat Power Forest Products Corporation | |
| Peak Industries (Cranbrook) Ltd. | |
| Phoenix Forest Products Inc. | |
| Pine Ideas Ltd. | |
| Pioneer Pallet & Lumber Ltd. | |
| Porcupine Wood Products Ltd. | |
| Portbec Forest Products Ltd (a.k.a. Les Produits Forestiers Portbec Ltee) | |
| Power Wood Corp. | |
| Precision Cedar Products Corp. | |
| Prendiville Industries Ltd. (a.k.a. Kenora Forest Products) | |
| Produits Forestiers Petit Paris Inc. | |
| Produits forestiers Temrex, s.e.c. (a.k.a. Temrex Forest Products LP) | |
| Produits Matra Inc.; Sechoirs de Beauce Inc.; Bois Ouvre de Beauceville (1992), Inc. | |
| Promobois G.D.S. Inc. | |
| R.A. Green Lumber Ltd. | |
| Rayonier A.M. Canada GP | |
| Rembos Inc. | |
| Rene Bernard inc. | |
| Resolute FP Canada Inc.; 9192–8515 Quebec Inc.; Abitibi-Bowater Canada Inc.; Bowater Canadian Ltd.; Produits Forestiers Maurice S.E.C.; Resolute Forest Products Inc. | |
| Rick Dubois | |
| Rielly Industrial Lumber Inc. | |
| River City Remanufacturing Inc. | |
| Roland Boulanger & Cie Ltee; Industries Daveluyville Inc.; Les Manufacturiers Warwick Ltee | |
| S&R Sawmills Ltd. | |
| S&W Forest Products Ltd. | |
| San Group | |
| San Industries Ltd. | |
| Sapphire Lumber Company | |
| Sawarne Lumber Co. Ltd. | |
| Scierie Alexandre Lemay & Fils Inc.; Bois Lemay Inc.; Industrie Lemay Inc. | |
| Scierie St-Michel Inc. | |
| Scierie West Brome Inc. | |

| | Period to be reviewed |
|---|---|
| Scott Lumber Sales Ltd. | |
| Shakertown Corp. | |
| Sigurdson Forest Products Ltd. | |
| Silvaris Corporation | |
| Sinclar Group Forest Products Ltd. | |
| Skana Forest Products Ltd. | |
| Skeena Sawmills Ltd. | |
| Smart Wood Forest Products Ltd. | |
| Smartlam LLC | |
| Sonora Logging Ltd. | |
| Source Forest Products | |
| South Beach Trading Inc. | |
| South Coast Reman Ltd. | |
| South Fraser Container Terminals | |
| Southcoast Millwork Ltd. | |
| Specialiste du Bardeau de Cedre Inc. (a.k.a. SBC) | |
| Spruceland Millworks Inc. | |
| Star Lumber Canada Ltd. | |
| Suncoast Industries Inc. | |
| Suncoh Custom Lumber Ltd. | |
| Sundher Timber Products Inc. | |
| Surplus G Rioux | |
| Surrey Cedar Ltd. | |
| Swiftwood Forest Products Ltd. | |
| T&P Trucking Ltd. | |
| Taan Forest Limited Partnership (a.k.a. Taan Forest Products) | |
| Taiga Building Products Ltd. | |
| Tall Tree Lumber Company | |
| Tenryu Canada Corporation | |
| Terminal Forest Products Ltd. | |
| TG Wood Products | |
| The Wood Source Inc. | |
| Tolko Industries Ltd.; Tolko Marketing and Sales Ltd.; Meadow Lake OSB Limited Partnership | |
| Top Quality Lumber Ltd. | |
| Trans-Pacific Trading Ltd. | |
| Triad Forest Products Ltd. | |
| Twin Rivers Paper Co. Inc. | |
| Tyee Timber Products Ltd. | |
| Universal Lumber Sales Ltd. | |
| Usine Sartigan Inc. | |
| Vaagen Fibre Canada, ULC | |
| Valley Cedar 2 Inc. | |
| Vancouver Specialty Cedar Products Ltd. | |
| Vanderhoof Specialty Wood Products Ltd. | |
| Vanderwell Contractors (1971) Ltd. | |
| Visscher Lumber Inc. | |
| W.I. Woodtone Industries Inc. | |
| Waldun Forest Product Sales Ltd. | |
| Watkins Sawmills Ltd. | |
| West Bay Forest Products Ltd. | |
| West Coast Panel Cutters | |
| West Fraser Mills Ltd.; Blue Ridge Lumber Inc.; Manning Forest Products, Ltd.; Sundre Forest Products Inc.; Sunpine Inc.; West Fraser Alberta Holdings, Ltd.; West Fraser Timber Co. Ltd. | |
| Western Forest Products Inc. | |
| Western Lumber Sales Limited | |
| Western Timber Products, Inc. | |
| Westminster Industries Ltd. | |
| Weston Forest Products Inc. | |
| Westrend Exteriors Inc. | |
| Weyerhaeuser Co. | |
| White River Forest Products L.P. | |
| Winton Homes Ltd. | |
| Woodline Forest Products Ltd. | |
| Woodstock Forest Products | |
| Woodtone Specialties Inc. | |
| WWW Timber Products Ltd. | |
| GERMANY: Forged Steel Fluid End Blocks, C–428–848 | 1/1/22–12/31/22 |
| BGH Edelstahl Siegen GmbH | |
| Buderus Edelstahl GmbH | |
| Deutsche Edelstahlwerke GmbH | |
| Saarschmiede GmbH Freiformschmiede | |
| Schmiedewerke Gröditz GmbH | |
| voestalpine Böhler Group | |

| | Period to be reviewed |
|---|---|
| INDIA: Polyester Textured Yarn, C–533–886 | 1/1/22–12/31/22 |
| Reliance Industries Limited | |
| INDIA: Forged Steel Fluid End Blocks, C–533–894 | 1/1/22–12/31/22 |
| Bharat Forge Ltd.; Saarloha Advanced Materials Private Limited [7] | |
| Bharat Forge Limited, India | |
| Echjay Industries Pvt. Ltd. | |
| Jaypee Forge Pvt. Ltd. | |
| MM Forgings Ltd. (a.k.a., M M Forgings Ltd.) | |
| Mars Forge Pvt. Ltd. | |
| Pradeep Metals Ltd. | |
| Ramkrishna Forgings Ltd. | |
| Rolex Rings Ltd. | |
| Sunrise Exports International | |
| Western Heat and Forge Pvt. Ltd. | |
| Western India Forgings Pvt. Ltd. | |
| ITALY: Forged Steel Fluid End Blocks, C–475–841 | 1/1/22–12/31/22 |
| Acciaierie Bertoli Safau S.p.A. | |
| ASFO S.p.A. | |
| Cogne Acciai Speciali S.p.A. | |
| Ellena S.p.A. | |
| Fomas S.p.A. | |
| Forge Monchieri S.p.A. | |
| Forgiatura Morandini S.r.l. | |
| Forgital Italy S.p.A. | |
| Galperti Group | |
| Industria Meccanica e Stampaggio S.p.A. a.k.a. I.M.E.S. S.p.A. | |
| IMER International S.p.A. | |
| Lucchini Mame Forge S.p.A; Lucchini RS S.p.A.; Lucchini Industries S.r.l.; Bicomet S.p.A., Setrans S.r.l.[8] | |
| Metalcam S.p.A., Adamello Meccanica S.r.l., and B.S. S.r.l.[9] | |
| Mimest S.p.A. | |
| Ofar S.p.A. | |
| Officine Galperti S.p.A. | |
| Officine Meccaniche Roselli S.r.l. | |
| P. Technologies S.r.l. | |
| Poclain Hydraulics Indistriale S.r.l. | |
| Poppi Ugo Euroforge S.p.A. | |
| Riganti S.p.A. | |
| Ringmill S.p.A. | |
| Siderforgerossi Group S.p.A. | |
| THE PEOPLE'S REPUBLIC OF CHINA: Carbon and Certain Alloy Steel Wire Rod, C–570–013 | 1/1/22–12/31/22 |
| Anshan Iron & Steel Group Corp. | |
| Anyang Iron & Steel Group Co., Ltd | |
| Baoshan Iron & Steel Co., Ltd | |
| Baotou Iron and Steel (Group) Co., Ltd | |
| Beijing Jianlong Heavy Industry Group Co., Ltd. | |
| Beijing Ju Xiang Ze Trading Co. Ltd. | |
| Beitai Iron & Steel (Group) Co., Ltd.; Benxi Beifang Gaosu Steel Wire Rod Co., Ltd.; Benxi Beifang Second Rolling Co., Ltd.; Benxi Beitai Gaosu Steel Wire Rod Co., Ltd.; Benxi Beiying Iron & Steel (Group) Co., Ltd.; Benxi Northern Steel Co., Ltd.; Benxi Northern Steel Rolling Co., Ltd.; Benxi Steel Group Corporation; Benxi Beiying Iron & Steel Imp & Exp Corp. | |
| Bekaert Binjiang Steel Cord Co., Ltd. | |
| Chongqing Iron and Steel (Group) Co., Ltd. | |
| Dezhou Hualude Hardware Products Co., Ltd. | |
| Dingzhou Xingkai Metal Products | |
| Fugang Group | |
| Goldenluck Imp. & Exp. (Ningbo Hai Shu) Co., Ltd. | |
| Guangxi Liuzhou Iron and Steel (Group) Company | |
| Handan Iron & Steel Group Co., Ltd. | |
| Hangzhou Iron & Steel Group Company | |
| Hebei Best Hardware And Mesh Co. | |
| Hebei Iron & Steel Group Co., Ltd. | |
| Hebei Leeter Imp. & Exp. Co., Ltd. | |
| Hebei Xinjin Iron and Steel Co., Ltd | |
| Henan Jiyuan Iron & Steel Group Co., Ltd | |
| Hongxin Tianjin Iron & Steel Group Co., Ltd | |
| Hunan Valin Xiangtan Iron & Steel Co., Ltd (XISC) | |
| Jiangsu Shagang Group Co., Ltd | |
| Jiangsu Weixi Group Company | |
| Jiangsu Yonggang Iron & Steel Group Co., Ltd | |
| Jiangxi Pingxiang Iron and Steel (PXSteel) Industrial Co. Ltd. | |
| Jiangyin HiTech Industrial Co., Ltd. | |
| Jiangyin Xing Cheng Special Steel Works Co., Ltd. | |
| Jiangyou Longhai Special Steel Co., Ltd. | |

| | Period to be reviewed |
|---|---|
| Jinxi Group | |
| Jiuquan Iron & Steel (Group) Co., Ltd (JISCO) | |
| Laiwu Iron and Steel Group. Co., Ltd. | |
| Leader Innovations Ltd. | |
| Ling Yuan Iron and Steel Group Co., Ltd. | |
| M And M Industries Co., Ltd. | |
| Maanshan Iron & Steel Co., Ltd | |
| Nanjing Iron and Steel United Co., Ltd. | |
| Nantong Dingxin Metal Products Co. | |
| Ningbo Sunburst International Trading Co., Ltd. | |
| Qingdao Haineng Hardware Products Co. | |
| Qingdao Iron & Steel Group Co. | |
| Renogy Suzhou Co., Ltd. | |
| Rizhao Steel Group | |
| Shaanxi Longmen Iron & Steel (Group) Co., Ltd | |
| Shandong Iron and Steel Group Co., Ltd. | |
| Shanghai (Shanghi) Jisco International Trade | |
| Shanxi Jincheng Steel Holding (Group) Co., Ltd. | |
| Shanxi Zhongyang Iron and Steel Co., Ltd. | |
| Shougang Changzhi Steel Co. Ltd. | |
| Shougang Group | |
| Sisor Commodity Co., Ltd. | |
| Tangshan Guofeng Iron &Steel Co. Ltd. | |
| Tangshan Iron and Steel Group Company Limited (Hesteel Group) | |
| Tempo International Industry Co., Ltd. | |
| Tewoo Jiujiang International Trade | |
| Tianjin Rockcheck Steel Group Co., Ltd. | |
| Tianjin Tiantie Metallurgical Group | |
| Tianjin Tiantie Zhaer Steel Production Co., Ltd | |
| Tianjin Wenyunxing Steel Trading Co. | |
| Tonghua Steel Group | |
| Weifang Special Steel Group Co., Ltd | |
| Wu'an Yuhua Steel Co., Ltd. | |
| Wuhan Iron & Steel Co., Ltd. | |
| Xilin Iron & Steel Group | |
| Xingtai Iron & Steel Co., Ltd | |
| Xinyu Iron & Steel Co., Ltd | |
| Xuanhua Iron & Steel Group Corp. Ltd | |
| Zhejiang Materials Industry International Co., Ltd. | |
| THE PEOPLE'S REPUBLIC OF CHINA: Certain Hardwood Plywood Products, C–570–052 | 1/1/22–12/31/22 |
| An An Plywood Joint Stock Company | |
| Arrow Forest International Co., Ltd. | |
| BAC Son Woods Processing Joint Stock Company | |
| Cam Lam Vietnam Joint Stock Company | |
| Camlam Vietnam Joint Stock Company | |
| Cong Ty TNHH Greatriver Wood | |
| Eagle Industries Company Limited | |
| Fulin Wood Import Export Company Limited | |
| Golden Bridge Industries Pte. Ltd. | |
| Govina Investment Joint Stock Company | |
| Greatriver Wood Co., Ltd. | |
| Greatwood Hung Yen Joint Stock Company | |
| Greatwood Joint Stock Company | |
| Greentech Investment Co., Ltd. | |
| Groll Ply and Cabinetry | |
| Groll Ply and Cabinetry Co., Ltd. | |
| Hai Hien Bamboo Wood Joint Stock Company | |
| Her Hui Wood (Vietnam) Co., Ltd | |
| Hoang LAM Plywood Joint Stock Co. | |
| Huong Son Wood Group Co., Ltd. | |
| Innovgreen Thanh Hoa Co., Ltd. | |
| Lechenwood Viet Nam Company Limited | |
| Lechenwood Vietnam Company Limited | |
| Long Dat Import and Export Production Company | |
| Long LUU Plywood Production Co., Ltd. | |
| Long Phat Construction Investment and Trade Joint Stock Company | |
| Plywood Sunshine Co., Ltd. | |
| Plywood Sunshine Ltd. Co. | |
| Quang Phat Wood Joint Stock Company | |
| Quang Phat Woods JSC | |
| Quoc Thai Forestry Import Export Limited Company | |
| Star Light Multimedia Co., Ltd. | |
| TEKCOM Corporation | |

| | Period to be reviewed |
|---|---|
| Thang Long Wood Panel Company | |
| TL Trung Viet Company Limited | |
| VietBac Plywood LLC | |
| VietNam ZhongJia Wood Company Limited | |
| Win Faith Trading | |
| Win Faith Trading Limited | |
| THE PEOPLE'S REPUBLIC OF CHINA: Refillable Stainless Steel Kegs, C–570–094 | 1/1/21–12/31/21 |
| Ningbo Master International Trade Co., Ltd.[10] | |
| TURKEY: Steel Concrete Reinforcing Bar,[11] C–489–819 | 1/1/21–12/31/21 |
| Ans Kargo Lojistik Tas ve Tic | |
| Baykan Dis Ticaret | |
| Colakoglu Dis Ticaret A.S. | |
| Colakoglu Metalurji A.S. | |
| Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. | |
| Mardas Marmara Deniz Isletmeciligi A.S. | |
| Artmak Denizcilik Ticaret ve Sanayi A.S. | |
| Oraysan Insaat Sanayi ve Ticaret A.S. | |
| Artim Demir Insaat Turizm Sanayi Ticaret Ltd. Sti. | |
| Anka Entansif Hayvancilik Gida Tarim Sanayi ve Ticaret A.S. | |
| Eras Tasimacilik Taahhut Insaat ve Ticaret A.S. | |
| Karsan Gemi Insaa Sanayi Ticaret A.S. | |
| Kaptan Metal Dis Ticaret ve Nakliyat A.S. | |
| Kaptan Demir Celik Endustrisi Ve Ticaret A.S. | |
| Kaptan Is Makinalari Hurda Alim Satim Ltd. Sti | |
| Efesan Demir San. Ve Tic. A.S. | |
| Martas Marmara Ereglisi Liman Tesisleri A.S. | |
| Aset Madencilik A.S. | |
| Nur Gemicilik ve Tic. A.S. | |
| Kibar dis Ticaret A.S | |
| Meral Makina Iml Ith Ihr Gida | |
| Sami Soybas Demir Sanayi ve Ticaret | |
| Yucel Boru Ihracat Ithalat ve Pazarlama | |
| **Suspension Agreements** | |
| None. | |

## Duty Absorption Reviews

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an AD order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), Commerce, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether AD duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

## Gap Period Liquidation

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise

[5] In the initiation notice that published on January 3, 2023 (88 FR 50), Commerce inadvertently listed Matra Americas LLC, a U.S. importer of subject merchandise, as a company under administrative review. Commerce hereby clarifies that Matra Americas LLC is not subject to the review.

[6] In the initiation notice that published on February 2, 2023 (88 FR 7060), Commerce inadvertently listed Changzhou Trina PV Ribbon Materials Co., Ltd. as a company under administrative review. Commerce hereby clarifies that Changzhou Trina PV Ribbon Materials Co., Ltd. is not subject to the review.

[7] Commerce previously found Bharat Forge Ltd. and Saarloha Advanced Materials Private Limited to be cross-owned. *See Forged Steel Fluid End Blocks from India: Preliminary Affirmative Countervailing Duty Determination, and Alignment of the Final Determination with the Final Antidumping Duty Determination,* 85 FR 31452 (May 26, 2020), and accompanying Preliminary Decision Memorandum at 7–8, unchanged in *Forged Steel Fluid End Blocks from India: Final Affirmative Countervailing Duty Determination,* 85 FR 79999 (December 11, 2020); *see also Forged Steel Fluid End Blocks from the People's Republic of China, the Federal Republic of Germany, India, and Italy: Correction to Countervailing Duty Orders,* 86 FR 10244 (February 19, 2021).

[8] Commerce previously found Lucchini Mame Forge S.p.A, Lucchini RS S.p.A., Lucchini Industries S.r.l., Bicomet S.p.A., and Setrans S.r.l to be cross-owned. *See Forged Steel Fluid End Blocks From Italy: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination,* 85 FR 31460 (May 26, 2020), and accompanying Preliminary Decision Memorandum at 18–19, unchanged in *Forged Steel Fluid End Blocks from Italy: Final Affirmative Countervailing Duty Determination,* 85 FR 80022 (December 11, 2020); *see also Forged Steel Fluid End Blocks From the People's Republic of China, the Federal Republic of Germany, India, and Italy: Correction to Countervailing Duty Orders,* 86 FR 10244 (February 19, 2021).

[9] Commerce previously found Metalcam S.p.A., Adamello Meccanica S.r.l., and B.S. S.r.l to be cross-owned. *See Forged Steel Fluid End Blocks From Italy: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination,* 85 FR 31460 (May 26, 2020), and accompanying Preliminary Decision Memorandum at 18–19, unchanged in *Forged Steel Fluid End Blocks from Italy: Final Affirmative Countervailing Duty Determination,* 85 FR 80022 (December 11, 2020); *see also Forged Steel Fluid End Blocks From the People's Republic of China, the Federal Republic of Germany, India, and Italy: Correction to Countervailing Duty Orders,* 86 FR 10244 (February 19, 2021).

[10] This company was inadvertently omitted from the initiation notice that published on February 2, 2023 (88 FR 7060). Commerce hereby clarifies that it received a request to conduct an administrative review of this company, and, in accordance with Commerce's regulations, has initiated this administrative review.

[11] In the initiation notice that published on January 3, 2023 (88 FR 50), Commerce inadvertently did not identify all the companies in cross-owned entities for which an administrative review was requested. Also, certain companies were inadvertently wrongly identified as belonging to a single cross-owned entity. The companies identified herein represent the complete list of companies under review.

entered, or withdrawn from warehouse, for consumption during the relevant ''gap'' period of the order (*i.e.,* the period following the expiry of provisional measures and before definitive measures were put into place), if such a gap period is applicable to the POR.

**Administrative Protective Orders and Letters of Appearance**

Interested parties must submit applications for disclosure under administrative protective orders in accordance with the procedures outlined in Commerce's regulations at 19 CFR 351.305. Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

**Factual Information Requirements**

Commerce's regulations identify five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). These regulations require any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The regulations, at 19 CFR 351.301, also provide specific time limits for such factual submissions based on the type of factual information being submitted. Please review the *Final Rule,*[12] available at *www.govinfo.gov/content/pkg/FR-2013-07-17/pdf/2013-17045.pdf,* prior to submitting factual information in this segment. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[13]

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information using the formats provided at the end of the *Final Rule.*[14] Commerce intends to reject factual submissions in any proceeding segments if the submitting party does not comply with applicable certification requirements.

**Extension of Time Limits Regulation**

Parties may request an extension of time limits before a time limit established under Part 351 expires, or as otherwise specified by Commerce.[15] In general, an extension request will be considered untimely if it is filed after the time limit established under Part 351 expires. For submissions which are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. on the due date. Examples include, but are not limited to: (1) case and rebuttal briefs, filed pursuant to 19 CFR 351.309; (2) factual information to value factors under 19 CFR 351.408(c), or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2), filed pursuant to 19 CFR 351.301(c)(3) and rebuttal, clarification and correction filed pursuant to 19 CFR 351.301(c)(3)(iv); (3) comments concerning the selection of a surrogate country and surrogate values and rebuttal; (4) comments concerning CBP data; and (5) Q&V questionnaires. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. This policy also requires that an extension request must be made in a separate, stand-alone submission, and clarifies the circumstances under which Commerce will grant untimely-filed requests for the extension of time limits. Please review the *Final Rule,* available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm,* prior to submitting factual information in these segments.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: March 9, 2023.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2023–05199 Filed 3–13–23; 8:45 am]

**BILLING CODE 3510–DS–P**

[12] *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* the frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

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

[14] *See* section 782(b) of the Act; *see also Final Rule;* and the frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[15] *See* 19 CFR 351.302.

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–557–816]**

### Certain Steel Nails From Malaysia: 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 certain steel nails (nails) from Malaysia for the period July 1, 2020, through June 30, 2021, to correct certain ministerial errors.

**DATES:** Applicable March 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** John Drury or Emily Bradshaw, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0195 or (202) 482–3896.

**SUPPLEMENTARY INFORMATION:**

**Background**

On February 8, 2023, Commerce published the final results of the 2020–2021 administrative review of nails from Malaysia.[1] On February 8, 2023, Commerce received a timely filed allegation from Mid Continent Steel & Wire, Inc. (the petitioner) with regard to the calculation of the final dumping margin for respondent Region International Co., Ltd. and Region System Sdn. Bhd (collectively, Region).[2] Also on February 8, 2023, Commerce

[1] *See Certain Steel Nails from Malaysia: Final Results of Antidumping Duty Administrative Review; 2020–2021,* 88 FR 8257 (February 8, 2023) (*Final Results*) and accompanying Issues and Decision Memorandum (IDM).

[2] *See* Petitioner's Letter, ''Ministerial Error Comments,'' dated February 8, 2023 (Petitioner Ministerial Allegation Letter).

received a timely filed allegation from Inmax Sdn. Bhd. and Inmax Industries Sdn. Bhd (collectively, Inmax) that Commerce made ministerial errors in the *Final Results* with regard to its calculation of the final dumping margin for Inmax.[3] Based on our analysis of these allegations, we determine that we made ministerial errors, and we have made changes to the calculation of the weighted-average dumping margin for Region, Inmax, and for the non-selected respondents.[4]

**Scope of the Order**

The merchandise covered by the order is certain steel nails having a nominal shaft length not exceeding 12 inches.[5] Certain steel nails include, but are not limited to, nails made from round wire and nails that are cut from flat-rolled steel. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and may have any type of surface finish, head type, shank, point type and shaft diameter. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, including but not limited to electroplating or hot dipping one or more times), phosphate, cement, and paint. Certain steel nails may have one or more surface finishes. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the nail using a tool that engages with the head. Point styles include, but are not limited to, diamond, needle, chisel and blunt or no point. Certain steel nails may be sold in bulk, or they may be collated in any manner using any material.

Excluded from the scope of this order are certain steel nails packaged in combination with one or more non-subject articles, if the total number of nails of all types, in aggregate regardless of size, is less than 25. If packaged in combination with one or more non-subject articles, certain steel nails remain subject merchandise if the total number of nails of all types, in aggregate regardless of size, is equal to or greater than 25, unless otherwise excluded based on the other exclusions below.

Also excluded from the scope are certain steel nails with a nominal shaft length of one inch or less that are (a) a component of an unassembled article, (b) the total number of nails is sixty (60) or less, and (c) the imported unassembled article falls into one of the following eight groupings: (1) builders' joinery and carpentry of wood that are classifiable as windows, French-windows and their frames; (2) builders' joinery and carpentry of wood that are classifiable as doors and their frames and thresholds; (3) swivel seats with variable height adjustment; (4) seats that are convertible into beds (with the exception of those classifiable as garden seats or camping equipment); (5) seats of cane, osier, bamboo or similar materials; (6) other seats with wooden frames (with the exception of seats of a kind used for aircraft or motor vehicles); (7) furniture (other than seats) of wood (with the exception of (i) medical, surgical, dental or veterinary furniture; and (ii) barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements); or (8) furniture (other than seats) of materials other than wood, metal, or plastics (*e.g.,* furniture of cane, osier, bamboo or similar materials). The aforementioned imported unassembled articles are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4418.10, 4418.20, 9401.30, 9401.40, 9401.51, 9401.59, 9401.61, 9401.69, 9403.30, 9403.40, 9403.50, 9403.60, 9403.81 or 9403.89.

Also excluded from the scope of this order are steel nails that meet the specifications of Type I, Style 20 nails as identified in Tables 29 through 33 of ASTM Standard F1667 (2013 revision).

Also excluded from the scope of this order are nails suitable for use in powder-actuated hand tools, whether or not threaded, which are currently classified under HTSUS subheadings 7317.00.20.00 and 7317.00.30.00.

Also excluded from the scope of this order are nails having a case hardness greater than or equal to 50 on the Rockwell Hardness C scale (HRC), a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.

Also excluded from the scope of this order are corrugated nails. A corrugated nail is made up of a small strip of corrugated steel with sharp points on one side.

Also excluded from the scope of this order are thumb tacks, which are currently classified under HTSUS subheading 7317.00.10.00.

Certain steel nails subject to this order are currently classified under HTSUS subheadings 7317.00.55.02, 7317.00.55.03, 7317.00.55.05, 7317.00.55.07, 7317.00.55.08, 7317.00.55.11, 7317.00.55.18, 7317.00.55.19, 7317.00.55.20, 7317.00.55.30, 7317.00.55.40, 7317.00.55.50, 7317.00.55.60, 7317.00.55.70, 7317.00.55.80, 7317.00.55.90, 7317.00.65.30, 7317.00.65.60 and 7317.00.75.00. Certain steel nails subject to this order also may be classified under HTSUS subheadings 7907.00.60.00, 7806.00.80.00, 7318.29.00.00, 8206.00.00.00 or other HTSUS subheadings.

While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

**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.''

The petitioner argues that Commerce mistakenly excluded certain cost records when implementing the use of quarterly costs.[6] Specifically, the petitioner states that Commerce inadvertently excluded cost records for one quarter when calculating average costs for the purpose of examining cost recovery.[7] We have examined the programming language contained in the ''ME Macros'' SAS program, and we agree with the petitioner.[8]

Inmax argues that Commerce mistakenly used the incorrect variables for total cost of manufacturing, general and administrative expenses, and interest expenses. We agree with Inmax, and therefore, we have corrected the error.[9]

[3] *See* Inmax's Letter, ''Ministerial Error Comments,'' dated February 8, 2023 (Inmax Ministerial Allegation Letter).

[4] *See* Memorandum ''Ministerial Error Memorandum for the Amended Final. Results of the 2020–2021 Administrative Review of the Antidumping Duty Order on Certain Steel Nails from Malaysia,'' dated concurrently with this notice (Ministerial Error Memorandum).

[5] The shaft length of certain steel nails with flat heads or parallel shoulders under the head shall be measured from under the head or shoulder to the tip of the point. The shaft length of all other certain steel nails shall be measured overall.

[6] *See* Petitioner Ministerial Allegation Letter.

[7] *Id.*

[8] *See* Ministerial Error Allegation Memorandum at 2–3.

[9] *Id.*

Furthermore, consistent with Commerce's practice,[10] the rate for the respondents not selected for individual examination will be the weighted-average dumping margin for Region, as the margin calculated for Region is the only rate calculated that is not zero, *de minimis,* or determined entirely on the basis of facts available.

## Amended Final Results of Review

Commerce determines that the following amended weighted-average dumping margins exist for the period July 1, 2010, through June 30, 2021:

| Producer/exporter | Estimated weighted-average dumping margin (percent) |
|---|---|
| Region International Co., Ltd./Region System Sdn. Bhd | 1.66 |
| Inmax Sdn. Bhd./Inmax Industries Sdn. Bhd | 0.00 |
| Non-Selected Respondents [11] | 1.66 |

## Disclosure

We will disclose the calculation memoranda 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

Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries.[12] For any individually examined respondents whose weighted-average dumping margin is above *de minimis,* we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales, in accordance with 19 CFR 351.212(b)(1). Upon issuance of the amended final results of this administrative review, if any importer-specific assessment rates calculated in the amended final results are above *de minimis* (*i.e.,* at or above 0.5 percent), Commerce will issue instructions directly to CBP to assess antidumping duties on appropriate entries.

To determine whether the duty assessment rates covering the period were *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific *ad valorem* rates by aggregating the amount of dumping calculated for all U.S. sales to that importer or customer and dividing this amount by the total entered value of the sales to that importer (or customer). Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis,* and the respondent has reported reliable entered values, we will apply the assessment rate to the entered value of the importer's/customer's entries during the POR. For the companies identified above that were not selected for individual examination, we will instruct CBP to liquidate entries at the rates established in these amended final results of review.

For entries of subject merchandise during the POR produced by any of these companies for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate such entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[13]

Consistent with its recent notice,[14] 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).

## Notification to Importers Regarding the Reimbursement of Duties

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.

## Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(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(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(h) and 19 CFR 351.221(b)(5).

Dated: March 8, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I—List of Non-Selected Respondents

Airlift Trans Oceanic Pvt. Ltd.
Alsons Manufacturing India, LLP.
Atlantic Marine Group Ltd.
Bluemoon Logistics Pvt. Ltd.
C.H. Robinson Worldwide Freight India Pvt., Ltd.
Chia Pao Metal Co., Ltd.
Chuan Heng Hardware Paints and Building Materials Sdn. Bhd.
Come Best (Thailand) Co., Ltd.
Dahnay Logistics Pvt., Ltd.
Gbo Fastening Systems AB.
Honour Lane Logistics Sdn., Bhd.
Honour Lane Shipping Ltd.
Impress Steel Wire Industries Sdn., Bhd.
Kerry-Apex (Thailand) Co., Ltd.
Kerry Indev Logistics Pvt., Ltd.
Kerry Logistics (M) Sdn., Bhd.
Kimmu Trading Sdn., Bhd.
Modern Factory for Steel Industries Co., Ltd.
Oman Fasteners LLC.
Orient Containers Sdn., Bhd.
Orient Express Container Co., Ltd.
RM Wire Industries Sdn. Bhd.
Royal Logistics.
SAR Transport Systems Pvt., Ltd.
Soon Shing Building Materials Sdn., Bhd.
Storeit Services LLP.
Tag Fasteners Sdn., Bhd.
Tag Staples Sdn., Bhd.
Tampin Sin Yong Wai Industry Sdn., Bhd.
Teamglobal Logistics Pvt., Ltd.
Top Remac Industries.
UD Industries Sdn., Bhd.
Vien Group Sdn., Bhd.
Watasan Industries Sdn., Bhd.

[10] *See, e.g., Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Final Successor-in-Interest Determination; 2018–2019,* 86 FR 30915 (June 10, 2021) and accompanying IDM at Comment 4.

[11] *See* Appendix for the list of non-selected respondents.

[12] In these amended final results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[13] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[14] *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).

WWL India Private Ltd.

[FR Doc. 2023–05210 Filed 3–13–23; 8:45 am]

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## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–570–016]

## Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2020–2021

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

**SUMMARY:** The Department of Commerce (Commerce) determines that the exporters of passenger vehicle and light truck tires (passenger tires) from the People's Republic of China (China) listed in the ''Final Results of Review'' section below, sold subject merchandise at less than normal value during the period of review (POR), August 1, 2020, through July 31, 2021. Further, we also determine that certain companies under review had no shipments to the United States during the POR.

**DATES:** Applicable March 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** Toni Page or Peter Shaw, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1938 or (202) 482–0697, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

On September 8, 2022, we published the *Preliminary Results* and invited interested parties to comment.[1] We invited parties to comment on the *Preliminary Results.* For details regarding the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[2]

### Scope of the Order [3]

The products covered by this *Order* are certain passenger vehicle and light truck tires from China. For a full description of the scope of the *Order, see* the Issues and Decision Memorandum.

### Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by interested parties are addressed in the Issues and Decision Memorandum. A list of the issues discussed in the Issues and Decision Memorandum is attached to this notice as an appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

### Changes Since the Preliminary Results

Based on our analysis of the comments received from interested parties and for the reasons explained in the Issues and Decision Memorandum, we made certain changes in the calculation of Giti's and Sumitomo's [4] weighted-average dumping margins. These include changes to the valuation of certain inputs, correction of certain errors alleged by parties in their case and rebuttal briefs, changes related to minor corrections raised at on-site verification for Giti, and the use of a revised factors of production database for Sumitomo. For a discussion of these changes, *see* the Issues and Decision Memorandum.[5]

### Final Determination of No Shipments

In the *Preliminary Results,* we found that: (1) Hongtyre Group Co.; (2) Mayrun Tyre (Hong Kong) Limited; (3) Qingdao Nama Industrial Co., Ltd.; (4) Shandong Changfeng Tyres Co., Ltd.; (5) Shandong Duratti Rubber Corporation Co., Ltd.; (6) Shandong Linglong Tyre Co., Ltd.; (7) Shandong Yongsheng Rubber Group Co., Ltd.; (8) Tyrechamp Group Co., Limited (Tyrechamp); (9) Wendeng Sanfeng Tyre Co., Ltd.; and (10) Zhaoqing Junhong Co., Ltd. did not have shipments of subject merchandise during the POR.[6] No party commented on this preliminary finding for any company except Tyrechamp.

As noted above, we preliminarily found that Tyrechamp did not have any shipments of subject merchandise during the POR. Although the petitioner [7] argued in its case brief against our preliminary finding of no shipments for Tyrechamp, we received no information to contradict our preliminary determination, thus, we continue to find that Tyrechamp made no shipments of subject merchandise to the United States during the POR.[8] Therefore, for the final results of review, we continue to find that these companies did not have any shipments of subject merchandise during the POR.

### Separate Rates

We made no changes to our preliminary separate rate findings. Thus, we continue to find that that the evidence provided by the two mandatory respondents as well as respondents: (1) Anhui Jichi Tire Co., Ltd.; (2) Crown International Corporation; (3) Hankook Tire China Co., Ltd.; (4) Jiangsu Hankook Tire Co., Ltd.; (5) Koryo International Industrial Limited; (6) Nankang (Zhangjiagang Free Trade Zone) Rubber Industrial Co., Ltd.; (7) Qingdao Sentury Tire Co., Ltd; 14 (8) Qingdao Sunfulcess Tyre Co., Ltd.; (9) Qingdao Transamerica Tire Industrial Co., Ltd.; (10) Shandong Haohua Tire Co., Ltd.; (11) Shandong Hengyu Science & Technology Co., Ltd.; (12) Shandong New Continent Tire Co., Ltd.; (13) Shandong Province Sanli Tire Manufactured Co., Ltd.; (14) Shandong Wanda Boto Tyre Co., Ltd.; and (15) Triangle Tyre Co., Ltd. supported finding an absence of both *de jure* and *de facto* government control, and,

[1] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; Rescission, in Part; and Preliminary Determination of No Shipments; 2020–2021,* 87 FR 54970 (September 8, 2022) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China and Final Determination of No Shipments; 2020–2021,'' dated concurrently with, and hereby adopted by, this notice (IDM).

[3] *See Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 80 FR 47902 (August 10, 2015) (*Order*).

[4] Giti refers to a single entity, which includes Giti Tire Global Trading Pte. Ltd. (GTT); Giti Radial (Anhui) Tire Company Ltd., and Giti Tire Fujian Company Ltd., Giti Tire (Hualin) Company, Ltd., Giti Tire Greatwall Company. Ltd., Giti Tire (Anhui) Company, Giti Tire (Yinchuan) Company Ltd., and Giti Tire (Chongqing) Company Ltd. Sumitomo refers to a single entity, which includes Sumitomo Rubber (Hunan) Co., Ltd.; Sumitomo Rubber (Changshu) Co., Ltd.; and Sumitomo Rubber Industries Co., Ltd. (collectively, Sumitomo). *See Preliminary Results* PDM at 2.

[5] *See* IDM at ''Changes Since the Preliminary Results.''

[6] *See Preliminary Results,* 87 FR at 54970–71 and *Preliminary Results* PDM at ''Preliminary Determination of No Shipments.''

[7] The petitioner is the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC.

[8] *See* Issues and Decision Memorandum at Comment 18 for a more detailed discussion of this issue.

therefore, we continue to grant a separate rate to these companies.[9]

**Rate for Non-Selected Separate Rate Respondents**

The Tariff Act of 1930, as amended (the Act) and Commerce's regulations do not address what rate to apply to respondents not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for non-selected respondents that are not examined individually in an administrative review. Section 735(c)(5)(A) of the Act states that the all-others rate should be calculated by averaging the weighted-average dumping margins for individually examined respondents, excluding rates that are zero, *de minimis,* or based entirely on facts available. When the rates for individually examined companies are all zero, *de minimis,* or based entirely on facts available, section 735(c)(5)(B) of the Act provides that Commerce may use ''any reasonable method'' to establish the all-others rate.

We calculated a 5.39 percent dumping margin for mandatory respondent Giti and a 0.59 percent dumping margin for mandatory respondent Sumitomo. We assigned the separate rate respondents a dumping margin equal to the weight average of Giti's and Sumitomo's final dumping margins. We weight averaged Giti's and Sumitomo's final dumping margins using the public values of their reported sales of subject merchandise to the United States during the POR in accordance with section 735(c)(5)(A) of the Act.[10]

**Final Results of Review**

We are assigning the following dumping margins to the firms listed below for the period August 1, 2020, through July 31, 2021:

| Exporter | Weighted-average dumping margin (percent) |
|---|---|
| Giti Tire Global Trading Pte. Ltd.; Giti Radial Tire (Anhui) Company Ltd.; and Giti Tire (Fujian) Company Ltd.; Giti Tire (Hualin) Company Ltd.; Giti Tire Greatwall Company, Ltd.; Giti Tire (Anhui) Company, ltd.; Giti Tire (Yinchuan) Company, Ltd.; Giti Tire (Chongqing) Company, Ltd | 5.39 |
| Sumitomo Rubber Industries Ltd.; Sumitomo Rubber (Hunan) Co., Ltd.; and Sumitomo Rubber (Changshu) Co., Ltd | 0.59 |
| Anhui Jichi Tire Co., Ltd | 2.19 |
| Crown International Corporation | 2.19 |
| Hankook Tire China Co., Ltd | 2.19 |
| Jiangsu Hankook Tire Co., Ltd | 2.19 |
| Koryo International Industrial Limited | 2.19 |
| Nankang (Zhangjiagang Free Trade Zone) Rubber Industrial Co., Ltd | 2.19 |
| Qingdao Sentury Tire Co., Ltd | 2.19 |
| Qingdao Sunfulcess Tyre Co., Ltd | 2.19 |
| Qingdao Transamerica Tire Industrial Co., Ltd | 2.19 |
| Shandong Haohua Tire Co., Ltd | 2.19 |
| Shandong Hengyu Science & Technology Co., Ltd | 2.19 |
| Shandong New Continent Tire Co., Ltd | 2.19 |
| Shandong Province Sanli Tire Manufactured Co., Ltd | 2.19 |
| Triangle Tyre Co., Ltd | 2.19 |

**Disclosure**

Pursuant to 19 CFR 351.224(b), within five days of the publication of this **Federal Register** notice, we will disclose to the parties to this proceeding the calculations that we performed for these final results.

**Assessment Rates**

Pursuant to section 751(a)(2)(C) of the Act, and 19 CFR 351.212(b), Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

For Giti and Sumitomo, we will calculate importer-specific assessment rates on the basis of the ratio of the total amount of antidumping duties calculated for each importer's examined sales and the total entered value of the sales, in accordance with 19 CFR 351.212(b)(1). Where an importer-specific *ad valorem* assessment rate is not zero or *de minimis,* Commerce will instruct CBP to collect the appropriate duties at the time of liquidation. Where either the respondent's weighted average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.

For entries that were not reported in the U.S. sales database submitted by an exporter individually examined during this review, but that entered under the case number of that exporter (*i.e.,* at the individually-examined exporter's cash deposit rate), Commerce will instruct CBP to liquidate such entries at the China-wide rate (*i.e.,* 76.46 percent).[11]

For respondents not individually examined in this administrative review that qualified for a separate rate, the assessment rate will be the rate assigned to them for the final results (*i.e.,* 2.19 percent).

For the respondents not eligible for a separate rate and that are part of the China-wide entity, we intend to instruct CBP to apply an *ad valorem* assessment

[9] *See Preliminary Results,* 87 FR at 54970–71; *see also Preliminary Results* PDM at ''Discussion of the Methodology;'' and IDM at ''Separate Rates.''

[10] *See* Memorandum, ''Calculation of the Cash Deposit Rate for Non-Selected Companies,'' dated March 7, 2023.

[11] *See Order,* 80 FR at 47904, n.19 and 47906.

rate of 76.46 percent (*i.e.,* the China-wide entity rate) to all entries of subject merchandise during the POR that were exported by these companies.

Additionally, if Commerce determined that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under the exporter's case number will be liquidated at the China-wide rate.

### Cash Deposit Requirements

The following cash deposit requirements will be effective for shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date for the final results of review, as provided for by section 751(a)(2)(C) of the Act: (1) for the exporters listed in the table above, the cash deposit rate will be the rate established in the final results of review that is listed for the exporter in the table; (2) for previously investigated or reviewed China and non-China exporters not listed in the table above that have separate rates, the cash deposit rate will continue to be the existing exporter-specific rate published for the most recent period; (3) for all China exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate previously established for the China-wide entity, which is 76.46 percent; and (4) for all non-China exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the China exporter that supplied that non-China exporter. The cash deposit requirements, when imposed, shall remain in effect until further notice.

### Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping or countervailing duties occurred and the subsequent assessment of double antidumping duties.

### Administrative Protective Order

This notice also serves as a reminder to parties subject to APO of their responsibility concerning the return or destruction of proprietary information disclosed under administrative protective order (APO) in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

### Notification to Interested Parties

We are issuing these final results of administrative review and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(h) and 351.221(b)(5).

Dated: March 7, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

### Appendix—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Final Determination of No Shipments
V. Separate Rates
VI. Changes Since the Preliminary Results
VII. Discussion of the Issues
Comment 1: Whether Giti Failed to Report Certain U.S. Sales
Comment 2: Whether to Apply Adverse Facts Available (AFA) to Giti's Warranty Expenses
Comment 3: Whether to Apply AFA to Giti's Advertising Expenses
Comment 4: Whether to Account for Giti's Minor Corrections in its Final Calculations
Comment 5: Whether Commerce Should Adjust Giti's Reported Section 301 Duty Reporting for the Final Results
Comment 6: Whether Commerce Should Correct the Value of Giti's Factors Of Production Usage
Comment 7: Whether Commerce Should Add Giti's Billing Adjustment in its Countervailing Duty Offset and U.S. Net Price Calculations
Comment 8: Whether Commerce Should Correct the Surrogate Value Used for Rail Freight
Comment 9: Whether Commerce Should Apply AFA to Sumitomo
Comment 10: Whether to Apply the Cohen's *d* Test
Comment 11: Whether to Grant Sumitomo a By-Product Offset
Comment 12: Whether to Grant Sumitomo's Rebate Price Adjustment
Comment 13: Whether Commerce Should Use Sumitomo's Reported Weight-Based Calculations for Freight, Warehousing and Marine Insurance Expenses
Comment 14: Whether Commerce Should Make Changes to the Surrogate Values Used for Natural Rubber for the Final Results Margin Calculations
Comment 15: Whether Commerce Should Make Changes to the Surrogate Values Used for Ocean Freight for the Final Results Margin Calculations
Comment 16: Whether to Include Distance in the Surrogate Value for Ocean Freight
Comment 17: Whether Commerce Should Use 10-Digit Harmonized Schedule Numbers for Surrogate Values
Comment 18: Whether Tyrechamp Group Co., Limited Had Reviewable Entries During the POR
Comment 19: Whether Kumho Tire Co., Inc. is Entitled to a Separate Rate
VIII. Recommendation

[FR Doc. 2023–05148 Filed 3–13–23; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–201–836]**

## Light-Walled Rectangular Pipe and Tube From Mexico: 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) determines that sales of light-walled rectangular pipe and tube (LWRPT) from Mexico were made at less than normal value during the period of review (POR), August 1, 2020, through July 31, 2021.

**DATES:** Applicable March 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** John Conniff or Kyle Clahane, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1009 or (202) 482–5449, respectively.

**SUPPLEMENTARY INFORMATION:**

### Background

On September 8, 2022, Commerce published the *Preliminary Results* for this review in the **Federal Register** and invited interested parties to comment on those results.[1] From November 15 to December 29, 2022, interested parties submitted case and rebuttal briefs.[2] For

[1] *See Light-Walled Rectangular Pipe and Tube from Mexico: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review; 2020–2021,* 87 FR 54965 (September 8, 2022) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum.

[2] *See* Nucor Tubular Products Inc. (Nucor)'s Letter, ''Nucor Tubular Case Brief,'' dated November 15, 2022; *see also* Regiomontana de Perfiles y Tubos S. de R.L. de C.V. (Regiopytsa)'s Letter, ''Case Brief;'' dated November 15, 2022; Perfiles LM, S.A. de C.V.'s Letter, ''Case Brief of Perfiles LM;'' dated November 15, 2022; Regiopytsa's Letter, ''Rebuttal Brief,'' dated November 22, 2022; Nucor's Letter, ''Nucor's

Continued

a complete summary of events that have occurred since Commerce published the *Preliminary Results,* as well as a full discussion of the issues raised by parties for these final results, *see* the Issues and Decision Memorandum.[3] Commerce conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

**Scope of the Order** [4]

The products covered by the *Order* are LWRPT from Mexico. For a complete description of the scope, *see* the Issues and Decision Memorandum.

**Analysis of Comments Received**

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum.[5] A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum is attached in an Appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

**Changes Since the Preliminary Results**

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we made certain changes to the preliminary weighted-average dumping margins calculated for Maquilacero/TEFLU, and Regiopytsa. For a detailed discussion of these changes, *see* the Issues and Decision Memorandum.[6]

**Rates for Companies Not Selected for Individual Examination**

The statute and Commerce's regulations do not address the establishment of a rate to be applied to individual companies not selected for examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides for calculating the all-others rate in an investigation, for guidance when calculating the rate for companies which Commerce did not examine in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding rates that are zero, *de minimis* (*i.e.,* less than 0.5 percent), or determined entirely on the basis of facts available.

For these final results of review, we calculated a weighted-average dumping margin for both respondents, Maquilacero/TEFLU and Regiopytsa. Consistent with section 735(c)(5)(A) of the Act, we determined the weighted-average dumping margin for each of the non-selected companies based on the weighted-average dumping margins calculated for the mandatory respondents.[7]

**Final Results of Review**

Commerce determines that the following weighted-average dumping margins exist for the period August 1, 2020, through July 31, 2021:

| Producer or exporter | Weighted-average dumping margin (percent) |
|---|---|
| Maquilacero S.A. de C.V./Tecnicas de Fluidos S.A. de C.V | 9.20 |
| Regiomontana de Perfiles y Tubos S. de R.L. de C.V | 1.56 |
| Perfiles LM, S.A. de C.V | 5.38 |
| Productos Laminados de Monterrey S.A. de C.V | 5.38 |

**Disclosure**

Commerce intends to disclose the calculations performed for these final results to interested parties in this review under administrative protective order within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

**Assessment Rate**

Pursuant to section 751(a)(2)(A) of the Act, and 19 CFR 351.212(b)(1), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. In accordance with 19 CFR 351.212(b)(1), for Maquilacero/TEFLU and Regiopytsa, the mandatory respondents, Commerce calculated importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for each importer's examined sales to the total entered value of those same sales. Where either a respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific assessment rate is zero or *de minimis,* we 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 for which the examined companies did not know that the merchandise they sold to an intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate such entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

The assessment rate for antidumping duties for each of the companies not selected for individual examination will be equal to the weighted-average dumping margin identified above in the ''Final Results of Review'' section.

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results

Tubular's Rebuttal Brief Resubmission,'' dated December 29, 2022; and Maquilacero S.A. de C.V. and Tecnicas de Fluidos S.A. de C.V. (collectively, Maquilacero/TEFLU)'s Letter, ''Resubmission of Maquilacero S.A. de C.V.'s Case and Rebuttal Briefs;'' dated December 29, 2022.

[3] *See* Memorandum, ''Light-Walled Rectangular Pipe and Tube from Mexico: Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review; 2020–2021,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders; Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value,* 73 FR 45403 (August 5, 2008) (*Order*).

[5] *See* Issues and Decision Memorandum.

[6] *Id.*

[7] *See* Memorandum, ''Final Results of the Antidumping Duty Administrative Review of Light-Walled Rectangular Pipe and Tube from Mexico: Calculation of the Rate for Non-Selected Respondents,'' dated concurrently with this notice.

of this review and for future deposits of estimated duties, where applicable.[8]

Commerce intends to issue assessment instructions to CBP no earlier than 41 days after the date of publication of the final results of this review in the **Federal Register** in accordance with 19 CFR 356.8(a).

**Cash Deposit Requirements**

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rates for the companies identified above in the ''Final Results of Review'' will be equal to the company-specific weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by a company not covered in this administrative review but covered in a completed 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 or completed prior segment of this proceeding but the producer is, the cash deposit rate will be the company-specific 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 3.76 percent, the rate established in the investigation of this proceeding.[9]

These cash deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of double antidumping duties.

**Administrative Protective Order**

This notice also serves as a final reminder to parties subject to 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 or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the term of an APO is a sanctionable violation.

**Notification to Interested Parties**

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5) and 19 CFR 351.213(h)(1).

Dated: March 7, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

**Appendix—List of Topics Discussed in the Issues and Decision Memorandum**

I. Summary
II. Background
III. Scope of the Order
IV. Changes Since the Preliminary Results
V. Discussion of Issues
  Comment 1: Whether Maquilacero and TEFLU Should Continue to be Collapsed
  Comment 2: Whether Products Sold by TEFLU are In-Scope Merchandise
  Comment 3: Whether Commerce Should Use Unverified Maquilacero/TEFLU Information
  Comment 4: Whether Commerce Should Modify its Treatment of Certain TEFLU IMMEX Sales
  Comment 5: Whether Commerce Should Modify the Product Comparison Methodology SAS Programming
  Comment 6: Whether Commerce Must Adjust its Differential Pricing Analysis for Maquilacero/TEFLU
  Comment 7: Whether to Reallocate Costs for Prime and Non-Prime Products
  Comment 8: Whether Commerce Should Combine Maquilacero and TEFLU's Home Market Sales
  Comment 9: Whether to Implement Certain Corrections to TEFLU's IMMEX Sales
  Comment 10: Whether to Correct the Application of Maquilacero/TEFLU's Transactions Disregarded Adjustment
  Comment 11: Whether to Assign a Value for U.S. Sales Where No Importer is Reported
  Comment 12: Whether to Include Abinsa's Late Payment Charges Revenue
  Comment 13: Whether to Modify the Treatment of Certain Agent-Related Expenses
  Comment 14: Whether to Allow Maquilacero's Packing Adjustment
  Comment 15: Whether Commerce Should Use Regiopytsa's Quarterly Cost Periods
  Comment 16: Whether Commerce Should Use a Different General and Administrative Expense Ratio for Regiopytsa
  Comment 17: Whether Commerce Should Modify Regiopytsa's Net Financial Expense Ratio
  Comment 18: Whether Commerce Should Rely on a Different Methodology for Assigning a Weighted-Average Dumping Margin to Perfiles
VI. Recommendation

[FR Doc. 2023–05209 Filed 3–13–23; 8:45 am]

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[8] *See* section 751(a)(2)(C) of the Act.

[9] *See Order,* 73 FR at 45405.

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–056, A–552–821]**

### Certain Tool Chests and Cabinets From the People's Republic of China and the Socialist Republic of Vietnam: Final Results of the Expedited Sunset Reviews of the Antidumping Duty Orders

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

**SUMMARY:** As a result of these expedited sunset reviews, the U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) orders on certain tool chests and cabinets (tool chests and cabinets) from the People's Republic of China (China) and the Socialist Republic of Vietnam (Vietnam) would be likely to lead to continuation or recurrence of dumping at the level indicated in the ''Final Results of Sunset Reviews'' section of this notice.

**DATES:** Applicable March 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** Claudia Cott, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4270.

**SUPPLEMENTARY INFORMATION:**

**Background**

On June 4, 2018, Commerce published in the **Federal Register** the AD orders on tool chests from China and Vietnam.[1] On December 1, 2022, Commerce published the *Initiation Notice* of the five-year sunset reviews of the *Orders* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] In accordance with 19 CFR 351.218(d)(1)(i) and (ii), Commerce received notices of

[1] *See Certain Tool Chests and Cabinets from the People's Republic of China and the Socialist Republic of Vietnam: Antidumping Duty Orders,* 83 FR 25645 (June 4, 2018) (collectively, *Orders*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 87 FR 73757 (December 1, 2022) (*Initiation Notice*).

intent to participate in these sunset reviews from Stanley Black & Decker (the domestic interested party) within 15 days after the date of publication of the *Initiation Notice.*[3] The domestic interested party claimed interested party status under section 771(9)(C) of the Act as a producer of a domestic like product in the United States.[4]

Commerce received timely, adequate substantive responses to the *Initiation Notice* from the domestic interested party within the 30-day period specified in 19 CFR 351.218(d)(3)(i).[5] We did not receive substantive responses from any other interested parties.

On January 25, 2023, Commerce notified the U.S. International Trade Commission (ITC) that it did not receive an adequate substantive response from other interested parties.[6] As a result, in accordance with section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted expedited, *i.e.,* 120-day sunset reviews of the *Orders.*

## Scope of the Orders

The products covered by these *Orders* are certain metal tool chests and tool cabinets, with drawers, from China and Vietnam. The scope covers all metal tool chests and cabinets, including top chests, intermediate chests, tool cabinets and side cabinets, storage units, mobile work benches, and work stations and that have the following physical characteristics:

(1) A body made of carbon, alloy, or stainless steel and/or other metals;

(2) two or more drawers for storage in each individual unit;

(3) a width (side to side) exceeding 15 inches for side cabinets and exceeding 21 inches for all other individual units but not exceeding 60 inches;

(4) a body depth (front to back) exceeding 10 inches but not exceeding 24 inches; and

(5) prepackaged for retail sale.

For purposes of this scope, the width parameter applies to each individual unit, *i.e.,* each individual top chest, intermediate top chest, tool cabinet, side cabinet, storage unit, mobile work bench, and work station. Merchandise subject to these *Orders* is classified under HTSUS categories 9403.20.0021, 9403.20.0026, 9403.20.0030, 9403.20.0080, 9403.20.0090, and 7326.90.8688, but may also be classified under HTSUS category 7326.90.3500. While HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of these *Orders* is dispositive.

A full description of the scope of the *Orders* is contained in the Issues and Decision Memorandum.[7]

## Analysis of Comments Received

All issues raised in these sunset reviews are addressed in the Issues and Decision Memorandum, including the likelihood of continuation or recurrence of dumping and the magnitude of the margins of dumping likely to prevail if the *Orders* were revoked.[8] A list of topics discussed in the Issues and Decision Memorandum is included as the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

## Final Results of Sunset Reviews

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Orders* would be likely to lead to continuation or recurrence of dumping and that the magnitude of the margins of dumping likely to prevail would be at a rate up to 244.29 percent for China, and up to 327.17 percent for Vietnam.

## Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

## Notification to Interested Parties

Commerce is issuing and publishing these final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act, and 19 CFR 351.221(c)(5)(ii).

Dated: March 8, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Orders*
IV. History of the *Orders*
V. Legal Framework
VI. Discussion of the Issues
  1. Likelihood of Continuation or Recurrence of Dumping
  2. Magnitude of Margin of Dumping Likely to Prevail
VII. Final Results of Expedited Sunset Reviews
VIII. Recommendation

[FR Doc. 2023–05170 Filed 3–13–23; 8:45 am]

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[3] *See* Domestic Interested Party's Letters, ''Five Year (''Sunset'') Review of the Antidumping Duty Order on Tool Chests and Cabinets from China—Domestic Interested Party's Notice of Intent to Participate,'' dated December 15, 2022; *see also* ''Five Year (''Sunset'') Review of the Antidumping Duty Order on Tool Chests and Cabinets from Vietnam—Domestic Interested Party's Notice of Intent to Participate,'' dated December 15, 2022 (*Notices of Intent to Participate*). The petitioner in the underlying investigation, Waterloo Industries Inc. (Waterloo), was acquired by Stanley Black & Decker Corporation on July 28, 2017, and now operates under the Stanley Black & Decker name.

[4] *Id.*

[5] *See* Domestic Interested Party's Letters, ''Five Year (''Sunset'') Review of the Antidumping Duty Order on Tool Chests and Cabinets from China—Domestic Interested Party's Substantive Response,'' dated January 3, 2023 (China Substantive Response); *see also* ''Five Year (''Sunset'') Review of the Antidumping Duty Order on Tool Chests and Cabinets from Vietnam—Domestic Interested Party's Substantive Response,'' dated January 3, 2023 (Vietnam Substantive Response).

[6] *See* Commerce's Letter, ''Sunset Reviews Initiated December 1, 2022,'' dated January 25, 2023.

[7] *See* Memorandum, ''Issues and Decision Memorandum for the Expedited Sunset Reviews of the Antidumping Duty Orders on Certain Tool Chests and Cabinets from the People's Republic of China, and the Socialist Republic of Vietnam,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[8] *Id.*

# DEPARTMENT OF COMMERCE

## International Trade Administration

**[A–533–871]**

## Finished Carbon Steel Flanges From India: 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) determines that producers and/or exporters subject to this administrative review made sales of subject merchandise at less than normal value (NV) during the period of review (POR) August 1, 2020, through July 31, 2021.

**DATES:** Applicable March 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** Fred Baker or Preston Cox, AD/CVD

Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2924 or (202) 482–5041, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

On August 24, 2017, Commerce published in the **Federal Register** the antidumping duty (AD) order on finished carbon steel flanges from India.[1] On September 8, 2022, Commerce published the *Preliminary Results* of this administrative review in the **Federal Register**.[2] We invited interested parties to comment on the *Preliminary Results*.[3] Between October 11 and 18, 2022, interested parties submitted case and rebuttal briefs.[4] On December 21, 2022, we extended the deadline for these final results until March 7, 2022.[5] This administrative review covers 41 producers and/or exporters of the subject merchandise.[6] Commerce selected R.N. Gupta & Co. Ltd. (RNG) and Norma Group [7] for individual examination. The producers/exporters not selected for individual examination are referenced in the ''Final Results of Administrative Review'' section below and listed in Appendix II of this notice. For a complete description of the events that followed the *Preliminary Results, see* the Issues and Decision Memorandum.[8] Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

## Scope of the Order

The merchandise covered by the *Order* is finished carbon steel flanges. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.

## Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by interested parties in this review are discussed in the Issues and Decision Memorandum. A list of the issues which parties raised, and to which we responded in the Issues and Decision Memorandum, is attached as Appendix I to this notice. The Issues and Decision Memorandum is a public document and is on file electronically *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

## Changes Since the Preliminary Results

Based on a review of the record and our analysis of the comments received, Commerce made certain changes to the *Preliminary Results.* For detailed information, *see* the Issues and Decision Memorandum.

## Rate for Non-Selected Respondents

The Act and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

In this administrative review, we preliminarily calculated weighted-average dumping margins for RNG and Norma Group that are not zero, *de minimis* (*i.e.,* less than 0.5 percent), or determined entirely on the basis of facts available. For these final results, we continue to calculate weighted-average dumping margins for RNG and Norma Group that are not zero, *de minimis,* or determined entirely on the basis of facts available. Accordingly, Commerce is assigning to the companies not individually examined, listed in Appendix II, a margin of 0.84 percent, which is the weighted average of RNG's margin and Norma Group's margin based on publicly ranged data.[9]

## Final Results of Administrative Review

For these final results, we determine that the following weighted-average dumping margins exist for the period August 1, 2020, through July 31, 2021:

| Producer/exporter | Weighted-average dumping margin (percent) |
|---|---|
| R.N. Gupta & Co. Ltd | 0.73 |
| Norma (India) Limited/USK Export Private Limited/Uma Shanker Khandelwal & Co./Bansidhar Chiranjilal | 1.00 |
| Non-Selected Companies [10] | 0.84 |

[1] *See Finished Carbon Steel Flanges from India and Italy: Antidumping Duty Orders,* 82 FR 40136 (August 24, 2017) (*Order*).

[2] *See Finished Carbon Steel Flanges from India: Preliminary Results of Antidumping Duty Administrative Review; 2020–2021,* 87 FR 54957 (September 8, 2022) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[3] *See Preliminary Results,* 87 FR at 54958.

[4] *See* Weldbend Corporation's Letter, ''Petitioner's Case Brief,'' dated October 11, 2022; R.N. Gupta & Co. Ltd.'s Letter, ''Rebuttal Brief of R.N. Gupta & Company Limited,'' dated October 18, 2022; and Norma (India) Limited's Letter, ''Rebuttal Brief of Norma (India) Limited and its Affiliates,'' dated October 18, 2022.

[5] *See* Memorandum, ''Extension of Deadline for Final Results,'' dated December 21, 2022.

[6] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 86 FR 55811 (October 7, 2021). Commerce initiated on ''Uma Shanker Khandelwal & Co.'' and ''UmaShanker Khandelwal and Co.'' based on the requests for administrative review that Commerce received from interested parties. Because of the minor differences in the spelling of these company names, we combined them under the name Uma Shanker Khandelwal & Co.

[7] Commerce continues to treat Norma (India) Limited, USK Exports Private Limited, Uma Shanker Khandelwal & Co., and Bansidhar Chiranjilal (collectively, Norma Group) as a collapsed single entity for the final results of this administrative review. *See Preliminary Results* PDM at 1; *see also Finished Carbon Steel Flanges from India: Final Results of Antidumping Duty Administrative Review; 2019–2020,* 87 FR 13701 (March 10, 2022).

[8] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the antidumping Duty Order on Finished Carbon Steel Flanges from India; 2020–2021,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[9] *See* Memorandum, ''Calculation of Margin for Respondents Not Selected for Individual Examination,'' dated concurrently with this notice.

[10] *See* Appendix II for a list of companies not selected for individual examination.

## Disclosure

Commerce intends to disclose the calculations performed for these final results to parties in this proceeding within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

## Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce shall determine and CBP shall assess antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For RNG and Norma Group, 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 in accordance with 19 CFR 351.212(b)(1). Where an importer-specific assessment rate is zero or *de minimis,* the entries by that importer will be liquidated without regard to antidumping duties. For entries of subject merchandise during the POR produced by RNG or Norma Group for which the producer did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate in the less-than-fair-value investigation if there is no rate for the intermediate company(ies) involved in the transaction.[11] For the companies identified in Appendix II that were not selected for individual examination, we will instruct CBP to liquidate entries at the rates established in these final results of review.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

## Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication in the **Federal Register** of these final results of administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for companies subject to this review will be equal to the company-specific weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by a company not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the producer is, then the cash deposit rate will be the rate established in the most recently completed segment of the proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 8.91 percent, the all-others rate established in the less-than-fair-value investigation.[12] These cash deposit requirements, when imposed, shall remain in effect until further notice.

## Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

## 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 or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

## Notification to Interested Parties

These final results of review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: March 7, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I

**List of Topics Discussed in the Issues and Decision Memorandum**

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes since the *Preliminary Results*
V. Discussion of the Issues
  Comment 1: Constructed Value Profit and Indirect Selling Expenses
  Comment 2: Norma Group's Interest Expenses
  Comment 3: Operating Expenses Related to RNG's Affiliates
  Comment 4: Calculation of RNG's Interest Expense Ratio
VI. Recommendation

## Appendix II

**List of Companies Not Selected for Individual Examination**

1. Adinath International
2. Allena Group
3. Alloyed Steel
4. Balkrishna Steel Forge Pvt. Ltd.
5. Bebitz Flanges Works Private Limited [13]
6. C. D. Industries
7. Cetus Engineering Private Limited
8. CHW Forge
9. CHW Forge Pvt. Ltd.
10. Citizen Metal Depot
11. Corum Flange
12. DN Forge Industries
13. Echjay Forgings Limited
14. Falcon Valves and Flanges Private Limited
15. Heubach International
16. Hindon Forge Pvt. Ltd.
17. Jai Auto Pvt. Ltd.
18. Kinnari Steel Corporation
19. Mascot Metal Manufacturers
20. M F Rings and Bearing Races Ltd.
21. Munish Forge Private Limited
22. OM Exports
23. Punjab Steel Works
24. Raaj Sagar Steels
25. Ravi Ratan Metal Industries
26. R. D. Forge
27. Rolex Fittings India Pvt. Ltd.
28. Rollwell Forge Engineering Components

[11] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[12] *See Order,* 82 FR at 40138.

[13] *See Finished Carbon Steel Flanges from India: Notice of Initiation and Preliminary Results of Changed Circumstances Review,* 87 FR 34251 (June 6, 2022), and accompanying Preliminary Decision Memorandum at 4, unchanged in *Finished Carbon Steel Flanges from India: Final Results of Changed Circumstances Review,* 87 FR 44337 (July 26, 2022). On July 26, 2022, Commerce published the final results of an antidumping duty changed circumstances review of Finished Carbon Steel Flanges from India. Commerce found that BFN Forgings Private Limited (BFN) is the successor-in-interest to Bebitz Flanges Works Private Limited (Bebitz). Effective August 14, 2020, Bebitz changed its name to BFN, which is during the POR. Cash deposits of estimated antidumping duties required pursuant to the final results of this review will be applied to BFN. Commerce intends to instruct CBP to liquidate entries made during the POR by Bebitz, and entries made after August 14, 2020, by BFN, at the rates established in these final results of review.

and Flanges
29. Rollwell Forge Pvt. Ltd.
30. SHM (ShinHeung Machinery)
31. Siddhagiri Metal & Tubes
32. Sizer India
33. Steel Shape India
34. Sudhir Forgings Pvt. Ltd.
35. Tirupati Forge Pvt. Ltd.
36. Umashanker Khandelwal Forging Limited

[FR Doc. 2023–05149 Filed 3–13–23; 8:45 am]

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## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–914]**

### Light-Walled Rectangular Pipe and Tube From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2020–2021

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

**SUMMARY:** The U.S. Department of Commerce (Commerce) determines that Hangzhou Ailong Metal Products Co., Ltd. (Ailong) made U.S. sales of light-walled rectangular pipe and tube (LWRPT) from the People's Republic of China (China) at less than normal value during the period of review (POR) August 1, 2020, through July 31, 2021.

**DATES:** Applicable March 14, 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 September 9, 2022, Commerce published the *Preliminary Results* and invited interested parties to comment.[1] For details regarding the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum. Commerce conducted this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

#### Scope of the Order [2]

The scope of the *Order* is certain welded carbon quality light-walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4 millimeters. For a full description of the scope, *see* the Issues and Decision Memorandum.

#### Analysis of Comments Received

We addressed all issues raised in the case and rebuttal briefs filed in this administrative review in the Issues and Decision Memorandum, which is hereby adopted by this notice. A list of the issues raised in the case and rebuttal briefs to which we responded in the Issues and Decision Memorandum is included in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

#### Changes Since the Preliminary Results

Based on our analysis of the comments received, and for the reasons explained in the Issues and Decision Memorandum, we made a change from the *Preliminary Results* involving the surrogate value (SV) for labor. As noted in the Issues and Decision Memorandum, we determined that forced labor practices in Malaysia resulted in our Malaysian-based labor SV being unsuitable for use. Therefore, we instead used the SV for labor on the record from Romania, one of the potential surrogate countries in this administrative review.

#### Separate Rates

No parties commented on our preliminary separate rate findings. Therefore, we have continued to grant Ailong (the mandatory respondent) separate rate status.

#### Final Results of Review

We are assigning the following dumping margin to the firm listed below for the period August 1, 2020, through July 31, 2021:

| Exporter | Weighted-average dumping margin (percent) |
|---|---|
| Hangzhou Ailong Metal Products Co., Ltd | 63.16 |

#### Disclosure

Commerce intends to disclose the calculations performed in connection with these final results of review to parties in this review within five days after public announcement of the final results or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

#### Assessment Rates

Pursuant to section 751(a)(2)(C) of the Tariff Act of 1930, as amended (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 covered by this review.[3] Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication date of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Where the respondent's weighted-average dumping margin is zero or de minimis, or where an importer- (or customer-) specific *ad valorem* or per-unit rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[4] For entries that were not reported in the U.S. sales database submitted by an exporter individually examined during this review, but that entered under the case number of that exporter (*i.e.,* at the individually-examined exporter's cash deposit rate), Commerce will instruct CBP to liquidate such entries at the China-wide rate (*i.e.,* 264.64 percent).[5]

For any individually-examined respondent whose weighted-average dumping margin is above *de minimis* (*i.e.,* 0.50 percent), we will calculate importer-specific assessment rates on

[1] *See Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review; 2020–2021,* 87 FR 55392 (September 9, 2022) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders; Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value,* 73 FR 45403 (August 5, 2008) (*Order*).

[3] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

[4] *Id.*

[5] *See Order,* 73 FR 45403.

the basis of the ratio of the total amount of antidumping duties calculated for each importer's examined sales and the total entered value of the sales, in accordance with 19 CFR 351.212(b)(1).[6]

**Cash Deposit Requirements**

The following cash deposit requirements will be effective for shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of review, as provided for by section 751(a)(2)(C) of the Act: (1) for the exporter listed in the table above, the cash deposit rate will be the rate established in the final results of review that is listed for the exporter in the table; (2) for previously investigated or reviewed China and non-China exporters not listed in the table above that have separate rates, the cash deposit rate will continue to be the existing exporter-specific rate published for the most recent period; (3) for all China exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate previously established for the China-wide entity, which is 264.64 percent; and (4) for all non-China exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the China exporter that supplied that non-China exporter. The cash deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant POR entries. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred 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 an 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 or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

**Notification to Interested Parties**

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(5).

Dated: March 8, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix

**List of Topics Discussed in the Issues and Decision Memorandum**

I. Summary
II. Background
III. Scope of the *Order*
IV. Changes Since the *Preliminary Results*
V. Discussion of the Issues
  Comment 1: Whether the Malaysian Surrogate Data Should Be Corrected
  Comment 2: Whether Romania Should Be Considered the Primary Surrogate Country
  Comment 3: Whether Turkey Should Be Considered the Primary Surrogate Country
  Comment 4: Whether Square/Rectangular Tubing Should Be Used as the Primary Input
VI. Recommendation

[FR Doc. 2023–05208 Filed 3–13–23; 8:45 am]

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[6] *Id.*

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## DEPARTMENT OF COMMERCE

## International Trade Administration

**[C–570–149]**

## Gas Powered Pressure Washers From the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigation

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

**DATES:** Applicable March 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** Theodore Pearson or Konrad Ptaszynski, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2631 or (202) 482–6187, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On January 25, 2023, the U.S. Department of Commerce (Commerce) initiated a countervailing duty (CVD) investigation of imports of gas powered pressure washers from the People's Republic of China (China).[1] Currently, the preliminary determination is due no later than March 27, 2023.

**Postponement of Preliminary Determination**

Section 703(b)(1) of the Tariff Act of 1930, as amended (the Act), requires Commerce to issue the preliminary determination in a CVD investigation within 65 days after the date on which Commerce initiated the investigation. However, if Commerce concludes that the parties concerned in the investigation are cooperating and determined the investigation is extraordinarily complicated, section 703(c)(1) of the Act permits Commerce to postpone the preliminary determination until no later than 130 days after the date on which Commerce initiated the investigation.

Commerce has determined that at least one respondent company involved in the proceeding is cooperating because it filed a request for an extension of time to respond to the Affiliated Companies portion of the Initial CVD Questionnaire,[2] and that the investigation is extraordinarily complicated.[3] Specifically, Commerce will require additional time to analyze the questionnaire responses and issue appropriate requests for clarification and additional information, particularly regarding questions of affiliation and cross-ownership and program use by the respondents (*i.e.,* Chongqing Dajiang Power Equipment Co., Ltd. (CDPE) and Jiangsu Jianghuai Engine Co., Ltd. (JD Power)), as well as 703(c)(1)(B) of the Act, Commerce is postponing the due date for the preliminary determination of this investigation to 130 days after the date on which this investigation was initiated, *i.e.,* May 30, 2023.[4] Pursuant to section 705(a)(1) of the Act and 19

[1] *See Gas Powered Pressure Washers from the People's Republic of China: Initiation of Countervailing Duty Investigation,* 88 FR 4812 (January 25, 2023).

[2] *See* JD Power's Letter, ''JD Power's Affiliated Companies Questionnaire Response Extension Request,'' dated March 6, 2023.

[3] *See* section 703(b)(1) of the Act.

[4] Postponing the preliminary determination to 130 days after initiation would place the deadline on Monday, May 29, 2023, which is a federal holiday. Commerce's practice dictates that where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

CFR 351.210(b)(1), the deadline for the final determination of this investigation will continue to be 75 days after the date of the preliminary determination.

**Notification to Interested Parties**

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f)(1).

Dated: March 8, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2023–05195 Filed 3–13–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–827]**

### Certain Cased Pencils From the People's Republic of China: Continuation of Antidumping Duty Order

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

**SUMMARY:** As a result of the determinations by the U.S. Department of Commerce (Commerce) and the International Trade Commission (ITC) in their five year (sunset) review that revocation of the antidumping duty (AD) order on certain cased pencils (pencils) from the People's Republic of China (China) would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD order on pencils from China.

**DATES:** Applicable March 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** Katherine Johnson, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4929.

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 28, 1994, Commerce published in the **Federal Register** the AD order on pencils from China.[1] On August 1, 2022, the ITC instituted [2] and Commerce initiated [3] the fifth five-year (sunset) review of the *Order,* pursuant to sections 751(c) and 752 of the Tariff Act of 1930, as amended (the Act). Commerce conducted an expedited (120-day) sunset review of the *Order,* pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2). As a result of its review, Commerce determined that revocation of the *Order* would likely lead to a continuation or recurrence of dumping. Therefore, Commerce notified the ITC of the magnitude of the margin of dumping likely to prevail were the *Order* to be revoked.[4]

On March 8, 2023, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Order* would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[5]

**Scope of the Order**

The products covered by the sunset review of this *Order* are certain cased pencils of any shape or dimension (except as described below) which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (*e.g.,* with erasers, *etc.*) in any fashion, and either sharpened or unsharpened. The pencils subject to this *Order* are currently classified under subheading 9609.10.00 of the Harmonized Tariff Schedules of the United States (HTSUS). Specifically excluded from the scope of this *Order* are mechanical pencils, cosmetic pencils, pens, non-cased crayons (wax), pastels, charcoals, chalks, and pencils produced under U.S. patent number 6,217,242, from paper infused with scents by the means covered in the above-referenced patent, thereby having odors distinct from those that may emanate from pencils lacking the scent infusion. Also excluded from the scope of the *Order* are pencils with all of the following physical characteristics: (1) length: 13.5 or more inches; (2) sheath diameter: not less than one-and-one quarter inches at any point (before sharpening); and (3) core length: not more than 15 percent of the length of the pencil.

In addition, pencils with all of the following physical characteristics are excluded from the scope of the order: novelty jumbo pencils that are octagonal in shape, approximately ten inches long, one inch in diameter before sharpening, and three-and-one eighth inches circumference, composed of turned wood encasing one-and-one half inches of sharpened lead on one end and a rubber eraser on the other end.

Although the HTSUS subheading is provided for convenience and customs purposes; our written description of the scope of the *Order* is dispositive.

**Continuation of the Order**

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would likely lead to a continuation or recurrence of dumping, and material injury to an industry in the United States, pursuant to sections 751(c) and 751(d)(2) of the Act, Commerce hereby orders the continuation of the *Order.* U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the *Order* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, Commerce intends to initiate the next five-year review of this *Order* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

**Administrative Protective Order**

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return/destruction or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO which may be subject to sanctions.

This five-year (sunset) review and notice are in accordance with sections 751(c) and (d)(2), and 777(i)(1) the Act, and 19 CFR 351.218(f)(4).

Dated: March 8, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2023–05169 Filed 3–13–23; 8:45 am]

**BILLING CODE 3510–DS–P**

[1] *See Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China,* 59 FR 66909 (December 28, 1994) (*Order*).

[2] *See Cased Pencils from China; Institution of a Five-Year Review,* 87 FR 46998 (August 1, 2022).

[3] *See Initiation of Five-Year (Sunset) Reviews,* 87 FR 46943 (August 1, 2022).

[4] *See Certain Cased Pencils from the People's Republic of China: Final Results of the Expedited Fifth Sunset Review of the Antidumping Duty Order,* 87 FR 71582 (November 23, 2022).

[5] *See Cased Pencils from China,* 88 FR 14391 (March 8, 2023).

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–520–807]**

### Circular Welded Carbon Quality Steel Pipe From the United Arab Emirates: Notice of Court Decision Not in Harmony With the Results of Antidumping Administrative Review; Notice of Amended Final Results

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

**SUMMARY:** On March 3, 2023, the U.S. Court of International Trade (CIT) issued its final judgment in *Ajmal Steel Tubes & Pipes Industries LLC.* v. *United States,* Consol. Court No. 21–00587, sustaining the Department of Commerce (Commerce)'s remand results pertaining to the administrative review of the antidumping duty (AD) order on circular welded carbon-quality steel pipe from the United Arab Emirates (UAE) covering the period December 1, 2018, through November 30, 2019. Commerce is notifying the public that the CIT's final judgment is not in harmony with Commerce's final results of the administrative review, and that Commerce is amending the final results with respect to the dumping margin assigned to Ajmal Steel Tubes & Pipes Industries LLC (Ajmal).

**DATES:** Applicable March 13, 2023.

**FOR FURTHER INFORMATION CONTACT:** Alice Maldonado, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4682.

**SUPPLEMENTARY INFORMATION:**

### Background

On October 27, 2021, Commerce published its *Final Results* in the 2018–2019 AD administrative review of circular welded carbon-quality steel pipe from UAE.[1] Commerce found that the use of facts available was warranted, pursuant to section 776(a) of the Tariff Act of 1930, as amended (the Act), and that Ajmal failed to cooperate to the best of its ability to comply with a request for information, within the meaning of section 776(b)(1) of the Act. Consequently, Commerce assigned Ajmal the highest dumping margin alleged in the petition (*i.e.,* 54.27 percent), in accordance with section 776(b) of the Act and 19 CFR 351.308(a).[2]

Ajmal appealed Commerce's *Final Results.* On October 28, 2022, the CIT remanded the *Final Results* to Commerce to accept and consider Ajmal's section A response and to determine a new estimated dumping margin for Ajmal that does not resort to section 776 of the Act with respect to the filing of the company's response to section A of the questionnaire.[3]

In its final remand redetermination, issued in January 2023, Commerce calculated Ajmal's weighted-average dumping margin based on Ajmal's reported data.[4] The CIT sustained Commerce's final redetermination.[5]

### Timken Notice

In its decision in *Timken,*[6] as clarified by *Diamond Sawblades,*[7] the Court of Appeals for the Federal Circuit held that, pursuant to section 516A(c) and (e) of the Act, Commerce must publish a notice of court decision that is not ''in harmony'' with a Commerce determination and must suspend liquidation of entries pending a ''conclusive'' court decision. The CIT's March 3, 2023, judgment constitutes a final decision of the CIT that is not in harmony with Commerce's *Final Results.* Thus, this notice is published in fulfillment of the publication requirements of *Timken.*

### Amended Final Results

Because there is now a final court judgment, Commerce is amending its *Final Results* with respect to Ajmal as follows:

| Exporter/producer | Weighted-average dumping margin (percent) |
|---|---|
| Ajmal Steel Tubes & Pipes Ind. LLC | 0.57 |

### Cash Deposit Requirements

Because Ajmal has a superseding cash deposit rate, *i.e.,* there have been final results published in a subsequent administrative review, we will not issue revised cash deposit instructions to U.S. Customs and Border Protection (CBP). This notice will not affect the current cash deposit rate.

### Liquidation of Suspended Entries

At this time, Commerce remains enjoined by CIT order from liquidating entries that: were produced and exported by Ajmal and entered, or withdrawn from warehouse, for consumption during the period December 1, 2018, through November 30, 2019. These entries will remain enjoined pursuant to the terms of the injunction during the pendency of any appeals process.

In the event the CIT's ruling is not appealed, or, if appealed, upheld by a final and conclusive court decision, Commerce intends to instruct CBP to assess antidumping duties on unliquidated entries of subject merchandise produced and exported by Ajmal in accordance with 19 CFR 351.212(b). We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific *ad valorem* assessment rate is not zero or *de minimis.* Where an import-specific *ad valorem* assessment rate is zero or *de minimis,*[8] we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

### Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c) and (e) and 777(i)(1) of the Act.

Dated: March 8, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2023–05194 Filed 3–13–23; 8:45 am]

**BILLING CODE 3510–DS–P**

[1] *See Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2018–2019,* 86 FR 59364 (October 27, 2021) (*Final Results*).

[2] *See Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman, Pakistan, the Philippines, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 80 FR 73708, 73712 (November 17, 2015).

[3] *See Ajmal Steel Tubes & Pipes Industries LLC.* v. *United States,* Slip Op. 22–121, Consol. Court No. 21–00587 (CIT 2022) at 11.

[4] *See Final Results of Redetermination Pursuant to Court Remand, Ajmal Steel Tubes & Pipes Industries LLC.* v. *United States,* Consol. Court No. 21–00587, Slip Op. 22–121, dated January 26, 2023, available at *https://access.trade.gov/Resources/remands/22-121.pdf.*

[5] *See Ajmal Steel Tubes & Pipes Industries LLC.* v. *United States,* Slip Op. 23–27, Court No. 21–00587 (CIT 2023).

[6] *See Timken Co.* v. *United States,* 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

[7] *See Diamond Sawblades Mfrs.' Coal.* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

[8] *See* 19 CFR 351.106(c)(2).

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Availability of Final Evaluation Findings of National Estuarine Research Reserves

**AGENCY:** Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

**ACTION:** Notice of availability of evaluation findings.

**SUMMARY:** Notice is hereby given of the availability of final evaluation findings for seven national estuarine research reserves, Ashepoo-Combahee-Edisto (ACE) Basin, Chesapeake Bay Virginia, Guana Tolomato Matanzas (GTM), San Francisco Bay, South Slough, Tijuana River, and Weeks Bay, under Section 315 of the Coastal Zone Management Act (CZMA).

**ADDRESSES:** Copies of these final evaluation findings may be found at *https://coast.noaa.gov/czm/evaluations/evaluation_findings/index.html* or by submitting a written request to Michael Migliori at *Michael.Migliori@noaa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Michael Migliori, Lead Evaluator, NOAA Office for Coastal Management, by phone at (443) 332–8936 or email at *Michael.Migliori@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** The NOAA Office for Coastal Management has completed the national estuarine research reserve evaluations for ACE Basin, Chesapeake Bay Virginia, GTM, San Francisco Bay, South Slough, Tijuana River, and Weeks Bay. The reserves were found to be adhering to the terms of the reserves' financial assistance awards and to the programmatic requirements of the CZMA, including the requirements of Section 315(f), and its implementing regulations. NOAA published in the **Federal Register** notices for public meetings and opportunities to submit public comments on the evaluation of these national estuarine research reserves. See 86 FR 23349 (May 3, 2021) (ACE Basin), 86 FR 52131 (September 20, 2021) (Chesapeake Bay Virginia), 87 FR 66162 (November 2, 2022) (GTM), 86 FR 33992 (June 28, 2021) (San Francisco Bay), 87 FR 11417 (March 1, 2022) (South Slough), 87 FR 36308 (June 16, 2022) (Tijuana River), and 87 FR 36309 (June 16, 2022) (Weeks Bay). NOAA addressed the public comments it received in the final evaluation findings.

*Authority:* 16 U.S.C. 1458 and 1461(f); 15 CFR 921.40 and 923.133(b)(7).

**Keelin Kuipers,**

*Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.*

[FR Doc. 2023–05207 Filed 3–13–23; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XC815]**

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Replacement of Pier 3 at Naval Station Norfolk in Norfolk, Virginia

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

**ACTION:** Notice; request for comments on proposed renewal incidental harassment authorization (IHA).

**SUMMARY:** NMFS received a request from the United States Department of the Navy for the renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to the replacement of Pier 3 at Naval Station Norfolk in Norfolk, Virginia. These activities are identical to those covered in the current authorization. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed renewal not previously provided during the initial 30-day comment period.

**DATES:** Comments and information must be received no later than March 29, 2023.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, and should be submitted via email to *ITP.taylor@noaa.gov.*

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Jessica Taylor Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:**

### Background

The Marine Mammal Protection Act (MMPA) prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, an incidental harassment authorization is issued.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the

availability of such species or stocks for taking for certain subsistence uses (referred to here as ''mitigation measures''). Monitoring and reporting of such takings are also required. The meaning of key terms such as ''take,'' ''harassment,'' and ''negligible impact'' can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency's regulations at 50 CFR 216.103.

NMFS' regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed 1 year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a renewal for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Description of the Specified Activities and Anticipated Impacts section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

1. A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA).

2. The request for renewal must include the following:

- An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).
- A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

3. Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed renewal. A description of the renewal process may be found on our website at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.* Any comments received on the potential renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested renewal, and agency responses will be summarized in the final notice of our decision.

## National Environmental Policy Act

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the initial IHA qualified to be categorically excluded from further NEPA review. NMFS has preliminarily determined that the application of this categorical exclusion remains appropriate for this renewal IHA.

## History of Request

On March 15, 2022, NMFS issued an IHA to the United States Navy (Navy) to take marine mammals incidental to the replacement of Pier 3 at Naval Station Norfolk in Norfolk, Virginia (87 FR 15945), effective from April 1, 2022 through March 31, 2023. On July 29, 2022, NMFS received a request from the Navy for a modification to the Pier 3 replacement project IHA due to a change in the construction contractor's plan to include concurrent pile driving and drilling activities, and a modified IHA was issued to the Navy on January 18, 2023 (88 FR 2880). Hereafter, any references to the initial IHA (as modified) refer to the modified IHA issued on January 18, 2023, while the 2022 IHA will be referred to as the 2022 initial IHA. On February 23, 2023, NMFS received a request for the renewal of the initial IHA (as modified). After discussion with the Navy, NMFS received a final revised request to renew the initial IHA (as modified) on March 7, 2023. As described in that request, the activities for which incidental take is requested consist of a subset of the identical activities covered in the initial authorization (as modified). As required, the applicant also provided a preliminary monitoring report which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

## Description of the Specified Activities and Anticipated Impacts

The Navy is replacing Pier 3 at Naval Station (NAVSTA) Norfolk in Norfolk, VA. The existing Pier 3 is being demolished and a new Pier 3 will be constructed immediately north of the existing location (see Figure 1 in the **Federal Register** notice for the proposed 2022 initial IHA; 87 FR 3976, January 26, 2022). Work at Pier 4, Pier 3T, and the bulkheads associated with Pier 3 and 3T is necessary to support the Pier 3 replacement. Pier 3 has been in a deteriorated state and does not provide minimum operation requirements for NAVSTA Norfolk. In-water work associated with Pier 4, including timber pile removal and concrete pile installation, has been completed under the 2022 initial IHA. In addition, concrete pile removal at Pier 3T will be completed by the expiration of the initial IHA. However, in-water work associated with construction of the CEP–176 and CEP–175 bulkheads, the CEP–102 bulkhead and relieving platform, and the new Pier 3, as well as installation of piles necessary for Pier 3T, will not be completed by the expiration date of the initial IHA (as modified). During the renewal period, the activities that would occur are the same as previously analyzed under the initial IHA (as modified). These activities include the installation of 42-inch (1.07 meters (m)) steel pipe piles, 28-inch (0.71 m) steel sheet piles, 13-inch (0.33 m) polymeric piles, and 24-

inch (0.61 m) precast concrete piles. Pre-drilling may be used to set the piles to depth. The remaining in-water construction associated with these activities is planned to occur from April 1, 2023 through June 30, 2023.

Under the 2022 initial IHA, Level A and Level B harassment resulting from pile driving and drilling activities was authorized for harbor seals (*Phoca vitulina*), gray seals (*Halichoerus grypus*), and harbor porpoises (*Phocoena phocoena*). Level B harassment only resulting from pile driving and drilling activities was authorized for bottlenose dolphins (*Tursiops truncatus*) and humpback whales (*Megaptera novaeangliae*). Neither the Navy nor NMFS expects serious injury or mortality to result from this activity and, therefore, a renewal IHA is appropriate.

The following documents are referenced in this notification and include important supporting information:

- 2023 final initial IHA (as modified) (88 FR 2880, January 18, 2023);
- 2023 proposed initial IHA (as modified) (87 FR 75600, December 9, 2022);
- 2022 final initial IHA (87 FR 15945, March 21, 2022); and
- 2022 proposed initial IHA (87 FR 3976, January 26, 2022).

The 2022 initial IHA application, IHA modification request, 2022 initial IHA, initial IHA (as modified), and references are available at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-replacement-pier-3-naval-station-norfolk-norfolk-virginia.*

*Detailed Description of the Activity*

A detailed description of the construction activities is found in the **Federal Register** notice associated with the issuance of the 2022 initial IHA (87 FR 3976, January 26, 2022). A description of the concurrent pile driving activities associated with the initial IHA (as modified) is described in the **Federal Register** notice of issuance of the initial IHA (88 FR 2880, January 18, 2023). The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices.

At the time of the renewal request, the following individual activities have been completed for the following structures:

- Pier 4
  - Vibratory removal of 36 14-inch timber piles; and
  - Pre-drilling and impact installation of 36 24-inch precast concrete square piles.
- Pier 3T
  - Vibratory removal of 87 14-inch timber piles; and
  - Vibratory removal of 196 18-inch precast concrete square piles.

At the time of the renewal request, the following concurrent activities have been completed for the following structures:

- Pier 3T and Pier 4
  - Vibratory removal of 14-inch timber and 18-inch concrete piles and impact installation of 24-inch concrete piles; and
  - Vibratory removal of 14-inch timber and 18-inch concrete piles and rotary drill of 24-inch concrete piles, with 90 concrete piles remaining as noted about for Pier 3T.
- Pier 3T and Pier 3
  - Vibratory removal of 14-inch timber and 18-inch concrete piles and impact installation of 24-inch concrete piles, with four concrete piles remaining to be installed.

In-water individual activities that are planned for completion for the following structures under this proposed renewal IHA are shown in Table 1 while in-water concurrent activities that are planned for completion under this proposed renewal IHA are shown in Table 2.

TABLE 1—IN-WATER INDIVIDUAL CONSTRUCTION ACTIVITIES PLANNED FOR COMPLETION UNDER THE RENEWAL IHA

| Structure | Pile size/type | Method | Number of piles | Number of piles per day | Total number of days |
|---|---|---|---|---|---|
| CEP–176 Bulkhead | 42-inch steel pipe pile | Impact or Vibratory Install | 80 | 4 | 20 |
| | 28-inch steel sheet piles | | 160 | 14 | 12 |
| CEP–175 Bulkhead | 13-inch polymeric piles | Impact or Vibratory Install [1] | 18 | 5 | 4 |
| CEP–102 Platform | 18-inch concrete piles | Vibratory Removal | 11 | 4 | 3 |
| | 14-inch timber piles | | 9 | 4 | 3 |
| | 13-inch polymeric piles | | 4 | 4 | 1 |
| | 24-inch precast concrete piles. | Impact Install [1] | 6 | 2 | 3 |
| | 42-inch steel pipe piles | Impact or Vibratory Install | 4 | 2 | 2 |
| | 28-inch steel sheet piles | | 8 | 4 | 2 |
| | 24-inch precast concrete piles. | Impact Install [1] | 11 | 2 | 6 |
| Pier 3 | 24-inch precast concrete piles. | Impact Install | 270 | 4 | 68 |

[1] Pre-drilling may be used to assist with pile installation. Represents estimated construction schedule as delays may occur due to equipment failure or weather.

TABLE 2—IN-WATER CONCURRENT CONSTRUCTION ACTIVITIES PLANNED FOR COMPLETION UNDER THE RENEWAL IHA

| Pile size/type/method | Number of piles | Number of piles per day | Total number of days |
|---|---|---|---|
| Vibratory removal of 18-inch concrete piles at Pier 3T and vibratory install of 42-inch steel pipe piles at either CEP–176 or CEP–102. | 90 18-inch concrete piles; 113 42-inch steel pipe piles. | 4 18-inch concrete piles; 4 42-inch steel piles. | 26 |

TABLE 2—IN-WATER CONCURRENT CONSTRUCTION ACTIVITIES PLANNED FOR COMPLETION UNDER THE RENEWAL IHA—Continued

| Pile size/type/method | Number of piles | Number of piles per day | Total number of days |
|---|---|---|---|
| Vibratory removal of 18-inch concrete piles at Pier 3T and rotary drill [1] for 24-inch concrete piles at Pier 3. | 90 18-inch concrete piles; 36 24-inch rotary drilling piles. | 4 18-inch concrete piles; 6 24-inch concrete piles. | 13 |

[1] Pre-drilling.

The proposed renewal IHA would be effective from April 1, 2023 through March 31, 2024 and in-water construction activities are planned for 90 days from April 1 through June 30, 2023. Of these 90 days, 39 days are planned for concurrent activities.

*Description of Marine Mammals*

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the notice of the proposed IHA for the initial authorization (87 FR 3976, January 26, 2022). NMFS has reviewed the monitoring data from the initial IHA (as modified), recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the 2022 initial IHA. The only changes indicated in the draft 2022 SARs are that the Potential Biological Removal value for the gray seal Western North Atlantic stock increased from 1,389 to 1,458, annual mortality and serious injury of the harbor porpoise Gulf of Maine/Bay of Fundy stock decreased from 217 to 164, and humpback whale Gulf of Maine stock is no longer considered a strategic stock.

*Potential Effects on Marine Mammals and Their Habitat*

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which the authorization of take is proposed here may be found in the notices of the proposed IHA for the 2022 initial authorization. NMFS has reviewed the monitoring data from the initial IHA (as modified), recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

*Estimated Take*

A detailed description of the methods and inputs used to estimate take for the specified individual activity are found in the notices of the proposed and final IHAs for the initial authorization (87 FR 3976, January 26, 2022; 87 FR 15945, March 21, 2022) and for the specified concurrent activities, in the notices of the proposed and final initial IHAs (as modified) (87 FR 75600, December 9, 2022; 88 FR 2880, January 18, 2023). Activities proposed under the renewal authorization would be subject to the same sound propagation boundaries as those analyzed for the 2022 initial IHA and initial IHA (as modified). The analysis of sound source level and sound pressure level (SPL) propagation provided in the 2022 initial IHA and initial IHA (as modified) would remain applicable to the activities covered in the proposed renewal IHA. Marine mammal density/occurrence data applicable to this authorization remain unchanged from the 2022 initial IHA.

Similarly, the stocks taken, methods of take, and types of take remain unchanged from the previously issued initial IHA. The take calculation method also remains the same, with the exception of fewer days of activity than what was described in the initial IHA. The approximate total number of operational days for this proposed renewal IHA is 90 days as compared to the 280 days required for the project under the initial IHA. The number of takes proposed to be authorized for the renewal IHA are indicated below in Table 3.

The total take number for bottlenose dolphins was estimated using inshore seasonal densities provided in Engelhaupt *et al.* (2016) from vessel line-transect surveys near NAVSTA Norfolk and adjacent areas near Virginia Beach, Virginia from August 2012 through August 2015. This density includes sightings inshore of the Chesapeake Bay from NAVSTA Norfolk west to the Thimble Shoals Bridge, and is the most representative density for the project area. NMFS multiplied the density of 1.38 dolphins per square kilometer by the Level B harassment zone area for each activity for the project, and then by the number of days associated with that activity (see Table 1). The Level B harassment zones increased as a result of concurrent pile driving activities; therefore, calculated Level B harassment exposure estimates also increased as a result. As described in the notice of the initial proposed and issued IHA, there is insufficient information on relative abundance to apportion the takes precisely to each of the three stocks in the area. Therefore, the same approach as used in previous projects (*e.g.,* Hampton Roads Bridge Tunnel project (86 FR 17458, April 2, 2021), and the U.S. Navy Norfolk Maintenance Rule (86 FR 24340, May 6, 2021)) was used to estimate the appointment of takes to each of the three bottlenose dolphin stocks that may be present in the area. Given that most of the Northern North Carolina Estuarine Stock (NNCES) are found in the Pamlico Sound Estuary, over 160 kilometers from Norfolk, we conservatively estimated that no more than 200 of the requested takes will be from this stock. Since members of the northern migratory coastal and southern migratory coastal stocks are thought to occur in or near the Bay in greater numbers, we conservatively assume that no more than half of the remaining takes will accrue to either of these stocks. Additionally, a subset of these takes would likely be comprised of the Chesapeake Bay resident dolphins, although the size of that population is unknown.

Based upon the methodology for estimating take for the initial IHA (as modified) (88 FR 2880, January 18, 2023), the Navy calculated potential exposure to Level A harassment for gray seals by assuming twenty percent of authorized take would be by Level A harassment. As only one take is estimated to occur under the renewal IHA, we assume that individual take will be by Level B harassment. Therefore, the Navy did not request, and NMFS does not propose to authorize, take by Level A harassment for gray seals.

The total taking by Level B harassment of all species is predicted to be the same or lower with concurrent activity scenarios due to a lower number of construction days for concurrent activities; therefore, the proposed authorized take from individual activities represents the most conservative take estimate.

TABLE 3—ESTIMATED TAKE PROPOSED FOR AUTHORIZATION AND PROPORTION OF POPULATION POTENTIALLY AFFECTED

| Species | Stock | Individual activities | | Concurrent activities | | Percent of stock [1] |
|---|---|---|---|---|---|---|
| | | Level A | Level B | Level A | Level B | |
| Bottlenose dolphin | Western North Atlantic Coastal, Northern Migratory | 0 | 1,281 | 0 | 486 | [2] 19.3 |
| | Western North Atlantic Coastal, Southern Migratory | | 1,280 | | 485 | [2] 34.1 |
| | Northern North Carolina Estuarine | | 200 | | 200 | [2] 24.3 |
| Harbor seal | Western North Atlantic | 57 | 759 | 53 | 478 | 1.33 |
| Gray seal | Western North Atlantic | 0 | 1 | 0 | 1 | 0.004 |
| Harbor porpoise | Gulf of Maine/Bay of Fundy | 2 | 2 | 0 | 2 | 0.004 |
| Humpback whale | Gulf of Maine | 0 | 4 | 0 | 2 | 0.29 |

[1] Percent of stock calculation based upon the largest take calculation from either individual or concurrent activities.
[2] Assumes multiple repeated takes of same individuals from a small portion of each stock.

*Description of Proposed Mitigation, Monitoring, and Reporting Measures*

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the FR notice announcing the issuance of the 2022 initial IHA (87 FR 15945, March 21, 2022) for individual activities and the FR notice announcing the issuance of the initial IHA (as modified) (88 FR 2880, January 18, 2023) for concurrent activities, and the discussion of the least practicable adverse impact included in that document remains accurate. The same measures are proposed for this renewal and are summarized here:

- The Navy must implement shutdown zones for all pile driving and removal and drilling activities. Shutdown zones would vary based upon the activity type and marine mammal hearing group, as shown in Table 4 for individual activities and Table 5 for concurrent activities. The Navy must shut down if any marine mammals come within hearing group-specific shutdown zones;
- The Navy must implement impact pile driving soft-starts at the beginning of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or more. To implement soft-start, contractors would be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a 30-second waiting period, then two subsequent reduced energy strike sets.
- Protected Species Observers (PSOs) must monitor the entirety of all shutdown zones as well as Level B harassment zones to the extent practicable during all pile driving and removal and drilling activities. Monitoring must be conducted by a minimum of two PSOs for impact driving, and a minimum of three PSOs for vibratory and drilling activities;
- Pre-activity monitoring must begin prior to the start of daily in-water construction activities or whenever a break in pile driving/removal of 30 minutes or longer occurs. Pre-activity and post-activity monitoring must take place for a period of 30 minutes prior to beginning construction activities and after construction activities are complete for the day;
- Acoustic monitoring shall include two underwater positions as well as be conducted in accordance with NMFS guidance for 10 percent of each type of activity that has not previously been monitored at NAVSTA Norfolk (see Table 6);
- The Navy must submit draft marine mammal and acoustic monitoring reports to NMFS within 90 days after the completion of pile driving and removal and drilling activities under the renewal IHA;
- The Navy must prepare and submit final monitoring reports within 30 days following resolution of comments on the draft reports from NMFS;
- The Navy must submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above); and
- The Navy must report injured or dead marine mammals.

TABLE 4—SHUTDOWN AND HARASSMENT ZONES FOR INDIVIDUAL PILE DRIVING ACTIVITIES

| Pile size, type, and method | Minimum shutdown zone (m) | | | Harassment zone (m) [1] |
|---|---|---|---|---|
| | Humpback whale | Porpoises | All other species | |
| Impact Driving, 42-inch Steel Pipe Pile | 1,005 | 500 | 200 | 1,000 |
| Vibratory Driving, 42-inch Steel Pipe Pile | 50 | 120 | 50 | 15,850 |
| Impact Driving, 28-inch Steel Sheet Piles | 775 | 500 | 200 | 2,520 |
| Vibratory Driving, 28-inch Steel Sheet Piles | 65 | 65 | 65 | 13,600 |
| Impact Driving, 13-inch Polymeric Piles | 30 | 30 | 30 | 10 |
| Vibratory Driving, 13-inch Polymeric Piles | 30 | 30 | 30 | 6,310 |
| Impact Driving, 24-inch Concrete Piles | 160 | 500 | 200 | 120 |
| Vibratory Driving, 24-inch Concrete Piles | 10 | 10 | 10 | 1,850 |

[1] Rounded to the nearest 10 m.

TABLE 5—SHUTDOWN AND HARASSMENT ZONES FOR CONCURRENT PILE DRIVING ACTIVITIES

| Pile sizes, type, and method | Minimum shutdown zone (m) | | | Harassment zone (m) [1] |
|---|---|---|---|---|
| | Humpback whale | Porpoises | All other species | |
| Vibratory removal 18-inch concrete piles and vibratory installation 42-inch steel pipe piles | 200 | 200 | 50 | 18,480 |
| Vibratory removal 18-inch concrete piles and pre-drilling for preparation of 24-in concrete pile install | 45 | 45 | 30 | 7,360 |

[1] Rounded to the nearest 10 m.

TABLE 6—ACOUSTIC MONITORING SUMMARY [1]

| Pile type | Count | Method of install/removal | Number monitored |
|---|---|---|---|
| 13-inch polymeric | 9 | Vibratory | 5 |
| 13-inch polymeric | 9 | Impact | 5 |
| 13-inch polymeric | 9 | Drilling | 5 |
| 24-inch concrete | 11 | Impact | 10 |
| 42-inch steel pipe | 103 | Impact | 10 |
| 42-inch steel pipe | 103 | Vibratory | 10 |
| 28-inch steel sheet | 221 | Impact | 10 |
| 28-inch steel sheet | 221 | Vibratory | 10 |

[1] Acoustic monitoring will be conducted for activities for which measurements are needed.

**Comments and Responses**

As noted previously, NMFS published a notice of a proposed IHA (87 FR 3976, January 26, 2022) and solicited public comments on both our proposal to issue the initial IHA for pile driving and drilling activities, and on the potential for a renewal IHA, should certain requirements be met. No public comments were received.

**Preliminary Determinations**

The proposed renewal request consists of a subset of activities analyzed through the initial IHA and initial IHA (as modified) described above. In analyzing the effects of the activities for the initial IHA, NMFS determined that the Navy's activities would have a negligible impact on the affected species or stocks and that authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.,* less than one-third the abundance of all stocks). No new information is available that affects NMFS' determinations in support of a renewal of the initial IHA (as modified). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA (as modified).

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA (as modified). Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) the Navy's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

**Endangered Species Act**

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

**Proposed Renewal IHA and Request for Public Comment**

As a result of these preliminary determinations, NMFS proposes to issue a renewal IHA to the Navy for conducting pile driving and drilling activities at NAVSTA Norfolk in Norfolk, VA effective through March 31, 2024, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the 2022 proposed and final initial IHA as well as proposed and final initial IHA (as modified) can be found at *https://www.fisheries.noaa.gov/action/incidental-take-authorization-replacement-pier-3-naval-station-norfolk-norfolk-virginia.* We request comment on our analyses, the proposed renewal IHA, and any other aspect of this notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: March 9, 2023.

**Kimberly Damon-Randall,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2023–05157 Filed 3–9–23; 4:15 pm]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID: 0648–XV191]**

### Space Weather Advisory Group Meeting

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of public meeting.

**SUMMARY:** The Space Weather Advisory Group (SWAG) will meet for a half-day on March 20, 2023.

**DATES:** The meeting is scheduled as follows: March 20, 2023, from 11 a.m.–3 p.m. Eastern Daylight Saving Time (EDT).

**ADDRESSES:** The public meeting will be a virtual event. For details on how to connect to the webinar or to submit comments, please visit *www.weather.gov/swag* or contact Jennifer Meehan, National Weather Service; telephone: 301–427–9798; email: *jennifer.meehan@noaa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Jennifer Meehan, National Weather Service, NOAA, 1325 East West Highway, Silver Spring, Maryland 20910; 301–427–9798 or *jennifer.meehan@noaa.gov;* or visit the SWAG website: *https://www.weather.gov/swag.*

**SUPPLEMENTARY INFORMATION:** Pursuant to the Promoting Research and Observations of Space Weather to Improve the Forecasting of Tomorrow (PROSWIFT) Act, 51 U.S.C. 60601 *et seq.,* the Administrator of NOAA and the National Science and Technology Council's Space Weather Operations, Research, and Mitigation (SWORM) Subcommittee established the Space Weather Advisory Group (SWAG) on April 21, 2021. The SWAG is the only Federal Advisory SWAG that advises and informs the interest and work of the SWORM. The SWAG is to receive advice from the academic community, the commercial space weather sector, and nongovernmental space weather end users to carry out the responsibilities of the SWAG set forth in the PROSWIFT Act, 51 U.S.C. 60601 *et seq.*

The SWAG is directed to advise the SWORM on the following: facilitating advances in the space weather enterprise of the United States; improving the ability of the United States to prepare for, mitigate, respond to, and recover from space weather phenomena; enabling the coordination and facilitation of research to operations and operations to research, as described in section 60604(d) of title 51, United States Code; and developing and implementing the integrated strategy under 51 U.S.C. 60601(c), including subsequent updates and reevaluations. The SWAG shall also conduct a comprehensive survey of the needs of users of space weather products to identify the space weather research, observations, forecasting, prediction, and modeling advances required to improve space weather products, as required by 51 U.S.C. 60601(d)(3).

#### Matters To Be Considered

The meeting will be open to the public. During the meeting, the SWAG will discuss the PROSWIFT Act, 51 U.S.C. 60601 *et seq.,* directed duties of the SWAG including the update to the 2019 National Space Weather Strategy and Action Plan (*https://tinyurl.com/NSWSAP2019*) Implementation Plan. The full agenda and meeting materials will be published on the SWAG website: *https://www.weather.gov/swag.*

#### Additional Information and Public Comments

The meeting will be held over one half-day and will be conducted in a virtual manner (for meeting details see **ADDRESSES**). Please register for the meeting through the website: *https://www.weather.gov/swag.*

This event is accessible to individuals with disabilities. For all other special accommodation requests, please contact *Jennifer.meehan@noaa.gov.* This webinar is a NOAA public meeting and will be recorded and transcribed. If you have a public comment, you acknowledge you will be recorded and are aware you can opt out of the meeting. Participation in the meeting constitutes consent to the recording. Both the meeting minutes and presentations will be posted to the SWAG website (*https://www.weather.gov/swag*). The agenda, speakers and times are subject to change. For updates, please check the SWAG website (*https://www.weather.gov/swag*).

Public comments directed to the SWAG members and SWAG related topics are encouraged. For other written public comments, please email *jennifer.meehan@noaa.gov* by March 17, 2023. Written comments received after this date will be distributed to the SWAG but may not be reviewed prior to the meeting date. As time allows, public comments will be read into the public record during the meeting. Advance comments will be collated and posted to the meeting website.

Dated: March 8, 2023.

**Michael Farrar,**

*Director, National Centers for Environmental Prediction, National Weather Service, National Oceanic and Atmospheric Administration.*

[FR Doc. 2023–05188 Filed 3–13–23; 8:45 am]

**BILLING CODE 3510–KE–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XC816]**

### Marine Mammals; File No. 27267

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that the Maryland Zoo in Baltimore, 1876 Mansion House Drive, Baltimore, MD 21217 (Responsible Party: Ellen Bronson, DVM), has applied in due form for a permit to import parts of the Amazon river dolphin (*Inia geoffrensis*) for scientific research.

**DATES:** Written, telefaxed, or email comments must be received on or before April 13, 2023.

**ADDRESSES:** The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the ''Features'' box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 27267 from the list of available applications. These documents are also available upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov.* Please include File No. 27267 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov.* The request should set forth the specific reasons why a hearing on this application would be appropriate.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Skidmore or Shasta McClenahan, Ph.D., (301) 427–8401.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant proposes to import parts from up to 20 individual Amazon river dolphins annually. The parts would be collected by researchers working under separate Bolivian authorizations during rescue and relocation efforts. These parts will be analyzed as part of health assessments for infectious disease and exposure to contaminants. The permit would be valid for 5 years from the date of issuance.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: March 8, 2023.

**Amy Sloan,**

*Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2023–05121 Filed 3–13–23; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

### Sunshine Act Meetings

**AGENCY HOLDING THE MEETINGS:** Mississippi River Commission.

**TIME AND DATE:** 9 a.m., March 27, 2023.

**PLACE:** On board MISSISSIPPI V at City Front, Cairo, Illinois.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:** (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the St. Louis and Memphis Districts; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

**TIME AND DATE:** 9 a.m., March 28, 2023.

**PLACE:** On board MISSISSIPPI V at Beale Street Landing, Memphis, Tennessee.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:** (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

**TIME AND DATE:** 9 a.m., March 29, 2023.

**PLACE:** On board MISSISSIPPI V at City Front, Greenville, Mississippi.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:** (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Vicksburg District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

**TIME AND DATE:** 9 a.m., March 31, 2023.

**PLACE:** On board MISSISSIPPI V at New Orleans District Office, New Orleans, Louisiana.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:** (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Vicksburg District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Charles A. Camillo, telephone 601–634–7023.

**Diana M. Holland,**

*Major General, USA, President, Mississippi River Commission.*

[FR Doc. 2023–05275 Filed 3–10–23; 11:15 am]

**BILLING CODE 3720–58–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2023–SCC–0046]**

### Agency Information Collection Activities; Comment Request; Federal Work Study (FWS) Wages for Student Aid Index

**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 new information collection request (ICR).

**DATES:** Interested persons are invited to submit comments on or before May 15, 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–0046. 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:* Federal Work Study (FWS) Wages for Student Aid Index.

*OMB Control Number:* 1845–NEW.

*Type of Review:* A new ICR.

*Respondents/Affected Public:* State, local, and Tribal governments; private sector.

*Total Estimated Number of Annual Responses:* 3,043.

*Total Estimated Number of Annual Burden Hours:* 12,172.

*Abstract:* This new collection will be used to gather information available to participating institutions of higher education (IHE) which is required to fully calculate eligibility for title IV student financial aid for applicants under the Higher Education Act of 1965, as amended (HEA).

The FAFSA Simplification Act (Pub. L. 116–260) introduced a change to the manner in which the Department of Education (ED) may obtain the amount of income an applicant has earned from work under the Federal Work Study (FWS) Program, for the purposes of calculating the applicant's student aid index (SAI) and determine their eligibility for certain Title IV aid. Pursuant to section 483(a)(2)(F) of the FAFSA Simplification Act, ED is required to collect an applicant's income earned under the FWS program from the IHE participating in the FWS program and can no longer add additional questions to the FAFSA to obtain this information from the FAFSA applicant.

Dated: March 8, 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. 2023–05122 Filed 3–13–23; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF EDUCATION

### Applications for New Awards; Innovative Approaches to Literacy Program

**AGENCY:** Office of Elementary and Secondary Education, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2023 for the Innovative Approaches to Literacy (IAL) program, Assistance Listing Number 84.215G. This notice relates to the approved information collection under OMB control number 1894–0006.

**DATES:**

*Applications Available:* March 14, 2023.

*Deadline for Notice of Intent to Apply:* March 29, 2023.

*Deadline for Transmittal of Applications:* May 15, 2023.

*Deadline for Intergovernmental Review:* July 12, 2023.

*Pre-Application Webinar Information:* The Department will hold a pre-application meeting via webinar for prospective applicants. For information about the pre-application webinar, visit the IAL website at: *https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/well-rounded-education-programs/innovative-approaches-to-literacy/.*

**ADDRESSES:** For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the version published on December 27, 2021.

**FOR FURTHER INFORMATION CONTACT:** Simon Earle, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E254, Washington, DC 20202–6450. Telephone: (202) 453–7923. Email: *Simon.Earle@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:**

### Full Text of Announcement

### I. Funding Opportunity Description

*Purpose of Program:* The IAL program supports high-quality programs designed to develop and improve literacy skills for children and students from birth through 12th grade in high-need local educational agencies (LEAs) and schools. IAL promotes innovative literacy programs that support the development of literacy skills in low-income communities, including programs that (1) develop and enhance effective school library programs, which may include providing professional development for school librarians, books, and up-to-date materials to high-need schools; (2) provide early literacy services, including pediatric literacy programs through which, during well-child visits, medical providers trained in research-based methods of early language and literacy promotion provide developmentally appropriate books and recommendations to parents to encourage them to read aloud to their children starting in infancy; and (3) provide high-quality books on a regular basis to children and adolescents from low-income communities to increase reading motivation, performance, and frequency.

*Background:* The IAL program focuses on improving literacy skills for school age children from birth to 12th grade. Following the Secretary's call to ''Raise the Bar'' in education, the priorities used in this competition are designed to create conditions under which students have equitable access to high-quality learning opportunities and experiences.[1] In FY 2023, the Department is particularly interested in projects that propose services and activities in settings that traditionally have limited access to high-quality literacy instruction and resources or settings in which funding disparities may limit access, including, for

[1] U.S. Secretary of Education Miguel Cardona laid out his vision for the direction the agency will follow in 2023 to promote academic excellence, improve learning conditions, and prepare our students for a world where global engagement is critical to our nation's standing. In his address Secretary Cardona remarked that ''Raise the Bar: Lead the World'' is not a list of new priorities, but a call to strengthen our will to transform education for the better, building on approaches that we know work in education.

example, programs that serve incarcerated youth and early learning programs. Similarly, many adult learning programs serve students between the ages of 16 and 19 who are working toward a General Educational Development certificate or State high school diploma. While these students may no longer be in the traditional K–12 setting, they are school-aged students who may have limited access to high-quality literacy instruction and resources. Resources should be provided and allocated in ways that are racially, ethnically, and culturally affirming; considerate of disability status; linguistically responsive; and inclusive of all students in various settings. Of particular interest to the Department are programs designed to meet the needs of students in juvenile correctional facilities. It is imperative that students receiving educational support in juvenile correctional facilities have access to multilevel, age-appropriate literacy materials. Additionally, educators supporting these students should have access to appropriate literacy materials to increase students' positive interactions with books and literature.

The Department also expects to continue awarding grants that will allow us to support school library programs.

*Priorities:* This notice contains two absolute priorities and four competitive preference priorities. Absolute Priorities 1 and 2, subpart (a) of Competitive Preference Priority 1, and Competitive Preference Priority 3 are from the notice of final priorities and requirement for IAL (IAL NFP), published in the **Federal Register** on July 12, 2021 (86 FR 36510). Subpart (b) of Competitive Preference Priority 1 and Competitive Preference Priority 2 are from the Administrative Priorities for Discretionary Grant Programs, published in the **Federal Register** on March 9, 2020 (85 FR 13640) (Administrative Priorities).

Competitive Preference Priority 4 is from the Secretary's Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612) (Supplemental Priorities).

*Absolute Priorities:* For FY 2023, and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), we consider only applications that meet at least one of these absolute priorities.

These priorities are:

*Absolute Priority 1—Projects, Carried Out in Coordination With School Libraries, for Book Distribution, Childhood Literacy Activities, or Both.*

Projects that propose to coordinate with school libraries to carry out grant activities, such as book distributions, childhood literacy activities, or both, for the proposed project.

*Absolute Priority 2—Projects, Carried Out in Coordination With School Libraries, That Provide a Learning Environment That Is Racially, Ethnically, Culturally, Disability Status and Linguistically Responsive and Inclusive, Supportive, and Identity-Safe.*

Projects coordinated with school libraries and designed to be responsive to racial, ethnic, cultural, disability, and linguistic differences in a manner that creates inclusive, supportive, and identity-safe learning environments.

In its application, the applicant must—

(a) Describe the types of racially, ethnically, culturally, disability status, and linguistically responsive program design elements that the applicant proposes to include in its project;

(b) Explain how its program design will create inclusive, supportive, and identity-safe environments; and

(c) Describe how its project will be carried out in coordination with school libraries.

*Competitive Preference Priorities:* For FY 2023, and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 10 points to an application, depending on how well the application meets one or more of these priorities. For Competitive Preference Priority 1, we award an additional 2 points to an application that meets the priority. For Competitive Preference Priority 2, we award an additional 2 points to an application that meets the priority. For Competitive Preference Priority 3, we award up to an additional 3 points, depending on which priority subpart (a, b, or c) the applicant meets. For Competitive Preference Priority 4, we award up to an additional 3 points to an application that meets the priority.

These priorities are:

*Competitive Preference Priority 1—Rural Applicants; Supporting Students in Urban Areas.* (0 or 2 points)

Under this priority, an applicant must demonstrate that it meets either paragraph (a) or (b).

(a) *Rural applicants.* The applicant proposes to serve a community that is served by one or more LEAs with a locale code of 32, 33, 41, 42, 43.

(b) *Projects that are designed to serve one or more urban LEAs.*

(1) The applicant is an eligible LEA or consortium of eligible LEAs with a locale code of 11, 12, or 13.

(2) The applicant is a national nonprofit that proposes to serve schools within eligible LEAs, all of which have a locale code of 11, 12, or 13.

*Note:* Applicants are encouraged to retrieve locale codes from the National Center for Education Statistics (NCES) School District search tool (*https://nces.ed.gov/ccd/districtsearch/*), where LEAs can be looked up individually to retrieve locale codes and Public School search tool (*https://nces.ed.gov/ccd/schoolsearch/*), where individual schools can be looked up to retrieve locale codes.

*Competitive Preference Priority 2—Applications from New Potential Grantees.* (0 or 2 points)

Under this priority, an applicant must demonstrate the applicant has never received a grant, including through membership in a group application submitted in accordance with 34 CFR 75.127–75.129, under the program from which it seeks funds.

*Competitive Preference Priority 3—Supporting Students From Low-Income Families.* (0 to 3 points)

Projects that serve LEAs serving students from low-income families. In its application, an applicant must demonstrate, based on Small Area Income and Poverty Estimates (SAIPE) data from the U.S. Census Bureau or, for an LEA for which SAIPE data are not available, the same State-derived equivalent of SAIPE data that the State uses to make allocations under part A of title I of the Elementary and Secondary Education Act of 1965, as amended (ESEA), one of the following:

(a) At least 30 percent of the students enrolled in each of the LEAs to be served by the proposed project are from families with an income below the poverty line. (1 point)

(b) At least 40 percent of the students enrolled in each of the LEAs to be served by the proposed project are from families with an income below the poverty line. (2 points)

(c) At least 50 percent of the students enrolled in each of the LEAs to be served by the proposed project are from families with an income below the poverty line. (3 points)

*Competitive Preference Priority 4—Promoting Equity in Student Access to Educational Resources and Opportunities.* (0 to 3 points)

In its application, the applicant must propose a project designed to promote education equity and adequacy in resources and opportunity for underserved students—

(a) In one or more of the following educational settings:

(1) Early learning programs.

(2) Career and technical education programs.

(3) Out-of-school-time settings.

(4) Alternative schools and programs.

(5) Juvenile justice system or correctional facilities.

(6) Adult learning.[2]

(b) That examines the sources of inequity and inadequacy and implement responses, and that may include one or more of the following:

(1) Expanding access to high-quality early learning, including in school-based and community-based settings, by removing barriers through implementation of programs that are inclusive with regard to race, ethnicity, culture, language, and disability status.

(2) Establishing, expanding, or improving learning environments, for multilingual learners, and increasing public awareness about the benefits of fluency in more than one language and how the coordination of language development in the school and the home improves student outcomes for multilingual learners.

(3) Improving the quality of educational programs in juvenile justice facilities (such as detention facilities and secure and non-secure placements) or adult correctional facilities.

*Definitions:* The definitions of ''demonstrates a rationale,'' ''logic model,'' ''project component,'' and ''relevant outcome'' are from 34 CFR 77.1. The definition of ''eligible national nonprofit organization'' is from section 2226(b)(2) of the ESEA (20 U.S.C. 6646(b)(2)). The definition of ''local educational agency'' is from section 8101(30) of the ESEA (20 U.S.C. 7801(30)). The definitions of ''children or students with disabilities,'' ''early learning,'' ''English learner,'' ''disconnected youth,'' ''military- or veteran-connected student,'' and ''underserved student'' are from the Supplemental Priorities.

*Children or students with disabilities* means children with disabilities as defined in section 602(3) of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1401(3)) and 34 CFR 300.8, or students with disabilities, as defined in the Rehabilitation Act of 1973 (29 U.S.C. 705(37), 705(202)(B)).

*Demonstrates a rationale* means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

*Disconnected youth* means an individual, between the ages 14 and 24, who may be from a low-income background, experiences homelessness, is in foster care, is involved in the justice system, or is not working or not enrolled in (or at risk of dropping out of) an educational institution.

*Early learning* means any (a) State-licensed or State-regulated program or provider, regardless of setting or funding source, that provides early care and education for children from birth to kindergarten entry, including, but not limited to, any program operated by a childcare center or in a family childcare home; (b) program funded by the Federal Government or State or LEAs (including any IDEA-funded program); (c) Early Head Start and Head Start program; (d) nonrelative childcare provider who is not otherwise regulated by the State and who regularly cares for two or more unrelated children for a fee in a provider setting; and (e) other program that may deliver early learning and development services in a child's home, such as the Maternal, Infant, and Early Childhood Home Visiting Program; Early Head Start; and Part C of IDEA.

*Eligible national nonprofit organization* (NNP) means an organization of national scope that—

(a) Is supported by staff, which may include volunteers, or affiliates at the State and local levels; and

(b) Demonstrates effectiveness or high-quality plans for addressing childhood literacy activities for the population targeted by the grant.

*Note:* A local affiliate of an NNP organization does not meet the definition of NNP organization. Only a national agency, organization, or institution is eligible to apply as an NNP organization.

*English learner* means an individual who is an English learner as defined in section 8101(20) of the ESEA or an individual who is an English language learner as defined in section 203(7) of the Workforce Innovation and Opportunity Act.

*Local educational agency:*

(a) In general—The term *local educational agency* means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(b) Administrative Control and Direction—The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(c) Bureau of Indian Education Schools—The term includes an elementary school or secondary school funded by the Bureau of Indian Education but only to the extent that including the school makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under this Act with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency (SEA) other than the Bureau of Indian Education.

(d) Educational Service Agencies—The term includes educational service agencies and consortia of those agencies.

(e) State Educational Agency—The term includes the SEA in a State in which the SEA is the sole educational agency for all public schools.

*Logic model* (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

*Military- or veteran-connected student* means one or more of the following:

(a) A child participating in an early learning program, a student enrolled in preschool through grade 12, or a student enrolled in career and technical education or postsecondary education who has a parent or guardian who is a member of the uniformed services (as defined by 37 U.S.C. 101), in the Army, Navy, Air Force, Marine Corps, Coast Guard, Space Force, National Guard, Reserves, National Oceanic and Atmospheric Administration, or Public Health Service or is a veteran of the uniformed services with an honorable discharge (as defined by 38 U.S.C. 3311).

(b) A student who is a member of the uniformed services, a veteran of the uniformed services, or the spouse of a service member or veteran.

[2] The IAL program provides high-quality books on a regular basis to children and adolescents from low-income communities to increase reading motivation, performance, and frequency. For the purpose of this program, the intended beneficiaries are children from infancy through adolescence, acknowledging adolescents may also be served in adult learning programs.

(c) A child participating in an early learning program, a student enrolled in preschool through grade 12, or a student enrolled in career and technical education or postsecondary education who has a parent or guardian who is a veteran of the uniformed services (as defined by 37 U.S.C. 101).

*Project component* means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

*Relevant outcome* means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program.

*Underserved student* means a student (which may include children in early learning environments, students in K–12 programs, students in postsecondary education or career and technical education, and adult learners, as appropriate) in one or more of the following subgroups:

(a) A student who is living in poverty or is served by schools with high concentrations of students living in poverty.

(b) A student of color.

(c) A student who is a member of a federally recognized Indian Tribe.

(d) An English learner.

(e) A child or student with a disability.

(f) A disconnected youth.

(g) A technologically unconnected youth.

(h) A migrant student.

(i) A student experiencing homelessness or housing insecurity.

(j) A lesbian, gay, bisexual, transgender, queer or questioning, or intersex (LGBTQI+) student.

(k) A student who is in foster care.

(l) A student without documentation of immigration status.

(m) A pregnant, parenting, or caregiving student.

(n) A student impacted by the justice system, including a formerly incarcerated student.

(o) A student performing significantly below grade level.

(p) A military- or veteran-connected student.

*Program Authority:* 20 U.S.C. 6646.

*Note:* Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in the Federal civil rights laws.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 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 part 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 NFP. (e) The Administrative Priorities. (f) The Supplemental Priorities.

*Note:* The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $9,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2023 from the list of unfunded applications from this competition.

*Estimated Range of Awards:* $175,000 to $750,000.

*Estimated Average Size of Awards:* $500,000.

*Estimated Number of Awards:* 15–20.

*Note:* The Department is not bound by any estimates in this notice.

*Project Period:* 60 months.

## III. Eligibility Information

1. *Eligible Applicants:* To be considered for an award under this competition, an applicant must be one or more of the following:

(1) An LEA in which 20 percent or more of the students served by the LEA are from families with an income below the poverty line (as defined in section 8101(41) of the ESEA).

(2) A consortium of such LEAs described in paragraph (1) above.

(3) The Bureau of Indian Education.

(4) An eligible national nonprofit organization (as defined in this notice) that serves children and students within the attendance boundaries of one or more eligible LEAs.

*Note:* Under the definition of ''poverty line'' in section 8101(41) of the ESEA, the determination of the percentage of students served by an LEA from families with an income below the poverty line is based on the U.S. Census Bureau's SAIPE data.

An entity that meets the definition of an LEA in section 8101(30) of the ESEA and that serves multiple LEAs, such as a county office of education, an education service agency, or regional service education agency, must provide the most recent SAIPE data for each of the individual LEAs it serves. To determine whether the entity meets the poverty threshold, the Department will derive the entity's poverty rate by aggregating the number of students from families below the poverty line (as provided in SAIPE data) in each of the LEAs the entity serves and dividing it by the total number of students (as provided in SAIPE data) in all of the LEAs the entity serves.

An LEA for which SAIPE data are not available, such as a non-geographic charter school, must provide a determination by the SEA that 20 percent or more of the students aged 5–17 in the LEA are from families with incomes below the poverty line based on the same State-derived poverty data the SEA used to determine the LEA's allocation under part A of title I of the ESEA.

*Note:* If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing (1) proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; or (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant.

2.a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This competition involves supplement-not-supplant funding requirements. Section 2301 of the ESEA provides that funds made available under this program must be used to supplement, and not supplant, non-Federal funds that would otherwise be used for IAL program activities by grantees.

c. *Indirect Cost Rate Information:* This program uses a restricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

d. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR

part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

## IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045). and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs,* which contain requirements and information on how to submit an application. Please note that these Common Instructions supersede the version published on December 27, 2021.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the IAL program, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 25 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; the one-page abstract, resumes, bibliography, logic model, or letters of support. However, the recommended page limit does apply to all of the application narrative.

6. *Notice of Intent to Apply:* The Department will be able to review grant applications more efficiently if we know the approximate number of applicants that intend to apply. Therefore, we strongly encourage each potential applicant to notify us of their intent to submit an application. To do so, please email the program contact person listed under **FOR FURTHER INFORMATION CONTACT** with the subject line ''Intent to Apply,'' and include the applicant's name and a contact person's name and email address. Applicants that do not submit a notice of intent to apply may still apply for funding; applicants that do submit a notice of intent to apply are not bound to apply or bound by the information provided.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are as follows:

(a) *Significance* (up to 10 points).

The Secretary considers the significance of the proposed project. In determining the significance of the proposed project, the Secretary considers the following factors:

(1) The significance of the problem or issue to be addressed by the proposed project.

(2) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population.

(3) The importance or magnitude of the results or outcomes likely to be attained by the proposed project, especially improvements in teaching and student achievement.

(b) *Quality of the project design* (up to 20 points).

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(2) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(3) The extent to which the proposed project represents an exceptional approach for meeting statutory purposes and requirements.

(4) The extent to which the proposed project demonstrates a rationale (as defined in this notice).

(c) *Quality of project services* (up to 30 points).

The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers:

(1) The quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(2) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(3) The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

(4) The extent to which the services to be provided by the proposed project are focused on those with greatest needs.

(d) *Quality of the management plan* (up to 30 points).

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within

budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

(3) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(e) *Quality of project evaluation* (up to 10 points).

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(1) The extent to which the methods of evaluation are appropriate to the context within which the project operates.

(2) The extent to which the methods of evaluation provide for examining the effectiveness of project implementation strategies.

2. *Review and Selection Process:* We remind potential applicants that, in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this program the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We also may notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR

75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

5. *Performance Measures:* For purposes of Department reporting under 34 CFR 75.110, the Department has established the following performance measures for the IAL program: (1) the percentage of fourth graders participating in the project who demonstrated individual student growth (*i.e.,* an improvement in their achievement) over the past year on State reading or language arts assessments under section 1111(b)(2) of the ESEA; (2) the percentage of eighth graders participating in the project who demonstrated individual student growth (*i.e.,* an improvement in their achievement) over the past year on State reading or language arts assessments under section 1111(b)(2) of the ESEA; (3) the percentage of schools participating in the project whose book-to-student ratios increase from the previous year; and (4) the percentage of participating children who receive at least one free, grade- and language-appropriate book of their own.

All grantees will be expected to submit an annual performance report that includes data addressing these performance measures to the extent that they apply to the grantee's project.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

## VII. 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.

**James Lane,**

*Senior Advisor to the Secretary, Delegated the Duties of the Assistant Secretary for Elementary and Secondary Education.*

[FR Doc. 2023–05119 Filed 3–13–23; 8:45 am]

BILLING CODE 4000–01–P

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# DEPARTMENT OF EDUCATION

## Applications for New Awards; Native Hawaiian Education Program

**AGENCY:** Office of Elementary and Secondary Education, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2023 for the Native Hawaiian Education (NHE) program, Assistance Listing Number 84.362A. This notice relates to the approved information collection under OMB control number 1894–0006.

**DATES:**

*Applications Available:* March 17, 2023.

*Deadline for Transmittal of Applications:* April 13, 2023.

*Deadline for Intergovernmental Review:* July 12, 2023.

**ADDRESSES:** For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the version published on December 27, 2021.

**FOR FURTHER INFORMATION CONTACT:** Joanne Osborne, U.S. Department of Education, 400 Maryland Avenue SW, Room 3E306, Washington, DC 20202. Telephone: (202) 401–1265. Email: *Hawaiian@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:**

## Full Text of Announcement

## I. Funding Opportunity Description

*Purpose of Program:* The purpose of the NHE program is to support innovative projects that recognize and address the unique educational needs of Native Hawaiians. These projects must include one or more of the activities authorized under section 6205(a)(3) of the Elementary and Secondary Education Act of 1965, as amended (ESEA).

*Background:* The NHE program serves the unique educational needs of Native Hawaiians and recognizes the roles of Native Hawaiian languages and cultures in the educational success and long-term well-being of Native Hawaiian students. The program supports effective supplemental education programs that maximize participation of Native Hawaiian educators and leaders in the planning, development, implementation, management, and evaluation of programs designed to serve Native Hawaiians.

In accordance with section 6204 of the ESEA, the Native Hawaiian Education Council (NHEC) was established in 1994 with the statutory responsibility to coordinate, assess, and provide guidance to appropriate Federal, State, and local agencies on the effectiveness of existing education programs for Native Hawaiians, the state of present Native Hawaiian education efforts, and improvements that may be made to existing programs, policies, and procedures to improve the educational attainment of Native Hawaiians. In its 2020–2021 annual report, the NHEC recommended the Department prioritize funding projects that (1) assert Hawaiian language-medium instruction and culture-based education programs, frameworks, and values as critical to addressing equity, resiliency, and social-emotional well-being for increased Native Hawaiian learner

outcomes and closing achievement gaps; (2) expand ʻāina-based (land-based) programs and initiatives to address place-based inequities and increase educational opportunities; and (3) address mental health and social-emotional well-being as essential for Native Hawaiian learner outcomes, increased academic performance, behavior, social integration, resiliency, identity, and self-efficacy. The Department encourages applicants to review NHEC's most recent program recommendations (available at: *http://www.nhec.org/nhec-reports/annual-reports/*) prior to applying, so that applicants can benefit from the research and community outreach that informed NHEC's recommendations.

*Priorities:* This notice contains two absolute priorities and two competitive preference priorities.

Consistent with 34 CFR 75.105(b)(2)(v), Absolute Priority 1 is from section 6205(a)(3) of the ESEA, which identifies authorized program activities. Absolute Priority 2 is from title III of division H of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328) (the Act). In accordance with 34 CFR 75.105(c)(2)(i), Competitive Preference Priority 1 is from section 6205(a)(2) of the ESEA and Competitive Preference Priority 2 is from the Notice of Final Priorities and Definitions-Secretary's Supplemental Priorities and Definitions for Discretionary Grants Programs (Supplemental Priorities) published in the **Federal Register** on December 10, 2021 (86 FR 70612), and available at *https://www.federalregister.gov/documents/2021/12/10/2021-26615/final-priorities-and-definitions-secretarys-supplemental-priorities-and-definitions-for.*

*Absolute Priorities:* For FY 2023 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), we consider only applications that meet one or more of these priorities. If addressing Absolute Priority 1, an applicant may address one or more subparts of the priority and must clearly identify in the Project Abstract section of its application which subpart or subparts of the Absolute Priority 1 its project addresses.

If addressing Absolute Priority 2 and proposing to renovate or modernize an existing public elementary school, secondary school, or structure related to a public elementary school or secondary school, the applicant must clearly identify in the Project Abstract section of its application the name of the school or structure. If addressing Absolute Priority 2 and proposing to construct a new building, an applicant must clearly indicate this in the Project Abstract section of its application, and provide the proposed name, if available. An applicant addressing Absolute Priority 2 must provide information or data showing that the proposed or existing structure serves or will serve a predominantly Native Hawaiian student body.

Applicants must clearly identify the specific absolute priority or priorities the proposed project addresses in the project abstract; an applicant that wishes to apply under both priorities should submit two separate applications.

*Note:* The Department may create two funding slates—one for applicants that meet Absolute Priority 1 and one for applicants that meet Absolute Priority 2. As a result, the Department may fund applications out of the overall rank order, provided applications of sufficient quality are submitted, but the Department is not bound to do so.

These priorities are:

*Absolute Priority 1—Native Hawaiian Education Activities.*

To meet this priority, an eligible applicant must propose a project that includes one or more of the following authorized activities pursuant to section 6205(a)(3) of the ESEA:

(a) The development and maintenance of a statewide Native Hawaiian early education and care system to provide a continuum of services for Native Hawaiian children from the prenatal period of the children through age 5.

(b) The operation of family-based education centers that provide such services as—

(i) Programs for Native Hawaiian parents and their infants from the prenatal period of the infants through age 3;

(ii) Preschool programs for Native Hawaiians; and

(iii) Research on, and development and assessment of, family-based, early childhood, and preschool programs for Native Hawaiians.

(c) Activities that enhance beginning reading and literacy in either the Hawaiian or the English language among Native Hawaiian students in kindergarten through grade 3 and assistance in addressing the distinct features of combined English and Hawaiian literacy for Hawaiian speakers in grades 5 and 6.

(d) Activities to meet the special needs of Native Hawaiian students with disabilities, including—

(i) The identification of such students and their needs;

(ii) The provision of support services to the families of such students; and

(iii) Other activities consistent with the requirements of the Individuals with Disabilities Education Act (IDEA).

(e) Activities that address the special needs of Native Hawaiian students who are gifted and talented, including—

(i) Educational, psychological, and developmental activities designed to assist in the educational progress of those students; and

(ii) Activities that involve the parents of those students in a manner designed to assist in the educational progress of such students.

(f) The development of academic and vocational curricula to address the needs of Native Hawaiian children and adults, including curriculum materials in the Hawaiian language and mathematics and science curricula that incorporate Native Hawaiian tradition and culture.

(g) Professional development activities for educators, including—

(i) The development of programs to prepare prospective teachers to address the unique needs of Native Hawaiian students within the context of Native Hawaiian culture, language, and traditions;

(ii) In-service programs to improve the ability of teachers who teach in schools with high concentrations of Native Hawaiian students to meet the unique needs of such students; and

(iii) The recruitment and preparation of Native Hawaiians, and other individuals who live in communities with a high concentration of Native Hawaiians, to become teachers.

(h) The operation of community-based learning centers that address the needs of Native Hawaiian students, parents, families, and communities through the coordination of public and private programs and services, including—

(i) Early childhood education programs;

(ii) Before, after, and summer school programs, expanded learning time, or weekend academies;

(iii) Career and technical education programs; and

(iv) Programs that recognize and support the unique cultural and educational needs of Native Hawaiian children, and incorporate appropriately qualified Native Hawaiian elders and seniors.

(i) Activities, including program co-location, to enable Native Hawaiians to enter and complete programs of postsecondary education, including—

(i) Family literacy services; and

(ii) Counseling, guidance, and support services for students.

(j) Research and data collection activities to determine the educational

status and needs of Native Hawaiian children and adults.

(k) Other research and evaluation activities related to programs carried out under title VI, part B of the ESEA.

(l) Other activities, consistent with the purposes of title VI, part B of the ESEA, to meet the educational needs of Native Hawaiian children and adults.

*Absolute Priority 2—Native Hawaiian Education Construction.*

To meet this priority, an eligible applicant must propose a project that will result in the construction, renovation, or modernization of a public elementary school, secondary school, or structure related to a public elementary school or secondary school that serves a predominantly Native Hawaiian student body. To meet this priority, an applicant must provide information or data showing that the proposed or existing structure serves or will serve a predominantly Native Hawaiian student body.

*Note:* FY 2023 funds may be used for the purpose of construction, renovation, and modernization of any public elementary school, secondary school, or structure related to a public elementary school or secondary school that serves a predominantly Native Hawaiian student body. For the purposes of this program, the Department considers ''predominantly'' to mean a student body that is comprised of 50 percent or more Native Hawaiian students.

*Competitive Preference Priorities:* For FY 2023 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities for applications under Absolute Priority 1. Under 34 CFR 75.105(c)(2)(i), we award up to an additional 3 points to an application, depending on how well the application meets Competitive Preference Priority 1, and we award up to an additional 3 points to an application, depending on how well the application meets Competitive Preference Priority 2. The maximum number of competitive preference priority points is 6.

These priorities are:

*Competitive Preference Priority 1—Native Hawaiian Education Priority Activities.* (up to 3 points)

To meet this priority, an eligible applicant must propose a project that is designed to address one or more of the following, pursuant to section 6205(a)(2) of the ESEA:

(a) Beginning reading and literacy among students in kindergarten through third grade.

(b) The needs of at-risk children and youth.

(c) The needs in fields or disciplines in which Native Hawaiians are underemployed.

(d) The use of the Hawaiian language in instruction.

*Competitive Preference Priority 2—Addressing the Impact of COVID–19 on Students, Educators, and Faculty.* (up to 3 points)

To meet this priority, an eligible applicant must propose a project that is designed to address the impacts of the COVID–19 pandemic, including impacts that extend beyond the duration of the pandemic itself, on the students most impacted by the pandemic, with a focus on underserved students and the educators who serve them, through one or both of the following priority areas:

(a) Addressing students' social, emotional, mental health, and academic needs through approaches that are inclusive with regard to race, ethnicity, culture, language, and disability status.

(b) Using evidence-based instructional approaches and supports, such as professional development, coaching, ongoing support for educators, high quality tutoring, expanded access to rigorous coursework and content across K–12, and expanded learning time to accelerate learning for students in ways that ensure all students have the opportunity to successfully meet challenging academic content standards without contributing to tracking or remedial courses.

*Definitions:* For FY 2023, and any subsequent year in which we make awards from the list of unfunded applications from this competition, the following definitions apply. The definitions of ''Demonstrates a rationale,'' ''Evidence-based'', ''Project component,'' ''Logic model,'' and ''Relevant outcome'' are from 34 CFR 77.1(c). The definition of ''Charter school'' is from section 4310(2) of the ESEA; the definitions of ''Native Hawaiian,'' ''Native Hawaiian community-based organization,'' ''Native Hawaiian educational organization,'' and ''Native Hawaiian language'' are from section 6207 of the ESEA; and the definitions of ''Regular high school diploma,'' ''Local educational agency,'' and ''State educational agency'' are from section 8101 of the ESEA. The definitions of ''Children or students with disabilities,'' ''Early learning,'' ''Educator,'' ''Military- or veteran-connected student,'' and ''Underserved student'' are from the Supplemental Priorities.

These definitions apply to the FY 2023 grant competition and any subsequent year in which we make awards from the list of unfunded applications from this competition.

*Charter school* means a public school that—

(a) In accordance with a specific State statute authorizing the granting of charters to schools, is exempt from significant State or local rules that inhibit the flexible operation and management of public schools, but not from any rules relating to the other requirements of this definition;

(b) Is created by a developer as a public school, or is adapted by a developer from an existing public school, and is operated under public supervision and direction;

(c) Operates in pursuit of a specific set of educational objectives determined by the school's developer and agreed to by the authorized public chartering agency;

(d) Provides a program of elementary or secondary education, or both;

(e) Is nonsectarian in its programs, admissions policies, employment practices, and all other operations, and is not affiliated with a sectarian school or religious institution;

(f) Does not charge tuition;

(g) Complies with the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*), section 444 of the General Education Provisions Act (20 U.S.C. 1232g) (commonly referred to as the ''Family Educational Rights and Privacy Act of 1974''), and part B of the Individuals with Disabilities Education Act;

(h) Is a school to which parents choose to send their children, and that

(1) admits students on the basis of a lottery, consistent with section 4303(c)(3)(A) of the ESEA, if more students apply for admission than can be accommodated; or

(2) in the case of a school that has an affiliated charter school (such as a school that is part of the same network of schools), automatically enrolls students who are enrolled in the immediate prior grade level of the affiliated charter school and, for any additional student openings or student openings created through regular attrition in student enrollment in the affiliated charter school and the enrolling school, admits students on the basis of a lottery as described in clause (i);

(i) Agrees to comply with the same Federal and State audit requirements as do other elementary schools and secondary schools in the State, unless such State audit requirements are waived by the State;

(j) Meets all applicable Federal, State, and local health and safety requirements;

(k) Operates in accordance with State law;

(l) Has a written performance contract with the authorized public chartering agency in the State that includes a description of how student performance will be measured in charter schools pursuant to State assessments that are required of other schools and pursuant to any other assessments mutually agreeable to the authorized public chartering agency and the charter school; and

(m) May serve students in early childhood education programs or postsecondary students. (Section 4310(2) of the ESEA)

*Children or students with disabilities* means children with disabilities as defined in section 602(3) of the IDEA (20 U.S.C. 1401(3)) and 34 CFR 300.8 or students with disabilities, as defined in the Rehabilitation Act of 1973 (29 U.S.C. 705(37), 705(202)(B)). (Supplemental Priorities)

*Demonstrates a rationale* means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes. (34 CFR 77.1(c))

*Early learning* means any

(a) State-licensed or State-regulated program or provider, regardless of setting or funding source, that provides early care and education for children from birth to kindergarten entry, including, but not limited to, any program operated by a child care center or in a family child care home;

(b) program funded by the Federal Government or State or local educational agencies (LEAs) (including any IDEA-funded program);

(c) Early Head Start and Head Start program;

(d) non-relative child care provider who is not otherwise regulated by the State and who regularly cares for two or more unrelated children for a fee in a provider setting; and

(e) other program that may deliver early learning and development services in a child's home, such as the Maternal, Infant, and Early Childhood Home Visiting Program; Early Head Start; and Part C of IDEA.

*Educator* means an individual who is an early learning educator, teacher, principal or other school leader, specialized instructional support personnel (*e.g.,* school psychologist, counselor, school social worker, early intervention service personnel), paraprofessional, or faculty. (Supplemental Priorities)

*Evidence-based* means the proposed project component is supported by one or more of strong evidence, moderate evidence, promising evidence, or evidence that demonstrates a rationale. (34 CFR 77.1(c))

*Local educational agency*—

(a) IN GENERAL.—The term ''local educational agency'' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.

(b) ADMINISTRATIVE CONTROL AND DIRECTION.—The term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(c) BUREAU OF INDIAN EDUCATION SCHOOLS.—The term includes an elementary school or secondary school funded by the Bureau of Indian Education but only to the extent that including the school makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the LEA receiving assistance under the ESEA with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Education.

(d) EDUCATION SERVICE AGENCIES.—The term includes educational service agencies and consortia of those agencies.

(e) STATE EDUCATIONAL AGENCY.—The term includes the State educational agency in a State in which the State educational agency is the sole educational agency for all public schools. (Section 8101(30) of the ESEA)

*Logic model* (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes. (34 CFR 77.1(c))

*Military- or veteran-connected student* means one or more of the following:

(a) A child participating in an early learning program, a student enrolled in preschool through grade 12, or a student enrolled in career and technical education or postsecondary education who has a parent or guardian who is a member of the uniformed services (as defined by 37 U.S.C. 101) in the Army, Navy, Air Force, Marine Corps, Coast Guard, Space Force, National Guard, Reserves, National Oceanic and Atmospheric Administration, or Public Health Service or is a veteran of the uniformed services with an honorable discharge (as defined by 38 U.S.C. 3311).

(b) A student who is a member of the uniformed services, a veteran of the uniformed services, or the spouse of a service member or veteran.

(c) A child participating in an early learning program, a student enrolled in preschool through grade 12, or a student enrolled in career and technical education or postsecondary education who has a parent or guardian who is a veteran of the uniformed services (as defined by 37 U.S.C. 101). (Supplemental Priorities)

*Native Hawaiian* means any individual who is—

(a) A citizen of the United States; and

(b) A descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii, as evidenced by—

(1) Genealogical records;

(2) Kupuna (elders) or Kamaaina (long-term community residents) verification; or

(3) Certified birth records. (Section 6207(2) of the ESEA)

*Native Hawaiian community-based organization* means any organization that is composed primarily of Native Hawaiians from a specific community and that assists in the social, cultural, and educational development of Native Hawaiians in that community. (Section 6207(3) of the ESEA)

*Native Hawaiian educational organization* means a private nonprofit organization that—

(a) Serves the interests of Native Hawaiians;

(b) Has Native Hawaiians in substantive and policymaking positions within the organization;

(c) Incorporates Native Hawaiian perspective, values, language, culture, and traditions into the core function of the organization;

(d) Has demonstrated expertise in the education of Native Hawaiian youth; and

(e) Has demonstrated expertise in research and program development. (Section 6207(4) of the ESEA)

*Native Hawaiian language* means the single Native American language indigenous to the original inhabitants of the State of Hawaii. (Section 6207(5) of the ESEA)

*Project component* means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers). (34 CFR 77.1(c))

*Regular high school diploma*

(a) means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in ESEA section 1111(b)(1)(E); and

(b) does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential. (Section 8101(43) of the ESEA)

*Relevant outcome* means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program. (34 CFR 77.1(c))

*State educational agency* means the agency primarily responsible for the State supervision of public elementary schools and secondary schools. (Section 8101(49) of the ESEA)

*Underserved student* means a student (which may include children in early learning environments, students in K–12 programs, students in postsecondary education or career and technical education, and adult learners, as appropriate) in one or more of the following subgroups:

(a) A student who is living in poverty or is served by schools with high concentrations of students living in poverty.

(b) A student of color.

(c) A student who is a member of a federally recognized Indian Tribe.

(d) An English learner.

(e) A child or student with a disability.

(f) A disconnected youth.

(g) A technologically unconnected youth.

(h) A migrant student.

(i) A student experiencing homelessness or housing insecurity.

(j) A lesbian, gay, bisexual, transgender, queer or questioning, or intersex (LGBTQI+) student.

(k) A student who is in foster care.

(l) A student without documentation of immigration status.

(m) A pregnant, parenting, or caregiving student.

(n) A student impacted by the justice system, including a formerly incarcerated student.

(o) A student who is the first in their family to attend postsecondary education.

(p) A student enrolling in or seeking to enroll in postsecondary education for the first time at the age of 20 or older.

(q) A student who is working full-time while enrolled in postsecondary education.

(r) A student who is enrolled in or is seeking to enroll in postsecondary education who is eligible for a Pell Grant.

(s) An adult student in need of improving their basic skills or an adult student with limited English proficiency.

(t) A student performing significantly below grade level.

(u) A military- or veteran-connected student. (Supplemental Priorities)

*Application Requirement:* In accordance with ESEA section 6206(b), we are establishing the following application requirement: Each applicant for a grant under this program shall submit the application for comment to the LEA serving students who will participate in the program to be carried out under the grant (*i.e.,* Hawaii State Department of Education), and include those comments, if any, with the application to the Secretary.

*Program Authority:* Section 6205 of the ESEA (20 U.S.C. 7515); Consolidated Appropriations Act, 2023.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 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 part 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 Supplemental Priorities.

*Note:* The regulations in 34 CFR part 86 apply to institutions of higher education only.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $33,197,670.

*Estimated Range of Awards:* $400,000–$1,325,000.

*Estimated Number of Awards:* 25–83.

*Note:* The Department is not bound by any estimates in this notice.

*Project Period:* Up to 36 months.

## III. Eligibility Information

1. *Eligible Applicants:* The following entities are eligible to apply under this competition:

(a) Native Hawaiian educational organizations.

(b) Native Hawaiian community-based organizations.

(c) Public and private nonprofit organizations, agencies, and institutions with experience in developing or operating Native Hawaiian programs or programs of instruction in the Native Hawaiian language.

(d) Charter schools.

(e) Consortia of the organizations, agencies, and institutions described in paragraphs (a) through (c).

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* No more than 5 percent of funds awarded for a grant under this program may be used for direct administrative costs (ESEA section 6305, (20 U.S.C. 7545 and the Act). For additional information please see Funding Restriction section below.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

4. *Performance Reports:* If you receive an award under this program, you are required to provide copies of the performance reports (see section VI of this document below) to the Native Hawaiian Education Council (authorized under section 6204 of the ESEA (20 U.S.C. 7514)).

5. *Build America Buy America Act:* This program is subject to the Build America, Buy America Act (Pub. L. 117–58) domestic sourcing requirements. Accordingly, under this program, grantees and their contractors may not use their grant funds for infrastructure projects or activities (*e.g.,* construction, remodeling, and broadband infrastructure) unless—

(a) All iron and steel used in the infrastructure project or activity are produced in the United States;

(b) All manufactured products used in the infrastructure project or activity are produced in the United States; and

(c) All construction materials are manufactured in the United States.

Grantees may request waivers to these requirements by submitting a Build America Buy America Act Waiver Request Form. For more information, including a link to the Waiver Request Form, see the Department's Build America Buy America Waivers website at *https://www2.ed.gov/policy/fund/guid/buy-america/index.html.*

## IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *https://www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the version published on December 27, 2021.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the NHE program, your application may include business information that you consider proprietary. In 34 CFR 5.11, we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended). Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

4. *Funding Restrictions:* No more than 5 percent of FY 2023 funds awarded for a grant under this program may be used for direct administrative costs (ESEA section 6205(b) and the Act). This 5 percent limit does not include indirect costs.

*Note:* In general, for purposes of this competition, the 5 percent limit on administrative costs under ESEA section 6205(b) includes direct and indirect administrative costs. In the Act, however, Congress explicitly specified that, for FY 2023 funds, the administrative cost cap refers only to direct administrative costs.

We reference regulations outlining additional funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 30 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210. The maximum score for all of the selection criteria is 100 points. The maximum score for each criterion is included in parentheses following the title of the specific selection criterion. Each criterion also includes the factors that reviewers will consider in determining the extent to which an applicant meets the criterion.

The selection criteria are as follows:

(a) *Need for project (up to 10 points)*

(1) The Secretary considers the need for the proposed project.

(2) In determining the need for the proposed project, the Secretary considers the extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

(b) *Quality of the project design (up to 30 points)*

(1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the extent to which the proposed project demonstrates a rationale (as defined in this notice).

(c) *Quality of project personnel (up to 10 points)*

(1) The Secretary considers the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability (up to 5 points).

(3) In addition, the Secretary considers the qualifications, including relevant training and experience, of key project personnel (up to 5 points).

(d) *Quality of the management plan (up to 30 points)*

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers the adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(e) *Quality of the project evaluation (up to 20 points)*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation will provide valid and reliable performance data on relevant outcomes (up to 10 points).

(ii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible (up to 10 points).

*Note:* The quality of the project evaluation selection criterion relates to performance measure (1) under the Performance Measures section of this notice.

2. *Review and Selection Process:* We remind potential applicants that, in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, and 110.23.).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.206(a)(2), we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General.* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205;

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b). At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* For the purposes of Department reporting under 34 CFR 75.110, we have established four performance measures for the NHE program under Absolute Priority 1: (1) the number of grantees that attain or exceed the targets for the outcome indicators for their projects that have been approved by the Secretary; (2) the percentage of Native Hawaiian children participating in early education programs who consistently demonstrate school readiness in literacy as measured by the Hawaii School Readiness Assessment (HSRA); (3) the percentage of students in schools served by the program who graduate from high school with a regular high school diploma (as defined in this notice) in 4 years; and (4) the percentage of students participating

in a Native Hawaiian language (as defined in this notice) program that is conducted under the NHE program who meet or exceed proficiency standards in reading on a test of the Native Hawaiian language.

For Absolute Priority 2, the Department has established the following performance measures for the NHE program: (1) the number of grantees that attain or exceed the targets for the outcome indicators for their projects that have been approved by the Secretary; (2) the number and percentage of grantees that report annually that the overall condition of the school building(s) on which their project focuses is adequate; and (3) the number and percentage of grantees that report their project is at each of the following levels of completion: (a) not started; (b) 1–25 percent; (c) 26–50 percent; (d) 51–75 percent; (e) 76–99 percent; (f) 100 percent complete.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things, whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

## VII. 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.

**James F. Lane,**

*Senior Advisor, Office of the Secretary. Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary Office of Elementary and Secondary Education.*

[FR Doc. 2023–05120 Filed 3–13–23; 8:45 am]

**BILLING CODE 4000–01–P**

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## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2022–SCC–0160]**

## Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; U.S. Department of Education Supplemental Information for the SF–424 Form

**AGENCY:** Office of the Secretary (OS), 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 April 13, 2023.

**ADDRESSES:** Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Cleveland Knight, 202–987–0064.

**SUPPLEMENTARY INFORMATION:** The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

*Title of Collection:* U.S. Department of Education Supplemental Information for the SF–424 Form.

*OMB Control Number:* 1894–0007.

*Type of Review:* A revision of a currently approved ICR.

*Respondents/Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Annual Responses:* 5,976.

*Total Estimated Number of Annual Burden Hours:* 2,271.

*Abstract:* The U.S. Department of Education Supplemental Information form for the SF–424 is used together with the SF–424, Application for Federal Assistance. Several years ago ED made a decision to switch from the Application for Federal Education Assistance or ED 424 (1890–0017) collection (now 1894–0007) to the SF–424, in order to adhere with Federal-wide forms standardization and streamlining efforts, especially with widespread agency use of *Grants.gov*.

There were several data elements/questions on the ED 424 that were required for applicants and were not included on the SF–424. Therefore, ED put these questions that were already cleared as part of the 1894–0007 collection on a form entitled the U.S. Department of Education Supplemental Information for the SF–424.

The questions on this form deal with the following areas: Project Director identifying and contact information; New Potential Grantee or Novice Applicants; Human Subjects Research, and Infrastructure Programs and Build America, Buy America Act Applicability (BABAA). The ED supplemental information form can be

used with any of the SF–424 forms in the SF–424 forms family, as applicable.

Dated: March 9, 2023.

**Stephanie Valentine,**

*PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.*

[FR Doc. 2023–05154 Filed 3–13–23; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Applications for New Awards; Magnet Schools Assistance Program

**AGENCY:** Office of Elementary and Secondary Education, Department of Education.

**ACTION:** Notice.

**SUMMARY:** The Department of Education (Department) is issuing a notice inviting applications for fiscal year (FY) 2023 for the Magnet Schools Assistance Program (MSAP), Assistance Listing Number 84.165A. This notice relates to the approved information collection under OMB control number 1855–0011.

**DATES:**

*Applications Available:* March 14, 2023.

*Deadline for Notice of Intent to Apply:* April 13, 2023.

*Deadline for Transmittal of Applications:* May 15, 2023.

*Deadline for Intergovernmental Review:* July 12, 2023.

*Pre-Application Webinar Information:* No later than March 24, 2023, MSAP will begin holding webinars to provide technical assistance to interested applicants on key application-related topics. Interested applicants are strongly encouraged to participate or review the accompanying materials available online. Updated information and past application webinars can be found on the MSAP website at *https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/school-choice-improvement-programs/magnet-school-assistance-program-msap/.* Recordings of all webinars will be available on the MSAP website following the sessions.

**ADDRESSES:** For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045), and available at *www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs.* Please note that these Common Instructions supersede the version published on December 27, 2021.

**FOR FURTHER INFORMATION CONTACT:** Gillian Cohen-Boyer, U.S. Department of Education, 400 Maryland Avenue SW, Room 3C134, Washington, DC 20202–5970. Telephone: (202) 401–1259. Email: *msap.team@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:**

### Full Text of Announcement

### I. Funding Opportunity Description

*Purpose of Program:* MSAP, authorized under title IV, part D of the Elementary and Secondary Education Act of 1965, as amended (ESEA), provides grants to local educational agencies (LEAs) and consortia of LEAs to create or revise magnet schools under required or voluntary desegregation plans.

Under section 4401(b) of the ESEA, 20 U.S.C. 7231, the purpose of MSAP is to assist LEAs in the desegregation of schools by providing financial assistance to eligible LEAs for: (1) the elimination, reduction, or prevention of minority group isolation (MGI) in elementary schools and secondary schools with substantial proportions of minority students, which shall include assisting in the efforts of the United States to achieve voluntary desegregation in public schools; (2) the development, implementation, and expansion of magnet school programs that will assist LEAs in achieving systemic reforms and providing all students the opportunity to meet challenging State academic standards; (3) the development, design, and expansion of innovative educational methods and practices that promote diversity and increase choices in public elementary schools and public secondary schools and public educational programs; (4) courses of instruction within magnet schools that will substantially strengthen the knowledge of academic subjects and the attainment of tangible and marketable career, technological, and professional skills of students attending such schools; (5) improving the capacity of LEAs, including through professional development, to continue operating magnet schools at a high performance level after Federal funding for the magnet schools is terminated; and (6) ensuring that all students enrolled in the magnet school programs have equitable access to high-quality education that will enable the students to succeed academically and continue with postsecondary education or employment.

*Background:* Since its inception nearly 40 years ago, MSAP has supported LEAs to create magnet schools, defined under section 4402 of the ESEA, 20 U.S.C. 7231a, as public elementary or secondary schools or education centers that offer ''a special curriculum capable of attracting substantial numbers of students of different racial backgrounds,'' as part of their efforts to voluntarily desegregate their schools or meet the intended outcomes of desegregation plans required by a final order of any court of the United States, a court of any State, or any other State agency or official of competent jurisdiction (herein referred to as ''required plans'' or ''required desegregation plans''). In this competition, the Department seeks to promote applications that effectively address the legislative purpose of the MSAP statute, namely assisting LEAs in the desegregation of schools through the use of magnet schools, by requiring applicants to demonstrate how they intend to align the elements of their proposed MSAP projects to address the goals identified in their required or voluntary desegregation plans. Applicants are required to include a copy of their required or voluntary desegregation plans as a component of their applications under sections 4403 and 4404 of the ESEA, 20 U.S.C. 7231b and 7231c. In accordance with 20 U.S.C. 7231d, 34 CFR 280.2 and 280.20, under section III, part 4 of this notice, applicants must summarize the specific goals and objectives of their required or voluntary desegregation plan and explain how Federal funding of specific magnet schools will assist in achieving their objectives related to the reduction, prevention, or elimination of MGI either in the proposed magnets or in those magnets' feeder schools (as defined in this notice). Applicants must demonstrate at the time of submission that the goals and objectives with regards to the creation or further development of the proposed magnet schools have been recently approved by the applicant's or applicants' school board(s), if operating under a voluntary plan, or that a court, or other cognizant entity as appropriate, has been asked to consider modifying a required plan with these specific goals and objectives in the case of required plans. This information will assist the Department in confirming applicants' eligibility for an award and inform the Department's review of an

applicant's project narrative against the selection criteria outlined in section V, part 1 of this notice.

Beyond proposing effective plans for creating or revising magnet schools that offer unique educational opportunities and attract substantial numbers of students of different backgrounds, we encourage applicants to employ a range of strategies to maximize the potential of providing equitable access to opportunities for all students to meet challenging State academic standards as a key aspect of their systemic reforms. Competitive Preferences Priorities 1–4 were established by Congress in the reauthorization of MSAP under ESEA as tools for promoting educational equity and commitments to excellence. Additionally, under section 4407 of the ESEA, 20 U.S.C. 7231f, MSAP permits applicants to support student transportation to and from magnet schools, provided the transportation costs are sustainable beyond the grant period and the costs do not constitute a significant portion of their grant funds. Also, under Competitive Preference Priority 5, we provide competitive preference for applicants that propose to establish, expand, or strengthen inter-district and regional magnet programs consistent with section 4407(a)(8) of the ESEA, 20 U.S.C. 7231f.[1] Responses to Competitive Preference Priority 5 could include activities such as establishing and participating in a voluntary, inter-district transfer program for students within geographic proximity but across districts' boundary lines; making strategic decisions regarding the selection of magnet school sites or revising school boundaries, attendance zones, or feeder patterns to take into account neighboring communities; and formal merging or coordination among multiple educational jurisdictions in order to pool and more equitably allocate resources, provide transportation, expand curricula options, and expand high-quality public school options for students from low-income backgrounds. In responding to Competitive Preference Priority 5, we encourage applicants to describe specific strategies beyond inter-district transfer policies, for example, that the applicant intends to employ to further promote diversity and increase choices across district, geographic, or other boundary lines through the proposed MSAP project.

To increase the overall diversity of the school settings in which students learn and best support a diverse set of learners within proposed magnet schools, under Competitive Preference Priority 6, we provide competitive preference to applicants that demonstrate connections between their proposed MSAP projects and broader school or district efforts to increase students' access to high-quality instruction delivered by a diverse and well-supported group of educators. In responding to Competitive Preference Priority 6, we encourage applicants to describe how they intend to leverage the LEA's broader human resource efforts as an integrated component in meeting the goals and objectives of the MSAP project. For example, to further LEA efforts to ameliorate teacher shortages in science, technology, engineering, and mathematics, and expand access for all students to rigorous coursework in these areas, an applicant could propose to provide meaningful professional development and leadership opportunities for excellent educators to expand their instructional reach beyond a single school building to more students using technology.

Additionally, through Invitational Priority 1, we encourage applicants to establish whole-school magnet programs in order to promote equitable learning opportunities for students in ways that allow all students within a school to successfully engage in the special curriculum and meet challenging academic content standards and to decrease the likelihood of tracking or segregation within schools.

The Department is also interested in projects that propose to coordinate with relevant government entities—such as housing and transportation authorities, among others—given the impact that other public policy choices may have on the composition of a school's student body. For example, the Department seeks applications connecting MSAP projects to nearby public housing redevelopment projects, such as those funded through the Department of Housing and Urban Development (HUD) Choice Neighborhoods Initiative and the HUD Rental Assistance Demonstration program. Accordingly, under Invitational Priority 2, and more generally through the selection criteria outlined in section V of this notice, we encourage projects that propose to coordinate efforts with housing and transportation authorities, as well as other Federal, State, or local agencies, or community-based organizations.

To assist grantees in grounding their programs in the existing knowledge base, as well as identifying practices that will improve LEA capacity to continue operating magnet schools at high performance levels beyond the funding period, this competition provides opportunities for applicants to address the use of evidence in several ways. Under Selection Criteria 1—Desegregation, outlined in section V, part 1(a) of this notice, applicants are encouraged to demonstrate a rationale, that is, to demonstrate how, strategically, their proposed project activities would allow them to meet the purposes of MSAP. In response to the quality of the project evaluation selection criterion in part 2(e), applicants should discuss both how they will monitor the implementation and results of their MSAP project activities and how they plan to evaluate a specific project component or components in a study designed to yield results at the level of promising evidence or higher. This study, to be reported on by the end of the grants project as outlined in section IV (4)(c), is one measure to assist the LEA in building capacity to continue operating magnet schools at a high performance level after Federal funding for the magnet schools ends.

*Priorities:* This competition includes six competitive preference priorities and two invitational priorities. In accordance with 34 CFR 75.105(b)(2)(ii), Competitive Preference Priorities 1 and 3 are from the MSAP regulations at 34 CFR 280.32. In accordance with 34 CFR 75.105(b)(2)(iv), Competitive Preference Priorities 2 and 4 are from section 4406 of the ESEA, 20 U.S.C. 7231e. In accordance with 34 CFR 75.105(b)(2)(v), Competitive Preference Priority 5 is from allowable activities specified in section 4407 of the ESEA, 20 U.S.C. 7231f, and Competitive Preference Priority 6 is from the Final Priorities and Definitions—Secretary's Supplemental Priorities and Definitions for Discretionary Grants Programs, published in the **Federal Register** on December 10, 2021 (86 FR 70612) (Supplemental Priorities).

*Competitive Preference Priorities:* For FY 2023 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award up to 2 additional points to an application depending on how well the application meets Competitive Preference Priority 1,

[1] We note that, in a FY 2023 Appropriations Report (H.R. Rep. No. 117–403 at 263 (2022)), the House Committee on Appropriations directs the Department to include such a priority, citing a 2019 report by the Urban Institute indicating that two-thirds of total school segregation in metropolitan areas is due to segregation between, rather than within, school districts. Monarrez, Tómas, Kisida, Brian, and Chingos, Matthew. When is a school segregated? Making sense of segregation 65 years after *Brown* v. *Board of Education.* Urban Institute, September 27, 2019. Retrieved January 3, 2021, from *www.urban.org/research/publication/when-school-segregated-making-sense-segregation-65-years-after-brown-v-board-education.*

up to 3 additional points to an application depending on how well the application meets Competitive Preference Priority 2, up to 2 additional points to an application depending on how well the application meets Competitive Preference Priority 3, up to 3 additional points to an application depending on how well the application meets Competitive Preference Priority 4, up to 3 additional points to an application depending on how well the application meets Competitive Preference Priority 5, and up to 3 additional points to an application depending on how well the application meets Competitive Preference Priority 6, for up to a total of 16 additional points. These points are in addition to any points the application earns under the selection criteria in this notice. Applicants may address one or more of the competitive preference priorities.

These priorities are:

*Competitive Preference Priority 1—Need for Assistance (up to 2 points).*

The Secretary evaluates the applicant's need for assistance by considering—

(1) The costs of fully implementing the magnet schools project as proposed;

(2) The resources available to the applicant to carry out the project if funds under the program were not provided;

(3) The extent to which the costs of the project exceed the applicant's resources; and

(4) The difficulty of effectively carrying out the approved plan and the project for which assistance is sought, including consideration of how the design of the magnet school project—*e.g.,* the type of program proposed, the location of the magnet school within the LEA—impacts the applicant's ability to successfully carry out the approved plan.

*Competitive Preference Priority 2—New or Revised Magnet Schools Projects and Strength of Evidence to Support Proposed Projects (up to 3 points).*

The Secretary determines the extent to which the applicant proposes to (1) carry out a new, evidence-based magnet school program; (2) significantly revise an existing magnet school program, using evidence-based methods and practices, as available; or (3) replicate an existing magnet school program that has a demonstrated record of success in increasing student academic achievement and reducing isolation of minority groups.

*Competitive Preference Priority 3—Selection of Students (up to 2 points).*

The Secretary determines the extent to which the applicant proposes to select students to attend magnet schools by methods such as lottery, rather than through academic examination.

*Competitive Preference Priority 4—Increasing Racial Integration and Socioeconomic Diversity (up to 3 points).*

The Secretary determines the extent to which the applicant proposes to increase racial integration by taking into account socioeconomic diversity in designing and implementing magnet school programs.

*Competitive Preference Priority 5—Inter-district and Regional Approaches (up to 3 points).*

Under this priority, an applicant must demonstrate that grant funds will be used to enable the LEA, or consortium of such agencies, or other organizations partnered with such agency or consortium, to establish, expand, or strengthen inter-district and regional magnet programs.

*Competitive Preference Priority 6—Supporting a Diverse Educator Workforce and Professional Growth to Strengthen Student Learning (up to 3 points).*

Projects that are designed to increase the proportion of well-prepared, diverse, and effective educators serving students, with a focus on underserved students, through building or expanding high-poverty school districts' capacity to hire, support, and retain an effective and diverse educator workforce, through one or both of the following:

(a) Adopting or expanding comprehensive, strategic career and compensation systems that provide competitive compensation and include opportunities for educators to serve as mentors and instructional coaches, or to take on additional leadership roles and responsibilities for which educators are compensated.

(b) Developing data systems, timelines, and action plans for promoting inclusive and bias-free human resources practices that promote and support development of educator diversity.

*Invitational Priorities:* For FY 2023 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1), we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

*Invitational Priority 1—Whole School Magnet Programs.*

Projects that propose to implement ''whole-school magnet'' schools in which all students enrolled in the school participate in the magnet school program, rather than schools that implement magnet programs within schools that are offered to less than the entire school population.

*Invitational Priority 2—Coordination Across Agencies and Organizations.*

Projects that propose to coordinate efforts with relevant governmental agencies, such as housing or transportation authorities, or community organizations to promote student diversity and achievement in magnet schools. This may include projects coordinated with public housing redevelopment efforts, such as those funded through the HUD Choice Neighborhoods Initiative or the HUD Rental Assistance Demonstration program.

*Definitions:* The definition of ''evidence-based'' is from 20 U.S.C. 7801. The definitions of ''desegregation,'' ''feeder school,'' ''magnet school,'' and ''minority group'' are from 34 CFR 280.4. The definitions of ''demonstrates a rationale,'' ''experimental study,'' ''logic model,'' ''project component,'' ''promising evidence,'' ''quasi-experimental design study,'' ''relevant outcome,'' and ''What Works Clearinghouse Handbooks'' are from 34 CFR 77.1(c). The definitions of ''children or students with disabilities,'' ''disconnected youth,'' ''educator,'' ''English learner,'' ''military- or veteran-connected student,'' and ''underserved student'' are from the Supplemental Priorities.

*Children or students with disabilities* means children with disabilities as defined in section 602(3) of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. 1401(3)) and 34 CFR 300.8, or students with disabilities, as defined in the Rehabilitation Act of 1973 (29 U.S.C. 705(37), 705(202)(B)).

*Demonstrates a rationale* means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

*Desegregation,* in reference to a plan, means a plan for the reassignment of children or faculty to remedy the illegal separation of minority group children or faculty in the schools of an LEA or a plan for the reduction, elimination, or prevention of minority group isolation in one or more of the schools of an LEA.

*Disconnected youth* means an individual, between the ages 14 and 24, who may be from a low-income background, experiences homelessness, is in foster care, is involved in the justice system, or is not working or not enrolled in (or at risk of dropping out of) an educational institution.

*Educator* means an individual who is an early learning (as defined in the Supplemental Priorities) educator, teacher, principal or other school leader, specialized instructional support personnel (*e.g.,* school psychologist, counselor, school social worker, early intervention service personnel), paraprofessional, or faculty.

*English learner* means an individual who is an English learner as defined in section 8101(20) of the ESEA, or an individual who is an English language learner as defined in section 203(7) of the Workforce Innovation and Opportunity Act.

*Evidence-based* means an activity, strategy, or intervention that—

(i) Demonstrates a statistically significant effect on improving student outcomes or other relevant outcomes based on—

(A) Strong evidence from at least one well-designed and well-implemented experimental study;

(B) Moderate evidence from at least one well-designed and well-implemented quasi-experimental study; or

(C) Promising evidence from at least one well-designed and well-implemented correlational study with statistical controls for selection bias; or

(ii)(A) Demonstrates a rationale based on high-quality research findings or positive evaluation that such activity, strategy, or intervention is likely to improve student outcomes or other relevant outcomes; and

(B) Includes ongoing efforts to examine the effects of such activity, strategy, or intervention.

*Experimental study* means a study that is designed to compare outcomes between two groups of individuals (such as students) that are otherwise equivalent except for their assignment to either a treatment group receiving a project component or a control group that does not. Randomized controlled trials, regression discontinuity design studies, and single-case design studies are the specific types of experimental studies that, depending on their design and implementation (*e.g.,* sample attrition in randomized controlled trials and regression discontinuity design studies), can meet What Works Clearinghouse (WWC) standards without reservations as described in the WWC Handbooks:

(i) A randomized controlled trial employs random assignment of, for example, students, teachers, classrooms, or schools to receive the project component being evaluated (the treatment group) or not to receive the project component (the control group).

(ii) A regression discontinuity design study assigns the project component being evaluated using a measured variable (*e.g.,* assigning students reading below a cutoff score to tutoring or developmental education classes) and controls for that variable in the analysis of outcomes.

(iii) A single-case design study uses observations of a single case (*e.g.,* a student eligible for a behavioral intervention) over time in the absence and presence of a controlled treatment manipulation to determine whether the outcome is systematically related to the treatment.

*Feeder school* means a school from which students are drawn to attend a magnet school.

*Logic model* (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

*Magnet school* means a public elementary school, public secondary school, public elementary education center, or public secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds.

*Military- or veteran-connected student* means a child participating in an early learning (as defined in the Supplemental Priorities) program, a student enrolled in preschool through grade 12, or a student enrolled in career and technical education or postsecondary education who has a parent or guardian who is a veteran of the uniformed services (as defined by 37 U.S.C. 101), in the Army, Navy, Air Force, Marine Corps, Coast Guard, Space Force, National Guard, Reserves, National Oceanic and Atmospheric Administration, or Public Health Service or is a veteran of the uniformed services with an honorable discharge (as defined by 38 U.S.C. 3311).

*Minority group* means the following:

(1) *American Indian or Alaskan Native.* A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(2) *Asian or Pacific Islander.* A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

(3) *Black (Not of Hispanic Origin).* A person having origins in any of the black racial groups of Africa.

(4) *Hispanic.* A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

*Project component* means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

*Promising evidence* means that there is evidence of the effectiveness of a key project component in improving a relevant outcome, based on a relevant finding from one of the following:

(i) A practice guide prepared by WWC reporting a ''strong evidence base'' or ''moderate evidence base'' for the corresponding practice guide recommendation;

(ii) An intervention report prepared by the WWC reporting a ''positive effect'' or ''potentially positive effect'' on a relevant outcome with no reporting of a ''negative effect'' or ''potentially negative effect'' on a relevant outcome; or

(iii) A single study assessed by the Department, as appropriate, that-

(A) Is an experimental study, a quasi-experimental design study, or a well-designed and well-implemented correlational study with statistical controls for selection bias (*e.g.,* a study using regression methods to account for differences between a treatment group and a comparison group); and

(B) Includes at least one statistically significant and positive (*i.e.,* favorable) effect on a relevant outcome.

*Quasi-experimental design study* means a study using a design that attempts to approximate an experimental study by identifying a comparison group that is similar to the treatment group in important respects. This type of study, depending on design and implementation (*e.g.,* establishment of baseline equivalence of the groups being compared), can meet WWC standards with reservations, but cannot meet WWC standards without reservations, as described in the WWC Handbooks.

*Relevant outcome* means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program.

*Underserved student* means a student (which includes students in K–12 programs) in one or more of the following student groups:

(a) A student who is living in poverty or is served by schools with high concentrations of students living in poverty.

(b) A student of color.

(c) A student who is a member of a federally recognized Indian Tribe.

(d) An English learner.

(e) A child or student with a disability.

(f) A disconnected youth.

(g) A technologically unconnected youth.

(h) A migrant student.

(i) A student experiencing homelessness or housing insecurity.

(j) A lesbian, gay, bisexual, transgender, queer or questioning, or intersex (LGBTQI+) student.

(k) A student who is in foster care.

(l) A student without documentation of immigration status.

(m) A pregnant, parenting, or caregiving student.

(n) A student impacted by the justice system, including a formerly incarcerated student.

(o) A student performing significantly below grade level.

(p) A military- or veteran-connected student.

*What Works Clearinghouse (WWC) Handbooks* means the standards and procedures set forth in the WWC Standards Handbook, Versions 4.0 or 4.1, and WWC Procedures Handbook, Versions 4.0 or 4.1, or in the WWC Procedures and Standards Handbook, Version 3.0 or Version 2.1 (all incorporated by reference, see § 77.2). Study findings eligible for review under WWC standards can meet WWC standards without reservations, meet WWC standards with reservations, or not meet WWC standards. WWC practice guides and intervention reports include findings from systematic reviews of evidence as described in the WWC Handbooks documentation.

*Note:* The WWC Procedures and Standards Handbook (Version 4.1), as well as the more recent WWC Handbooks released in August 2022 (Version 5.0), are available at *https://ies.ed.gov/ncee/wwc/Handbooks.*

*Program Authority:* 20 U.S.C. 7231–7231j.

*Note:* Projects will be awarded and must be operated in a manner consistent with the nondiscrimination requirements contained in Federal civil rights laws.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 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 this program in 34 CFR part 280. (e) Supplemental Priorities.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $122,000,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2024 from the list of unfunded applications from this competition.

*Estimated Range of Awards:* $1,500,000–$3,500,000 per budget year.

*Maximum Award:* Under section 4408(c) of the ESEA, 20 U.S.C. 7231h(3), awards to an LEA or a consortium of LEAs must not exceed $15,000,000 for the project period. Under section 4408(b) of the ESEA, 20 U.S.C. 7231h(2), grantees may not expend more than 50 percent of year one grant funds and not more than 15 percent of years two and three grant funds on planning activities. Professional development is not considered to be a planning activity.

*Note:* Yearly award amounts may vary.

*Estimated Number of Awards:* 25.

*Note:* The Department is not bound by any estimates in this notice.

*Project Period:* Up to 60 months.

## III. Eligibility Information

1. *Eligible Applicants:* LEAs or consortia of LEAs implementing a desegregation plan as specified in section III. 4 of this notice.

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

4. *Other—Desegregation Plans:* Under section 4404 of the ESEA, 20 U.S.C. 7231c, and 34 CFR 280.20(e) and (f), to establish eligibility to receive MSAP assistance, applicants must submit with their applications one of the following types of desegregation plans: (i) a desegregation plan required by a court order; (ii) a desegregation plan required by a State agency or an official of competent jurisdiction; (iii) a desegregation plan required by the Department's Office for Civil Rights (OCR) under title VI of the Civil Rights Act of 1964 (title VI); or (iv) a voluntary desegregation plan adopted by the applicant and submitted to the Department for approval as part of the application. Under the MSAP regulations, applicants are required to provide all of the information outlined in 34 CFR 280.20(a) through (g) in order to satisfy the eligibility requirements in 34 CFR 280.2(a)(2) and (b).

Applicants that are not operating under a required plan must submit with their application a copy of their voluntary desegregation plan. Applicants that are operating under a required plan must submit with their application a copy of their required plan along with documentation demonstrating that a request to modify that plan as necessary to meet the goals of the MSAP project was made to the court, agency, or official that approved a required plan per 34 CFR 280.10(c). An application must also include, in accordance with 34 CFR 280.20(e), (f), and (g)—

- Projected enrollment by race and ethnicity for magnet and feeder schools (Note: If seeking to *prevent* MGI, as opposed to seeking to reduce or eliminate MGI, we encourage applicants to include trend data showing the trajectory of school enrollment in the absence of MSAP funding);
- Signed civil rights assurances; and
- An assurance that the desegregation plan is being implemented or will be implemented if the application is funded.

Finally, under section 4405(b)(1)(A) of the ESEA, 20 U.S.C. 7231d(b)(1)(A), applicants must describe ''how a grant awarded under this part will be used to promote desegregation, including any available evidence on, or if such evidence is not available, a rationale, based on current research, for how the proposed magnet school programs will increase interaction among students of different social, economic, ethnic, and racial backgrounds.'' Applicants should provide this information in responding to the first selection criterion described

in section V(1) of this notice—Desegregation. However, to assist the Department in conducting this review and applicants in submitting succinct and comprehensive information, the application package for this competition includes a Desegregation Plan Form OMB–1855–0011. On this form, clearly summarize the goals and objectives of the desegregation plan, including: (1) the proposed magnet schools to be revised or created under the applicant's MSAP project; (2) the specific schools (either magnet and/or feeder schools) targeted for change in MGI; (3) the nature of the MGI goals for each school, that is whether it is to reduce, eliminate, or prevent MGI; and (4) the current degree of and change in MGI sought at each targeted school over the period of the grant.

*Note:* Section 4401(b)(1) of the ESEA, 20 U.S.C. 7231, states MSAP's desegregation purpose as the elimination, reduction, or prevention of MGI in elementary and secondary schools with *substantial* proportions of minority students. A main goal of the MSAP statute is to support districts ''seeking to foster meaningful interaction among students of different racial and ethnic backgrounds.'' Section 4401(a)(4)(A) of the ESEA, 20 U.S.C. 7231(a)(4)(A). Congress also recognized that ''segregation exists between minority and nonminority students as well as among students of different minority groups.'' Section 4401(a)(4)(C) of the ESEA, 20 U.S.C. 7231(a)(4)(C). Therefore, projects should target schools where a particular minority group is isolated or is likely to become isolated without MSAP interventions such that the group has limited access to meaningful interaction with students from different racial and ethnic backgrounds. In accordance with section 4404 of the ESEA, 20 U.S.C. 7231c, and 34 CFR 280.2, projects that are not designed to reduce, eliminate, or prevent MGI and to bring students from different social, economic, ethnic, and racial backgrounds together in accordance with an approved desegregation plan, are not eligible for MSAP funding. Additionally, under 34 CFR 280.4(b), a ''feeder school'' is defined as ''a school from which students are drawn to attend the magnet school,'' and refers to the schools that students attending magnet schools would otherwise have attended had the magnet school not been available.

*Note:* Voluntary desegregation plans with *current school board approval* must be submitted as a part of the required application materials for consideration in this competition. However, these desegregation plans do not require *Department approval* prior to application submission. Under section 4404 of the ESEA, 20 U.S.C. 7231c, and 34 CFR 280.2(b), the Department will review applicants' voluntary desegregation plans to ensure that for each magnet school for which funding is sought, the magnet school will reduce, eliminate, or prevent MGI within the project period, either in the magnet school or in a feeder school, as appropriate.

Further details regarding types of desegregation plans and required documentation follows:

*Required Desegregation Plans*

1. *Desegregation plans required by a court order.* An applicant submitting a desegregation plan required by a court order must submit complete and signed copies of all court documents demonstrating that the magnet schools are a part of the approved desegregation plan. Examples of the types of documents that would meet this requirement include a Federal or State court order that establishes specific magnet schools, amends a previous order or orders by establishing additional or different specific magnet schools, requires or approves the establishment of one or more unspecified magnet schools, or authorizes the inclusion of magnet schools at the discretion of the applicant.

2. *Desegregation plans required by a State agency or official of competent jurisdiction.* An applicant submitting a desegregation plan ordered by a State agency or official of competent jurisdiction must provide documentation that shows that the desegregation plan was ordered based upon a determination that State law was violated. In the absence of this documentation, the applicant should consider its desegregation plan to be a voluntary plan and submit the data and information necessary for voluntary plans.

3. *Desegregation plans required by OCR under Title VI.* An applicant that submits a desegregation plan required by OCR under Title VI must submit a complete copy of the desegregation plan demonstrating that magnet schools are part of the approved plan or that the plan authorizes the inclusion of magnet schools at the discretion of the applicant.

4. *Modifications to required desegregation plans.* A previously approved desegregation plan that does not include the magnet school or program for which the applicant is now seeking assistance must be modified to include the magnet school component. The modification to the desegregation plan must be approved by the court, agency, or official that originally approved the plan. An applicant that wishes to modify a previously approved OCR Title VI desegregation plan to include different or additional magnet schools must submit the proposed modification for review and approval to the OCR regional office that approved its original plan.

An applicant should indicate in its application if it is seeking to modify its previously approved desegregation plan. Applicants seeking modifications to their plans are encouraged to submit evidence that the applicant has requested the modification as part of their application package and to submit demonstration of approval for the modification before September 11, 2023. Proof of approval for plan modifications should be emailed to Gillian Cohen-Boyer at *msap.team@ed.gov* or mailed to: U.S. Department of Education, 400 Maryland Avenue SW, Room 3C134, Washington, DC 20202–5970. Telephone: (202) 401–1259.

*Voluntary Desegregation Plans*

In order to be eligible for MSAP funding, an applicant must be operating under an approved voluntary desegregation plan, and under 34 CFR 280.2(b), the Secretary approves a voluntary desegregation plan only if it is determined that for each magnet school for which funding is sought, the magnet school will reduce, eliminate, or prevent minority group isolation within the period of the grant award, either in the magnet school or in a feeder school, as appropriate. A voluntary desegregation plan must be approved by the Department each time an application is considered for funding. Even if the Department has approved an LEA's voluntary desegregation plan in an LEA in the past, to be reviewed for approval, the desegregation plan must be resubmitted with each new application by the application deadline.

As part of the eligibility review for this award, the Department determines on a case-by-case basis whether an LEA's voluntary plan meets the statutory purpose of reducing, eliminating, or preventing MGI in its magnet or feeder schools, considering the unique circumstances in each district and school. As part of this determination, the Department will consider, consistent with 20 U.S.C. 7231(b)(1), whether the project is designed to eliminate, reduce, or prevent MGI in elementary and/or secondary schools with substantial proportions of students from any minority group(s). The Department's

case-by-case review will include an examination of the factual basis for any proposed increases in enrollment of students from minority groups at district schools; for example, the Department will consider whether a plan to reduce, eliminate, or prevent MGI at a magnet school or at a feeder school would significantly increase MGI at any other magnet or feeder school in the LEA at the grade levels served by the magnet school.

An applicant's voluntary desegregation plan must demonstrate how the LEA will reduce, eliminate, or prevent MGI for each magnet school in the proposed project, and/or, if relevant, at identified feeder schools.

Under 34 CFR 280.20(f) and (g), applicants with voluntary desegregation plans must submit complete and accurate enrollment forms and other information to demonstrate their eligibility (specific requirements are detailed in the application package).

Voluntary desegregation plan applicants must submit documentation of school board approval (or documentation of other official adoption of the plan by a governing authority for the LEA as required under 34 CFR 280.20(f)(2)) when submitting their application. LEAs that were previously subject to a required desegregation plan, but have achieved unitary status and so are voluntary desegregation plan applicants, typically would not need to include court orders. Rather, such applicants should provide the documentation discussed in this section.

5. *Single-Sex Programs:* An applicant proposing to operate a single-sex magnet school or a coeducational magnet school that offers single-sex classes or extracurricular activities will undergo a review of its proposed single-sex educational program to determine compliance with applicable nondiscrimination laws, including the Equal Protection Clause of the U.S. Constitution (as interpreted in *United States* v. *Virginia,* 518 U.S. 515 (1996), and other cases) and Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, *et seq.*) and its regulations—including 34 CFR 106.34. This review may require the applicant to provide additional fact-specific information about the single-sex program.

## IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on December 7, 2022 (87 FR 75045) and available at *www.federalregister.gov/documents/2022/12/07/2022-26554/common-instructions-for-applicants-to-department-of-education-discretionary-grant-programs,* which contain requirements and information on how to submit an application.

2. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the MSAP, your application may include business information that you consider proprietary. In 34 CFR 5.11, we define ''business information'' and describe the process we use in determining whether any of that information is proprietary, and thus protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information, please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* Unallowable costs are specified in section 4407 of the ESEA, 20 U.S.C. 7231f. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to 150 pages and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double-space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances, certifications, desegregation plan and related information; or the one-page abstract, the resumes, or letters of support. However, the recommended page limit does apply to the application narrative.

6. *Notice of Intent to Apply:* The Department will be able to review grant applications more efficiently if we know the approximate number of applicants that intend to apply. Therefore, we strongly encourage each potential applicant to notify the Department of their intent to submit an application. To do so, please submit your intent to apply by emailing *msap.team@ed.gov* with the subject line, ''[LEA Name(s)] Intent to Apply.'' Applicants that do not notify the Department of their intent to apply may still apply for funding.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria are from 34 CFR 75.210, 280.31, and sections 4401 and 4405 of the ESEA, 20 U.S.C. 7231 and 7231d.

The maximum score for all of the selection criteria is 100 points. The maximum score for each criterion is included in parentheses following the title of the specific selection criterion. Each criterion also includes the factors that reviewers will consider in determining the extent to which an applicant meets the criterion.

Points awarded under these selection criteria are in addition to any points an applicant earns under the competitive preference priorities in this notice. The maximum score that an application may receive under the competitive preference priorities and the selection criteria is 116 points.

(a) *Desegregation (up to 30 points).*

The Secretary reviews each application to determine the quality of the desegregation-related activities, including:

(1) The effectiveness of the applicant's proposed desegregation strategies for the elimination, reduction, or prevention of MGI in elementary schools and secondary schools with substantial proportions of minority students. (section 4401(b)(1) of the ESEA, 20 U.S.C. 7231) (up to 10 points)

(2) The importance or magnitude of the results or outcomes likely to be attained by the proposed project. (34 CFR 75.210) (up to 8 points)

(3) The effectiveness of its plan to recruit students from different social, economic, ethnic, and racial backgrounds into the magnet schools. (34 CFR 280.31) (up to 4 points)

(4) How it will foster interaction among students of different social, economic, ethnic, and racial backgrounds in classroom activities, extracurricular activities, or other activities in the magnet schools (or, if appropriate, in the schools in which the magnet school programs operate). (34 CFR 280.31) (up to 4 points)

(5) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework. (34 CFR 75.210) (up to 4 points)

(b) *Quality of the project design (up to 30 points).*

The Secretary reviews each application to determine the quality of the project design. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(1) The manner and extent to which the magnet school program will increase student academic achievement in the instructional areas offered by the school, including any evidence, or if such evidence is not available, a rationale based on current research findings, to support such description. (section 4405(b)(1)(B) of the ESEA, 20 U.S.C. 7231d(b)(1)(B)) (up to 6 points)

(2) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services. (34 CFR 75.210) (up to 6 points)

(3) The extent to which each magnet school for which funding is sought will encourage greater parental decision-making and involvement. (34 CFR 280.31) (up to 6 points)

(4) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services. (34 CFR 75.210) (up to 6 points)

(5) The potential for the incorporation of project purposes, activities, or benefits into the ongoing program of the agency or organization at the end of Federal funding. (34 CFR 75.210) (up to 6 points)

(c) *Quality of the management plan (up to 10 points).*

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks. (34 CFR 75.210) (up to 5 points)

(2) The extent to which the costs are reasonable in relation to the number of persons to be served and to the anticipated results and benefits. (34 CFR 75.210) (up to 5 points)

(d) *Quality of personnel (up to 15 points).*

(1) The Secretary determines the extent to which—

(a) The project director (if one is used) is qualified to manage the project;

(b) Other key personnel are qualified to manage the project; and

(c) Teachers who will provide instruction in participating magnet schools are qualified to implement the special curriculum of the magnet schools. (34 CFR 280.31) (up to 10 points)

(2) To determine personnel qualifications, the Secretary considers experience and training in fields related to the objectives of the project, including the key personnel's knowledge of and experience in curriculum development and desegregation strategies. (34 CFR 280.31) (up to 5 points)

(e) *Quality of the project evaluation (up to 15 points).*

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(1) How the applicant will assess, monitor, and evaluate the impact of the activities funded under this part on student achievement and integration. (section 4405(b)(1)(D) of the ESEA, 20 U.S.C. 7231d(b)(1)(D)) (up to 5 points)

(2) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible. (34 CFR 75.210) (up to 5 points)

(3) The extent to which the methods of evaluation will, if well implemented, produce promising evidence (as defined in 34 CFR 77.1(c)) about the project's effectiveness. (34 CFR 75.210) (up to 5 points)

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.206, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 200.208, the Secretary may impose specific conditions and, under 2 CFR 3474.10, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

4. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000) under 2 CFR 200.206(a)(2), we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII,

require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with:

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(d) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN) (or we may send you an email containing a link to access an electronic version of your GAN). We may notify you informally as well.

If your application is not evaluated or not selected for funding, we will notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements, please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) If awarded a grant, applicants must also submit a final report with the results of a study designed to yield results at the level of promising evidence or higher, undertaken during the grant to assist the LEA in building capacity to continue operating magnet schools at a high performance level after Federal funding ends. The plans for this study, which may be narrowly tailored to a specific project component(s), are specifically what is being assessed under selection criterion factor (e)(3).

5. *Performance Measures:* For the purposes of reporting under 34 CFR 75.110, the following six performance measures have been established for the MSAP:

(a) The number and percentage of magnet schools receiving assistance whose student enrollment eliminates, reduces, or prevents MGI.

(b) The percentage increase of students from major racial and ethnic groups in magnet schools receiving assistance who score proficient or above on State assessments in reading/language arts as compared to the previous year.

(c) The percentage increase of students for all students across each racial and ethnic group in magnet schools receiving assistance who score proficient or above on State assessments in mathematics as compared to the previous year.

(d) The percentage of MSAP-funded magnet schools still operating magnet school programs 3 years after Federal funding ends.

(e) The percentage increase of students for all students across each racial and ethnic group in MSAP-funded magnet schools still operating magnet school programs who score proficient or above on State assessments in reading/language arts 3 years after Federal funding ends as compared to the final project year.

(f) The percentage increase of students for all students across each racial and ethnic group in MSAP-funded magnet schools still operating magnet school programs who score proficient or above on State assessments in mathematics 3 years after Federal funding ends as compared to the final project year.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, whether the grantee has made substantial progress in achieving the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

## VII. 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.

**James F. Lane,**

*Senior Advisor to the Secretary, Delegated the Duties of the Assistant Secretary Office of Elementary and Secondary Education.*

[FR Doc. 2023–05118 Filed 3–13–23; 8:45 am]

**BILLING CODE 4000–01–P**

## ELECTION ASSISTANCE COMMISSION

### Sunshine Act Meetings

**AGENCY:** U.S. Election Assistance Commission.

**ACTION:** Notice; correction.

**SUMMARY:** The U.S. Election Assistance Commission published a document in the **Federal Register** on February 28, 2023 regarding the scheduled Public Meeting focusing on list maintenance. The notice contained an incorrect address.

**FOR FURTHER INFORMATION CONTACT:** Kristen Muthig, Telephone: (202) 897–9285, Email: *kmuthig@eac.gov.*

**SUPPLEMENTARY INFORMATON:**

### Correction

In the **Federal Register** of February 28, 2023 in FR Doc. 2023–04198, on page 12669 in the second column, correct the **ADDRESSES** caption to read:

**ADDRESSES:** Virtual via Zoom.

The roundtable discussion is open to the public and will be livestreamed on the U.S. Election Assistance Commission YouTube Channel: *https://www.youtube.com/channel/UCpN6i0g2rlF4ITWhwvBwwZw.*

**Amanda Joiner,**

*Acting General Counsel, U.S. Election Assistance Commission.*

[FR Doc. 2023–05267 Filed 3–10–23; 11:15 am]

**BILLING CODE P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CD23–5–000]**

### Sites Project Authority; Notice of Preliminary Determination of a Qualifying Conduit Hydropower Facility and Soliciting Comments and Motions To Intervene

On February 22, 2023, the Sites Project Authority, filed a notice of intent to construct a qualifying conduit hydropower facility, pursuant to section 30 of the Federal Power Act (FPA). The proposed Funks Energy Recovery Project would have an installed capacity of 34,500 kilowatts (kW), and would be located along a pipeline within the water supply system near Maxwell, Colusa County, California.

*Applicant Contact:* Jerry Brown, Executive Director, Sites Project Authority, PO Box 517, Maxwell, CA 95955, 925–260–7417, *jbrown@sitesproject.org.*

*FERC Contact:* Christopher Chaney, 202–502–6778, *christopher.chaney@ferc.gov.*

*Qualifying Conduit Hydropower Facility Description:* The project would consist of: (1) two turbine generator buildings, one housing a 20,000-kW unit and the other housing a 14,500-kW unit, (2) intake and discharge pipes, and (3) appurtenant facilities. The proposed project would have an estimated annual generation of approximately 37,000 megawatt-hours.

A qualifying conduit hydropower facility is one that is determined or deemed to meet all the criteria shown in the table below.

TABLE 1—CRITERIA FOR QUALIFYING CONDUIT HYDROPOWER FACILITY

| Statutory provision | Description | Satisfies (Y/N) |
|---|---|---|
| FPA 30(a)(3)(A) | The conduit the facility uses is a tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. | Y |
| FPA 30(a)(3)(C)(i) | The facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit. | Y |
| FPA 30(a)(3)(C)(ii) | The facility has an installed capacity that does not exceed 40 megawatts | Y |
| FPA 30(a)(3)(C)(iii) | On or before August 9, 2013, the facility is not licensed, or exempted from the licensing requirements of Part I of the FPA. | Y |

*Preliminary Determination:* The proposed Funks Energy Recovery Project will not alter the primary purpose of the conduit, which is for irrigation, municipal water supply, and other uses. Therefore, based upon the above criteria, Commission staff preliminarily determines that the operation of the project described above satisfies the requirements for a qualifying conduit hydropower facility, which is not required to be licensed or exempted from licensing.

*Comments and Motions to Intervene:* Deadline for filing comments contesting whether the facility meets the qualifying criteria is 30 days from the issuance date of this notice. Deadline for filing motions to intervene is 30 days from the issuance date of this notice.

Anyone may submit comments or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210 and

385.214. Any motions to intervene must be received on or before the specified deadline date for the particular proceeding.

*Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the ''COMMENTS CONTESTING QUALIFICATION FOR A CONDUIT HYDROPOWER FACILITY'' or ''MOTION TO INTERVENE,'' as applicable; (2) state in the heading the name of the applicant and the project number of the application to which the filing responds; (3) state the name, address, and telephone number of the person filing; and (4) otherwise comply with the requirements of sections 385.2001 through 385.2005 of the Commission's regulations.[1] All comments contesting Commission staff's preliminary determination that the facility meets the qualifying criteria must set forth their evidentiary basis.

The Commission strongly encourages electronic filing. Please file motions to intervene and comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may send a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

*Locations of Notice of Intent:* 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 website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (*i.e.,* CD23–5) in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. Copies of the notice of intent can be obtained directly from the applicant. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659.

Dated: March 8, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–05162 Filed 3–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

[1] 18 CFR 385.2001–2005 (2021).

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 6470–008]**

### Winooski Hydroelectric Company; Notice of Waiver Period for Water Quality Certification Application

On March 6, 2023, Winooski Hydroelectric Company submitted to the Federal Energy Regulatory Commission (Commission) evidence of the date on which the certifying agency received the certification request for a Clean Water Act section 401(a)(1) water quality certification filed with the Vermont Department of Environmental Conservation, in conjunction with the above-captioned project. Pursuant to 40 CFR 121.6 and section [4.34(b)(5), 5.23(b), 153.4, or 157.22] of the Commission's regulations,[1] we hereby notify the Vermont Department of Environmental Conservation of the following:

*Date of Receipt of the Certification Request:* March 6, 2023.

*Reasonable Period of Time To Act on the Certification Request:* One year (March 6, 2024).

If the Vermont Department of Environmental Conservation fails or refuses to act on the water quality certification request on or before the above date, then the agency certifying authority is deemed waived pursuant to section 401(a)(1) of the Clean Water Act, 33 U.S.C. 1341(a)(1).

Dated: March 8, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–05163 Filed 3–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

[1] 18 CFR [4.34(b)(5)/5.23(b)/153.4/157.22].

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC23–60–000.
*Applicants:* NTUA Generation-Utah, LLC.
*Description:* Application for Authorization Under Section 203 of the Federal Power Act of NTUA Generation-Utah, LLC.
*Filed Date:* 3/7/23.
*Accession Number:* 20230307–5183.
*Comment Date:* 5 p.m. ET 3/28/23.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER23–68–004.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* Tariff Amendment: Amendment to ISA, SA No. 1949; Queue No. NQ16 (amend) to be effective 12/12/2022.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5007.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–651–001.
*Applicants:* Southwest Power Pool, Inc
*Description:* Tariff Amendment: 4010 Plum Nellie Wind Farm & ITCGP FSA-Deficiency Response to be effective 2/14/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5034.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–672–001.
*Applicants:* Southwest Power Pool, Inc
*Description:* Tariff Amendment: 4039SO Ponderosa Wind II & SPS FSA-Deficiency Response to be effective 5/8/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5002.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–1261–000.
*Applicants:* Dynegy Marketing and Trade, LLC.
*Description:* Dynegy Marketing and Trade, LLC Request Additional Cost Recovery Pursuant to Section III.A.15 of Appendix A to Market Rule 1 of the ISO New England Tariff.
*Filed Date:* 3/6/23.
*Accession Number:* 20230306–5206.
*Comment Date:* 5 p.m. ET 3/27/23.

*Docket Numbers:* ER23–1262–000.
*Applicants:* Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.

*Description:* § 205(d) Rate Filing: Mid-Atlantic Interstate Transmission, LLC submits tariff filing per 35.13(a)(2)(iii: MAIT submits one Engineering and Construction Service Agreement, SA No. 6630 to be effective 5/8/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5015.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–1263–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* Tariff Amendment: Notice of Cancellation of ICSA, SA No. 5310; Queue No. AB2–174 re: 14.1.1 to be effective 9/27/2021.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5044.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–1264–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* Tariff Amendment: Notice of Cancellation of WMPA, SA No. 5376; Queue No. AE1–098 re: withdrawal to be effective 5/5/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5058.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–1265–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Revisions to the OATT, OA and RAA re: GDECS Phase 7 to be effective 5/8/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5067.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–1266–000.
*Applicants:* PJM Interconnection, L.L.C.
*Description:* Tariff Amendment: Notice of Cancellation of WMPA, SA No. 5377; Queue No. AE1–099 re: withdrawal to be effective 5/5/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5074.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–1268–000.
*Applicants:* NorthWestern Corporation.
*Description:* § 205(d) Rate Filing: Revised Exhibits to Montana Intertie Agreement to be effective 12/1/2022.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5082.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–1269–000.
*Applicants:* Duke Energy Carolinas, LLC.
*Description:* § 205(d) Rate Filing: DEC-Orangeburg RS No. 611—Reimbursement Agmt to be effective 5/8/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5084.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–1270–000.
*Applicants:* Midcontinent Independent System Operator, Inc
*Description:* § 205(d) Rate Filing: 2023–03–08_MRES Service Protocols Att O, GG, MM Removal of LIBOR to be effective 6/1/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5088.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* ER23–1271–000.
*Applicants:* Niagara Mohawk Power Corporation, New York Independent System Operator, Inc
*Description:* § 205(d) Rate Filing: Niagara Mohawk Power Corporation submits tariff filing per 35.13(a)(2)(iii: Niagara Mohawk filing of tariff revisions re: Segment A Project cost recovery to be effective 5/8/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5093.
*Comment Date:* 5 p.m. ET 3/29/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 8, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–05160 Filed 3–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas & Oil Pipeline Rate and Refund Report filings:

**Filings in Existing Proceedings**

*Docket Numbers:* PR23–36–001.
*Applicants:* Enable Oklahoma Intrastate Transmission, LLC.
*Description:* § 284.123 Rate Filing: Enable Revised Fuel Percentages April 1, 2023-March 31, 2024 to be effective 3/8/2023.
*Filed Date:* 3/8/23.
*Accession Number:* 20230308–5051.
*Comment Date:* 5 p.m. ET 3/29/23.

*Docket Numbers:* RP20–1060–009.
*Applicants:* Columbia Gas Transmission, LLC.
*Description:* Compliance filing: Motion to Place Period 2 Settlement Rate Into Effect to be effective 4/1/2023.
*Filed Date:* 3/6/23.
*Accession Number:* 20230306–5146.
*Comment Date:* 5 p.m. ET 3/20/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: March 8, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–05159 Filed 3–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Sunshine Act Meeting Notice

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

**AGENCY HOLDING MEETING:** Federal Energy Regulatory Commission.

**TIME AND DATE:** March 16, 2023, 10 a.m.

**PLACE:** Room 2C, 888 First Street NE, Washington, DC 20426.

**STATUS:** Open to the public.

**MATTERS TO BE CONSIDERED:** Agenda.

* *Note*—Items listed on the agenda may be deleted without further notice.

**CONTACT PERSON FOR MORE INFORMATION:** Kimberly D. Bose, Secretary. Telephone (202) 502–8400.

For a recorded message listing items stricken from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does

not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's website at *https://elibrary.ferc.gov/eLibrary/search* using the eLibrary link.

1099TH—MEETING

[Open Meeting; March 16, 2023, 10:00 a.m.]

| Item No. | Docket No. | Company |
|---|---|---|
| | | **Administrative** |
| A–1 | AD23–1–000 | Agency Administrative Matters. |
| A–2 | AD23–2–000 | Customer Matters, Reliability, Security and Market Operations. |
| A–3 | AD06–3–000 | Market Update. |
| | | **Electric** |
| E–1 | RD23–3–000 | North American Electric Relaibility Corporation. |
| E–2 | ER21–2459–001 | Tenaska Power Services Co. |
| E–3 | EL23–31–000 | Commonwealth Edison Company. |
| E–4 | EL22–39–000 | Public Service Company of Colorado. |
| E–5 | EL22–37–000 | Idaho Power Company. |
| E–6 | ES23–23–000 | PJM Interconnection, L.L.C. |
| E–7 | EL15–3–005 | *City and County of San Francisco* v. *Pacific Gas and Electric Company.* |
| | E15–704–027 | Pacific Gas and Electric Company. |
| E–8 | EL22–56–001 | *Iowa Coalition for Affordable Transmission* v. *ITC Midwest, LLC.* |
| E–9 | EL23–8–000 | *Cubit Power One, Inc.* v. *Consolidated Edison Company of New York, Inc.* |
| E–10 | ER20–2584–001 | Transource Maryland, LLC, American Electric Power Service Corporation, and PJM Interconnection, L.L.C. |
| E–11 | ER22–2377–000 | Black Hills Colorado Electric, LLC. |
| E–12 | EL23–14–000 | Alternative Transmission Inc. |
| | | **Gas** |
| G–1 | RP22–1105–000 | Anadarko US Offshore LLC, Murphy Exploration & Production Company—USA, Eni Petroleum US LLC, and INPEX Americas, Inc. |
| G–2 | RP21–1143–001 | Transcontinental Gas Pipe Line Company, LLC. |
| | | **Hydro** |
| H–1 | P–2322–073 | Brookfield White Pine Hydro LLC. |
| | | **Certificates** |
| C–1 | CP23–11–000 | Florida Gas Transmission Company, LLC. |
| C–2 | CP21–498–000 | Columbia Gas Transmission, LLC. |
| C–3 | CP21–113–000 | Alliance Pipeline L.P. |
| C–4 | CP22–41–000 | Cameron LNG, LLC. |
| C–5 | OMITTED. | |
| C–6 | CP21–94–001 | Transcontinental Gas Pipe Line Company, LLC. |

A free webcast of this event is available through the Commission's website. Anyone with internet access who desires to view this event can do so by navigating to *www.ferc.gov*'s Calendar of Events and locating this event in the Calendar. The Federal Energy Regulatory Commission provides technical support for the free webcasts. Please call (202) 502–8680 or email *customer@ferc.gov* if you have any questions.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters but will not be telecast.

Issued: March 9, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–05288 Filed 3–10–23; 11:15 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CD23–6–000]**

### Sites Project Authority; Notice of Preliminary Determination of a Qualifying Conduit Hydropower Facility and Soliciting Comments and Motions To Intervene

On February 22, 2023, the Sites Project Authority, filed a notice of intent to construct a qualifying conduit hydropower facility, pursuant to section 30 of the Federal Power Act (FPA). The proposed Terminal Regulating Reservoir Energy Recovery Project would have an installed capacity of 26,000 kilowatts (kW), and would be located along a pipeline within the water supply system

near Maxwell, Colusa County, California.

*Applicant Contact:* Jerry Brown, Executive Director, Sites Project Authority, PO Box 517, Maxwell, CA 95955, 925–260–7417, *jbrown@sitesproject.org.*

*FERC Contact:* Christopher Chaney, 202–502–6778, *christopher.chaney@ferc.gov.*

*Qualifying Conduit Hydropower Facility Description:* The project would consist of: (1) two turbine generator buildings, each housing a 13,000-kW unit, (2) intake and discharge pipes, and (3) appurtenant facilities. The proposed project would have an estimated annual generation of approximately 12,200 megawatt-hours.

A qualifying conduit hydropower facility is one that is determined or deemed to meet all the criteria shown in the table below.

TABLE 1—CRITERIA FOR QUALIFYING CONDUIT HYDROPOWER FACILITY

| Statutory provision | Description | Satisfies (Y/N) |
|---|---|---|
| FPA 30(a)(3)(A) | The conduit the facility uses is a tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity. | Y |
| FPA 30(a)(3)(C)(i) | The facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit. | Y |
| FPA 30(a)(3)(C)(ii) | The facility has an installed capacity that does not exceed 40 megawatts | Y |
| FPA 30(a)(3)(C)(iii) | On or before August 9, 2013, the facility is not licensed, or exempted from the licensing requirements of Part I of the FPA. | Y |

*Preliminary Determination:* The proposed Terminal Regulating Reservoir Energy Recovery Project will not alter the primary purpose of the conduit, which is for irrigation, municipal water supply, and other uses. Therefore, based upon the above criteria, Commission staff preliminarily determines that the operation of the project described above satisfies the requirements for a qualifying conduit hydropower facility, which is not required to be licensed or exempted from licensing.

*Comments and Motions to Intervene:* Deadline for filing comments contesting whether the facility meets the qualifying criteria is 30 days from the issuance date of this notice. Deadline for filing motions to intervene is 30 days from the issuance date of this notice.

Anyone may submit comments or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210 and 385.214. Any motions to intervene must be received on or before the specified deadline date for the particular proceeding.

*Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the ''COMMENTS CONTESTING QUALIFICATION FOR A CONDUIT HYDROPOWER FACILITY'' or ''MOTION TO INTERVENE,'' as applicable; (2) state in the heading the name of the applicant and the project number of the application to which the filing responds; (3) state the name, address, and telephone number of the person filing; and (4) otherwise comply with the requirements of sections 385.2001 through 385.2005 of the Commission's regulations.[1] All comments contesting Commission staff's preliminary determination that the facility meets the qualifying criteria must set forth their evidentiary basis.

The Commission strongly encourages electronic filing. Please file motions to intervene and comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may send a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

*Locations of Notice of Intent:* 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 website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (*i.e.,* CD23–6) in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. Copies of the notice of intent can be obtained directly from the applicant. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659.

Dated: March 8, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–05161 Filed 3–13–23; 8:45 am]

**BILLING CODE 6717–01–P**

[1] 18 CFR 385.2001–2005 (2021).

## DEPARTMENT OF ENERGY

### Western Area Power Administration

### Desert Southwest Region Ancillary Services—Rate Order No. WAPA–208

**AGENCY:** Western Area Power Administration, DOE.

**ACTION:** Notice of rate order concerning formula rates for Energy Imbalance Market services.

**SUMMARY:** New formula rates for Energy Imbalance Market (EIM) Administrative Service, Energy Imbalance (EI) Service, and Generator Imbalance (GI) Service for the Western Area Lower Colorado (WALC) Balancing Authority (BA) have been confirmed, approved, and placed into effect on an interim basis. The new formula rates are necessary for the

WALC BA's participation in the California Independent System Operator's (CAISO) EIM.

**DATES:** The provisional formula rates under Rate Schedules DSW–EIM1T, DSW–EIM4T, and DSW–EIM9T are effective on April 5, 2023, and will remain in effect through September 30, 2026, pending confirmation and approval by the Federal Energy Regulatory Commission (FERC) on a final basis or until superseded.

**FOR FURTHER INFORMATION CONTACT:** Jack D. Murray, Regional Manager, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457, or Tina Ramsey, Rates Manager, Desert Southwest Region, Western Area Power Administration, (602) 605–2565, or email: *dswpwrmrk@wapa.gov.*

**SUPPLEMENTARY INFORMATION:** On October 25, 2022, as part of Rate Order WAPA–175, FERC approved and confirmed on a final basis the following rate schedules for ancillary services applicable to the WALC BA through September 30, 2026: Rate Schedules DSW–SD4 (Scheduling, System Control, and Dispatch), DSW–RS4 (Reactive Supply and Voltage Control), DSW–FR4 (Regulation and Frequency Response), DSW–EI4 (Energy Imbalance), DSW–SPR4 (Spinning Reserves), DSW–SUR4 (Supplemental Reserves), and DSW–GI2 (Generator Imbalance).[1]

On September 15, 2021, WAPA and CAISO executed an Implementation Agreement to facilitate the WALC BA's participation in CAISO's real-time energy market effective April 5, 2023.[2] WAPA's decision to participate in CAISO's EIM was the result of nearly two years of analysis and collaboration with customers and stakeholders on the best path forward to manage the real-time mismatches between supply and demand within the WALC BA. To accommodate the WALC BA's participation in EIM and maintain revenue neutrality, new formula rates are required to pass through the financial settlements, administrative costs, and transaction fees incurred by the WALC BA.

On January 9, 2023, WAPA's Desert Southwest Region (DSW) published a **Federal Register** notice (88 FR 1220) that proposed three new formula rates for EIM: EIM Administrative Service, EIM EI Service, and EIM GI Service and initiated a 30-day public consultation and comment period.

## Legal Authority

By Delegation Order No. S1—DEL–RATES–2016, effective November 19, 2016, the Secretary of Energy delegated: (1) the authority to develop power and transmission rates to the WAPA Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, or to remand or disapprove such rates, to FERC. By Delegation Order No. S1–DEL–S3–2022–2, effective June 13, 2022, the Secretary of Energy also delegated the authority to confirm, approve, and place such rates into effect on an interim basis to the Under Secretary for Infrastructure. By Redelegation Order No. S3–DEL–WAPA1–2022, effective June 13, 2022, the Under Secretary for Infrastructure further redelegated the authority to confirm, approve, and place such rates into effect on an interim basis to WAPA's Administrator. This rate action is issued under Redelegation Order No. S3–DEL–WAPA1–2022 and Department of Energy procedures for public participation in rate adjustments set forth at 10 CFR part 903.[3]

Following a review of its proposal, DSW's formula rates for EIM Administrative Service, EI Service, and GI Service are hereby confirmed, approved, and placed into effect on an interim basis. WAPA will submit Rate Order No. WAPA–208 to FERC for confirmation and approval on a final basis.

## Department of Energy

## Administrator, Western Area Power Administration

*In the matter of:* Western Area Power Administration, Desert Southwest Region, Ancillary Services, New Formula Rates,

Rate Order No. WAPA–208

## Order Confirming, Approving, and Placing Formula Rates for Energy Imbalance Market Services Into Effect on an Interim Basis

The formula rates in Rate Order No. WAPA–208 are established following section 302 of the Department of Energy (DOE) Organization Act (42 U.S.C. 7152).[4]

By Delegation Order No. S1–DEL–RATES–2016, effective November 19, 2016, the Secretary of Energy delegated: (1) the authority to develop power and transmission rates to the Western Area Power Administration (WAPA) Administrator; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, or to remand or disapprove such rates, to the Federal Energy Regulatory Commission (FERC). By Delegation Order No. S1–DEL–S3–2022–2, effective June 13, 2022, the Secretary of Energy also delegated the authority to confirm, approve, and place such rates into effect on an interim basis to the Under Secretary for Infrastructure. By Redelegation Order No. S3–DEL–WAPA1–2022, effective June 13, 2022, the Under Secretary for Infrastructure further redelegated the authority to confirm, approve, and place such rates into effect on an interim basis to WAPA's Administrator. This rate action is issued under Redelegation Order No. S3–DEL–WAPA1–2022 and DOE procedures for public participation in rate adjustments set forth at 10 CFR part 903.[5]

## Acronyms, Terms, and Definitions

As used in this Rate Order, the following acronyms, terms, and definitions apply:

*BA:* Balancing Authority. As defined in WAPA's Tariff, the responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balance within a BAA, and supports interconnection frequency in real time.

*BAA:* Balancing Authority Area. As defined in WAPA's Tariff, the term Balancing Authority Area shall have the same meaning as ''Control Area.''

*CAISO:* California Independent System Operator Corporation. As defined in WAPA's Tariff, a state-chartered, California non-profit public benefit corporation that operates the transmission facilities of all CAISO participating transmission owners and dispatches certain generating units and

[1] Order Confirming and Approving Rate Schedules on a Final Basis, Docket No. EF21–6–000 (Oct. 25, 2022).

[2] FERC accepted the Implementation Agreement effective November 28, 2021, pursuant to a November 17, 2021, letter order in Docket No. ER21–2950. CAISO and WAPA subsequently executed, and CAISO filed with FERC, several participation agreements governing the WALC BA's participation in EIM. FERC accepted the participation agreements effective November 2, 2022, pursuant to an October 21, 2022 letter order in Docket No. ER22–2786.

[3] 50 FR 37835 (Sept. 18, 1985) and 84 FR 5347 (Feb. 21, 2019).

[4] This Act transferred to, and vested in, the Secretary of Energy the power marketing functions of the Secretary of the Department of the Interior and the Bureau of Reclamation (Reclamation) under the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent laws, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)) and other acts that specifically apply to the projects involved.

[5] 50 FR 37835 (Sept. 18, 1985) and 84 FR 5347 (Feb. 21, 2019).

loads. The CAISO is the market operator for the EIM.

*NEPA:* National Environmental Policy Act of 1969, as amended.

*Tariff:* Open Access Transmission Tariff, including all schedules or attachments thereto, as amended from time to time and approved by FERC.

*OASIS:* Open Access Same-Time Information System. As defined in WAPA's Tariff, the information system and standards of conduct contained in Part 37 of FERC's regulations and all additional requirements implemented by subsequent FERC orders dealing with OASIS.

*Provisional Formula Rates:* Formula rates that are confirmed, approved, and placed into effect on an interim basis by the Secretary or his/her designee.

**Effective Date**

The provisional formula rates under Rate Schedules DSW–EIM1T, DSW–EIM4T, and DSW–EIM9T will take effect on April 5, 2023, and remain in effect through September 30, 2026, pending approval by FERC on a final basis or until superseded.

**Public Notice and Comment**

WAPA's Desert Southwest Region (DSW) followed the Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions, 10 CFR part 903, in developing these formula rates. DSW took the following steps to involve interested parties in the rate process:

1. On January 9, 2023, a **Federal Register** notice (88 FR 1220) announced the proposed formula rates and initiated a 30-day public consultation and comment period.

2. On January 10, 2023, DSW notified customers and interested parties of the proposed formula rates and provided a copy of the **Federal Register** notice by email.

3. DSW established a website to post information about the rate adjustment process. The website is located at *www.wapa.gov/regions/DSW/Pages/DSW-EIM.aspx.*

4. During the 30-day consultation and comment period, which ended on February 8, 2023, DSW received no comments.

**Ancillary Services Rate Discussion**

In accordance with WAPA's Tariff and to maintain the reliability of transmission service, DSW currently provides the following ancillary services: (1) Scheduling, System Control and Dispatch (Rate Schedule DSW–SD4); (2) Reactive Supply and Voltage Control (Rate Schedule DSW–RS4); (3) Regulation and Frequency Response (Rate Schedule DSW–FR4); (4) Energy Imbalance (Rate Schedule DSW–EI4); (5) Spinning Reserve (Rate Schedule DSW–SPR4); (6) Supplemental Reserves (Rate Schedule DSW–SUR4); and (7) Generator Imbalance (Rate Schedule DSW–GI2). The formula rates for these services are designed to recover the costs incurred for providing each of the services.

To accommodate the WALC BA's participation in the CAISO EIM, DSW has added the following ancillary services: (1) EIM Administrative Service (provisional Rate Schedule DSW–EIM1T), (2) EIM EI Service (provisional Rate Schedule DSW–EIM4T), and (3) EIM GI Service (provisional Rate Schedule DSW–EIM9T). The formula rates for these services are designed to pass through the costs resulting from the WALC BA's participation in the CAISO EIM.

*EIM Administrative Service*

The CAISO assesses administrative service charges and transaction fees to recover the costs associated with operating the EIM and providing services to participants. Rate Schedule DSW–EIM1T facilitates the pass through of CAISO EIM administrative service charges and transaction fees to DSW transmission customers and ensures the WALC BA remains revenue neutral. This rate schedule aligns with WAPA's Tariff and applies when the WALC BA participates in the CAISO EIM and when the EIM has not been suspended. The services provided under Rate Schedule DSW–SD4 continue to apply and the costs are included in the applicable transmission service rates. For clarity, when the WALC BA is participating in CAISO EIM, both Rate Schedules DSW–SD4 and DSW–EIM1T will apply.

Transmission customers will be billed for their share of EIM Administrative Service charges allocated to the WALC BA for its participation in the CAISO EIM in accordance with DSW's EIM business practice posted on its OASIS at *www.oasis.oati.com/walc/index.html.* Revisions to the CAISO's Tariff may require changes to DSW's EIM business practice, which would be processed consistent with section 4.3 of WAPA's Tariff.

*EIM Energy Imbalance Service*

EI service is provided when a difference occurs between the scheduled and actual delivery of energy to a load within the WALC BAA. DSW's existing rate schedule for EI Service, DSW–EI4, does not address EIM participation or settlements.

Rate Schedule DSW–EIM4T facilitates the pass through of any financial settlements for EI Service from the CAISO EIM to DSW transmission customers and ensures the WALC BA remains revenue neutral. This rate schedule aligns with WAPA's Tariff and applies to EI Service when the WALC BA participates in the CAISO EIM and when the EIM has not been suspended. Rate Schedule DSW–EI4 applies when the WALC BA is not participating in EIM or when the EIM has been suspended.

Transmission customers will be billed for their share of EIM EI Service charges incurred by the WALC BA for its participation in the CAISO EIM in accordance with the settlement methods in DSW's EIM business practice posted on its OASIS at w*ww.oasis.oati.com/walc/index.html.* Revisions to the CAISO's Tariff may require changes to DSW's EIM business practice, which would be processed consistent with section 4.3 of WAPA's Tariff.

*EIM Generator Imbalance Service*

GI service is provided when a difference occurs between the output of a generator located in the WALC BAA, and the delivery schedule from that generator to (1) another BAA or (2) a load within the WALC BAA. The EIM requires all participating resources to settle directly with the CAISO. Non-participating resources need to settle with the WALC BA, the EIM entity. DSW's existing rate schedule for GI Service, DSW–GI2, does not address EIM participation or make a distinction between participating and non-participating resources.

Rate Schedule DSW–EIM9T facilitates the pass through of any financial settlements for GI service from the CAISO EIM to DSW transmission customers and ensures the WALC BA remains revenue neutral. This rate schedule aligns with WAPA's Tariff and applies to GI service when the WALC BA participates in the CAISO EIM and when the EIM has not been suspended. Rate Schedule DSW–GI2 applies when the WALC BA is not participating in EIM or when the EIM has been suspended.

Transmission customers will be billed for their share of EIM GI Service charges incurred by the WALC BA for its participation in the CAISO EIM in accordance with the settlement methods in DSW's EIM business practice posted on its OASIS at *www.oasis.oati.com/walc/index.html.* Revisions to the CAISO's Tariff may require changes to DSW's EIM business practice, which would be processed consistent with section 4.3 of WAPA's Tariff.

**Comments**

DSW received no comments during the public consultation and comment period.

**Certification of Rates**

I have certified that the provisional formula rates under Rate Schedules DSW–EIM1T, DSW–EIM4T, and DSW–EIM9T are the lowest possible rates, consistent with sound business principles. The provisional formula rates were developed following administrative policies and applicable laws.

**Availability of Information**

Information used by DSW to develop the provisional formula rates is available for inspection and copying at the Desert Southwest Regional Office, 615 South 43rd Avenue, Phoenix, Arizona. Many of these documents are also available on WAPA's website at *www.wapa.gov/regions/DSW/Pages/DSW-EIM.aspx.*

**Ratemaking Procedure Requirements**

**Environmental Compliance**

WAPA determined that this action fits within the following categorical exclusion listed in appendix B to subpart D of 10 CFR 1021.410: B4.3 (Electric power marketing rate changes). Categorically excluded projects and activities do not require preparation of either an environmental impact statement or an environmental assessment.[6] A copy of the categorical exclusion determination is available on WAPA's website at *www.wapa.gov/regions/DSW/Environment/Pages/environment.aspx.*

**Determination Under Executive Order 12866**

WAPA has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

**Submission to the Federal Energy Regulatory Commission**

The provisional formula rates herein confirmed, approved, and placed into effect on an interim basis, together with supporting documents, will be submitted to FERC for confirmation and final approval.

**Order**

In view of the above, and under the authority delegated to me, I hereby confirm, approve, and place into effect, on an interim basis, Rate Order No. WAPA–208. The formula rates will remain in effect on an interim basis until: (1) FERC confirms and approves them on a final basis; (2) subsequent formula rates are confirmed and approved; or (3) such formula rates are superseded.

**Signing Authority**

This document of the Department of Energy was signed on March 1, 2023, by Tracey A. LeBeau, Administrator, Western Area Power Administration, pursuant to delegated authority from the Secretary of Energy. That document, with the original signature and date, is maintained by DOE. For administrative purposes only, and in compliance with Office of the Federal Register requirements, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on March 9, 2023.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

**Rate Schedule DSW–EIM1T**

**Schedule 1T to OATT**

**United States Department of Energy**

**Western Area Power Administration**

**Desert Southwest Region**

*Western Area Lower Colorado Balancing Authority*

**Energy Imbalance Market—Administrative Service**

*(Approved Under Rate Order No. WAPA–208)*

**Effective**

Beginning on April 5, 2023, and extending through September 30, 2026, or until superseded by another rate schedule, whichever occurs earlier.

**Applicable**

This rate schedule applies to Administrative Service when the Western Area Lower Colorado (WALC) Balancing Authority (BA) participates in the California Independent System Operator's (CAISO) Energy Imbalance Market (EIM) and when the EIM has not been suspended. Rate Schedule DSW–SD4 for Scheduling, System Control and Dispatch Service, or its superseding rate schedule will continue to apply. Both DSW–EIM1T and DSW–SD4 shall apply when the WALC BA participates in the EIM.

The CAISO assesses charges and fees to cover the costs associated with operating the EIM and providing various services to participants. The charges and fees associated with the WALC BA's participation in the EIM will be passed through to ensure the WALC BA remains revenue neutral.

**Formula Rate**

Charges for Administrative Service shall reflect the pass through of applicable costs associated with the WALC BA's participation in the EIM that are assessed by the CAISO to the WALC BA. Costs shall be identified by a CAISO charge code and passed through to transmission customers using the settlement methods detailed in Desert Southwest Region's (DSW) EIM business practice posted on its Open Access Same-time Information System (OASIS) at *www.oasis.oati.com/walc/index.html.* Revisions to the CAISO's Tariff may require changes to DSW's EIM business practice, which would be processed consistent with section 4.3 of WAPA's Tariff.

**Charge Components**

Administrative Service charges typically include one or more of the following items:

| Component | Description |
|---|---|
| EIM Transaction | CAISO charge assessed to entities for EIM participation. |
| Scheduling Coordinator | CAISO charge assessed to Scheduling Coordinators that have any settlement activity during the relevant trading month. |

[6] The determination was done in compliance with NEPA (42 U.S.C. 4321–4347); the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021).

| Component | Description |
|---|---|
| Forecasting Service ..... | CAISO fee to forecast the output of Variable Energy Resources that are external to the CAISO BA Area. |

**Rate Schedule DSW–EIM4T**

**Schedule 4T to OATT**

**United States Department of Energy**

**Western Area Power Administration**

**Desert Southwest Region**

*Western Area Lower Colorado Balancing Authority*

**Energy Imbalance Market—Energy Imbalance Service**

*(Approved Under Rate Order No. WAPA–208)*

**Effective**

Beginning on April 5, 2023, and extending through September 30, 2026, or until superseded by another rate schedule, whichever occurs earlier.

**Applicable**

This rate schedule applies to Energy Imbalance (EI) Service when the Western Area Lower Colorado (WALC) Balancing Authority (BA) participates in the California Independent System Operator's (CAISO) Energy Imbalance Market (EIM) and when the EIM has not been suspended. Rate Schedule DSW–EI4 or its superseding rate schedule would apply when the WALC BA is not participating or when the EIM has been suspended.

The CAISO EIM provides energy to the WALC BA when there is a difference between the scheduled and actual delivery of energy to a load within the WALC BA Area. These differences (energy imbalances) result in financial settlements between the CAISO and the WALC BA. Any financial settlements for energy imbalances associated with the WALC BA's participation in the EIM will be passed through to ensure the WALC BA remains revenue neutral.

**Formula Rate**

Charges for EI Service shall reflect the pass through of all applicable costs associated with the WALC BA's participation in the EIM that are assessed by the CAISO to the WALC BA. Costs shall be identified by a CAISO charge code and passed through to transmission customers using the settlement methods detailed in Desert Southwest Region's (DSW) EIM business practice posted on its Open Access Same-time Information System (OASIS) at *www.oasis.oati.com/walc/index.html.* Revisions to the CAISO's Tariff may require changes to DSW's EIM business practice, which would be processed consistent with section 4.3 of WAPA's Tariff.

**Charge Components**

Charges for EI Service will typically include one or more of the following items:

| Components | Description |
|---|---|
| Instructed Imbalance Energy. | Operational adjustment of transmission customer's affected interchange or intrachange, including certain changes made to an E-Tag. |
| Uninstructed Imbalance Energy. | Differences between a transmission customer's metered load and base schedule derived from interchange and intrachange forecast data (E-Tags). |
| Unaccounted for Energy .... | Differences between WALC BA generation (generators, non-generator resources, and imports) and demand (from loads and exports) adjusted for transmission losses. |
| Under/Over-Scheduling Load. | The under-scheduling and over-scheduling of transmission that contributes to energy imbalances. |
| Uplifts or Offsets ..... | Imbalance energy for each settlement interval for each resource within the EIM area and all system resources dispatched in real time. |
| Bid Cost Recovery ..... | Bid costs for eligible resources (real-time energy) that were scheduled or dispatched by the CAISO for the EIM. |
| Flexible Ramping ..... | Sufficient ramping capability to meet the forecasted net load and cover upward and downward forecast error uncertainty. |

**Rate Schedule DSW–EIM9T**

**Schedule 9T to OATT**

**United States Department of Energy**

**Western Area Power Administration**

**Desert Southwest Region**

*Western Area Lower Colorado Balancing Authority*

**Energy Imbalance Market—Generator Imbalance Service**

*(Approved Under Rate Order No. WAPA–208)*

**Effective**

Beginning on April 5, 2023, and extending through September 30, 2026, or until superseded by another rate schedule, whichever occurs earlier.

**Applicable**

This rate schedule applies to Generator Imbalance (GI) Service when the Western Area Lower Colorado (WALC) Balancing Authority (BA) participates in the California Independent System Operator's (CAISO) Energy Imbalance Market (EIM) and when the EIM has not been suspended. Rate Schedule DSW–GI4 or its superseding rate schedule would apply when the WALC BA is not participating or when the EIM has been suspended.

The CAISO EIM provides energy to the WALC BA when there is a difference between the scheduled and actual delivery of energy from a non-participating resource within the WALC BA Area. These differences (generator imbalances) result in financial settlements between the CAISO and the WALC BA. Any financial settlements for generator imbalances associated with the WALC BA's participation in the EIM will be passed through to ensure the WALC BA remains revenue neutral.

**Formula Rate**

Charges for GI Service shall reflect the pass through of all applicable costs associated with the WALC BA's participation in the EIM that are assessed by the CAISO to the WALC BA. Costs shall be identified by a CAISO charge code and passed through to transmission customers using the settlement methods detailed in Desert Southwest Region's (DSW) EIM business practice posted on its Open Access Same-time Information System (OASIS) at *www.oasis.oati.com/walc/index.html.* Revisions to the CAISO's Tariff may require changes to DSW's EIM business

practice, which would be processed consistent with section 4.3 of WAPA's Tariff.

**Charge Components**

Charges for GI Service will typically include one or more of the following items:

| Component | Description |
|---|---|
| Instructed Imbalance Energy. | Resource imbalances created by a manual dispatch, EIM available balancing capacity dispatch, or adjustments to resource forecasts pursuant to provisions of the CAISO's Tariff. |
| Uninstructed Imbalance Energy. | Differences between a customer's metered generation and base schedule derived from the resource forecast data submitted through the CAISO's Base Schedule Aggregation Portal. |
| Unaccounted for Energy .... | Differences between WALC BA generation (generators, non-generator resources, and imports) and demand (loads and exports) adjusted for losses. |
| Under/Over-Scheduling ..... | The under-scheduling and over-scheduling of resources that contributes to generator imbalances. |
| Uplifts or Offsets ..... | Imbalance energy for each settlement interval for each resource within the EIM area and all system resources dispatched in real time. |
| Bid Cost Recovery ..... | Bid costs for eligible resources (real-time energy) that were scheduled or dispatched by the CAISO for the EIM. |
| Flexible Ramping ..... | Sufficient ramping capability to meet the forecasted net load and cover upward and downward forecast error uncertainty. |

[FR Doc. 2023–05152 Filed 3–13–23; 8:45 am]

BILLING CODE 6450–01–P

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL—10758–01–OA]**

## Public Meetings of the Science Advisory Board Biosolids Panel

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office is announcing public meetings of the Science Advisory Board Biosolids Panel. The purpose of the meetings is to receive a briefing from EPA, review and discuss charge questions, and peer review the EPA's biosolid risk assessment framework.

**DATES:**

*Public Meetings:* The Science Advisory Board Biosolids Panel will meet on the following dates. All times listed are in Eastern Standard Time.

1. April 5, 2023, from 1:00 p.m. to 4:00 p.m.
2. May 2–3, 2023, from 9:30 a.m. to 4:00 p.m.
3. May 31, 2023, from 1:00 p.m. to 4:00 p.m.

*Comments:* See the section titled ''Procedures for Providing Public Input'' under **SUPPLEMENTARY INFORMATION** for instructions and deadlines.

**ADDRESSES:** The April 5, 2023, and May 31, 2023, meetings will be conducted virtually. Please refer to the SAB website at *https://sab.epa.gov* for information on how to attend the meeting. The May 2–3, 2023, meeting will be in person and virtually. Please refer to the SAB website at *https://sab.epa.gov* for the location and information on how to attend the meeting.

**FOR FURTHER INFORMATION CONTACT:** Any member of the public who wants further information concerning this notice may contact Dr. Shaunta Hill-Hammond, Designated Federal Officer (DFO), via telephone (202) 564–3343, or email at *hill-hammond.shaunta@epa.gov.* General information about the SAB, as well as any updates concerning the meetings announced in this notice, can be found on the SAB website at *https://sab.epa.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background:* The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDDAA), codified at 42 U.S.C. 4365, to provide independent scientific and technical advice to the EPA Administrator on the scientific and technical basis for agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Pursuant to FACA and EPA policy, notice is hereby given that the Science Advisory Board Biosolids Panel will hold three public meetings to receive a briefing from EPA, review and discuss charge questions, listen to public comments and peer review the EPA's biosolid risk assessment framework; including the prioritization process, choice of models and usability of a biosolids screening tool by risk assessors.

*Availability of Meeting Materials:* All meeting materials, including the agenda, will be available on the SAB web page at *https://sab.epa.gov.*

*Procedures for Providing Public Input:* Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office. Federal advisory committees and panels, including scientific advisory committees, provide independent advice to the EPA. Members of the public can submit relevant comments pertaining to the committee's charge or meeting materials. Input from the public to the SAB will have the most impact if it provides specific scientific or technical information or analysis for the SAB to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should follow the instructions below to submit comments.

*Oral Statements:* In general, individuals or groups requesting an oral presentation at a meeting conducted virtually will be limited to three minutes and individuals or groups requesting an oral presentation at an in-person meeting will be limited to five minutes. Each person making an oral statement should consider providing written comments as well as their oral statement so that the points presented orally can be expanded upon in writing. Persons interested in providing oral statements should contact the DFO, in writing (preferably via email) at the contact information noted above by March 22, 2023, for the April 5, 2023, meeting, by April 18, 2023, for the May 2–3, 2023, and by May 17, 2023, for the May 31, 2023, meeting to be placed on the list of registered speakers.

*Written Statements:* Written statements will be accepted throughout the advisory process; however, for timely consideration by SAB members,

statements should be submitted to the DFO by March 22, 2023, for consideration at the April 5, 2023, meeting by April 18, 2023, for consideration at the May 2–3, 2023, and by May 17, 2023, for consideration at the May 31, 2023, meeting. Written statements should be supplied to the DFO at the contact information above via email. Submitters are requested to provide a signed and unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its websites. Members of the public should be aware that their personal contact information if included in any written comments, may be posted to the SAB website. Copyrighted material will not be posted without the explicit permission of the copyright holder.

*Accessibility:* For information on access or services for individuals with disabilities, please contact the DFO, at the contact information noted above, preferably at least ten days prior to the meetings, to give the EPA as much time as possible to process your request.

**V. Khanna Johnston,**

*Deputy Director, Science Advisory Board Staff Office.*

[FR Doc. 2023–05181 Filed 3–13–23; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–XXXX; FR ID 130762]**

### Information Collection Being Reviewed by the Federal Communications Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (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 May 15, 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.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–XXXX.

*Title:* Affordable Connectivity Program (ACP) Transparency Data Collection.

*Form Number:* FCC Form 5651.

*Type of Review:* New information collection.

*Respondents:* Business or other for-profit.

*Number of Respondents and Responses:* 1,755 respondents; 1,755 responses.

*Estimated Time per Response:* 21 hours.

*Frequency of Response:* Annual reporting requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in section 904 of Division N, Title IX of the Consolidated Appropriations Act, 2021, Public Law 116–260, 134 Stat. 1182, as amended by the Infrastructure Investment and Jobs Act, Public Law 117–58, 60502(c), 135 Stat. 429, 1243 (2021) and 47 U.S.C. 1752.

*Total Annual Burden:* 36,855 hours.

*Total Annual Cost:* No Cost.

*Needs and Uses:* On November 15, 2021, the President signed the Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429 (2021), which appropriated $14.2 billion to expand and modify the Emergency Broadband Benefit Program in the form of a new, longer-term broadband affordability program called the Affordable Connectivity Program (ACP). The Affordable Connectivity Program provides qualifying low-income households with a monthly discount of up to $30 per month (or up to $75 per month for households on qualifying Tribal Lands) for broadband services, and a one-time $100 discount on a connected device (tablet, laptop, or desktop computer) from the participating provider with a co-pay of more than $10 but less than $50.

The Infrastructure Act also directed the Commission to ''issue final rules regarding the annual collection by the Commission of data relating to the price and subscription rates of each internet service offering of a participating provider under the Affordable Connectivity Program . . . to which an eligible household subscribes.'' Infrastructure Act, § 60502(c)(1). On November 23, 2022, the Commission adopted a Fourth Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 21–450, FCC 22–87 (Fourth Report and Order) establishing the ACP Data Collection to satisfy the statutory collection requirement. The data collection also will allow the Commission to determine the value being provided by the affordable connectivity benefit.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2023–05206 Filed 3–13–23; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

**[Docket No. AS23–01]**

### Appraisal Subcommittee Notice of Meeting

**AGENCY:** Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

**ACTION:** Notice of meeting.

*Description:* In accordance with section 1104(b) of title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in open session for its regular meeting:

*Location:* This will be a virtual meeting via Webex. Please visit the agency's homepage (*www.asc.gov*) and access the provided registration link in the News and Events section. You

MUST register in advance to attend this meeting.

*Date:* March 15, 2023.

*Time:* 10:00 a.m. ET.

*Status:* Open.

**Reports**

Chair
Executive Director
Grants
Financial

**Action and Discussion Items**

Approval of Minutes
November 16, 2022 Quarterly Meeting Minutes
Future ASC Public Hearings
60-Day Paperwork Reduction Act Notice for the Appraiser Survey Project

**How To Attend and Observe an ASC Meeting**

The meeting will be open to the public via live webcast only. Visit the agency's homepage (*www.asc.gov*) and access the provided registration link in the News and Events section. The meeting space is intended to accommodate public attendees. However, if the space will not accommodate all requests, the ASC may refuse attendance on that reasonable basis. The use of any video or audio tape recording device, photographing device, or any other electronic or mechanical device designed for similar purposes is prohibited at ASC Meetings.

**James R. Park,**

*Executive Director.*

[FR Doc. 2023–05211 Filed 3–13–23; 8:45 am]

BILLING CODE 6700–01–P

## FEDERAL MARITIME COMMISSION

### Notice of Agreements Filed

The Commission hereby gives notice of filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, 800 North Capitol Street, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**, and the Commission requests that comments be submitted within 7 days on agreements that request expedited review. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

*Agreement No.:* 201400.

*Agreement Name:* HMM/ONE PSX Space Charter Agreement.

*Parties:* Hyundai Merchant Marine Co., Ltd.; Ocean Network Express, Pte. Ltd

*Filing Party:* Joshua Stein, Cozen O'Connor.

*Synopsis:* The Agreement authorizes HMM to charter space to ONE on HMM's service in the trade between ports in the Republic of Korea and China on the one hand and ports on the U.S. Pacific Coast on the other hand.

*Proposed Effective Date:* 3/3/2023.

*Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/77502.*

*Agreement No.:* 201401.

*Agreement Name:* WHL/HLAG Vessel Sharing Agreement.

*Parties:* Hapag Lloyd AG; Wan Hai Lines Ltd and Wan Hai Lines (Singapore) Pte Ltd.

*Filing Party:* Wayne Rohde, Cozen O'Connor.

*Synopsis:* The Agreement authorizes the parties to share vessels in the trades between ports on the Atlantic Coast of the United States on the one hand and ports in China, Taiwan, Vietnam, Singapore, and Sri Lanka on the other hand.

*Proposed Effective Date:* 3/3/2023.

*Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/77503.*

Dated: March 9, 2023.

**JoAnne O'Bryant,**

*Program Analyst.*

[FR Doc. 2023–05186 Filed 3–13–23; 8:45 am]

BILLING CODE 6730–02–P

## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

### Sunshine Act Meeting Notice

**TIME AND DATE:** 10 a.m., Tuesday, March 21, 2023.

**PLACE:** The Richard V. Backley Hearing Room, Room 511, 1331 Pennsylvania Avenue NW, Suite 504 North, Washington, DC 20004 (enter from F Street entrance).

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission will consider and act upon the following in open session: *Secretary of Labor on behalf of Smitherman* v. *Warrior Met Coal Mining LLC,* Docket No. SE 2021–0153. (Issues include whether a miner was terminated in violation of section 105(c) of the Mine Act because the operator believed he was involved in making a safety complaint.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

**CONTACT PERSON FOR MORE INFO:** Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

*Phone Number for Listening to Meeting:* 1-(866) 236–7472 Passcode: 678–100.

(Authority: 5 U.S.C. 552b)

Dated: March 10, 2023.

**Sarah L. Stewart,**

*Deputy General Counsel.*

[FR Doc. 2023–05299 Filed 3–10–23; 11:15 am]

BILLING CODE 6735–01–P

## FEDERAL TRADE COMMISSION

**[File No. 202 3169]**

### BetterHelp, Inc.; Analysis of Proposed Consent Order 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 or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before April 13, 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 ''BetterHelp, Inc.; File No. 202 3169'' 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 P), Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Miles Plant (202–326–2526), Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

**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 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 at *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 April 13, 2023. Write ''BetterHelp, Inc.; File No. 202 3169'' 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.

Because of heightened security screening, postal mail addressed to the Commission will be subject to delay. 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 ''BetterHelp, Inc.; File No. 202 3169'' 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 P), 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 the *https://www.regulations.gov* website—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 *http://www.ftc.gov* to read this document and the news release describing the proposed settlement. 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 April 13, 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 Proposed Consent Order To Aid Public Comment

The Federal Trade Commission (the ''Commission'') has accepted, subject to final approval, an agreement containing a consent order from BetterHelp, Inc. (''Respondent'' or ''BetterHelp''). The proposed consent order (''Proposed Order'') has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement, along with any comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the Proposed Order.

BetterHelp is an online mental health counseling service that matches consumers with one of BetterHelp's over 25,000 contracted licensed therapists. Through BetterHelp's websites and apps, consumers can communicate with therapists via video conferencing, text messaging, live chat, and audio calls. BetterHelp has offered this service under several names, including BetterHelp Counseling, Faithful Counseling, Pride Counseling, ReGain, Terappeuta, iCounseling, and MyTherapist.

To sign up for BetterHelp's counseling service, a consumer must complete an online intake questionnaire containing detailed questions about the consumer's mental health status and history (the ''Intake Questionnaire''). Following completion of the Intake Questionnaire, the consumer can create an account by providing their name or nickname, email address, phone number, and emergency contact information.

As consumers progressed through the Intake Questionnaire, BetterHelp represented that the consumers' information ''will stay private between you and your counselor.'' Similarly, when a consumer completed the Intake Questionnaire and signed up for an account to use Faithful Counseling, Pride Counseling, or Teen Counseling, BetterHelp represented that the consumer's email address would be ''kept strictly private'' and ''never shared, sold or disclosed to anyone.'' BetterHelp made additional privacy guarantees in its privacy policies—first implicitly and then explicitly—of limited use and limited disclosure of consumers' email addresses, IP addresses, and health information. Despite representing to consumers that BetterHelp would keep consumers' information private and only use their information for non-advertising purposes, BetterHelp used and disclosed information obtained from consumers through the Intake Questionnaire and sign-up process for advertising.

Additionally, BetterHelp prominently displayed a seal—in close proximity to several other seals provided by third parties—that attested to BetterHelp's purported compliance with the Health Insurance Portability and Accountability Act of 1996 (''HIPAA''), a statute that sets forth privacy and information security protections for health information. In addition, BetterHelp represented to consumers that it was in fact ''HIPAA certified,'' with its customer service representatives informing consumers that ''[y]ou will also be able to see our HIPAA certification at the bottom of''

our web pages. However, no government agency or other third party had reviewed BetterHelp's information practices for compliance with HIPAA, let alone determined that the practices met the requirements of HIPAA.

The Commission's proposed eight-count complaint alleges that BetterHelp violated section 5(a) of the Federal Trade Commission Act by: (1) unfairly failing to employ reasonable measures to protect consumers' health information in connection with the collection, use, and disclosure of that information (Count I); (2) unfairly failing to obtain consumers' affirmative express consent prior to collecting, using, and disclosing consumers' health information (Count II); (3) failing to disclose that it shared consumers' health information with third parties for BetterHelp's advertising purposes and the recipient third parties' own business purposes, and failing to disclose that BetterHelp used consumers' health information to target the consumers and others with advertisements (Counts III and IV); (4) misrepresenting that it would not disclose consumers' health information to third parties for advertising and the recipient third parties' own business purposes, that it would not use such information for advertising or advertising-related purposes, and that it would not share such information with anyone except each consumer's licensed therapist (Counts V–VII); and (5) misrepresenting that a governmental agency or third party had reviewed BetterHelp's practices and determined that such practices met the requirements of HIPAA (Count VIII).

*Summary of Proposed Order With BetterHelp*

The Proposed Order contains provisions designed to prevent BetterHelp from engaging in the same or similar acts or practices in the future. Part I of the Proposed Order prohibits BetterHelp from sharing individually identifiable information relating to the past, present, or future physical or mental health or condition(s) of a consumer with any third party (*i.e.,* any party other than BetterHelp, its service providers, therapists or counselors employed by or contracted with BetterHelp, certain employee benefit programs, and entities using consumers' information for other very limited purposes) for advertising. Part I also prohibits BetterHelp from sharing consumers' personal information more generally with Third Parties for the purpose of re-targeting (*i.e.,* sharing personal information of consumers who have previously engaged with BetterHelp, such as by visiting one of its websites or using one of its apps, to send advertisements to those consumers). Part II of the Proposed Order requires that, before it can share a consumers' personal information with a third party for any purpose that is not prohibited under part I, BetterHelp must obtain that consumer's affirmative express consent, which includes informing the consumer of the information to be disclosed, the third parties that will receive the information, and how the information will be used.

Part III of the Proposed Order prohibits BetterHelp from misrepresenting: (1) the extent to which it collects, maintains, uses, discloses, deletes, or permits or denies access to any Covered Information, or the extent to which it protects the privacy, security, availability, confidentiality, or integrity of Covered Information; (2) the purposes for which BetterHelp or any entity to whom it discloses or permits access to Covered Information collects, maintains, uses, discloses, or permits access to such information; (3) the extent to which a consumer can maintain privacy and anonymity when visiting or using BetterHelp's online properties; (4) the extent to which consumers may exercise control over BetterHelp's collection of, maintenance of, use of, deletion of, disclosure of, or permission of access to Covered Information; (5) the extent to which BetterHelp is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy, security or any other compliance program sponsored by a government or any self-regulatory or standard-setting organization; and (6) the extent to which BetterHelp is covered by HIPAA, and the extent that its privacy and information practices are in compliance with HIPAA requirements.

Part IV of the Proposed Order requires BetterHelp to identify to the Commission which third parties received consumers' personal information from BetterHelp without their consent and what personal information each such third party received. Part IV also requires that BetterHelp then ask those third parties to delete such personal information.

Part V of the Proposed Order requires that BetterHelp provide notice to consumers who created an account with BetterHelp prior to January 1, 2021, that BetterHelp may have used and disclosed their personal information for advertising. Part VI requires BetterHelp to establish and implement, and thereafter maintain, a comprehensive privacy program that protects the privacy, security, availability, confidentiality, and integrity of consumers' Covered Information (as defined in the Proposed Order).

Part VII of the Proposed Order requires BetterHelp to obtain initial and biennial privacy assessments by an independent, third-party professional (''Assessor'') for 20 years, and part VIII requires BetterHelp to cooperate with the Assessor in connection with the assessments required by part VII. Part IX of the Proposed Order requires that a BetterHelp executive certify the company's compliance with the Proposed Order. Part X of the Proposed Order requires BetterHelp to notify the Commission following the discovery of a violation of parts I, II, or III of the Proposed Order.

Part XI of the Proposed Order requires BetterHelp to pay $7,800,000 in monetary relief for consumer redress, and part XII describes the procedures and legal rights related to that payment. Part XIII of the Proposed Order requires BetterHelp to provide information to, and pay for, an independent redress administrator (''Administrator'') selected by the Commission, which will be responsible for administration of consumer redress.

Parts XIV through XVII of the Proposed Order are reporting and compliance provisions, which include recordkeeping requirements and provisions requiring BetterHelp to provide information or documents necessary for the Commission to monitor compliance. Part XVIII states that the Proposed Order will remain in effect for twenty (20) years, with certain exceptions.

The purpose of this analysis is to aid public comment on the Proposed Order. It is not intended to constitute an official interpretation of the complaint or Proposed Order, or to modify in any way the Proposed Order's terms.

By direction of the Commission.

**April J. Tabor,**

*Secretary.*

**Concurring Statement of Commissioner Christine S. Wilson**

Today the Commission announces a consent agreement with BetterHelp resolving allegations that it failed to protect consumers' health information and failed to disclose or misrepresented its marketing practices. I support the allegations in the proposed complaint and the relief in the negotiated consent.

The complaint explains that BetterHelp provides an online counseling service that matches users with the respondent's therapists and facilitates counseling via its websites

and apps. Millions of consumers have used the service and provided BetterHelp with sensitive personal information regarding their health status and history, in addition to their name, email address, and IP address. Contrary to its repeated representations to keep this information private, the complaint explains that BetterHelp monetized consumers' health information to target them and others with advertisements. To this end, Respondent provided sensitive consumer health information to third-party advertising platforms including Facebook, Pinterest, Snapchat, and Criteo. I agree that this alleged conduct violates Section 5 of the FTC Act.

Notably, the complaint does not include an allegation that BetterHelp violated the Health Breach Notification Rule (HBNR or Rule). I support this careful approach to the application of the Rule, particularly given the FTC Policy Statement on Breaches by Health Apps and Other Connected Devices (Policy Statement). The Commission, in a 3–2 party-line vote, issued this Policy Statement in September 2021.[1] I dissented [2] because the Policy Statement included a novel expansion of the application of the Rule that contradicted earlier business guidance [3] and was issued during the pendency of the ongoing HBNR rulemaking proceeding.[4]

One could argue that BetterHelp would fall within the ambit of the HBNR because it offers a health platform and app, particularly under the expansive view espoused in the Policy Statement. I am pleased to see that the Commission has not taken this approach.[5]

The information BetterHelp collects from consumers and provides to therapists on its platform does not constitute a personal health record of identifiable health information under the Rule because it does not include records that ''can be drawn from multiple sources,'' as required by the existing formulation of the Rule.[6] A consumer provides his or her information to BetterHelp but the company does not pull additional health information from another source or vendor. For this reason, foregoing an HBNR count is appropriate.

I note further that I support the imposition of monetary relief in this matter. BetterHelp told consumers: ''Rest assured—your health information will stay private between you and your counselor'' but, as alleged, shared this highly sensitive information with third parties for the purpose of monetizing it. I am comfortable that this conduct falls within our authority to seek relief under Section 19 of the FTC Act. I commend the staff on the successful resolution of this matter.

[FR Doc. 2023–05139 Filed 3–13–23; 8:45 am]

**BILLING CODE 6750–01–P**

[1] FTC Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), *https://www.ftc.gov/news-events/events-calendar/open-commission-meeting-september-15-2021.*

[2] Dissenting Statement of Commissioner Christine S. Wilson, Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15 2021), *https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf.*

[3] *See* Exhibit A, Dissenting Statement of Commissioner Christine S. Wilson, Policy Statement on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021) (prior Commission business guidance on the HBNR), *https://www.ftc.gov/system/files/documents/public_statements/1596356/wilson_health_apps_policy_statement_dissent_combined_final.pdf.*

[4] Health Breach Notification Rule, Request for Public Comment, 85 FR 31085 (May 22, 2020).

[5] This is especially appropriate because, according to the complaint, BetterHelp's violative conduct ceased in December 2020, before the issuance of the Policy Statement. I recently supported the application of the Rule to the conduct in the GoodRx matter because the alleged conduct at issue there fell squarely within the scope of the HBNR as drafted. *See* Concurring Statement of Commissioner Christine S. Wilson, GoodRx (Feb. 3, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/goodrx-concurring-statement-commissioner-christine-wilson.*

[6] *See* 16 CFR 318.2(d); 42 U.S.C. 1320d(6).

## GENERAL SERVICES ADMINISTRATION

**[Notice–ID–2023–03; Docket No. 2023–0002; Sequence No. 9]**

## Privacy Act of 1974; Notice of a Modified System of Records

**AGENCY:** Office of the Chief Information Officer, General Services Administration (GSA).

**ACTION:** Notice of a modified system of records.

**SUMMARY:** GSA proposes to modify a system of records subject to the Privacy Act of 1974. GSA is modifying the notice to update the system name to ''Office of the Chief Financial Officer's (OCFO) Imaging/Workflow Solution''. It is a subsystem within the Ancillary Corporate Applications (ACA) at GSA. OCFO's Imaging/Workflow Solution allows users in the Payroll Services Branch, Accounts Payable and customer agencies to annotate metadata to scanned images, and search and view documents (*i.e.,* invoices, payroll, property records, deeds, transfers) that have been scanned/stored.

**DATES:** Submit comments on or before April 13, 2023. The new and/or significantly modified routine uses will be applicable on April 13, 2023.

**ADDRESSES:** Submit comments by any of the following methods:

- *Regulations.gov: https://www.regulations.gov.* Search for Notice–ID–2023–03, Rescindment of a System of Records Notice. Select the link ''Comment Now'' that corresponds with ''Notice–ID–2023–03, Rescindment of a System of Records Notice.'' Follow the instructions provided on the screen. Please include your name, company name (if any), and ''Notice–ID–2023–03, Rescindment of a System of Records Notice'' on your attached document.
- *By email to the GSA Privacy Act Officer: gsa.privacyact@gsa.gov.*
- *By mail to:* Privacy Office (IDE), GSA, 1800 F Street NW, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Call or email Richard Speidel, the GSA Chief Privacy Officer (Office of the Deputy Chief Information Officer): telephone 202–969–5830; email *gsa.privacyact@gsa.gov.*

**SUPPLEMENTARY INFORMATION:** GSA proposes to modify a system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a. Office of the Chief Financial Officer's (OCFO) Imaging/Workflow Solution (previously named ImageNow), is the subsystem within the Ancillary Corporate Applications (ACA) at GSA. Please refer to the SORN link below: *https://www.federalregister.gov/documents/2009/08/10/E9-19102/privacy-act-of-1974-notice-of-new-system-of-records.*

**SYSTEM NAME AND NUMBER:**

OCFO Imaging/Workflow Solution GSA/PPFM–12.

**SECURITY CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

The system is maintained in Kansas City, MO, in the Financial Administrative Systems Division (BDT).

**SYSTEM MANAGER:**

Director, Financial and Payroll Services Division, OCFO, GSA (BCE), 1500 E Bannister Road, Kansas City, MO 66085.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. Part III, Subparts D and E, 26 U.S.C. Chapter 24 and 2501, and Executive Order 9397, and the Chief Financial Officers (CFO) Act of 1990 (Pub. L. 101–576) as amended (Chapter 9 of Title 31 of the U.S. Code (2009)).

**PURPOSES OF THE SYSTEM:**

The purpose of the system is to capture electronic images of financial documents, and store, retrieve, and process these images. It will maintain these images in order to support the day-to-day official operating needs of GSA's financial and payroll operations.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

This system covers individuals with electronic facility access credentials including GSA employees, contractor employees, building occupants, interns, and volunteers.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

System records include information that identify vendors and/or employees by their names or other unique identifier in conjunction with other data elements such as gender, birth date, age, marital status, spouse and dependents, home email addresses, home addresses, home phone numbers, health records, Social Security Numbers, Employer Identification Numbers, payroll deductions, banking information, personal credit card information, and similar personally identifiable information.

**RECORD SOURCE CATEGORIES:**

The source for the image data in the system originates from the individuals and vendors who submit the documents on their own behalf. In addition, documents may come from Federal Government Agencies that may include Privacy Act information.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:**

System users will be limited to those U.S. government employees that require this information to perform their assigned official responsibilities. All access will be reviewed and approved by the employee's supervisor, system owner and the information system security officer. Information from this system also may be disclosed as a routine use:

a. In any legal proceeding, where pertinent, to which GSA is a party before a court or administrative body.

b. To a Federal, State, local, or foreign agency responsible for investigating, prosecuting, enforcing, or carrying out a statute, rule, regulation, or order when GSA becomes aware of a violation or potential violation of civil or criminal law or regulation.

c. To conduct investigations, by authorized officials, that are investigating or settling a grievance, complaint, or appeal filed by an individual who is the subject of the record.

d. To the Office of Personnel Management (OPM), the Office of Management and Budget (OMB), and the Government Accountability Office (GAO) when the information is required for program evaluation purposes.

e. To a Member of Congress or his or her staff on behalf of and at the request of the individual who is the subject of the record.

f. To a federal agency in connection with the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation; the letting of a contract; or the issuance of a grant, license, or other benefit to the extent that the information is relevant and necessary to a decision.

g. To authorized officials of the agency that provided the information for inclusion in ACMIS.

h. To an expert, consultant, or contractor of GSA in the performance of Start Printed Page 39962a Federal duty to which the information is relevant.

i. To the National Archives and Records Administration (NARA) for records management purposes.

j. To appropriate agencies, entities, and persons when (1) The Agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with GSA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS: STORAGE:**

All records are stored electronically in client-server computer format.

**POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:**

Records are retrievable with indexing values or other unique identifiers such as name or Social Security Number.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

System records are retained and disposed of according to GSA records maintenance and disposition schedules and the requirements of the National Archives and Records Administration (General Records Schedule 2.3, item 20).

**RETENTION AND DISPOSAL:**

Records created for input to other financial systems are intermediary records according to NARA's General Records Schedule 5.2 item 020 and can be destroyed upon verification of successful creation of the final document or file, or when no longer needed for business use, whichever is later.

Records managed by the system and accessed by other financial systems such as through an Application Programming Interface (API) are treated as financial records and their disposition is determined by the type of financial record and disposed according to the appropriate item in GRS schedule 1.1, Financial Management and Reporting Records.

**ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS: SAFEGUARDS**

System records are safeguarded in accordance with the requirements of the Privacy Act, the Computer Security Act, and the System Security Plan. Technical, administrative, and personnel security measures are implemented to ensure confidentiality and integrity of the data. Security measures include password protections, assigned roles, and transaction tracking.

**RECORD ACCESS PROCEDURES:**

Individuals wishing to access their own records may do so by sending a request to the program manager. Director, Financial and Payroll Services Division, OCFO, GSA (BCE), 1500 E Bannister Road, Kansas City, Missouri 66085.

**CONTESTING RECORD PROCEDURES:**

GSA rules for access to records, and for contesting the contents and appealing initial determinations are provided in 41 CFR part 105–64.

**NOTIFICATION PROCEDURES:**

Individuals wishing to inquire if the system contains information about them should contact the program manager. Director, Financial and Payroll Services Division, OCFO, GSA (BCE), 1500 E Bannister Road, Kansas City, Missouri 66085.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

None.

**HISTORY:**

This notice modifies the Supplemental Information section of the system of records notice that is

published in full at 74 FR 39961, September 09, 2009.

**Richard Speidel,**

*Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.*

[FR Doc. 2023–05191 Filed 3–13–23; 8:45 am]

**BILLING CODE 6820–34–P**

## GENERAL SERVICES ADMINISTRATION

**[Notice–ID–2023–05; Docket No. 2023–0002; Sequence No. 11]**

### Privacy Act of 1974; System of Records

**AGENCY:** Office of the Chief Privacy Officer, General Services Administration, (GSA).

**ACTION:** Rescindment of a system of records notice.

**SUMMARY:** Pursuant to the Privacy Act of 1974, notice is hereby given that the General Services Administration (GSA) proposes to rescind the GSA/HRO–3 Occupational Health and Injury Files SORN. GSA is rescinding the system of records notice, GSA/HRO–3 Occupational Health and Injury Files. The rescinded system of records described in this notice no longer maintains any Personally Identifiable Information (PII). Additionally, GSA uses the Employees' Compensation Operations & Management Portal (ECOMP) system to report an incident. GSA uses the ECOMP system to track injuries and illnesses. Link to ECOMP system at DOL: *https://www.ecomp.dol.gov.*

**DATES:** Submit comments on or before April 13, 2023.

**ADDRESSES:** Submit comments by any of the following methods:

- *Regulations.gov:* Search *http://www.regulations.gov* for ID–2023–05, Rescindment of a System of Records Notice. Select the link ''Comment Now'' that corresponds with ''ID–2023–05, Rescindment of a System of Records Notice.'' Follow the instructions provided on the screen. Please include your name, company name (if any), and ''ID–2023–05, Rescindment of a System of Records Notice'' on your attached document.
- *By email to the GSA Privacy Act Officer: gsa.privacyact@gsa.gov.*
- *By mail to:* Privacy Office (IDE), GSA, 1800 F Street NW, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Call or email Richard Speidel, the GSA Chief Privacy Officer: telephone 202–969–5830; email *gsa.privacyact@gsa.gov.*

**SUPPLEMENTARY INFORMATION:** The SORN should be removed from GSA's inventory once OMB reviews and approves. The records are only stored in a Dept of Labor system. GSA's replacement for the SORN is now obsolete as the records described in it are instead stored in a Dept of Labor system [DOL/OASAM–4—Safety and Health Information Management System (SHIMS)]—(*https://www.dol.gov/agencies/sol/privacy*) and *https://www.dol.gov/agencies/sol/privacy/govt-1.*

**SYSTEM NAME AND NUMBER:**

GSA/HRO–3—Occupational Health and Injury Files SORN.

**HISTORY:**

73 FR 22389.

**Richard Speidel,**

*Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.*

[FR Doc. 2023–05192 Filed 3–13–23; 8:45 am]

**BILLING CODE 6820–34–P**

## GENERAL SERVICES ADMINISTRATION

**[Notice–ID–2023–04; Docket No. 2023–0002; Sequence No. 10]**

### Privacy Act of 1974; System of Records

**AGENCY:** Office of the Chief Privacy Officer, General Services Administration, (GSA).

**ACTION:** Rescindment of a system of records notice.

**SUMMARY:** Pursuant to the Privacy Act of 1974, notice is hereby given that GSA proposes to rescind the GSA/CIO–2 Enterprise Server Services (ESS) SORN. The ESS no longer maintains any Personally Identifiable Information (PII). GSA's replacement for ESS migrated all subsystems to the new Enterprise Infrastructure Operations (EIO) system and those elements were placed as subsystems to the Enterprise Infrastructure Operations (EIO).

**DATES:** Submit comments on or before April 13, 2023.

**ADDRESSES:** Submit comments by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Search for ID–2023–04, Rescindment of a System of Records Notice. Select the link ''Comment Now'' that corresponds with ''ID–2023–04, Rescindment of a System of Records Notice.'' Follow the instructions provided on the screen. Please include your name, company name (if any), and ''ID–2023–04, Rescindment of a System of Records Notice'' on your attached document.
- *By email to the GSA Privacy Act Officer: gsa.privacyact@gsa.gov.*
- *By mail to:* Privacy Office (IDE), GSA, 1800 F Street NW, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Call or email Richard Speidel, the GSA Chief Privacy Officer: telephone 202–969–5830; email *gsa.privacyact@gsa.gov.*

**SUPPLEMENTARY INFORMATION:** Enterprise Server Services (ESS)system was migrated from all ESS subsystems to the new Enterprise Infrastructure Operations (EIO) system and those elements being placed as subsystems to the Enterprise Infrastructure Operations (EIO). For more information, refer to this link below: *https://www.govinfo.gov/content/pkg/FR-2011-08-10/pdf/2011-20271.pdf.*

**SYSTEM NAME AND NUMBER:**

GSA/CIO–2 Enterprise Server Services (ESS).

**HISTORY:**

73 FR 22389.

**Richard Speidel,**

*Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.*

[FR Doc. 2023–05193 Filed 3–13–23; 8:45 am]

**BILLING CODE 6820–34–P**

## GENERAL SERVICES ADMINISTRATION

**[Notice–ID–2023–02; Docket No. 2023–0002; Sequence No. 8]**

### Privacy Act of 1974; System of Records

**AGENCY:** Office of the Chief Privacy Officer, General Services Administration (GSA).

**ACTION:** Rescindment of a system of records notice.

**SUMMARY:** Pursuant to the Privacy Act of 1974, notice is hereby given that the General Services Administration (GSA) proposes to rescind the system GSA/HRO–2—Employee Drug Abuse Alcoholism Files, as the records are now with the U.S. Department of Health and Human Services (HHS), not GSA, as GSA entered an interagency agreement with HHS for support so the records are covered by the HHS SORN, 09–90–0010, Employee Assistance Program (EAP) Records.

**DATES:** Submit comments on or before April 13, 2023.

**ADDRESSES:** Submit comments by any of the following methods:

• *Regulations.gov: http://www.regulations.gov.* Search for Notice–ID–2023–02, Rescindment of a System of Records Notice. Select the link ''Comment Now'' that corresponds with ''Notice–ID–2023–02, Rescindment of a System of Records Notice.'' Follow the instructions provided on the screen. Please include your name, company name (if any), and ''Notice–ID–2023–02, Rescindment of a System of Records Notice'' on your attached document.

• *By email to the GSA Privacy Act Officer: gsa.privacyact@gsa.gov.*

• *By mail to:* Privacy Office (IDE), GSA, 1800 F Street NW, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Call or email Richard Speidel, the GSA Chief Privacy Officer: telephone 202–969–5830; email *gsa.privacyact@gsa.gov.*

**SUPPLEMENTARY INFORMATION:** The SORN GSA/HRO–2—Employee Drug Abuse Alcoholism Files is no longer required as the records are now with the U.S. Department of Health and Human Services (HHS), not GSA, as GSA entered an interagency agreement with HHS for support, so the records are covered by the HHS SORN 09–90–0010.

**SYSTEM NAME AND NUMBER:**

GSA/HRO–2—Employee Drug Abuse Alcoholism Files.

**HISTORY:**

73 FR 22412.

**Richard Speidel,**

*Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.*

[FR Doc. 2023–05190 Filed 3–13–23; 8:45 am]

**BILLING CODE 6820–34–P**

## GENERAL SERVICES ADMINISTRATION

**[Notice–ID–2023–01; Docket No. 2023–0002; Sequence No. 2]**

## Privacy Act of 1974; System of Records

**AGENCY:** General Services Administration (GSA).

**ACTION:** Notice of a modified system of records.

**SUMMARY:** This system covers current or former employees who file grievances and includes records related to the grievance process.

**DATES:** Submit comments on or before April 13, 2023. The new and/or significantly modified routine uses will be applicable on April 13, 2023.

**ADDRESSES:** You may submit comments by any of the following methods:

• *By email to the GSA Privacy Officer: gsa.privacyact@gsa.gov.*

• *By mail to:* Privacy Office (IDE), General Services Administration, 1800 F Street NW, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Call or email the GSA Chief Privacy Officer, Richard Speidel. Telephone 202–969–5830; email *gsa.privacyact@gsa.gov.*

**SUPPLEMENTARY INFORMATION:** GSA proposes to revise a system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a. GSA is modifying the notice to update the categories of records in the system, policies within ''POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS'', safeguards within ''ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS'', system location (Under ''System Location''), and the manager's address. The modification is to reflect modern records retention practices and other clerical changes.

**SYSTEM NAME AND NUMBER:**

GSA/HRO–10—Grievance Records.

**SYSTEM CLASSIFICATION:**

Unclassified.

**SYSTEM LOCATION:**

The system is hosted in secure government owned data-centers in the continental United States. Also, the records are stored electronically but may also be located in the Office of Human Resources Management at the GSA or office in GSA in which grievances were filed.

**SYSTEM MANAGER(S):**

The Director of Workforce Relations Division (CSE), Office of Human Capital Strategy (CS), 1800 F Street NW, Washington, DC 20405. Email address is *nlrt@gsa.gov.*

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

5 U.S.C. chapter 75; E.O. 10577, as amended; E.O. 11491, as amended.

**PURPOSE(S) OF THE SYSTEM:**

The purpose of this system is to document employee grievances, including statements of witnesses, reports of interviews and hearings, examiner's findings and recommendations, a copy of the original and final decision, and related correspondence and exhibits.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Current or former employees who have filed grievances with GSA under 5 CFR part 771 or a negotiated procedure.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The system contains:

• Employee Full Name

Grievances filed by agency employees full name, internal grievance and arbitration systems files that are established through negotiations with recognized labor unions.

**RECORD SOURCE CATEGORIES:**

Officials who manage records pertaining to employees who have filed grievances with GSA under part 771 of the Office of Personnel Management (OPM) Regulations (5 CFR part 771) or a negotiated procedure.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside GSA as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

a. In any legal proceeding, where pertinent, to which GSA is a party before a court or administrative body.

b. To disclose information to any source from which additional information is requested in the course of processing a grievance, to the extent necessary to identify the individual, inform the source of the purpose(s) of the request, and to identify the type of information requested.

c. To authorized officials engaged in investigating or settling a grievance, complaint, or appeal filed by an individual who is the subject of the record.

d. To a Federal agency in connection with the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation; the letting of a contract; or the issuance of a grant, license, or other benefit to the extent that the information is relevant and necessary to a decision.

e. By GSA or the Office of Personnel Management in the production of summary description statistics and analytical studies in support of the function for which the records are collected and maintained, or for related work force studies. While published statistics do not contain individual identifiers, in some instances the selection of elements of data included in the study may be structured in such a way as to make the data individually identifiable by inference.

f. To officials of the Merit Systems Protection Board, including the Office of Special Counsel; the Federal Labor Relations

Authority and its General Counsel, or Equal Employment Opportunity Commission when requested in performance of their authorized duties.

g. In response to a request for a discovery or for appearance of a witness, information that is relevant to the subject matter involved in a pending judicial or administrative proceeding.

h. To provide information to officials of labor organizations reorganized under the Civil Service Reform Act when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

i. To a Member of Congress or staff on behalf of and at the request of the individual who is the subject of the record.

j. To an expert, consultant, or contractor of GSA in the performance of a Federal duty to which the information is relevant.

k. To the National Archives and Records Administration (NARA) for records management purposes.

l. To appropriate agencies, entities, and persons when (1) the Agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with GSA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

The records are maintained electronically.

**POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:**

Records reside in the HR Service Center where the grievance is processed. The records are filed by employee name, and may be retrieved. The records are filed numerically and/or alphabetically by name.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Per NARA approved records retention schedule DAA–GRS–2018–0002–0006, these records are disposed of no sooner than 4 years but no later than 7 years after the case is closed or final settlement on appeal, as appropriate. Records will be disposed via electronic deletion of digital records.

**ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:**

Records are maintained electronically.

**RECORD ACCESS PROCEDURES:**

Requests from current employees to review information about themselves should be directed to the HR Service Center where the action was processed. For the identification required, see 41 CFR part 105–64.

**CONTESTING RECORD PROCEDURES:**

Review of a request from an individual seeking to amend a grievance record that has been the subject of a judicial or quasi-the judicial process is limited in scope. The only review permitted is determining if the record accurately documents GSA's ruling on the case and does not include a review of the merits of an action, determination, or finding. An individual who wishes to amend his or her record to correct factual errors should contact the GSA Office of Human Resources Management. The individual must also follow the GSA Privacy Act procedures on amending records (CPO 1878.1).

**NOTIFICATION PROCEDURES:**

Current employees may obtain information about whether they are a part of the system by contacting the HR Service Center where the action was processed.

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

Under 5 U.S.C. 552a(k)(2), this system of records is exempt from subsections (c)(3); (d); (e)(1); (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) of the Act when the records are compiled for a law enforcement purpose and the record will not be used to deny a right, benefit, or privilege from the subject of the record.

**HISTORY:**

[73 FR 22393, May 27, 2008].

**Richard Speidel,**

*Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.*

[FR Doc. 2023–05133 Filed 3–13–23; 8:45 am]

**BILLING CODE 6820–34–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Rescission of the Requirements for Negative Pre-Departure COVID–19 Test Result or Documentation of Recovery From COVID–19 for Aircraft Passengers Traveling to the United States From the People's Republic of China

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

**ACTION:** Notice.

**SUMMARY:** The Centers for Disease Control and Prevention (CDC), within the Department of Health and Human Services (HHS), announces the rescission of the Order requiring negative pre-departure COVID–19 test result or documentation of recovery from COVID–19 for aircraft passengers traveling to the United States from the People's Republic of China, including the Special Administrative Regions of Hong Kong and Macau.

**DATES:** This Order was effective March 10, 2023.

**FOR FURTHER INFORMATION CONTACT:** Candice Swartwood, Division of Global Migration and Quarantine, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H16–4, Atlanta, GA 30329. Telephone: 404–639–8897; Email: *dgmqpolicyoffice@cdc.gov.*

**SUPPLEMENTARY INFORMATION:** On December 30, 2022, CDC issued an Order titled, ''Requirements for Negative Pre-Departure COVID–19 Test Results or Documentation of Recovery from COVID–19 for Aircraft Passengers Traveling to the United States From the People's Republic of China'' (88 FR 864). Beginning on January 5, 2023, all air passengers 2 years of age and older traveling to the United States from China, Hong Kong, or Macau have been required to get a COVID–19 viral test no more than 2 days before their flight and show their negative result or show proof of documentation of having recovered from COVID–19 in the past 90 days, to the airline before boarding the aircraft. The requirement also applied to passengers who have been in China, Hong Kong, or Macau in the past 10 days and are traveling to the United States from one of the following airports: Incheon International Airport (ICN) in Seoul, South Korea; Toronto Pearson International Airport (YYZ) in Canada; and Vancouver International Airport (YVR) in Canada (referred to as Designated Airports).

The Order was issued as a public health measure to protect U.S. citizens and communities as the United States worked to both identify the size of the surge and gain better insights into the COVID–19 variants that were circulating.

This Order rescinds the requirement for negative pre-departure COVID–19 test results or documentation of recovery from COVID–19 for aircraft passengers traveling to the United States from the People's Republic of China, that went into effect on January 5, 2023.

A copy of the Order is provided below, and a copy of the signed Order can be found at Order: Requirements for Negative Pre-Departure COVID–19 Test Result or Documentation of Recovery from COVID–19 for Aircraft Passengers Traveling to the United States from the People's Republic of China | Quarantine | CDC.

**Centers for Disease Control and Prevention (CDC) Department of Health and Human Services (HHS) Notice and Order Under Section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 Code of Federal Regulations 71.20 & 71.31(b)**

**Rescission of the Requirements for Negative Pre-departure COVID–19 Test Result or Documentation of Recovery From COVID–19 for Aircraft Passengers Traveling to the United States From the People's Republic of China (PRC)**

*Summary and Action*

On December 30, 2022, the Centers for Disease Control and Prevention (CDC), located within the U.S. Department of Health and Human Services (HHS), issued an Order (Order) under 42 CFR 71.20 and 71.31(b) to prohibit the boarding of passengers 2 years of age or older on an itinerary that included the United States on:

- any aircraft departing from the PRC, including the Special Administrative Regions of Hong Kong and Macau; or
- any aircraft departing from a *Designated Airport* if the passenger had been in the PRC within the ten (10) days prior to their departure for the United States,

unless the passenger presented paper or digital documentation of a negative result for a COVID–19 viral test taken no more than 2 calendar days before the departure of the flight or Documentation of Recovery from COVID–19. *Designated Airports* included Incheon International Airport (ICN) in Seoul, Republic of Korea; Toronto Pearson International Airport (YYZ) in Canada; and Vancouver International Airport (YVR) in Canada.

The Order was issued in response to concerns that COVID–19 cases were surging in the PRC. At that time, mitigation measures were largely not known to be in use in the PRC, and there were significant gaps in data and information on cases, hospitalizations, and deaths. Furthermore, the PRC had shared little genomic sequencing data and there were concerns that any new virus variants may have been undetected. Therefore, CDC concluded that the Order was a reasonable and necessary measure in light of the surging cases in the PRC and gaps in information concerning the status of COVID–19 in the PRC.

Current available epidemiologic data through global datasets and modeling results indicate that the COVID–19 surge experienced by the PRC has returned to a baseline level. According to World Health Organization data, daily cases peaked at 7 million cases per day on December 23, 2022, then declined 99% by January 24, 2023, leveling off around 20,000 cases per day from January 24 through February 21, 2023.

In addition, no variants of concern have been identified as emerging from the PRC at this time. According to genomic sequence data available through GISAID,[1] among six PRC-specific lineages identified to date, all were derivatives of the BA.5 lineages that are circulating globally and did not carry additional spike mutations known to cause immune escape beyond those already found in BA.5.

This data is supported by information from CDC's Traveler-based Genomic Surveillance (TGS) program,[2] which CDC began expanding in December 2022 and has proven effective in filling gaps in global SARS–CoV–2 variant surveillance. Between December 5, 2022 and February 26, 2023, 5,621 travelers from the PRC and surrounding transit hubs volunteered to participate in TGS. No new COVID–19 sequences were identified among travelers from the PRC to the United States.

CDC, in coordination with other federal agencies, will continue to monitor travel patterns between the PRC and the United States and adjust its approach as needed based on the latest science, virus variants, and the evolving state of COVID–19. Importantly, CDC continues to recommend that all travelers remain up to date with vaccination against COVID–19 and get tested for current infection with a viral test before and after they travel, and after any known exposure to a person with COVID–19, so they can take appropriate precautions to reduce the risk of transmission while infectious.

*Action*

Therefore, based on these considerations, I have concluded that the continuation of the Order is not currently necessary.[3] There being no operational need to delay implementation of this rescission, it shall take effect immediately for all air passengers with an itinerary that includes the United States that are boarding any aircraft departing from the PRC, including the Special Administrative Regions of Hong Kong and Macau, or any aircraft departing from a *Designated Airport* if the passenger has been in the PRC within the ten (10) days prior to their departure for the United States.

*Effective Date*

This Rescission is effective at 3 p.m. EST (8 p.m. GMT) on March 10, 2023.

Dated: March 10, 2023.

**Kathryn L. Wolff,**

*Chief of Staff, Centers for Disease Control and Prevention.*

[FR Doc. 2023–05305 Filed 3–10–23; 4:15 pm]

BILLING CODE 4163–18–P

[1] GISAID Initiative, *https://gisaid.org.*

[2] Centers for Disease Control and Prevention, *Traveler-Based Genomic Surveillance for Early Detection of New SARS–CoV–2 Variants* (last reviewed Feb. 8, 2023). Available at *https://wwwnc.cdc.gov/travel/page/travel-genomic-surveillance.*

[3] This Rescission Order is not a legislative rule within the meaning of the Administrative Procedure Act (''APA'') but rather a rescission of a previous Order undertaken as an emergency action under the existing authority of 42 U.S.C. 264(a) and 42 CFR 71.20, 71.31(b), which was taken without notice and comment for good cause. In the event that a court determines this rescission qualifies as a legislative rule under the APA, notice and comment and a delay in effective date are not required because the prior Order was established without notice and comment and there is good cause to lift that restriction immediately, given the current judgment that it is unnecessary to prevent the introduction of COVID–19 into the United States and to seek comment prior to the effective date of this notice would be impracticable and contrary to the public interest. 5 U.S.C. 553(b)(3)(B). Further, if this Order qualifies as a major rule under the Congressional Review Act (''CRA''), it is not necessary to delay the effective date for similar reasons of good cause. 5 U.S.C. 808(2).

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifiers: CMS–10261 & CMS–1450]**

### 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 (the 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 May 15, 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–10261 Part C Medicare Advantage Reporting Requirements

CMS–1450 Uniform Institutional Providers Form

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 currently approved collection; *Title of Information Collection:* Part C Medicare Advantage Reporting Requirements; *Use:* The Centers for Medicare and Medicaid Services (CMS) established reporting requirements for Medicare Advantage Organizations (MAOs) under the authority described in 42 CFR 422.516(a). Each MAO must have an effective procedure to develop, compile, evaluate, and report to CMS, its enrollees, and the public at the times and in the manner that CMS requires.

These Part C Reporting Requirements will provide key data to CMS on the utilization and cost of these benefits that has not been available since the removal of benefit utilization requirements in 2011. This proposed collection will also build upon the previous collection-by asking for information regarding all unique supplemental benefits categories. These categories match the current Plan Benefit Package (PBP) which is submitted annually by plans. Additionally, the proposed collection will request information to be split out by the authority under which each plan offers the benefits (mandatory, optional, mandatory-SSBCI, mandatory-Uniformity Flexibility). *Form Number:* CMS–10261 (OMB control number: 0938–1054); *Frequency:* Annually; *Affected Public:* Business or other for-profits; *Number of Respondents:* 743; *Total Annual Responses:* 6,687; *Total Annual Hours:* 187,979. (For policy questions regarding this collection contact Lucia Patrone at (410) 786–8621).

2. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Uniform Institutional Providers Form; *Use:* The UB–04 CMS–1450 is managed by the National Uniform Billing Committee (NUBC), sponsored by the American Hospital Association. Most payers are represented on this body, and the UB–04 is widely used in the industry. Medicare Part A MACs use the information on the UB–04 CMS–1450 to determine whether to make Medicare payment for the services provided, the payment amount, and whether or not to apply deductibles to the claim. The same method is also used by other payers. CMS is also a secondary user of data. CMS uses the information to develop a database, which is used to update, and revise established payment schedules and other payment rates for covered services. CMS also uses the information to conduct studies and reports. *Form Number:* CMS–1450 (OMB control number: 0938–0997); *Frequency:* Occasionally; *Affected Public:* Private Sector, Business or other for-profits, Not-for-profits institutions; *Number of Respondents:* 53,111; *Total Annual Responses:* 193,535,941; *Total Annual Hours:* 1,617,010. (For policy questions regarding this collection contact Charlene Parks at (410) 786–8684).

Dated: March 8, 2023.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2023–05145 Filed 3–13–23; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity: Child and Family Services Plan, Annual Progress and Services Report, and Annual Budget Expenses Request and Estimated Expenditures (CFS–101) (0970–0426)

**AGENCY:** Children's Bureau, Administration for Children and Families, Department of Health and Human Services.

**ACTION:** Request for public comment.

**SUMMARY:** The Administration for Children and Families (ACF) is requesting a three-year extension of the collection of information under the Child and Family Services Plan (CFSP), the Annual Progress and Services Report (APSR), and the Annual Budget Expenses Request and Estimated Expenditures (Child and Family Services (CFS)–101) collection (Office of Management and Budget (OMB) #0970–0426, expiration January 31, 2021). There are minor changes to the CFS–101 form but no changes to the burden hours.

**DATES:** *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) 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:* Under title IV–B, subparts 1 and 2 of the Social Security Act (the Act), states, territories, and tribes are required to submit a CFSP. The CFSP lays the groundwork for a system of coordinated, integrated, and culturally relevant family services for the subsequent 5 years (45 CFR 1357.15(a)(1)). The CFSP outlines initiatives and activities the state, tribe or territory will carry out in administering programs and services to promote the safety, permanency, and well-being of children and families, including, as applicable, those activities conducted under the John H. Chafee Foster Care Program for Successful Transition to Adulthood (Section 477 of the Act) and the state grant authorized by the Child Abuse Prevention and Treatment Act. By June 30 of each year, states, territories, and tribes are also required to submit an APSR and a financial report called the CFS–101. The APSR is a yearly report that discusses progress made by a state, territory, or tribe in accomplishing the goals and objectives cited in its CFSP (45 CFR 1357.16(a)). The APSR contains new and updated information about service needs and organizational capacities throughout the five-year plan period and includes information on the use of the Family First Transition Grants and Funding Certainty Grants authorized by the Family First Transition Act included in Public Law 116–94. The CFS–101 has three parts. Part I is an annual budget request for the upcoming fiscal year. Part II includes a summary of planned expenditures by program area for the upcoming fiscal year, the estimated number of individuals or families to be served, and the geographical service area. Part III includes actual expenditures by program area, numbers of families and individuals served by program area, and the geographic areas served for the last complete fiscal year. The revision made to the CFS–101 form are to streamline the data entry.

*Respondents:* States, territories, and tribes must complete the CFSP, APSR, and CFS–101. Tribes and territories are exempted from the monthly caseworker visits reporting requirement of the CFSP/APSR. There are approximately 180 tribal entities that currently receive IV–B funding. There are 53 states (including the Commonwealth of Puerto Rico, the District of Columbia, and the Virgin Islands) that must complete the CFSP, APSR, and CFS–101.

*Annual Burden Estimates:*

| Instrument | Total number of respondents | Total number of responses per respondent | Average burden hours per response | Total burden hours | Annual burden hours |
|---|---|---|---|---|---|
| APSR | 233 | 3 | 82 | 57,318 | 19,106 |
| CFSP | 47 | 1 | 123 | 5,781 | 1,927 |
| CFS–101, Part I, II, and III | 233 | 3 | 5 | 3,495 | 1,165 |
| Caseworker Visits | 53 | 3 | 99.33 | 15,794 | 5,265 |

*Estimated Total Annual Burden Hours:* 27,463.

*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:* Title IV–B, subparts 1 and 2 of the Social Security Act (the Act), and title IV–E, section 477 of the Act; sections 106 and 108 of the Child Abuse Prevention and Treatment Act (42 U.S.C. 5106a. and 5106d.); and Public Law 116–94, the Family First Transition Act within Section 602, Subtitle F, Title I, Division N of the Further Consolidated Appropriations Act, 2020.

**John M. Sweet, Jr,**

*ACF/OPRE Certifying Officer.*

[FR Doc. 2023–05189 Filed 3–13–23; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Proposed Information Collection Activity; United States Repatriation Program Forms (Office of Management and Budget#: 0970–0474)

**AGENCY:** Office of Human Services Emergency Preparedness and Response, Administration for Children and Families, United States Department of Health and Human Services.

**ACTION:** Request for public comments.

**SUMMARY:** The Administration for Children and Families (ACF) is proposing to collect information to support state planning, training, and exercise activities and training and technical assistance for the United States (U.S.) Repatriation Program through six new forms in addition to the currently approved forms.

**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:* The purpose of the U.S. Repatriation Program (Program) is to provide temporary assistance to eligible U.S. citizens and their dependents (repatriates) returned by the Department of State from a foreign country because of destitution, illness, war, threat of war, or a similar crisis, and who are without available resources, or (2) mental illness. Temporary assistance is provided upon their arrival in the U.S. and is available initially for up to 90 days from a repatriate's date of arrival in the U.S. Temporary assistance is provided in the form of a service loan and is repayable to the U.S. Government.

Temporary assistance is defined in 42 U.S.C. 1313(c) as money payments, medical care, temporary lodging, transportation, and other goods and services necessary for the health or welfare of individuals, including guidance, counseling, and other welfare services provided to them within the U.S. upon their arrival in the U.S. Other goods and services may include clothes, food, assistance with obtaining identification (driver's license, birth certificate), child care, and translation services.

The ACF Office of Human Services Emergency Preparedness and Response (OHSEPR), at the U.S. Department of Health and Human Services (HHS), administers the U.S. Repatriation Program.

OHSEPR developed new forms to support the planning, training, and exercise cooperative agreements with states and the new training and technical assistance center.

The following is a description of the forms and the proposed revisions:

**Project Narrative**

The purpose of this form is for an overall description of planned activities for the entire project period (*e.g.,* years 1, 2, and 3) regarding emergency repatriation planning, training, and exercises.

**Annual Workplan**

The purpose of this form is for an annual workplan for each federal fiscal year for emergency repatriation planning, training, and exercises.

**Budget and Budget Narrative**

This form is to provide a budget and budget narrative for planned activities for each annual workplan regarding planning, training, and exercises for repatriation.

**Repatriation State Contact List**

The purpose is to ensure current and accurate points-of-contact within states and territories for the U.S. Repatriation Program routine and emergency operations.

**Repatriation Training and Technical Assistance Request**

States, territories, counties, and local service providers may use this form to request training and technical assistance on the U.S. Repatriation Program via a web portal account.

**Post-Training Survey**

The purpose of this survey is to receive feedback on trainings to improve the support for and customer experience of states, territories, and local service providers supporting the U.S. Repatriation Program.

*Respondents:* States, territories, local social service providers, administrative staff.

ANNUAL BURDEN ESTIMATES

| Instrument | Total number of respondents | Total number of responses per respondent | Average burden hours per response | Total burden hours | Annual burden hours |
|---|---|---|---|---|---|
| Project Narrative | 54 | 1 | .5 | 27 | 27 |
| Annual Workplan | 54 | 1 | .5 | 27 | 27 |
| Budget and Budget Narrative | 54 | 1 | 1 | 54 | 54 |
| Repatriation State Contact List | 200 | 1 | .5 | 100 | 100 |
| Repatriation Training and Technical Assistance Request | 250 | 2 | .2 | 100 | 100 |
| Post-Training Survey | 250 | 2 | .2 | 100 | 100 |

*Estimated Total Annual Burden Hours:* 408.

*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. 1313, 24 U.S.C. 321–329.

**John M. Sweet, Jr,**

*ACF/OPRE Certifying Officer.*

[FR Doc. 2023–05196 Filed 3–13–23; 8:45 am]

**BILLING CODE 4184–PL–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

**[Document Identifier: OS–0937–new]**

## Agency Information Collection Request; 60-Day Public Comment Request

**AGENCY:** Office of the Secretary, HHS.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

**DATES:** Comments on the ICR must be received on or before May 15, 2023.

**ADDRESSES:** Submit your comments to *Sherrette.Funn@hhs.gov* or by calling (202) 264–0041 and *PRA@HHS.GOV.*

**FOR FURTHER INFORMATION CONTACT:** When submitting comments or requesting information, please include the document identifier 0937–New–60D and project title for reference, to Sherrette A. Funn, email: *Sherrette.Funn@hhs.gov, PRA@HHS.GOV* or call (202) 264–0041 the Reports Clearance Officer.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

*Title of the Collection:* Teen Pregnancy Prevention FY2023 performance measures collection.

*Type of Collection:* new.

*OMB No.:* 0937–New–60D.

*Abstract:* The Office of Population Affairs (OPA), in the Office of the Assistant Secretary for Health (OASH), U.S. Department of Health and Human Services (HHS), requests a new clearance for the collection of performance measures specifically for new FY2023 Teen Pregnancy Prevention (TPP) Program grantees. In FY2023, OPA expects to award 5-year TPP cooperative agreements to up to 96 organizations across three Notice of Funding Opportunities (NOFOs). Collection of performance measures is a requirement of all TPP awards and is included in the NOFOs. The data collection will allow OPA to comply with federal accountability and performance requirements, inform stakeholders of grantee progress in meeting TPP program goals, provide OPA with metrics for monitoring FY2023 TPP grantees, and facilitate individual grantees' continuous quality improvement efforts within their projects. OPA requests clearance for three years.

*Annualized Burden Hour Table:*

| Forms (if necessary) | Respondents (if necessary) | Number of respondents | Number of responses per respondents | Average burden per response | Total burden hours |
|---|---|---|---|---|---|
| TPP Tier 1 & Tier 2 Rigorous Impact grantees. | TPP Tier 1 & Tier 2 Rigorous Impact grantees. | 86 | 2 | 8 | 1376 |
| Supportive Services | Tier 1 Grantees | 70 | 2 | 15/60 | 35 |
| Tier 2 Innovation Network | Tier 2 Innovation Network Grantees | 10 | 2 | 1 | 20 |
| Total | | | 18 | | 1431 |

**Sherrette A. Funn,**

*Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.*

[FR Doc. 2023–05158 Filed 3–13–23; 8:45 am]

**BILLING CODE 4150–11–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## National Institutes of Health

## National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 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 Neurological Disorders and Stroke Special Emphasis Panel; Translational and Brain Devices Panel.

*Date:* March 16, 2023.

*Time:* 11:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate cooperative agreement applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Shanta Rajaram, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, 301–435–6033, *rajarams@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS.)

Dated: March 8, 2023.

**Tyeshia M. Roberson-Curtis,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–05151 Filed 3–13–23; 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 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 Environmental Health Sciences Special Emphasis Panel: Career Development and Pathway to Independence in Biomedical/Clinical Research Review.

*Date:* April 3, 2023.

*Time:* 11:00 a.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Environmental Health Sciences, Keystone Building, 530 Davis Drive, Durham, NC 27709 (Virtual Meeting).

*Contact Person:* Alfonso R. Latoni, Ph.D., Chief and Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, National Institute of Environmental Health Sciences, Research Triangle Park, NC 27709, 984–287–3279, *alfonso.latoni@nih.gov*.

*Name of Committee:* National Institute of Environmental Health Sciences Special Emphasis Panel: Career Development (K) Applications.

*Date:* April 4, 2023.

*Time:* 11:00 a.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Environmental Health Sciences, Keystone Building, 530 Davis Drive, Durham, NC 27709 (Virtual Meeting).

*Contact Person:* Beverly W. Duncan, Ph.D., Scientific Review Officer, Keystone Building, 530 Davis Drive, Room 3130, Durham, NC 27713, (240) 353–6598, *beverly.duncan@nih.gov*.

*Name of Committee:* National Institute of Environmental Health Sciences Special Emphasis Panel: NIEHS Support for Conferences and Scientific Meetings.

*Date:* April 18, 2023.

*Time:* 10:00 a.m. to 1:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Environmental Health Sciences, Keystone Building, 530 Davis Drive, Durham, NC 27709 (Virtual Meeting).

*Contact Person:* Alfonso R. Latoni, Ph.D., Chief and Scientific Review Officer, Scientific Review Branch, Division of Extramural Research and Training, National Institute of Environmental Health Sciences, Research Triangle Park, NC 27709, 984–287–3279, *alfonso.latoni@nih.gov*.

(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: March 9, 2023.

**David W. Freeman,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–05180 Filed 3–13–23; 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 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 Mental Health Special Emphasis Panel; RFA Review: Epigenetic Mechanisms Regulating HIV CNS Latency and Neuropathogenesis Using Novel Single Cell Technologies.

*Date:* April 6, 2023.

*Time:* 9:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Nicholas Gaiano, Ph.D., Review Branch Chief, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard Bethesda, MD 20892–9606 301–443–2742, *nick.gaiano@nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: March 9, 2023.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–05166 Filed 3–13–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Office of the Secretary, Muscular Dystrophy Coordinating Committee Call for Committee Membership Nominations

**AGENCY:** National Institutes of Health, HHS.

**ACTION:** Notice.

**SUMMARY:** The Office of the Secretary of the Department of Health and Human Services (HHS) is seeking nominations for three individuals to serve as non-federal public members on the Muscular Dystrophy Coordinating Committee.

**DATES:** Nominations are due by 5 p.m. EDT on April 28, 2023.

**ADDRESSES:** Nominations must be sent to Glen Nuckolls, Ph.D., by email to *nuckollg@ninds.nih.gov.*

**FOR FURTHER INFORMATION CONTACT:** Glen Nuckolls, Ph.D., by email to *nuckollg@ninds.nih.gov* or (301) 496–5745.

**SUPPLEMENTARY INFORMATION:** The Muscular Dystrophy Coordinating Committee (MDCC) is a federal advisory committee established in accordance with the Muscular Dystrophy Community Assistance, Research, and Education Amendments of 2001 (MD–CARE Act; Pub. L. 107–84). The MD–CARE Act was reauthorized in 2008 by Public Law 110–361, and again in 2014 by Public Law 113–166. The MD–CARE Act specifies that the committee membership be composed of ⅔ governmental agency representatives and ⅓ public members. We are seeking nominations for three non-federal public members at this time, due to turnover of committee membership. Nominations will be accepted until 5:00 p.m. EDT on April 28, 2023.

*Who is Eligible:* Nominations are encouraged for new or reappointment of non-federal public members who can provide the public and/or patient perspectives to discussions of issues considered by the Committee. Self-nominations and nominations of other

individuals are both permitted. Only one nomination per individual is required. Multiple nominations for the same individual will not increase likelihood of selection. Non-federal public members may be selected from the pool of submitted nominations or other sources as needed to meet statutory requirements and to form a balanced committee that represents the diversity within the muscular dystrophy communities. Nominations are especially encouraged from leaders or representatives of muscular dystrophy research, advocacy, or service organizations, as well as individuals with muscular dystrophy or their parents or guardians. In accordance with White House Office of Management and Budget guidelines (FR Doc. 2014–19140), federally-registered lobbyists are not eligible.

*Committee Composition:* The Department strives to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that the views of all genders, all ethnic and racial groups, and people with disabilities are represented on HHS Federal advisory committees and, therefore, the Department encourages nominations of qualified candidates from these groups. The Department also encourages geographic diversity in the composition of the Committee. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status. Requests for reasonable accommodation to enable participation on the Committee should be indicated in the nomination submission.

*Member Terms:* Non-Federal public members of the Committee serve for a term of three years and may serve for an unlimited number of terms if reappointed. Members may serve after the expiration of their terms, until their successors have taken office.

*Meetings and Travel:* As specified by Public Law 113–166, the MDCC ''shall meet no fewer than two times per calendar year.'' Travel expenses are provided for non-federal public Committee members to facilitate attendance at in-person meetings. Members are expected to make every effort to attend all full committee meetings, twice per year, either in person or via remote access. Participation in relevant subcommittee, working and planning group meetings, and workshops, is also encouraged.

*Submission Instructions and Deadline:* Nominations are due by 5:00 p.m. EDT on April 28, 2023, and should be sent to Glen Nuckolls, Ph.D., by email to *nuckollg@ninds.nih.gov.*

Nominations must include contact information for the nominee, a current curriculum vitae or resume of the nominee, and a paragraph describing the qualifications of the person to represent some portion(s) of the muscular dystrophy research, advocacy, and/or patient care communities.

More information about the MDCC is available at *https://mdcc.nih.gov/.*

Dated: March 8, 2023.

**Walter J. Koroshetz,**

*Director, National Institute of Neurological Disorders and Stroke, National Institutes of Health.*

[FR Doc. 2023–05177 Filed 3–13–23; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Stress, Endocannabinoid Signaling, and Cocaine Seeking Behavior.

*Date:* April 6, 2023.

*Time:* 2 to 5 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:* Simone Chebabo Weiner, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1011K, Bethesda, MD 20892, (301) 435–1042, *weinersc@csr.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: March 9, 2023.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–05213 Filed 3–13–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket Number DHS–2023–0012]**

### Agency Information Collection Activities: Generic Clearance for Pretesting Instruments and Procedures for Evaluation, Research, and Evidence Building

**AGENCY:** Department of Homeland Security (DHS).

**ACTION:** 60-Day notice and request for comments.

**SUMMARY:** The Department of Homeland Security, will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted until May 15, 2023. This process is conducted in accordance with 5 CFR 1320.1

**ADDRESSES:** You may submit comments, identified by docket number Docket #DHS–2023–0012, at:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Please follow the instructions for submitting comments.

*Instructions:* All submissions received must include the agency name and docket number Docket #DHS–2023–0012. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

**SUPPLEMENTARY INFORMATION:** The U.S. Department of Homeland Security (DHS) intends to request approval from OMB for a generic clearance to pretest data collection instruments and procedures with more than nine participants to identify and resolve any question or procedural problems in DHS's survey administration. The Generic Clearance for Pretesting Instruments and Procedures for Evaluation, Research, and Evidence-Building is a new information collection request.

The DHS studies its programs, and the populations they serve, through rigorous evaluation, research, and evidence-building activities. These include evaluations of existing programs, evaluations of innovative approaches to allow the Agency to respond to its evolving threat environment with effective strategies and operations that ensure a safe, secure, and prosperous Homeland, research syntheses, and descriptive and exploratory studies. To improve the development of its surveys used in evaluation, research, and evidence-building activities, the DHS intends to pretest data collection instruments and procedures through a variety of techniques including cognitive and usability laboratory and field techniques, behavior coding, exploratory interviews, respondent debriefing questionnaires, split sample experiments, focus groups, and pilot studies/pretests. These activities will allow the DHS to identify if and when a survey may be simplified for respondents, respondent burden may be reduced, and other possible improvements.

The DHS will use the results of information collections internally to inform subsequent information collection requests. The information collected is not intended to be used as the principal basis for a decision by a federal decision-maker and is not expected to meet the threshold of influential or highly influential scientific information.

The DHS will test a variety of instruments and procedures under this clearance. The exact nature of the instruments and the samples is dependent on each individual project and details will be provided for each individual information collection requests submitted. The particular samples included in future generic information collection requests will vary based on the content of the instrument being tested. The DHS and its contractors will collect information electronically and/or use online collaboration tools, as appropriate, to reduce the burden. Specific information regarding the use of technology will be submitted with each individual information collection request. Following standard OMB requirements, the DHS will submit a change request for each individual data collection activity under this generic clearance. Each request will include the individual instrument(s), a justification specific to the individual information collection, and any supplementary documents. OMB should review within 10 days of receiving each change request.

Respondents include participants in DHS programs being evaluated; participants in DHS pilots and demonstrations; recipients of DHS grants and individuals served by DHS grantees; comparison group members; and other relevant populations, such as individuals eligible for DHS services. Small business or other small entities may be involved in these efforts but the DHS will minimize the burden on them of information collections approved under this clearance by sampling, asking for readily available information, and using short, easy-to-complete information collection instruments.

This may include one-time collections or iterative testing, based on the specific situation. In all cases, without the proposed information collection activities, the quality of the data collected for DHS studies would suffer. Pretesting of the scale envisioned here would not be done under other circumstances due to the time constraints of seeking clearance for each individual survey's pretesting plan. The efficient and timely pretesting and piloting efforts allow feedback to contribute directly to more targeted and improved study designs. Conversely, the failure to engage in pretesting and pilot data collection limits the DHS's ability to improve the quality of evidence about programs, pilots, initiatives, and services while reducing administrative burden to the public.

If the Privacy Act does apply to a collection, the DHS will provide a Privacy Act statement, System of Record Notices (SORN), or other associated documentation, as appropriate. Participation in any formative data collection effort will be voluntary, and personally identifiable information will only be collected to the extent necessary. Respondents will be informed of all planned data uses, that their participation is voluntary, and that their information will be kept private to the extent permitted by law. All data collection shall protect respondent privacy to the extent permitted by law and will comply with all Federal and Agency regulations for private information. If a confidentiality pledge is deemed necessary, the Agency will only include a pledge of confidentiality supported by authority established in statute or regulation, supported by disclosure and data security policies that are consistent with the pledge.

The primary purpose of data collected under this generic clearance is not for publication. However, because the pretesting and piloting data collection efforts are intended to inform the DHS's decision-making related to evidence-building and programmatic activities, results of these methodological studies may be made public through methodological appendices or footnotes, reports on instrument development, instrument user guides, descriptions of respondent behavior, and other publications or presentations describing findings of methodological interest. The results of these pretesting activities may be prepared for presentation at professional meetings or publication in professional journals. Although not anticipated, the DHS may receive requests to release the information (*e.g.,* congressional inquiry, Freedom of Information Act requests) and will disseminate the findings when appropriate, following the Agency's guidelines. Results will be labeled as exploratory in nature and any limitations will be described.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**Analysis**

*Agency:* Department of Homeland Security (DHS).

*Title:* Generic Clearance for Pretesting Instruments and Procedures for Evaluation, Research, and Evidence Building.

*OMB Number:* OMB Control Number.

*Frequency:* One-time collections or iterative testing, based on the specific situation.

*Affected Public:* Participants in DHS programs being evaluated; participants in DHS pilots and demonstrations; recipients of DHS grants and individuals served by DHS grantees; comparison group members; and other relevant populations, such as individuals eligible for DHS services.

*Number of Respondents:* 3,590.

*Estimated Time per Respondent:* 64 minutes.

*Total Burden Hours:* 3,825.

**Robert Dorr,**

*Executive Director, Business Management Directorate.*

[FR Doc. 2023–05132 Filed 3–13–23; 8:45 am]

**BILLING CODE 9112–FL–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket Number DHS–2023–0011]**

## Agency Information Collection Activities: Generic Clearance for Formative Data Collections for Evaluation, Research, and Evidence Building

**AGENCY:** Department of Homeland Security (DHS).

**ACTION:** 60-Day notice and request for comments.

**SUMMARY:** The Department of Homeland Security, will submit the following Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted until May 15, 2023. This process is conducted in accordance with 5 CFR 1320.1.

**ADDRESSES:** You may submit comments, identified by docket number Docket #DHS–2023–0011, at:

○ *Federal eRulemaking Portal: https://www.regulations.gov.* Please follow the instructions for submitting comments.

*Instructions:* All submissions received must include the agency name and docket number Docket #DHS–2023–0011. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

**SUPPLEMENTARY INFORMATION:** The U.S. Department of Homeland Security (DHS) intends to request approval from OMB for a generic clearance to design and conduct formative studies with more than nine participants that inform the DHS's evaluation, research, and evidence-building activities. The Generic Clearance for Formative Data Collections for Evaluation, Research, and Evidence Building is a new information collection request.

The DHS anticipates undertaking various new evaluation, research, and evidence-building activities related to the priority questions identified in the Agency's Learning Agenda and Annual Evaluation Plans. The evidence-building activities include formative evaluations of existing programs, process, and new initiatives; logic model development and testing; process or journey mapping; research syntheses; survey, questionnaire, and metric development; analysis; and foundational fact-finding through descriptive and exploratory studies. Pursuant to Executive Orders 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, and 14058, Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government, the DHS continuously seeks to ensure that the Agency's programs are effective, designed and delivered in a manner all people can navigate, reach underserved communities, promote equitable delivery of services, and meet customers' needs. In accordance with the DHS's commitment to advancing equity, improving service delivery, and promoting trust, the information collected under this generic clearance is necessary to enable the Agency to gather customer and stakeholder feedback in a timely and efficient manner.

Under this generic clearance, the DHS would engage in a variety of formative and exploratory data collections with DHS grantees, program and potential program providers and participants, researchers, practitioners, and other stakeholders to fulfill the following goals:

- maintain a rigorous and relevant evaluation and research agenda,
- inform the development of the DHS's evidence-building activities,
- inform the delivery of targeted assistance and workflows related to program and grantee processes,
- inform the development and refinement of recordkeeping and communication systems,
- plan for provision of programmatic or evidence-capacity-related training or technical assistance,
- obtain grantee or stakeholder input on the development or refinement of program logic models, evaluations, and performance measures,
- test activities to strengthen programs, and
- preparation for summative evaluations.

The formative studies will collect data using well-established methodologies, including but not limited to semi-structured small group discussions or focus groups, questionnaires and surveys, observation, interviews, and cognitive interviews and user testing (*e.g.,* in-person, video, and audio collections). The data collected will be used to improve internal decision-making, such as improvements of program management and the delivery of products and services, and to inform future studies but will not be highly systematic nor intended to be statistically representative. The data collection efforts are also not intended to produce influential information that is expected to have a genuinely clear and substantial impact on major policy decisions.

The DHS will conduct a variety of formative studies under this clearance. The exact nature of the instruments and the samples is dependent on each individual project and details will be provided for each individual information collection requests submitted. The DHS and its contractors will collect information electronically and/or use online collaboration tools, as appropriate, to reduce the burden. Specific information regarding the use of technology will be submitted with each individual information collection request. Following standard OMB requirements, the DHS will submit a change request for each individual data collection activity under this generic clearance. Each request will include the data collection method, sampling strategy, a copy of the individual instruments or questionnaires, recruitment materials, protocols, and as appropriate, other supplementary materials describing the project. OMB should review within 10 days of receiving each change request.

Respondents include DHS grantees, program and potential program providers and participants, researchers, practitioners, and other stakeholder groups involved in DHS programs, experts in fields pertaining to DHS evaluation and research, or others involved in conducting DHS evaluation, research, or evidence-building projects. Small business or other small entities may be involved in these efforts but the DHS will minimize the burden on them of information collections approved under this clearance by sampling, asking for readily available information, and using short, easy-to-complete information collection instruments.

The DHS anticipates that all data information collected under this generic clearance will involve a one-time data collection. However, if a data collection effort involved a more frequent collection, the rationale and detail will be provided in the individual information collection request. These data collections will allow for collaborative, ongoing, and actionable communications between the Agency

and its customers and stakeholders and allow the DHS to identify the strengths and weaknesses of current programs, pilots, initiatives, and services. The efficient and timely formative collection efforts allow feedback to contribute directly to rapid cycle improvements of program management and the delivery of products and services. Conversely, the failure to engage in formative data collection substantially limits the DHS's ability to understand emerging needs and issues, identify evidence gaps, build evidence about programs and initiatives, and inform the development of future impact studies to ensure that DHS leadership and program offices have current data and information to implement DHS programs and initiatives successfully.

If the Privacy Act does apply to a collection, the DHS will provide a Privacy Act statement, System of Record Notices (SORN), or other associated documentation, as appropriate. Participation in any formative data collection effort will be voluntary, and personally identifiable information will only be collected to the extent necessary. Respondents will be informed of all planned data uses, that their participation is voluntary, and that their information will be kept private to the extent permitted by law. All data collection shall protect respondent privacy to the extent permitted by law and will comply with all Federal and Agency regulations for private information. If a confidentiality pledge is deemed necessary, the Agency will only include a pledge of confidentiality supported by authority established in statute or regulation, supported by disclosure and data security policies that are consistent with the pledge.

The primary purpose of data collected under this generic clearance is not for publication. However, because the formative data collection efforts are intended to inform the DHS's decision-making related to evidence-building and programmatic activities, the findings may be incorporated into documents and presentations available to the public. Such documents may include design and method documents; process or journey maps, conceptual frameworks, or logic models; performance metrics; background materials for technical workgroups, informational presentations, technical assistance plans; and evaluation or research reports. The aggregated results of this work may be prepared for presentation at professional meetings or disseminated in evaluation reports, research papers, and professional journals. Although not anticipated, the DHS may receive requests to release the information (*e.g.,* congressional inquiry, Freedom of Information Act requests) and will disseminate the findings when appropriate, following the Agency's guidelines. Shared findings will include a discussion of the limitations regarding generalizability and intended use, and when necessary, results will be labeled as formative or exploratory.

The Office of Management and Budget is particularly interested in comments which:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

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

**Analysis**

*Agency:* Department of Homeland Security (DHS).

*Title:* Generic Clearance for Formative Data Collections for Evaluation, Research, and Evidence Building.

*OMB Number:* OMB Control Number.

*Frequency:* One-time collection.

*Affected Public:* Participants in DHS programs being evaluated; participants in DHS pilots and demonstrations; recipients of DHS grants and individuals served by DHS grantees; comparison group members; and other relevant populations, such as individuals eligible for DHS services.

*Number of Respondents:* 22,750.

*Estimated Time per Respondent:* 33 minutes.

*Total Burden Hours:* 12,488.

**Robert Dorr,**

*Executive Director, Business Management Directorate.*

[FR Doc. 2023–05131 Filed 3–13–23; 8:45 am]

BILLING CODE 9112–FL–P

## DEPARTMENT OF THE INTERIOR

**[FWS–R4–ES–2023–N005; FVHC98220410150–XXX–FF04H00000]**

## Deepwater Horizon Natural Resource Damage Assessment Open Ocean Trustee Implementation Group Draft Restoration Plan 3 and Environmental Assessment: Birds

**AGENCY:** Department of the Interior.

**ACTION:** Notice of availability; request for public comments.

**SUMMARY:** In accordance with the Oil Pollution Act of 1990 (OPA), the National Environmental Policy Act of 1969 (NEPA), the *Deepwater Horizon* (DWH) Oil Spill *Final Programmatic Damage Assessment Restoration Plan and Final Programmatic Environmental Impact Statement* (Final PDARP/PEIS), Record of Decision and Consent Decree, the Federal natural resource trustee agencies for the Open Ocean Trustee Implementation Group (Open Ocean TIG) have prepared the *Draft Restoration Plan 3 and Environmental Assessment: Birds* (Draft RP/EA). The Draft RP/EA proposes projects to help restore bird species injured in the DWH oil spill. The Draft RP/EA evaluates a reasonable range of 11 project alternatives under the Oil Pollution Act's Natural Resource Damage Assessment regulations and NEPA. The total cost to implement the Open Ocean TIG's seven preferred alternatives is approximately $26,000,000. A No Action alternative is also analyzed. The Open Ocean TIG invites comments on the Draft RP/EA.

**DATES:**

*Submitting Comments:* The Open Ocean TIG will consider public comments on the Draft RP/EA received on or before April 28, 2023.

*Public Webinar:* The Open Ocean TIG will host two public webinars during the public comment period. The webinars will include an overview presentation of the Draft RP/EA and an open house session for general questions regarding the plan. The public will also be able to provide formal comments during the webinar. The public may register for the webinars at *https://www.gulfspillrestoration.noaa.gov/restoration-areas/open-ocean.* After registering for a webinar, participants will receive a confirmation email with instructions for joining the webinar. Instructions for commenting will be provided during the webinar. Presentation material and factsheets about the projects can be found on the web at *https://www.gulfspillrestoration.noaa.gov/restoration-areas/open-ocean.*

**ADDRESSES:**

*Obtaining Documents:* You may download the Draft RP/EA at *https://www.gulfspillrestoration.noaa.gov/restoration-areas/open-ocean.* Alternatively, you may request a USB flash drive containing the Draft RP/EA (see **FOR FURTHER INFORMATION CONTACT**).

*Submitting Comments:* You may submit comments on the Draft RP/EA by one of the following methods:

- *Internet: https://www.gulfspillrestoration.noaa.gov/restoration-areas/open-ocean.*
- *U.S. Mail:* U.S. Fish and Wildlife Service Gulf Restoration Office, 1875 Century Blvd., Atlanta, GA 30345. To be considered, mailed comments must be postmarked on or before the comment deadline given in **DATES**.
- *During the public webinar:* Verbal comments may be provided by the public during the webinar. Webinar information is provided in **DATES**.
- *Telephone:* 1–888–467–0009. Comments may be provided by leaving voice comment at this number. To be considered, voice comments left at this toll-free international phone number must be left on or before the comment deadline given in **DATES**.

**FOR FURTHER INFORMATION CONTACT:**

Nanciann Regalado, at *nanciann_regalado@fws.gov* or 1–678–296–6805. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

**SUPPLEMENTARY INFORMATION:**

## Introduction

On April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon* (DWH), which was being used to drill a well for BP Exploration and Production, Inc. (BP), in the Macondo prospect (Mississippi Canyon 252–MC252), experienced a significant explosion, fire, and subsequent sinking in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The DWH oil spill is the largest offshore oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over 1 million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released into the environment as a result of the spill.

The Trustees conducted the natural resource damage assessment (NRDA) for the DWH oil spill under the Oil Pollution Act 1990 (OPA; 33 U.S.C. 2701 *et seq.*). Pursuant to OPA, Federal and State agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. The OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship to baseline (the resource quality and conditions that would exist had the spill not occurred). This includes the loss of use and services provided by those resources from the time of injury until the completion of restoration.

The DWH Trustees are:

- U.S. Department of the Interior (DOI), as represented by the U.S. Fish and Wildlife Service, National Park Service, and Bureau of Land Management;
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Environmental Protection Agency (EPA);
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- State of Texas: Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

On April 4, 2016, the United States District Court for the Eastern District of Louisiana entered a consent decree resolving civil claims by the Trustees against BP arising from the DWH oil spill: *United States* v. *BPXP et al.,* Civ. No. 10–4536, centralized in MDL 2179, In re: Oil Spill by the Oil Rig *Deepwater Horizon* in the Gulf of Mexico, on April 20, 2010 (E.D. La.) (*https://www.epa.gov/enforcement/consent-decree-deepwater-horizon-bp-gulf-mexico-oil-spill*). Pursuant to the Consent Decree, the Open Ocean TIG chooses and manages restoration projects in the Open Ocean Restoration Area. The Open Ocean TIG is composed of the following Federal Trustees: DOI, NOAA, EPA, and USDA.

## Background

On March 25, 2021, the Open Ocean Trustee Implementation Group (Open Ocean TIG) issued a notice of solicitation on the Gulf Spill Restoration website requesting project ideas for the Sturgeon and Birds Restoration Types. On March 11, 2022, the Open Ocean TIG announced that it had reviewed project idea submissions and had initiated drafting its third restoration plan and environmental assessment (Draft RP/EA), which would include a reasonable range of restoration alternatives (projects) for the Birds Restoration Type only.

## Overview of the Open Ocean TIG's Draft RP/EA

The Draft RP/EA is being released in accordance with OPA NRDA regulations found in the Code of Federal Regulations (CFR) at 15 CFR part 990, NEPA and its implementing regulations found at 40 CFR parts 1500–1508, the Final PDARP/PEIS, and the Consent Decree. The Draft RP/EA provides OPA NRDA and NEPA analyses for a reasonable range of 11 alternatives. The Open Ocean TIG's seven proposed preferred alternatives are listed below. If selected, funding to implement these projects would come from the Birds Restoration Type allocation.

- Predator Removal and Seabird Nesting Colony Restoration at Mona Island
- Seabird Nesting Colony Reestablishment and Protection at Desecheo National Wildlife Refuge
- Seabird Nesting Colony Protection and Enhancement at Dry Tortugas National Park
- Seabird Bycatch Reduction in Northeast U.S. and Atlantic Canada Fisheries
- Northern Gannet Nesting Colony Restoration in Eastern Canada
- Common Tern Nesting Colony Restoration in Manitoba
- Invasive Goat Removal to Restore Seabird Nesting Habitat in St. Vincent and the Grenadines

## Next Steps

As described above in **DATES**, the Open Ocean TIG will host two (2) public webinars to facilitate the public review and comment process. They are also providing an international toll-free telephone number for the public to leave comments via voice message. After the public comment period ends, the Open Ocean TIG will consider and

address the comments received before issuing a final RP/EA.

**Public Availability of Comments**

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Administrative Record**

The documents comprising the Administrative Record for the Draft RP/EA can be viewed electronically at *https://www.doi.gov/deepwaterhorizon/adminrecord* under folder 6.5.2.2.3.

**Authority**

The authority for this action is the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*), its implementing Natural Resource Damage Assessment regulations found at 15 CFR part 990, and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and its implementing regulations found at 40 CFR parts 1500–1508.

**Mary Josie Blanchard,**

*Department of the Interior, Director of Gulf of Mexico Restoration.*

[FR Doc. 2023–05114 Filed 3–13–23; 8:45 am]

**BILLING CODE 4333–15–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[LLCO956000 L14400000.BJ0000 223]**

### Notice of Filing of Plats of Survey, Colorado

**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), Colorado State Office, Lakewood, Colorado, 30 calendar days from the date of this publication. The surveys, which were executed at the request of the U.S. Forest Service and the U.S. National Park Service, are necessary for the management of these lands.

**DATES:** Unless there are protests of this action, the plats described in this notice will be filed on April 13, 2023.

**ADDRESSES:** You may submit written protests to the BLM Colorado State Office, Cadastral Survey, P.O. Box 151029, Lakewood, CO 80215.

**FOR FURTHER INFORMATION CONTACT:** Tasha A. Huhta, Acting Chief Cadastral Surveyor for Colorado, telephone: (970) 271–4209; email: *thuhta@blm.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

**SUPPLEMENTARY INFORMATION:** The plat and field notes of the dependent resurvey and subdivision of section 11 in Township 12 South, Range 72 West, Sixth Principal Meridian, Colorado, were accepted on December 2, 2022.

The plat, in 2 sheets, and field notes of the dependent resurvey and survey in Township 49 North, Range 7 West, New Mexico Principal Meridian, Colorado, were accepted on January 22, 2023.

The plat and field notes of the remonumentation of certain original corners in Township 8 South, Range 78 West, Sixth Principal Meridian, Colorado, were accepted on February 8, 2023.

A person or party who wishes to protest any of the above surveys must file a written notice of protest within 30 calendar days from the date of this publication at the address listed in the **ADDRESSES** section of this notice. A statement of reasons for the protest may be filed with the notice of protest and must be filed within 30 calendar days after the protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved.

Before including your address, phone number, email address, or other personal identifying information in your protest, please be aware that your entire protest, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 43 U.S.C. chap. 3.)

**Tasha A. Huhta,**

*Acting Chief Cadastral Surveyor.*

[FR Doc. 2023–05201 Filed 3–13–23; 8:45 am]

**BILLING CODE 4310–JB–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–1265]**

### Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same Notice of the Commission's Final Determination Finding a Violation of Section 337; Issuance of a Limited Exclusion Order and Cease and Desist Orders; Termination of the Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has found a violation of section 337 in the above-captioned investigation. The Commission has determined to issue: (1) a limited exclusion order (''LEO'') prohibiting the unlicensed entry of fitness devices, streaming components thereof, and systems containing same infringing certain claims of U.S. Patent Nos. 10,469,554 (''the '554 patent''); 10,469,555 (''the '555 patent''); and 10,757,156 (''the '156 patent'') that are manufactured by or on behalf of, or imported by or on behalf of, respondents ICON Health & Fitness, Inc. of Logan, Utah (''ICON'' or ''iFIT Inc.''); FreeMotion Fitness, Inc. of Logan, Utah (''FreeMotion''); NordicTrack Inc. of Logan, Utah (''NordicTrack,'' and together with ICON and FreeMotion, ''iFit''); and Peloton Interactive, Inc. of New York, New York (''Peloton''), or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns; and (2) cease and desist orders (''CDOs'') directed against iFit and Peloton, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns. The Commission has also determined to grant a joint motion filed by complainants DISH DBS Corporation of Englewood, Colorado; DISH Technologies, L.L.C., of Englewood, Colorado; and Sling TV L.L.C., of Englewood, Colorado (collectively, ''DISH'') and respondents lululemon athletica inc., of Vancouver, Canada (''lululemon''); and Curiouser Products Inc. d/b/a MIRROR of New York, New York (together with lululemon, ''MIRROR'') that sought to terminate the investigation as to MIRROR on the basis of a settlement agreement. This investigation is terminated.

**FOR FURTHER INFORMATION CONTACT:** Ronald A. Traud, Esq., Office of the

General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3427. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on May 19, 2021, based on a complaint filed by DISH. 86 FR 27106–07 (May 19, 2021). The complaint alleged a violation of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain fitness devices, streaming components thereof, and systems containing same by reason of infringement of certain claims of U.S. Patent Nos. 9,407,564 (''the '564 patent''); 10,951,680 (''the '680 patent''); the '554 patent; the '555 patent; and the '156 patent. *Id.* at 27106. The notice of investigation named as respondents iFit, MIRROR, and Peloton (collectively, ''Respondents''). *Id.;* Order No. 14 (Nov. 4, 2021), *unreviewed by* Comm'n Notice (Dec. 6, 2021), 86 FR 70532 (Dec. 10, 2021). The Commission's Office of Unfair Import Investigations (''OUII'') also was named as a party in this investigation. 86 FR at 27106.

Prior to the issuance of the Final ID, the complaint and notice of investigation were amended to change the name of ICON to iFIT Inc. Order No. 14 (Nov. 4, 2021), *unreviewed by* Comm'n Notice (Dec. 6, 2021), 86 FR at 70532. The investigation was also terminated in part as to claims 6, 11, and 12 of the '156 patent, claim 22 of the '554 patent, and claim 17 of the '555 patent. Order No. 15 (Nov. 19, 2021), *unreviewed by* Comm'n Notice (Dec. 20, 2021). Moreover, claims 9 and 12 of the '156 patent, claim 19 of the '554 patent, claims 12 and 13 of the '555 patent, and claim 6 of the '564 patent are no longer asserted against iFit and Peloton. *Id.* The investigation was further terminated as to claims 6–8, 10, and 13–15 of the '564 patent, claims 3 and 6–12 of the '156 patent, claims 18, 19, 21–25, and 30 of the '554 patent, claims 12, 13, 16, 17, 26, and 27 of the '555 patent, and all asserted claims of the '680 patent. Order No. 21 (Mar. 3, 2022), *unreviewed by* Comm'n Notice (Mar. 23, 2022).

At the time of the Final ID, DISH asserted the following claims against MIRROR and iFit: claims 1, 3, and 5 of the '564 patent; claims 16, 17 and 20 of the '554 patent; claims 10, 11, 14, and 15 of the '555 patent; and claims 1, 4, and 5 of the '156 patent. DISH also asserted the following claims against Peloton: claims 1 and 3–5 of the '564 patent; claims 16, 17, and 20 of the '554 patent; claims 10, 11, 14, and 15 of the '555 patent; and claims 1, 2, 4, and 5 of the '156 patent.

On September 9, 2022, the Chief Administrative Law Judge (''CALJ'') issued the Final ID, which found that Respondents violated section 337.

The CALJ's recommendation on remedy and bonding (the ''RD'') recommended that, if the Commission finds a violation of section 337, the Commission should issue an LEO and a CDO directed to each of the Respondents. The RD further recommended that the Commission impose a zero percent (0%) bond during the period of Presidential Review. The Commission did not direct the CALJ to make findings and a recommendation on the statutory public interest factors.

On September 23, 2022, Respondents and OUII filed petitions for review of the Final ID. On October 3, 2022, DISH and OUII filed responses to the petitions.

On October 11, 2022, DISH and Respondents filed their public interest comments pursuant to Commission Rule 210.50(a)(4) (19 CFR 210.50(a)(4)).

On November 18, 2022, the Commission determined to review the Final ID in part. 87 FR 72510, 72510–12 (Nov. 25, 2022). In particular, the Commission reviewed the following:

(1) whether DISH satisfied the technical prong of the domestic industry requirement as to all Asserted Patents;

(2) whether claims 16, 17, and 20 of the '554 patent and claims 14 and 15 of the '555 patent are entitled to claim priority to U.S. App. No. 60/566,831;

(3) whether claims 16, 17, and 20 of the '554 patent and claims 14 and 15 of the '555 patent are invalid as anticipated over the prior public use of the Move Media Player;

(4) whether the asserted claims of the '555 patent are invalid for misjoinder of Mr. Brueck; and

(5) whether the preamble of claim 10 of the '555 patent is limiting.

*Id.* The Commission requested briefing on certain issues under review and on remedy, the public interest, and bonding. *See id.*

On December 2, 2022, the parties filed their written submissions on the issues under review and on remedy, public interest, and bonding, and on December 9, 2022, the parties filed their reply submissions. The Commission did not receive comments on the public interest from non-parties.

On February 13, 2023, MIRROR and DISH filed a joint, unopposed motion to partially terminate the investigation as to MIRROR based on a settlement agreement between DISH and MIRROR. The Commission has determined to grant the motion.

On review, and consistent with the simultaneously-issued Commission opinion, the Commission affirms-in-part and reverses-in-part, on other grounds, the Final ID's finding that DISH's domestic industry products practice the asserted claims of the Asserted Patents. The Commission also resolves in the first instance the claim construction dispute amongst the parties regarding whether the asserted claims require a display. The Commission concludes that the asserted claims of the '156, '554, and '555 patents do not require a display, but the asserted claims of the '564 patent do require a display. Accordingly, the Commission further finds that DISH has satisfied the technical prong of the domestic industry requirement as to the '156, '554, and '555 patents, but not as to '564 patent. The Commission also affirms with modifications the Final ID's findings that the asserted claims of the '554 and '555 patents can properly claim priority to U.S. App. No. 60/566,831 and affirms the Final ID's findings that those claims are not invalid over the prior public use of the Move Media Player. The Commission additionally finds that the respondents did not show that the asserted claims of the '555 patent are invalid for misjoinder of inventorship.

The Commission has determined that the appropriate form of relief is an LEO prohibiting (1) the unlicensed entry of infringing fitness devices, streaming components thereof, and systems containing same manufactured by or on behalf of iFit, Peloton, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns. The Commission has also determined to issue CDOs against iFit and Peloton. The Commission has determined to include an exemption to the remedial orders for repair or, under warranty terms, replacement of products purchased by consumers prior to the date of the remedial orders.

The Commission has further determined that the public interest factors enumerated in subsections (d)(l) and (f)(1) (19 U.S.C. 1337(d)(l), (f)(1)) do not preclude issuance of the above-referenced remedial orders. Additionally, the Commission has determined to impose a bond of zero (0%) (*i.e.,* no bond) of entered value of the covered products during the period of Presidential review (19 U.S.C. 1337(j)). This investigation is terminated.

The Commission vote for this determination took place on March 8, 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: March 8, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–05144 Filed 3–13–23; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Proposed Consent Decree Under the System Unit Resource Protection Act

On March 8, 2023, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Southern District of West Virginia in the lawsuit entitled *United States* v. *Wild Rock West Virginia, et al.,* Civil Action No. 2:21–cv–00341.

The United States filed this lawsuit under the System Unit Resource Protection Act and common law trespass and conversion. The complaint alleges that defendants Wild Rock West Virginia; Optima Properties WV, LLC; and William Frischkorn, Administrator of the Estate of Carl F. Frischkorn, (collectively ''Defendants'') unlawfully cut trees and removed vegetation at the New River Gorge National Park and Preserve (the ''Park''), near Fayetteville, West Virginia. The complaint seeks recovery of damages and response costs and injunctive relief.

Under the Consent Decree, Defendants will pay $152,000 to the U.S. Department of the Interior, National Park Service (''NPS''), for response costs and damages, with interest. In addition, Defendants will transfer an undeveloped 40-acre parcel of property adjacent to the Park to a local non-profit land trust for permanent conservation and recreational use. Further, Defendants will grant public access to a hiking and climbing-access trail on Wild Rock property. Finally, NPS will be given access to Wild Rock property for five years to conduct restoration activities near the sites of the tree-cutting.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Wild Rock West Virginia, et al.,* D.J. Ref. No. 90–11–3–12073. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

| *To submit comments:* | *Send them to:* |
|---|---|
| By email ..... | *pubcomment-ees.enrd@usdoj.gov.* |
| By mail ..... | Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611. |

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $13.25 (25 cents per page reproduction cost) payable to the United States Treasury.

**Jeffrey Sands,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2023–05130 Filed 3–13–23; 8:45 am]

**BILLING CODE 4410–15–P**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. OSHA–2009–0025]**

### UL LLC: Application for Expansion of Recognition and Proposed Modification to the NRTL Program's List of Appropriate Test Standards

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Notice.

**SUMMARY:** In this notice, OSHA announces the application of UL LLC, for expansion of the scope of recognition as a Nationally Recognized Testing Laboratory (NRTL) and presents the agency's preliminary finding to grant the application. Additionally, OSHA proposes to add one test standard to the NRTL Program's List of Appropriate Test Standards.

**DATES:** Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before March 29, 2023.

**ADDRESSES:** Submit comments by any of the following methods:

*Electronically:* You may submit comments and attachments electronically at: *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

*Facsimile:* If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

*Docket:* To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the docket are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

*Instructions:* All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (OSHA–2009–0025). OSHA will place comments, attachments and other information and requests, including personal information, in the public docket without revision, and these materials will be available online at *https://www.regulations.gov.* Therefore, the agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

*Extension of comment period:* Submit requests for an extension of the comment period on or before March 29, 2023 to the Office of Technical Programs and Coordination Activities,

Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor; or by fax to (202) 693–1644.

**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, phone: (202) 693–2110 or email: *robinson.kevin@dol.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Notice of the Application for Expansion

OSHA is providing notice that UL LLC, (UL) is applying to expand the current recognition as a NRTL. UL requests 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 a 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 UL, which details that NRTL's scope of recognition. These pages are available from the OSHA website at *https://www.osha.gov/dts/otpca/nrtl/index.html.*

UL currently has thirteen facilities (sites) recognized by OSHA for product testing and certification, with headquarters located at: UL LLC, 333 Pfingsten Road, Northbrook, Illinois 60062. A complete list of UL sites recognized by OSHA is available at *https://www.osha.gov/dts/otpca/nrtl/ul.html.*

## II. General Background on the Application

UL submitted an application, dated October 4, 2020 (OSHA–2009–0025–0047), to expand recognition to include one additional test standard. OSHA staff performed a detailed analysis of the application packet and other pertinent information. OSHA did not perform any on-site reviews in relation to this application.

Table 1, below, lists the test standard found in UL's application for expansion for testing and certification of products under the NRTL Program.

TABLE 1—PROPOSED TEST STANDARD FOR INCLUSION IN UL'S NRTL SCOPE OF RECOGNITION

| Test standard | Test standard title |
|---|---|
| * UL 2525 | Standard for Two-Way Emergency Communications Systems for Rescue Assistance. |

* In this notice, OSHA also proposes to add this test standard to the NRTL Program's List of Appropriate Test Standards

## III. Proposal To Add a New Test Standard to the NRTL Program's List of Appropriate Test Standards

Periodically, OSHA will propose to add new test standards to the NRTL list of appropriate test standards following an evaluation of the test standard document. To qualify as an appropriate test standard, the agency evaluates the document to: (1) verify it represents a product category for which OSHA requires certification by a NRTL; (2) verify the document represents a product and not a component; and (3) verify the document defines safety test specifications (not installation or operational performance specifications). OSHA becomes aware of new test standards through various avenues. For example, OSHA may become aware of new test standards by: (1) monitoring notifications issued by certain Standards Development Organizations; (2) reviewing applications by NRTLs or applicants seeking recognition to include new test standards in their scopes of recognition; and (3) obtaining notification from manufacturers, manufacturing organizations, government agencies, or other parties. OSHA may determine to include a new test standard in the list, for example, if the test standard is for a particular type of product that another test standard also covers, or it covers a type of product that no standard previously covered.

In this notice, OSHA proposes to add one new test standard to the NRTL Program's list of appropriate test standards. Table 2, below, lists the test standard that is new to the NRTL Program. OSHA preliminarily determines that this test standard is an appropriate test standard. OSHA seeks public comment on this preliminary determination.

TABLE 2—STANDARD OSHA IS PROPOSING TO ADD TO THE NRTL PROGRAM'S LIST OF APPROPRIATE TEST STANDARDS

| Test standard | Test standard title |
|---|---|
| UL 2525 ... | Standard for Two-Way Emergency Communications Systems for Rescue Assistance. |

## IV. Preliminary Findings on the Application

UL submitted an acceptable application for expansion of the scope of recognition. OSHA's review of the application files and related material preliminarily indicates that UL can meet the requirements prescribed by 29 CFR 1910.7 for expanding recognition to include the addition of the test standard listed above for NRTL testing and certification. This preliminary finding does not constitute an interim or temporary approval of UL's application.

OSHA also preliminarily determined that the test standard listed above is an appropriate test standard.

OSHA seeks public comment on these preliminary determinations.

## V. Public Participation

OSHA welcomes public comment as to whether UL meets the requirements of 29 CFR 1910.7 for expansion of recognition as a NRTL and whether the test standard listed above is an appropriate test standard that should be included in the NRTL Program's List of Appropriate Test Standards. Comments

should consist of pertinent written documents and exhibits.

Commenters needing more time to comment must submit a request in writing, stating the reasons for the request by the due date for comments. OSHA will limit any extension to 10 days unless the requester justifies a longer time period. OSHA may deny a request for an extension if it is not adequately justified.

To review copies of the exhibits identified in this notice, as well as comments submitted to the docket, contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor. These materials also are generally available online at *https://www.regulations.gov* under Docket No. OSHA–2009–0025 (for further information, see the ''*Docket*'' heading in the section of this notice titled **ADDRESSES**),

OSHA staff will review all comments to the docket submitted in a timely manner and after addressing the issues raised by these comments, make a recommendation to the Assistant Secretary for Occupational Safety and Health on whether to grant UL's application for expansion of its scope of recognition and to add the test standard listed above to the NRTL Program's List of Appropriate Test Standards. The Assistant Secretary will make the final decision on granting the application and on adding the test standard listed above to the NRTL Program's List of Appropriate Test Standards. In making these decisions, the Assistant Secretary may undertake other proceedings prescribed in Appendix A to 29 CFR 1910.7.

OSHA will publish a public notice of its final decision in the **Federal Register**.

## VI. 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 March 8, 2023.

**James S. Frederick,**

*Deputy Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. 2023–05147 Filed 3–13–23; 8:45 am]

**BILLING CODE 4510–26–P**

## LEGAL SERVICES CORPORATION

### Notice of Funding Availability and Request for Proposals for Calendar Year 2024 Basic Field Grant Awards

**AGENCY:** Legal Services Corporation.

**ACTION:** Notice of funding availability.

**SUMMARY:** The Legal Services Corporation (LSC) is a federally established and funded organization that funds civil legal aid organizations across the country and in the U.S. territories. Its mission is to expand access to justice by funding high-quality legal representation for low-income people in civil matters. In anticipation of a congressional appropriation to LSC for Fiscal Year 2024, LSC hereby announces the availability of funding for basic field grants with terms commencing in January 2024. LSC will publish a Request for Proposals (RFP) and seeks applications from interested parties who are qualified to provide effective, efficient, and high-quality civil legal services to eligible clients in the service area(s) of the states and territories identified below. The availability and the exact amount of congressionally appropriated funds, as well as the date, terms, and conditions of funds available for grants for calendar year 2024 have not yet been determined.

**DATES:** See **SUPPLEMENTARY INFORMATION** section below for grant application dates.

**ADDRESSES:** By email to *lscgrants@lsc.gov* or by other correspondence to Legal Services Corporation—Basic Field Grant Awards, 3333 K Street NW, Washington, DC 20007–3522.

**FOR FURTHER INFORMATION CONTACT:** Christine Williams, Program Manager for Basic Field Competition, at 202–295–1602 or email at *williamsc@lsc.gov,* or visit the LSC website at *https://www.lsc.gov/grants/basic-field-grant.*

**SUPPLEMENTARY INFORMATION:** The Legal Services Corporation (LSC) hereby announces the availability of funding for basic field grants with terms beginning in January 2024. LSC seeks grant proposals from interested parties who are qualified to provide effective, efficient, and high-quality civil legal services to eligible clients in the service area(s) of the states and territories identified below. Interested potential applicants must first file a Pre-Application (formerly Notice of Intent to Compete). After approval by LSC of the Pre-Application, an applicant can submit an application in response to the RFP, which contains the grant proposal guidelines, proposal content requirements, and selection criteria. The Pre-Application and RFP will open in GrantEase, LSC's grants management system, on or around April 14, 2023. Additional information will be available at *https://www.lsc.gov/grants/basic-field-grant.*

The listing of all key dates for the LSC 2024 basic field grants process, including the deadlines for filing grant proposals, is available at *https://www.lsc.gov/grants/basic-field-grant/how-apply-basic-field-grant/basic-field-grant-key-dates.*

LSC seeks proposals from: (1) non-profit organizations that have as a purpose the provision of legal assistance to eligible clients; (2) private attorneys; (3) groups of private attorneys or law firms; (4) state or local governments; and (5) sub-state regional planning and coordination agencies that are composed of sub-state areas and whose governing boards are controlled by locally elected officials.

The service areas for which LSC is requesting grant proposals for 2024 are listed below. LSC provides grants for three types of service areas: Basic Field-General, Basic Field-Native American, and Basic Field-Agricultural Worker. For example, the state of Idaho has three basic field service areas: ID–1 (General), NID–1 (Native American), and MID (Agricultural Worker). Service area descriptions are available at *https://www.lsc.gov/grants/basic-field-grant/lsc-service-areas.* LSC will post all updates and changes to this notice at *https://www.lsc.gov/grants/basic-field-grant.* Interested parties can visit *https://www.lsc.gov/grants/basic-field-grant* or contact LSC by email at *lscgrants@lsc.gov.*

| State or territory | Service area(s) |
|---|---|
| Alaska | AK–1, NAK–1. |
| Arizona | AZ–2, NAZ–5. |
| California | MCA, CA–14, CA–31. |
| Connecticut | NCT–1. |
| Delaware | DE–1. |
| Guam | GU–1. |
| Iowa | MIA, IA–3. |
| Idaho | MID, ID–1, NID–1. |
| Kansas | KS–1. |
| Kentucky | KY–5. |
| Maine | MMX–1, ME–1, NME–1. |
| Michigan | MI–13, MI–14. |
| Micronesia | MP–1. |
| Minnesota | NMN–1. |
| Nebraska | MNE, NE–4, NNE–1. |
| New Jersey | MNJ, NJ–8, NJ–15, NJ–17, NJ–18, NJ–20. |
| New Mexico | NM–1, NNM–2. |
| Nevada | NV–1, NNV–1. |
| Ohio | OH–24. |
| Oregon | MOR, OR–6, NOR–1. |
| Pennsylvania | PA–25, PA–5. |
| Rhode Island | RI–1. |
| South Dakota | SD–4, NSD–1. |
| Texas | TX–14. |

| State or territory | Service area(s) |
|---|---|
| Utah | MUT, UT–1, NUT–1. |
| Virgin Islands | VI–1. |
| Virginia | MVA, VA–15, VA–16, VA–18. |
| Vermont | VT–1. |
| Washington | MWA, WA–1, NWA–1. |
| Wisconsin | WI–2, NWI–1. |

(Authority: 42 U.S.C. 2996g(e))

Dated: March 9, 2023.

**Stefanie Davis,**

*Senior Associate General Counsel.*

[FR Doc. 2023–05203 Filed 3–13–23; 8:45 am]

BILLING CODE 7050–01–P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice: [23–017]]**

### Name of Information Collection: Automated Technology Licensing Application System (ATLAS)

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of extension of information collection.

**SUMMARY:** The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

**DATES:** Comments are due by May 15, 2023.

**ADDRESSES:** Written comments and recommendations for this information collection should be sent within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Bill Edwards-Bodmer, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, 757–864–3292, or *b.edwards-bodmer@nasa.gov.*

**SUPPLEMENTARY INFORMATION:**

*I. Abstract:* The information submitted by the public is a license application for those companies and individuals who wish to obtain a patent license for a NASA patented technology. Information needed for the license application in ATLAS may include supporting documentation such as a certificate of incorporation, a financial statement, a business and/or commercialization plan, a project revenue/royalty spreadsheet, and a company balance sheet. At a minimum, all license applicants must submit a satisfactory plan for the development and/or marketing of an invention. The collected information is used by NASA to ensure that companies that see to commercialize NASA technologies have a solid business plan for bringing the technology to market.

*II. Methods of Collection:* NASA is participating in Federal efforts to extend the use of information technology to more Government processes via internet. NASA encourages recipients to use the latest computer technology in preparing documentation. Companies and individuals submit license applications by completing the automated form by way of the Automated Technology Licensing Application System (ATLAS). NASA requests all license applications to be submitted via electronic means.

*III. Data:*

*Title:* Automated Technology Licensing Application System (ATLAS).

*OMB Number:* 2700–0169.

*Type of review:* Extension.

*Affected Public:* Public and companies.

*Estimated Annual Number of Activities:* 1.

*Estimated Number of Respondents per Activity:* 421.

*Annual Responses:* 421.

*Estimated Time per Response:* 8 hours.

*Estimated Total Annual Burden Hours:* 3,368.

*Estimated Total Annual Cost:* $130,038.

*IV. Request for Comments:*

*Comments are invited on:* (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

**William Edwards-Bodmer,**

*NASA PRA Clearance Officer.*

[FR Doc. 2023–05173 Filed 3–13–23; 8:45 am]

BILLING CODE 7510–13–P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice: [23–018]]**

### Name of Information Collection: Software Catalog

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of information collection.

**SUMMARY:** The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections.

**DATES:** Comments are due by May 15, 2023.

**ADDRESSES:** Written comments and recommendations for this information collection should be sent within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Bill Edwards-Bodmer, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, 757–864–3292, or *b.edwards-bodmer@nasa.gov.*

**SUPPLEMENTARY INFORMATION:**

*I. Abstract:* The information submitted by government entities, companies, academic institutions, and individuals is a software request form who wish to obtain a Software Usage Agreement (SUA) for a released NASA software technology. At a minimum, all software requestors must submit the intended use of the software and the requestor's citizenship, country of residence, phone number, and address. The collected information is used by NASA to ensure that the software requestor meets the qualifications to receive the NASA software technology.

*II. Methods of Collection:* NASA is participating in Federal efforts to extend the use of information technology to

more Government processes via internet. NASA encourages recipients to use the latest computer technology in preparing documentation. Government entities, companies, academic institutions, and individuals submit software requests by completing the automated form by way of the Software Catalog. NASA requests all software requests to be submitted via electronic means.

*III. Data:*

*Title:* Software Catalog.

*OMB Number:*

*Type of review:* New.

*Affected Public:* Government entities, companies, academic institutions, and individuals.

*Estimated Annual Number of Activities:* 1.

*Estimated Number of Respondents per Activity:* 1,171.

*Annual Responses:* 1,171.

*Estimated Time per Response:* 8 hours.

*Estimated Total Annual Burden Hours:* 9,368.

*Estimated Total Annual Cost:* $361,698.

*IV. Request for Comments:* Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

**William Edwards-Bodmer,**

*NASA PRA Clearance Officer.*

[FR Doc. 2023–05174 Filed 3–13–23; 8:45 am]

BILLING CODE 7510–13–P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice: (23–019)]**

## Privacy Act of 1974; System of Records

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of a Modified System of Records.

**SUMMARY:** In accordance with the requirements of the Privacy Act of 1974, the National Aeronautics and Space Administration is providing public notice of a modification to an existing system of records entitled Opportunities and Associated Reviewers (OAAR). The notice updates the System Locations section. The system of records is more fully described in the **SUPPLEMENTARY INFORMATION** section of this notice.

**DATES:** Submit comments within 30 calendar days from the date of this publication. The proposed system will take effect at the end of that period if no significant adverse comments are received.

**ADDRESSES:** Submit comments to Bill Edwards-Bodmer, Privacy Act Officer, Office of the Chief Information Officer, Mary W. Jackson, NASA Headquarters, Washington, DC 20546–0001, 757–864–3292, or *NASA-PAOfficer@nasa.gov.*

**FOR FURTHER INFORMATION CONTACT:** NASA Privacy Act Officer, Bill Edwards-Bodmer, 757–864–3292, or *NASA-PAOfficer@nasa.gov.*

**SUPPLEMENTARY INFORMATION:** NASA accepts solicited and unsolicited proposals and makes funded, non-funded and no-exchange-of-funds agreements using its other transaction authority (OTA) under the Space Act, the FAR, the NASA FAR Supplement, 2 CFR 200 Grants and Agreement and directed appropriations (commonly called earmarks), that are managed by multiple NASA organizations using the Opportunities and Associated Reviewers (OAAR) records system. OAAR enables the review of proposals and the monitoring of performance and costing of any subsequent awards and/or partnership agreements.

**William Edwards-Bodmer,**

*NASA Privacy Act Officer.*

**SYSTEM NAME AND NUMBER:**

Opportunities and Associated Reviewers, NASA 10OAAR.

**SECURITY CLASSIFICATION:**

Unclassified; Classified.

**SYSTEM LOCATION:**

- Mary W. Jackson, NASA Headquarters, National Aeronautics and Space Administration, Washington, DC 20546–0001
- NASA Shared Services Center, Building 1111, Jerry Hlass Road, Stennis Space Center, MS 39529
- NASA Centers and Facilities. A list of participating NASA locations is available at *https://www.nasa.gov/about/sites/index.html.*
- NASA support contractors locations.

**SYSTEM MANAGER(S):**

- Mission Directorates' Official Representative(s), NASA Research and Education Support Services, Mary W. Jackson, NASA Headquarters-Washington, DC 20546–0001
- Grants Activities Branch Chief, NASA Shared Services Center (NSSC), Stennis Space Center, MS 39529–6000
- Director, NASA Partnerships Mary W. Jackson, NASA Headquarters-Washington, DC 20546–0001

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

- 51 U.S.C. 20113(a)
- 44 U.S.C. 3101
- Title 2 of The Code of Federal Regulations
- The Foundations for Evidence-Based Policymaking Act of 2019
- Grant Reporting Efficiency and Agreements Transparency Act of 2019
- Title 51—National and Commercial Space Programs. This title was enacted by Public Law 111–314, section 3, Dec. 18, 2010, 124 Stat. 3328; Public Law 111–314, 124 Stat. 3328 (Dec. 18, 2010)
- Title VI of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972
- Section 504 of the Rehabilitation Act of 1973
- The Age Discrimination Act of 1975
- The American Innovation and Competitiveness Act (Pub. L. 114–329; Section 303(b))
- The Federal Advisory Committee Act (''FACA'') of 1972 (5 U.S.C., Appendix 2, as amended).

**PURPOSE(S) OF THE SYSTEM:**

1. To evaluate proposals or requests for NASA-funds, including projects conducted on a no-exchange of funds basis, with partners under the authority of the Space Act or other transaction authority using data generated as part of the NASA merit review process.

2. To identify and contact subject matter experts (*e.g.,* scientists, engineers, educators), who may be interested in applying for support, in attending a scientific or similar meeting, in applying for a position, or engagement in some similar opportunity or who may be interested in serving as reviewers in the peer review system or for inclusion on a NASA panel or advisory committee. Information from this system for this purpose may be used as a source of potential candidates to serve as reviewers as part of the NASA merit review process, or for inclusion on a review panel or advisory committee.

3. To evaluate progress and results of NASA-funded and other projects for program management, evaluation, or public reporting. Anonymized demographic information from this system for this purpose may be used to ensure compliance with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and for public reporting in Agency- or Federally-produced products that are statistical in nature and do not identify individuals. Information from this system may be merged with other computer files to complete such public reporting, studies or evaluations as required by public law, regulations and/or executive orders.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals, sometimes known as key personnel or project participants collectively, *i.e.,* principal investigators, co-investigators, graduate students, postdoctoral fellows, educators, collaborators, subject matter experts, etc. and peer reviewers (1) who have requested and/or received research funding or other support from NASA, either independently or via a non-profit or for-profit organization, a NASA Center or tribal, federal, state, local or foreign government agency and/or (2) who have been requested to or have served as a reviewer for NASA proposals or other types of applications, such as competed Space Act Agreements and requests for information (RFIs).

**CATEGORIES OF RECORDS IN THE SYSTEM:**

1. Proposal/Application/RFI Data—Names and contact information of investigators/partners; NASA-assigned non-sensitive identification numbers; sensitive demographic data, when voluntarily provided; proposals and supporting data from human and institutional applicants; and financial data.

2. Reviewer Data—Names, social security numbers, sensitive demographic data, contact information and responses from peer reviewers, including reviews and/or panel discussion summaries as applicable or other related material.

3. Post-Selection Data for (i) Awards, *i.e.,* assistance, procurements, interagency transfer agreements and other funded agreements and (ii) no-exchange of funds partnership type agreements. Data may take the form of project and performance reports that may include major research activities and findings; research training; educational and outreach activities; and products such as citations to publications, contributions resulting from the research, and other related material.

**RECORD SOURCE CATEGORIES:**

Record sources are key project participants, academic or other applicant institutions, proposal reviewers, and NASA program officials.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Any disclosures of information in this system of records will be relevant, necessary, and compatible with the purpose for which the Agency collected the information. Under the following routine uses that are unique to this system of records, records from this system may be disclosed to:

1. Qualified reviewers for their opinion and evaluation of applicants and their proposals as part of the NASA application review process; and to other government agencies or other entities needing information regarding applicants or nominees as part of a joint application review process, or in order to coordinate programs or policy; or to compensate reviewers for their work in accordance with reporting requirements under U.S. tax code.

2. Individual or institutional applicants and grantee/contracted institutions to provide or obtain data as part of the application review process, award decisions, or administering grant/procurement/cooperative awards.

3. Other entities when merging records with other computer files to carry out studies for or otherwise assist NASA with program management, evaluation, or reporting. Disclosure may be made for this purpose to NASA contractors, collaborating researchers, other government agencies, and qualified research institutions and their staffs. Disclosures are made only after scrutiny of research protocols and with appropriate controls. The results of such studies are administrative or statistical in nature and do not identify individuals.

4. Contractors, grantees, volunteers, experts, consultants, advisors, and other individuals who perform a service to or work on or under a contract, grant, cooperative agreement, advisory committee, independent review boards, or other arrangement with or for NASA or for the Federal government, as necessary to carry out their duties in pursuit of the purposes described above. The contractors are subject to the provisions of the Privacy Act.

5. The name, home institution, field of study, city, state, and zip code of key personnel whose proposals are selected for funding by NASA may be released for public information/affairs purposes, including press releases, if the disclosure of such record(s) would not constitute an unwarranted invasion of personal privacy.

6. Another Federal entity, including the Office of Science and Technology Policy, the National Science and Technology Council, etc., so the demographic and institutional data may be used for cross-Federal program management, evaluation, or reporting only after scrutiny of research protocols and with appropriate controls. The results of such strategic plans, reports, studies, or evaluations are statistical in nature and do not identify individuals.

In addition, information may be disclosed under the following NASA Standard Routine Uses:

1. *Law Enforcement*—When a record on its face, or in conjunction with other information, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order, disclosure may be made to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order, if NASA determines by careful review that the records or information are both relevant and necessary to any enforcement, regulatory, investigative or prosecutive responsibility of the receiving entity.

2. *Certain Disclosures to Other Agencies*—A record from this SOR may be disclosed to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary, to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

3. *Certain Disclosures to Other Federal Agencies*—A record from this SOR may be disclosed to a Federal agency, in response to its request, for a matter concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to

the requesting agency's decision on the matter.

4. *Department of Justice*—A record from this SOR may be disclosed to the Department of Justice when (a) NASA, or any component thereof; or (b) any employee of NASA in his or her official capacity; or (c) any employee of NASA in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States, where NASA determines that litigation is likely to affect NASA or any of its components, is a party to litigation or has an interest in such litigation, and by careful review, the use of such records by the Department of Justice is deemed by NASA to be relevant and necessary to the litigation.

5. *Courts*—A record from this SOR may be disclosed in an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when NASA determines that the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant and necessary to the proceeding.

6. *Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information*—A record from this SOR may be disclosed to appropriate agencies, entities, and persons when (1) NASA suspects or has confirmed that there has been a breach of the system of records; (2) NASA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, NASA (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 NASA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

7. *Members of Congress*—A record from this SOR may be disclosed to a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

8. *Disclosures to Other Federal Agencies in Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information*—A record from this SOR may be disclosed to another Federal agency or Federal entity, when NASA 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.

9. *National Archives and Records Administration*—A record from this SOR may be disclosed as a routine use to the officers and employees of the National Archives and Records Administration (NARA) pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

10. *Audit*—A record from this SOR may be disclosed to another agency, or organization for 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.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records primarily are stored on electronic digital media; however, when necessary, records may be stored in paper.

**POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:**

Records are retrieved by an individual's name or proposal number or institution.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

Records are maintained and disposed of in accordance with NARA approved record schedules. Awarded proposals are permanent records and are transferred to NARA in accordance with the approved record schedule. Declined or withdrawn paper proposals are destroyed five years after close of year in which declined or withdrawn. Declined electronic proposals are retained in electronic archive on site at NASA for ten years after close of year in which declined or withdrawn. Electronic files are destroyed at the end of the ten-year retention period. Some records may be cumulative and maintained indefinitely.

**ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:**

Records are protected by administrative, technical, and physical safeguards administered by NASA or by contractors on behalf of NASA.

**RECORD ACCESS PROCEDURES:**

In accordance with 14 CFR part 1212, Privacy Act—NASA Regulations, and subject to exemptions described therein, individuals who wish to gain access to their records should submit their request in writing to the System Manager or Subsystem Manager at locations listed above. Requests may also be requested electronically by the individual on whom the records are maintained or by their authorized representative.

**CONTESTING RECORD PROCEDURES:**

The NASA regulations for access to records and for contesting contents and appealing initial determinations by the individual concerned appear in 14 CFR part 1212.

**NOTIFICATION PROCEDURES:**

In accordance with 14 CFR part 1212, Privacy Act—NASA Regulations, information may be obtained from the cognizant system or subsystem manager [or managers] listed at the above locations where the records are created and/or maintained.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

The portions of this system consisting of data that would identify reviewers or other persons supplying evaluations of NASA proposals or for some personnel provided in proposals and awards have been exempted at 45 CFR part 613.5, pursuant to 5 U.S.C. 552a(k)(5).

**HISTORY:**

(23–009, 88 FR 36, pp. 11479–11481).

[FR Doc. 2023–05168 Filed 3–13–23; 8:45 am]

**BILLING CODE 7510–13–P**

## NATIONAL CREDIT UNION ADMINISTRATION

### Sunshine Act Meetings

**TIME AND DATE:** 10 a.m., Thursday, March 16, 2023.

**PLACE:** Board Room, 7th Floor, Room 7B, 1775 Duke Street (All visitors must use Diagonal Road Entrance), Alexandria, VA 22314–3428.

**STATUS:** This meeting will be open to the public.

**MATTERS TO BE CONSIDERED:** 1. NCUA Rules and Regulations, Subordinated Debt.

**CONTACT PERSON FOR MORE INFORMATION:** Melane Conyers-Ausbrooks, Secretary of the Board, Telephone: 703–518–6304.

**Melane Conyers-Ausbrooks,**

*Secretary of the Board.*

[FR Doc. 2023–05266 Filed 3–10–23; 11:15 am]

**BILLING CODE 7535–01–P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts

### National Council on the Arts 209th Meeting

**AGENCY:** National Endowment for the Arts, National Foundation on the Arts and Humanities.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, as amended, notice is hereby given that a meeting of the National Council on the Arts will be held open to the public for in-person attendance as well as by videoconference.

**DATES:** See the **SUPPLEMENTARY INFORMATION** section for meeting time and date. The meeting is Eastern time and the ending time is approximate.

**ADDRESSES:** The National Endowment for the Arts, Constitution Center, 400 Seventh Street SW, Washington, DC 20560. This meeting will be held in-person and by videoconference. See the **SUPPLEMENTARY INFORMATION** section for the meeting location. Please monitor *arts.gov* for the most up-to-date information.

**FOR FURTHER INFORMATION CONTACT:** Liz Auclair, Office of Public Affairs, National Endowment for the Arts, Washington, DC 20506, at 202/682–5744.

**SUPPLEMENTARY INFORMATION:** If you need special accommodations due to a disability, please contact Beth Bienvenu, Office of Accessibility, National Endowment for the Arts, Constitution Center, 400 7th St. SW, Washington, DC 20506, 202/682–5733, Voice/T.T.Y. 202/682–5496, at least seven (7) days prior to the meeting.

*The upcoming meeting is:*

### National Council on the Arts 209th Meeting

This portion of the meeting will be held open to the public for in-person attendance and by videoconference at the National Museum of African American History and Culture, Oprah Winfrey Theater, 1400 Constitution Ave. NW, Washington, DC 20560.

*Date and time:* March 31, 2022; 9:30 a.m. to 11:00 a.m.

There will be opening remarks and voting on recommendations for grant funding and rejection, followed by updates from NEA Chair Maria Rosario Jackson.

To view the webcasting of this open session of the meeting, go to: *https://www.arts.gov/.*

Dated: March 9, 2022.

**David Travis,**

*Specialist, Office of Guidelines and Panel Operations.*

[FR Doc. 2023–05197 Filed 3–13–23; 8:45 am]

**BILLING CODE 7537–01–P**

## POSTAL REGULATORY COMMISSION

**[Docket Nos. MC2023–118 and CP2023–121]**

### New Postal Products

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* March 15, 2023.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at *https://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202–789–6820.

**SUPPLEMENTARY INFORMATION:**

### Table of Contents

I. Introduction
II. Docketed Proceeding(s)

### I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*https://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

### II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–118 and CP2023–121; *Filing Title:* USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 15 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* March 7, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* March 15, 2023.

This Notice will be published in the **Federal Register**.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2023–05113 Filed 3–13–23; 8:45 am]

**BILLING CODE 7710–FW–P**

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97077; File No. SR–PEARL–2023–06]**

## 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

March 8, 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 February 23, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend the Fee Schedule 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.[7] 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.

[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] For example, the New York Stock Exchange, Inc.'s (''NYSE'') Secure Financial Transaction Infrastructure (''SFTI'') network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and FIX and MEO Ports in order to recoup ongoing costs and increased expenses set forth below in the Exchange's cost analysis. The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The Exchange initially filed the proposal on December 30, 2022 (SR–PEARL–2022–61) (the ''Initial Proposal'').[8] The Exchange recently withdrew the Initial Proposal and replaced it with this current proposal (SR–PEARL–2023–06).

The Exchange previously included a cost analysis in the Initial Proposal. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (separately among MIAX Pearl Options and MIAX Pearl Equities, Miami International Securities Exchange, LLC (''MIAX''), and MIAX Emerald, LLC (''MIAX Emerald,'' together with MIAX and MIAX Pearl Options, the ''affiliated markets'')) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated exchanges. Although the baseline cost analysis used to justify the proposed fees was made in the Initial Proposal, the fees themselves have not changed since the Initial Proposal and the Exchange still proposes fees that are intended to cover the Exchange's cost of providing 10Gb ULL connectivity and FIX and MEO Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision* [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''

[8] *See* Securities Exchange Act Release No. 96631 (January 10, 2023), 88 FR 2671 (January 17, 2023) (SR–PEARL–2022–61).

[9] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

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* 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.'' [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 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

[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).

[26] *See supra* note 21, at page 2.

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, 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]

[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] For example, the options exchange affiliates of MIAX Pearl Equities, MIAX, MIAX Pearl Options, and 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.

[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.*

[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.* The Exchanges notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and

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 Pearl. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. For example, the options facility of MIAX Pearl has attempted to increase similar 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 and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act[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 is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[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 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.[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

has the effect of perpetuating fee and revenue advantages of legacy exchanges.

[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, 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).

[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.*

[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.

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.

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1Gb and 10Gb ULL Connectivity Fee Change

Sections 2(a) 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 connections assigned to each User[50] 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.[51]

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 2(d), 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.[52]

Implementation

The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[53] in general, and furthers the objectives of Section 6(b)(4) of the Act[54] 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[55] 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

[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] 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).

[50] 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.

[51] 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).

[52] 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.

[53] 15 U.S.C. 78f(b).

[54] 15 U.S.C. 78f(b)(4).

[55] 15 U.S.C. 78f(b)(5).

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 [56] and the Staff Guidance,[57] 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.'' [58] 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.'' [59] 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.'' [60]

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 with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on 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.

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.[61] 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.[62]

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*

[56] *See supra* note 16.

[57] *See supra* note 17.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *See* supra note 6.

[62] *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).

*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' . . . .'' [63]

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.'' [64]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [65] 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.'' [66] 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.'' [67] 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.'' [68]

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 competitive and 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 and other offerings.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other 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) [69]. | 1Gb ULL connection | $2,500. |
| | 10Gb ULL connection | $8,000. |
| | FIX and MEO Ports | 1–5 ports: FREE.<br>6 ports or more: $450 per port. |
| | FXD Ports (*i.e.,* Drop Copy Ports). | FREE. |
| MEMX [70] (market share of 3.05% for the month of November 2022) [71] | 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'') [72] (market share of 0.70% for the month of November 2022) [73]. | 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'') [74] (market share of 0.60% for the month of November 2022) [75] | 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 Market Maker of

[63] *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)).

[64] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[65] *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.'').

[66] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[67] *Id.*

[68] *See* Staff Guidance, *supra* note 17.

[69] *See* Market at a Glance, *available at https://www.miaxoptions.com/.*

[70] *See* MEMX Fee Schedule, Connectivity and Application Sessions, *available at https://info.memxtrading.com/fee-schedule/.*

[71] *See supra* note 69.

[72] *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.

[73] *See supra* note 69.

[74] *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.

[75] *See supra* note 69.

MIAX Pearl Options terminated their membership effective January 1, 2023 as a direct result of the proposed fee changes to the MIAX Pearl 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.[76] 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.[77]

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 only one of the three exchanges.[78] 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.[79] 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.[80] 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.[81]

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,[82] or request sponsored access[83] through a member of an exchange in order to submit a trade directly to an equities exchange.[84] 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).[85] Indeed, the Exchange does not

[76] 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.''

[77] Service Bureaus may obtain ports on behalf of Equity Members.

[78] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17).

[79] *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19).

[80] *See* 17 CFR 242.611.

[81] 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).

[82] 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.

[83] 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.

[84] This may include utilizing a floor broker and submitting the trade to an equities trading floor.

[85] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at,* US

Continued

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.[86] 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 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. This is again evidenced by the fact that one MIAX Pearl Options Market Maker terminated their MIAX Pearl membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options. If a market participant chooses to become an Equity Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on 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,[87] and Rule 19b–4 thereunder,[88] with respect to the types of information SROs should provide when filing fee changes, and Section 6(b) of the Act,[89] which requires, among other things, that exchange fees be reasonable and equitably allocated,[90] not designed to permit unfair discrimination,[91] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[92] 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.[93] The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 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[94]) 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'').[95] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers'').

As an initial step, the Exchange determined the total cost for the

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).

[86] 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.

[87] 15 U.S.C. 78s(b)(1).

[88] 17 CFR 240.19b–4.

[89] 15 U.S.C. 78f(b).

[90] 15 U.S.C. 78f(b)(4).

[91] 15 U.S.C. 78f(b)(5).

[92] 15 U.S.C. 78f(b)(8).

[93] *See* Staff Guidance, *supra* note 17.

[94] 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.

[95] 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.

Exchange and the affiliated markets. That total cost was then divided among the Exchange and each of its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.,* price time or pro-rata), which may impact message traffic, individual system architectures that impact platform size,[96] storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time. This will result in different allocation percentages among the Exchange and its affiliated markets. Meanwhile this allocation methodology ensures that no portion of any cost was allocated twice or double-counted between the Exchange and its affiliated markets.

Next, the Exchange adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange pursuant to the above methodology should be allocated within the Exchange 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%). This next level of the allocation methodology at the individual exchange level also took into account a number of factors similar to those set forth under the first allocation methodology described above, to determine the appropriate allocation to connectivity or market data versus what is to be allocated to providing other services. The allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only 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 for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange is left with its best efforts attempt to conduct such an allocation in a thoughtful and reasonable manner.

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 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[97] | Monthly cost[98] | % 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 |

[96] For example, the Exchange maintains 24 matching engines, MIAX Pearl Options maintains 12 matching engines, MIAX maintains 24 matching engines and MIAX Emerald maintains 12 matching engines.

[97] The Annual Cost includes figures rounded to the nearest dollar.

[98] 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.

10Gb ULL CONNECTIVITY—Continued

| Cost drivers | Annual cost [97] | Monthly cost [98] | % of all |
|---|---|---|---|
| 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 [99] | Monthly cost [100] | % 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 and its affiliated markets have 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. Specifically, twice a year and as needed with additional new hires and new project initiatives, in consultation with each employee, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine that market's individual Human Resources expense. Then, again in consultation with each employee, managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including, network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

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. 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

[99] *See* supra note 97.

[100] *See* supra note 98.

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.[101] 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.[102]

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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

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.[103] 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 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).

[101] This allocation may differ from MIAX Pearl Options due to the different amount of proprietary market data feeds the Exchange purchases for its options and equities trading platforms. For options, the Exchange primarily relies on data purchased from OPRA. For equities, the Exchange does not solely rely on data purchased from the consolidated tape plans (*e.g.,* Nasdaq UTP, CTA, and CQ plans), but rather purchases multiple proprietary market data feeds from other equities exchanges. *See, e.g.,* Exchange Rule 2613 (setting forth the data feeds the Exchange subscribes to for each equities exchange and trading center).

[102] This expense may be greater than the Exchange's affiliated markets, specifically MIAX and MIAX Emerald, because, unlike MIAX and MIAX Emerald, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX and MIAX Emerald.

[103] 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.

FIX PORTS

| Cost drivers | Annual cost [104] | Monthly cost [105] | % 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 [106] | Monthly cost [107] | % 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). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing 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.[108] 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.

[104] *See supra* note 97 (describing rounding of Annual Costs).

[105] *See supra* note 98 (describing rounding of Monthly Costs based on annual costs).

[106] *See supra* note 97 (describing rounding of Annual Costs).

[107] *See supra* note 98 (describing rounding of Monthly Costs based on annual costs).

[108] This allocation may differ from MIAX Pearl Options due to the different amount of proprietary market data feeds the Exchange purchases for its options and equities trading platforms. For options, the Exchange primarily relies on data purchased from OPRA. For equities, the Exchange does not solely rely on data purchased from the consolidated tape plans (*e.g.,* Nasdaq UTP, CTA, and CQ plans), but rather purchases multiple proprietary market data feeds from other equities exchanges. *See, e.g.,* Exchange Rule 2613 (setting forth the data feeds the Exchange subscribes to for each equities exchange and trading center). The Exchange separately 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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

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 based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (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. 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, which will decrease over time.[109]
- 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, which will decrease over time.[110]
- 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, which will decrease over time.[111]
- 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, which will decrease over time.[112]

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 that deviates from that of other exchanges 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.[113] 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

[109] Assuming the U.S. inflation rate continues at its current rate, the projected profit margins in this proposal will further decrease. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited February 15, 2023).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] 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.*

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 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. 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.

The Exchange is part of a holding company that operates four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (''IEX'') and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings can allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies associated with shared costs across multiple platforms. The Exchange and its affiliated markets must share a single cost, which results in cost efficiencies that cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or similar to competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Commission Staff must consider whether the proposed fee level is comparable to, or on parity with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. If it is the case that the Commission Staff is making determinations as to appropriate profit margins, the Exchange believes that Staff should be clear to all market participants as to what they determine is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, 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.[114] 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

[114] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

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.[115] 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[116] due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the 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. In fact, as mentioned above, one MIAX Pearl Market Maker terminated their MIAX Pearl Options membership on January 1, 2023 as a direct result of the proposed fee changes.[117] The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

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

[115] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[116] *See supra* note 113.

[117] The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR–IEX–2022–02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See, e.g., supra* note 48. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost. In addition, despite the potential for existing subscribers to terminate connections due to the proposal, the Exchange anticipates its number of subscribers to remain generally static, resulting in an immaterial difference between a best case and worst case scenario.

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*

The Exchange received one comment letter on the Initial Proposal.[118] In its letter, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. To the extent the sole commenter has attempted to raise new issues in its letter, the Exchange believes those issues are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filing. Among other things, the commenter is requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[119] and Rule 19b–4(f)(2) [120] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2023–06 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2023–06. 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–2023–06 and should be submitted on or before April 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[121]

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–05124 Filed 3–13–23; 8:45 am]

**BILLING CODE 8011–01–P**

[118] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP to Vanessa Countryman, Secretary, Commission, dated February 7, 2023.

[119] 15 U.S.C. 78s(b)(3)(A)(ii).

[120] 17 CFR 240.19b–4(f)(2).

[121] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** 2:00 p.m. on Thursday, March 16, 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: March 9, 2023.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2023–05247 Filed 3–10–23; 11:15 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97079; File No. SR–EMERALD–2023–05]**

## Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Modify Certain Connectivity and Port Fees

March 8, 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 February 23, 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 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/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.[9] As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] The MIAX 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.*

[9] For example, the New York Stock Exchange, Inc.'s (''NYSE'') Secure Financial Transaction Infrastructure (''SFTI'') network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

$11,361,586 for providing 10Gb ULL connectivity and $1,779,066 for providing Limited Service MEI Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Limited Service MEI Ports in order to recoup ongoing costs and increase in expenses set forth below in the Exchange's cost analysis. The Exchange initially filed this proposal on December 30, 2022 as SR–EMERALD–2022–38. On January 9, 2023, the Exchange withdrew SR–EMERALD–2022–38 and resubmitted this proposal as SR–EMERALD–2023–01 (the ''Initial Proposal'').[10] The Exchange recently withdrew the Initial Proposal and replaced it with this current proposal (SR–EMERALD–2023–05).

The Exchange previously included a cost analysis in the Initial Proposal. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (MIAX PEARL, LLC (''MIAX Pearl'') (separately among MIAX Pearl Options and MIAX Pearl Equities) and Miami International Securities Exchange, LLC (''MIAX,'' together with MIAX Pearl Options and MIAX Pearl Equities, the ''affiliated markets'')) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated exchanges. Although the baseline cost analysis used to justify the proposed fees was made in the Initial Proposal, the fees themselves have not changed since the Initial Proposal and the Exchange still proposes fees that are intended to cover the Exchange's cost of providing 10Gb ULL connectivity and Limited Service MEI Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision*[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 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]

[10] *See* Securities Exchange Act Release No. 96628 (January 10, 2023), 88 FR 2651 (January 17, 2023) (SR–EMERALD–2023–01).

[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'').

[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.*

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 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] 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

[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 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).

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 content. . .'',[44] this is not the reality experienced by exchanges such as MIAX Emerald. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. 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 and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act [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 is anticompetitive to the non-legacy exchanges. This does not meet the

[32] 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.

[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.* The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

[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. 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).

[46] 15 U.S.C. 78f(b)(4).

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 places a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.[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 proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks[52] via a 10Gb ULL fiber connection. Specifically, the Exchange proposes to amend Sections 5a(–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'').[53]

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[54] and two (2) Limited Service MEI Ports[55] per

[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] *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).

[52] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[53] 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.'').

[54] 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.

[55] 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.

matching engine[56] 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.[57] 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[58] in accordance with its fair access requirements under Section 6(b)(5) of the Act.[59]

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 generated over 4 billion quotes, and Market Makers who utilized the two free Limited Service MEI Ports generated 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.[60] 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 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[61] in general, and furthers the objectives of Section 6(b)(4) of the Act[62] 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

[56] 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.

[57] 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.

[58] 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.

[59] *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.

[60] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[61] 15 U.S.C. 78f(b).

[62] 15 U.S.C. 78f(b)(4).

Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of Section 6(b)(5) of the Act [63] 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 [64] and the Staff Guidance, [65] 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.'' [66] 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.'' [67] 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.'' [68]

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 with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, 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 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.[69]

[63] 15 U.S.C. 78f(b)(5).

[64] *See supra* note 18.

[65] *See supra* note 19.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *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 2020, as the Exchange's market share increased,[70] 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.[71] 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' . . . .''[72]

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.''[73]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' ''[74] 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.''[75] 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.''[76] 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.''[77]

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are competitive and reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that allow the Exchange to recoup its costs and some margin in a manner that is closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure and other offerings.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the 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)[78]. | 10Gb ULL connection | $13,500. |
| | Limited Service MEI Ports | 1–2 ports: FREE (not changed in this proposal).<br>3–4 ports: $200 each.<br>5–6 ports: $300 each.<br>7 or more ports: $400 each. |
| NASDAQ[79] (equity options market share of 6.61% for the month of November 2022)[80]. | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port | 1–5 ports: $1,500 per port.<br>6–20 ports: $1,000 per port.<br>21 or more ports: $500 per port. |
| NASDAQ ISE LLC (''ISE'')[81] (equity options market share of 5.76% for the month of November 2022)[82]. | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port[83] | $1,100 per port. |

[70] 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.*

[71] *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).

[72] *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)).

[73] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[74] *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.'').

[75] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[76] *Id.*

[77] *See* Staff Guidance, *supra* note 19.

[78] *See supra* note 70.

[79] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[80] *See supra* note 70.

[81] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.

[82] *See supra* note 70.

[83] Similar to the Exchange's MEI Ports, SQF ports are primarily utilized by Market Makers.

| Exchange | Type of connection or port | Monthly fee (per connection or per port) |
|---|---|---|
| NYSE American LLC (''NYSE American'') [84] (equity options market share of 6.41% for the month of November 2022) [85]. | 10Gb LX LCN connection ..... | $22,000 per connection. |
| | Order/Quote Entry Port ..... | 1–40 Ports: $450 per port.<br>41 or more Ports: $150 per port. |
| NASDAQ GEMX, LLC (''GEMX'') [86] (equity options market share of 1.79% for the month of November 2022) [87]. | 10Gb Ultra connection ..... | $15,000 per connection. |
| | SQF Port ..... | $1,250 per port. |

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 Market Maker MIAX Pearl terminated 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.[88] 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.[89]

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.[90] 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 Market Maker terminated 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.[91] 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.[92]

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

[84] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[85] *See supra* note 70.

[86] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.

[87] *See supra* note 70.

[88] 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.''

[89] Service Bureaus may obtain ports on behalf of Members.

[90] *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.

[91] *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.*

[92] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

broker-dealer, a service bureau,[93] or request sponsored access [94] through a member of an exchange in order to submit a trade directly to an options exchange.[95] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.,* fees based on the number of firms that connect to the Exchange indirectly via the third-party).[96] Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.[97] Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 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. This is again evidenced by the fact that one MIAX Pearl Market Maker terminated their MIAX Pearl membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl. If a market participant chooses to become a Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[98] and Rule 19b–4 thereunder,[99] with respect to the types of information SROs should provide when filing fee changes, and Section 6(b) of the Act,[100] which requires, among other things, that exchange fees be reasonable and equitably allocated,[101] not designed to permit unfair discrimination,[102] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[103] 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.[104] The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at $11,361,586 (or approximately $946,799 per month, rounded to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Limited Service MEI Ports at $1,799,066 (or approximately $148,255 per month, rounded to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its Users (both Members and non-Members [105]) going forward

[93] Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

[94] Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[95] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[96] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at,* US Direct-Extranet Connection (*nasdaqtrader.com*); *and* Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); *and* 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[97] The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

[98] 15 U.S.C. 78s(b)(1).

[99] 17 CFR 240.19b–4.

[100] 15 U.S.C. 78f(b).

[101] 15 U.S.C. 78f(b)(4).

[102] 15 U.S.C. 78f(b)(5).

[103] 15 U.S.C. 78f(b)(8).

[104] *See* Staff Guidance, *supra* note 19.

[105] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets.

Continued

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'').[106] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers'').

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets). That total cost was then divided among the Exchange and each of its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.,* price time or pro-rata), which may impact message traffic, individual system architectures that impact platform size,[107] storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time. This will result in different allocation percentages among the Exchange and its affiliated markets. Meanwhile this allocation methodology ensures that no portion of any cost was allocated twice or double-counted between the Exchange and its affiliated markets.

Next, the Exchange adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange pursuant to the above methodology should be allocated within the Exchange 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%). This next level of the allocation methodology at the individual exchange level also took into account a number of factors similar to those set forth under the first allocation methodology described above, to determine the appropriate allocation to connectivity or market data versus what is to be allocated to providing other services. The allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive updated Cost Analysis, 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

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.

[106] 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.

[107] For example, the Exchange maintains 12 matching engines, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, and MIAX maintains 24 matching engines.

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 [108] | Monthly cost [109] | % 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 and its affiliated markets have184 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. Specifically, twice a year and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine that market's individual Human Resources expense. Then, again managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

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 (61.9%) to physical 10Gb ULL connectivity because the third-party data centers and the

[108] The Annual Cost includes figures rounded to the nearest dollar.

[109] 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.

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.[110]

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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

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.[111] 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).

| Cost drivers | Annual cost[112] | Monthly cost[113] | % 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 |

[110] This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl, because, unlike the Exchange, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX Pearl.

[111] 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.

[112] *See supra* note 108 (describing rounding of Annual Costs).

[113] *See supra* note 109 (describing rounding of Monthly Costs based on Annual Costs).

Human Resources

With respect to Limited Service MEI Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Limited Service MEI Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Limited Service MEI Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Limited Service MEI Ports and maintaining performance thereof. 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.[114] 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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

[114] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical 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 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 based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42.4%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 8.0% to Limited Service MEI Ports and the remaining 49.6% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 19.8% for 10Gb ULL connectivity or 19.9% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (5% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Limited Service MEI Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Limited Service MEI Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 28.1% of its personnel costs to providing 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. 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 which will decrease over time.[115] 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 an estimated profit margin of 37% when compared to the cost of providing Limited Service MEI Port services, which will decrease over time.[116] Even if the Exchange earns those amounts or incrementally more or less, the Exchange believes the proposed fees are fair and reasonable because they will not result in pricing that deviates from that of other exchanges 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.[117] 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. 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.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (''IEX'') and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings can allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies associated with shared costs across multiple platforms. The Exchange and its affiliated markets must share a single cost, which results in cost efficiencies that cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or similar to competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Commission Staff must consider whether the proposed fee level is comparable to, or on parity with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. If it is the case that the Commission Staff is making determinations as to appropriate profit margins, the Exchange believes that Staff should be clear to all market participants as to what they determine is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, 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.

[115] Assuming the U.S. inflation rate continues at its current rate, the projected profit margins in this proposal will decrease and may reach single to negative digit levels in approximately 18 to 24 months. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited February 15, 2023).

[116] *Id.*

[117] 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.*

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.[118] 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.[119] 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.[120] 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

[118] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[119] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[120] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

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 launch in 2019 [121] 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 Market Maker terminated their MIAX Pearl membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAX Pearl.[122] 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

[121] *See supra* note 117.

[122] The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR–IEX–2022–02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See, e.g., supra* note 52. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange received one comment letter on the Initial Proposal.[123] In its letter, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. To the extent the sole commenter has attempted to raise new issues in its letter, the Exchange believes those issues are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filing. Among other things, the commenter is requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[124] and Rule 19b–4(f)(2) [125] 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–2023–05 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–2023–05. 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–2023–05 and should be submitted on or before April 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[126]

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–05126 Filed 3–13–23; 8:45 am]

**BILLING CODE 8011–01–P**

[123] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP to Vanessa Countryman, Secretary, Commission, dated February 7, 2023.

[124] 15 U.S.C. 78s(b)(3)(A)(ii).

[125] 17 CFR 240.19b–4(f)(2).

[126] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97081; File No. SR–MIAX–2023–08]**

## Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Modify Certain Connectivity and Port Fees

March 8, 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 February 23, 2023, Miami International Securities Exchange, LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

## I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Fee Schedule (''Fee Schedule'') to amend certain connectivity and port fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend 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.[10] As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $12,034,554 for providing 10Gb ULL connectivity on a single unshared network (an overall increase over its prior cost to provide 10Gb ULL connectivity on a shared network with MIAX Pearl) and $2,157,178 for providing Limited Service MEI Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Limited Service MEI Ports in order to recoup cost related to bifurcating 10Gb connectivity to the Exchange and MIAX Pearl as well as the ongoing costs and increase in expenses set forth below in the Exchange's cost analysis.[11] The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The Exchange initially filed the proposal on December 30, 2022 (SR–MIAX–2022–50) (the ''Initial Proposal'').[12] The Exchange recently withdrew the Initial Proposal and replaced it with this current proposal (SR–MIAX–2023–08).

The Exchange previously included a cost analysis in the Initial Proposal. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (MIAX Pearl (separately among MIAX Pearl Options and MIAX Pearl Equities) and MIAX Emerald, LLC (''MIAX Emerald,'' together with MIAX Pearl Options and MIAX Pearl Equities, the ''affiliated markets'')) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated exchanges. Although the baseline cost analysis used to justify the proposed fees was made in the Initial Proposal, the fees themselves have not changed since the Initial Proposal and the Exchange still proposes fees that are intended to cover the Exchange's cost of providing 10Gb ULL connectivity and Limited Service MEI Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision* [13] 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

[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] For example, the New York Stock Exchange, Inc.'s (''NYSE'') Secure Financial Transaction Infrastructure (''SFTI'') network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

[11] The Exchange notes that MIAX Pearl will make a similar filing to increase its 10Gb ULL connectivity fees.

[12] *See* Securities Exchange Act Release No. 96629 (January 10, 2023), 88 FR 2729 (January 17, 2023) (SR–MIAX–2022–50).

[13] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

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.[14] 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.[15] 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'').[16] 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.'' [17] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[18] 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.'' [19] 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.[20] 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.'' [21] 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.'' [22] 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.'' [23]

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* [24] and remanded for further proceedings consistent with its opinion.[25] 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.'' [26] 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.[27] 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.*'' [28] 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.[29]

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 enable us to perform our review.'' [30] As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the ''record'' or ''review'' earlier intended by the Commission.

[14] *Id.*

[15] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[16] *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).

[17] *Id.* at page 2.

[18] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[19] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[20] *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).

[21] 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'').

[22] *Id.*

[23] *Id.*

[24] *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.

[25] *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.*

[26] *Id.* at *2; see also *id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[27] *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'').

[28] *Id.*

[29] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[30] *See supra* note 16, at page 2.

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'').[31] 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 [32] 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.[33] 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.[34] 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 [35] and $80,383,000 for 2021.[36] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020 [37] and $22,843,000 for 2021.[38] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020 [39] and $44,800,000 for 2021.[40] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020 [41] and $30,687,000 for 2021.[42] 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.[43] 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.'' [44]

[31] 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.*

[32] 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.

[33] *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).

[34] 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.

[35] 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.*

[36] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[37] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[38] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[39] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[40] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[41] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[42] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[43] 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.*

[44] *See* PHLX Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/*

Continued

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,[45] 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 . . .'',[46] this is not the reality experienced by exchanges such as MIAX. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. The Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[47] However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act[48] in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[49] 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;[50] or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and places a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.[51]

Lastly, the Exchange notes that the Commission Staff has allowed similar

*21000475.pdf.* The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

[45] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[46] *See supra* note 21, at note 1.

[47] *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).

[48] 15 U.S.C. 78f(b)(4).

[49] 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.

[50] 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.*

[51] 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.

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.[52] Recently, the Commission Staff has not afforded the Exchange the same flexibility.[53] 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.[54] 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 bifurcated the Exchange and MIAX Pearl 10Gb ULL networks on January 23, 2023. The Exchange issued an alert on August 12, 2022 publicly announcing the planned network change and implementation plan and dates to provide market participants adequate time to prepare.[55] 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[56] 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'').[57] 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.

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[58] and two (2) Limited Service MEI Ports[59] per matching engine[60] 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

[52] *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).

[53] *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).

[54] *See supra* note 9.

[55] *Id.*

[56] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[57] Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section 4(c) of the Exchange's fee schedule. *See* Section 4(c) of the Exchange's fee schedule *available at https://www.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.'').

[58] 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.

[59] 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.

[60] A ''matching engine'' is a part of the MIAX electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines. *See* Fee Schedule, Section 5(d)(ii), note 29.

Ports that are included for free. This fee was unchanged since 2016.[61]

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[62] in accordance with its fair access requirements under Section 6(b)(5) of the Act.[63]

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 generated approximately 5 billion quotes, and Market Makers who utilized the two free Limited Service MEI Ports generated 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.[64] 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,[65] which is designed to recover a portion of the costs associated with directly accessing the Exchange.

*Implementation.* The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[66] in general, and furthers the objectives of Section 6(b)(4) of the Act[67] 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[68] 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[69] and the Staff Guidance,[70] the Exchange believes that the proposed

[61] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[62] 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.

[63] *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.

[64] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[65] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[66] 15 U.S.C. 78f(b).

[67] 15 U.S.C. 78f(b)(4).

[68] 15 U.S.C. 78f(b)(5).

[69] *See supra* note 20.

[70] *See supra* note 21.

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.'' [71] 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.'' [72] 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.'' [73]

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity (driven by the bifurcation of the 10Gb ULL network) and Limited Service MEI Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction related fees to provide them with additional necessary revenue to better compete with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, 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).[74] 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.[75]

Later in 2013, as the Exchange's market share increased,[76] the Exchange adopted a nominal $10 fee for each additional Limited Service MEI Port.[77] The Exchange last increased the fees for its 10Gb ULL fiber connections from $9,300 to $10,000 per month on January 1, 2021.[78] 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

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See* Securities Exchange Act Release No. 68415 (December 12, 2012), 77 FR 74905 (December 18, 2012) (SR–MIAX–2012–01).

[75] *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).

[76] 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.*

[77] *See* Securities Exchange Act Release No. 70903 (November 20, 2013), 78 FR 70615 (November 26, 2013) (SR–MIAX–2013–52).

[78] *See* Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02).

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' . . . .'' [79]

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.'' [80]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [81] 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.'' [82] 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.'' [83] 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.'' [84]

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are competitive and reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that allow us to recoup our costs and some margin in a manner that is closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure and other offerings.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the 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) [85]. | 10Gb ULL connection | $13,500. |
| | Limited Service MEI Ports | 1–2 ports: FREE (not changed in this proposal).<br>3–4 ports: $150 each.<br>5–6 ports: $200 each.<br>7 or more ports: $250 each. |
| NASDAQ [86] (equity options market share of 6.61% for the month of November 2022) [87] | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port [88] | 1–5 ports: $1,500 per port.<br>6–20 ports: $1,000 per port.<br>21 or more ports: $500 per port. |
| NASDAQ ISE LLC (''ISE'') [89] (equity options market share of 5.76% for the month of November 2022) [90]. | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port | $1,100 per port. |
| NYSE American LLC (''NYSE American'') [91] (equity options market share of 6.41% for the month of November 2022) [92]. | 10Gb LX LCN connection | $22,000 per connection. |
| | Order/Quote Entry Port | 1–40 ports: $450 per port.<br>41 or more ports: $150 per port. |
| NASDAQ GEMX, LLC (''GEMX'') [93] (equity options market share of 1.79% for the month of November 2022) [94]. | 10Gb Ultra connection | $15,000 per connection. |
| | SQF Port | $1,250 per port. |

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,

[79] *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)).

[80] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[81] *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.'').

[82] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[83] *Id.*

[84] *See supra* note 21.

[85] *See supra* note 76.

[86] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[87] *See supra note 76.*

[88] Similar to the Exchange's MEI Ports, SQF ports are primarily utilized by Market Makers.

[89] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.

[90] *See supra note 76.*

[91] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[92] *See supra note 76.*

[93] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.

[94] *See supra note 76.*

MIAX PEARL, LLC (''MIAX Pearl''), experienced a decrease in membership as the result of similar fees proposed herein. One MIAX Pearl Market Maker terminated 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.[95] 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.[96]

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.[97] 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 Market Maker terminated 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.[98] 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.[99]

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,[100] or request sponsored access [101] through a member of an exchange in order to submit a trade directly to an options exchange.[102] 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-

[95] 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.''

[96] Service Bureaus may obtain ports on behalf of Members.

[97] *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.

[98] *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.*

[99] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[100] 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.

[101] 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.

[102] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

party).[103] 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.[104] 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. This is again evidenced by the fact that one MIAX Pearl Market Maker terminated their MIAX Pearl membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl. If a market participant chooses to become a Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Bifurcation of 10Gb ULL Connectivity and Related Fees

The Exchange began to operate on a single shared network with MIAX Pearl when MIAX Pearl commenced operations as a national securities exchange on February 7, 2017.[105] The Exchange and MIAX Pearl have operated on a single shared network to provide Members with a single convenient set of access points for both exchanges. Both the Exchange and MIAX Pearl offer two methods of connectivity, 1Gb and 10Gb ULL connections. The 1Gb connection services are supported by a discrete set of switches providing 1Gb access ports to Members. The 10Gb ULL connection services are supported by a second and mutually exclusive set of switches providing 10Gb ULL access ports to Members. Previously, both the 1Gb and 10Gb ULL shared extranet ports allow Members to use one connection to access both exchanges, namely their trading platforms, market data systems, test systems, and disaster recovery facilities.

The Exchange stresses that bifurcating the 10Gb ULL connectivity between the Exchange and MIAX Pearl was not designed with the objective to generate an overall increase in access fee revenue. Rather, the proposed change was necessitated by 10Gb ULL connectivity experiencing a significant decrease in port availability mostly driven by connectivity demands of latency sensitive Members that seek to maintain multiple 10Gb ULL connections on every switch in the network. Operating two separate national securities exchanges on a single shared network provided certain benefits, such as streamlined connectivity to multiple exchanges, and simplified exchange infrastructure. However, doing so was no longer sustainable due to ever-increasing capacity constraints and current system limitations. The network is not an unlimited resource. As described more fully in the proposal to bifurcate the 10Gb ULL network,[106] the connectivity needs of Members and market participants has increased every year since the launch of MIAX Pearl and the operations of the Exchange and MIAX Pearl on a single shared 10Gb ULL network is no longer feasible. This required constant System expansion to meet Member demand for additional ports and 10Gb ULL connections has resulted in limited available System headroom, which eventually became operationally problematic for both the Exchange and its customers.

As stated above, the shared network is not an unlimited resource and its expansion was constrained by MIAX's and MIAX Pearl's ability to provide fair and equitable access to all market participants of both markets. Due to the ever-increasing connectivity demands, the Exchange found it necessary to bifurcate 10Gb ULL connectivity to the Exchange's and MIAX Pearl's Systems and networks to be able to continue to meet ongoing and future 10Gb ULL connectivity and access demands.[107]

Unlike the switches that provide 1Gb connectivity, the availability for additional 10Gb ULL connections on each switch had significantly decreased. This was mostly driven by the connectivity demands of latency sensitive Members (*e.g.,* Market Makers and liquidity removers) that sought to maintain connectivity across multiple 10Gb ULL switches. Based on the Exchange's experience, such Members did not typically use a shared 10Gb ULL connection to reach both the Exchange and MIAX Pearl due to related latency concerns. Instead, those Members maintain dedicated separate 10Gb ULL connections for the Exchange and separate dedicated 10Gb ULL connections for MIAX Pearl. This resulted in a much higher 10Gb ULL usage per switch by those Members on the shared 10Gb ULL network than would otherwise be needed if the Exchange and MIAX Pearl had their own dedicated 10Gb ULL networks. Separation of the Exchange and MIAX Pearl 10Gb ULL networks naturally lends itself to reduced 10Gb ULL port consumption on each switch and, therefore, increased 10Gb ULL port availability for current Members and new Members.

Prior to bifurcating the 10Gb ULL network, the Exchange and MIAX Pearl continued to add switches to meet ongoing demand for 10Gb ULL connectivity. That was no longer sustainable because simply adding additional switches to expand the current shared 10Gb ULL network

[103] *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).

[104] 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.

[105] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (establishing MIAX Pearl Fee Schedule and establishing that the MENI can also be configured to provide network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facility of the MIAX Pearl's affiliate, MIAX, via a single, shared connection).

[106] *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).

[107] Currently, the Exchange maintains sufficient headroom to meet ongoing and future requests for 1Gb connectivity. Therefore, the Exchange did not propose to alter 1Gb connectivity and continues to provide 1Gb connectivity over a shared network.

would not adequately alleviate the issue of limited available port connectivity. While it would have resulted in a gain in overall port availability, the existing switches on the shared 10Gb ULL network in use would have continued to suffer from lack of port headroom given many latency sensitive Members' needs for a presence on each switch to reach both the Exchange and MIAX Pearl. This was because those latency sensitive Members sought to have a presence on each switch to maximize the probability of experiencing the best network performance. Those Members routinely decide to rebalance orders and/or messages over their various connections to ensure each connection is operating with maximum efficiency. Simply adding switches to the extranet would not have resolved the port availability needs on the shared 10Gb ULL network since many of the latency sensitive Members were unwilling to relocate their connections to a new switch due to the potential detrimental performance impact. As such, the impact of adding new switches and rebalancing ports would not have been effective or responsive to customer needs. The Exchange has found that ongoing and continued rebalancing once additional switches are added has had, and would have continued to have had, a diminishing return on increasing available 10Gb ULL connectivity.

Based on its experience and expertise, the Exchange found the most practical way to increase connectivity availability on its switches was to bifurcate the existing 10Gb ULL networks for the Exchange and MIAX Pearl by migrating the exchanges' connections from the shared network onto their own set of switches. Such changes accordingly necessitated a review of the Exchange's previous 10Gb ULL connectivity fees and related costs. The proposed fees are necessary to allow the Exchange to cover ongoing costs related to providing and maintaining such connectivity, described more fully below. The ever increasing connectivity demands that necessitated this change further support that the proposed fees are reasonable because this demand reflects that Members and non-Members believe they are getting value from the 10Gb ULL connections they purchase.

The Exchange announced on August 12, 2022 the planned network change and the January 23, 2023 implementation date to provide market participants adequate time to prepare.[108] Since August 12, 2022, the Exchange has worked with current 10Gb ULL subscribers to address their connectivity needs ahead of the January 23, 2023 date. Based on those interactions and subscriber feedback, the Exchange experienced a minimal net increase of 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 optimizing its operations and deploying innovative technology to the benefit of market participants if it believes the Commission would later prevent that exchange from covering its costs and monetizing operational enhancements, thus adversely impacting competition. Also, as noted above, the economic consequences of not being able to better establish fee parity with other exchanges for non-transaction fees hampers the Exchange's ability to compete on transaction fees.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[109] and Rule 19b–4 thereunder,[110] with respect to the types of information SROs should provide when filing fee changes, and Section 6(b) of the Act,[111] which requires, among other things, that exchange fees be reasonable and equitably allocated,[112] not designed to permit unfair discrimination,[113] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[114] 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.[115] The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at $12,034,554 (or approximately $1,002,880 per month, rounded up to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Limited Service MEI Ports at $2,157,178 (or approximately $179,765 per month, rounded down to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its Users (both Members and non-Members[116]) 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

[108] *See supra* note 9.

[109] 15 U.S.C. 78s(b)(1).

[110] 17 CFR 240.19b–4.

[111] 15 U.S.C. 78f(b).

[112] 15 U.S.C. 78f(b)(4).

[113] 15 U.S.C. 78f(b)(5).

[114] 15 U.S.C. 78f(b)(8).

[115] *See supra* note 21.

[116] 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.

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'').[117] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers'').

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets). That total cost was then divided among the Exchange and each of its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.,* price time or pro-rata), which may impact message traffic, individual system architectures that impact platform size,[118] storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time. This will result in different allocation percentages among the Exchange and its affiliated markets. Meanwhile this allocation methodology ensures that no portion of any cost was allocated twice or double-counted between the Exchange and its affiliated markets.

Next, the Exchange adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange pursuant to the above methodology should be allocated within the Exchange 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%). This next level of the allocation methodology at the individual exchange level also took into account a number of factors similar to those set forth under the first allocation methodology described above, to determine the appropriate allocation to connectivity or market data versus what is to be allocated to providing other services. The allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and, the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive updated Cost Analysis, 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 $1,182,645 (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

[117] 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.

[118] For example, the Exchange maintains 24 matching engines, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, and MIAX Emerald maintains 12 matching engines.

25.6% of its overall Human Resources cost to offering physical connectivity).

| Cost drivers | Annual cost [119] | Monthly cost [120] | % 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 and its affiliated markets have 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. Specifically, twice a year and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine that market's individual Human Resources expense. Then, again managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

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

[119] The Annual Cost includes figures rounded to the nearest dollar.

[120] 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.

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.[121]

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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

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.[122] 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 [123] | Monthly cost [124] | % 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 |

[121] This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl, because, unlike the Exchange, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX Pearl.

[122] 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.

[123] *See supra* note 119 (describing rounding of Annual Costs).

[124] *See supra* note 120 (describing rounding of Monthly Costs based on Annual Costs).

Human Resources

With respect to Limited Service MEI Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Limited Service MEI Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Limited Service MEI Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Limited Service MEI Ports and maintaining performance thereof. 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.[125] 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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

[125] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical 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 based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 8.4% to Limited Service MEI Ports and the remaining 49.6% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 17.8% for 10Gb ULL connectivity or 18.2% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (5% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Limited Service MEI Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Limited Service MEI Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 25.6% of its personnel costs to providing 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. 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 [126]

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.

[126] 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.

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 $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, which will decrease over time.[127] 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 an estimated profit margin of 35% when compared to the cost of providing Limited Service MEI Port services, which will decrease over time.[128] Even if the Exchange earns those amounts or incrementally more or less, the Exchange believes the proposed fees are fair and reasonable because they will not result in pricing that deviates from that of other exchanges 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.[129] 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. 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.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (''IEX'') and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings can allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies associated with shared costs across multiple platforms. The Exchange and its affiliated markets must share a single cost, which results in cost efficiencies that cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or similar to competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Commission Staff must consider whether the proposed fee level is comparable to, or on parity with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. If it is the case that the Commission Staff is making determinations as to appropriate profit margins, the Exchange believes that Staff should be clear to all market participants as to what they determine is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, 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

[127] Assuming the U.S. inflation rate continues at its current rate, the projected profit margins in this proposal will decrease and may reach single to negative digit levels in approximately 18 to 24 months. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited February 15, 2023).

[128] *Id.*

[129] 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.*

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.[130] 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 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.[131] 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.[132] Thus, as the number of connections a Market Maker has increases, the related pull on Exchange

[130] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[131] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[132] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

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 [133] 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 Market Maker terminated their MIAX Pearl membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAX Pearl.[134] 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

[133] *See supra* note 129.

[134] The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR–IEX–2022–02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See, e.g., supra* note 52. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

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.[135] 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.[136] 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.'' [137] 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.[138]

The proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[139] 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.[140] 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.'' [141] 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.[142]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[143] 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.[144]

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.[145] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[146] 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.[147] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[148] BZX,[149] and Cboe EDGA Exchange, Inc.[150]

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-

[135] *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.

[136] *Id.* at 71676.

[137] *Id.*

[138] *Id.* at 71676.

[139] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *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'').

[144] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011).

[145] *Id.* at 18426.

[146] *Id.*

[147] *Id.*

[148] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[149] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[150] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeEDGA–2022–004).

transaction fees. If the Commission were to apply a different standard of review to this proposal than it applied to other exchange fee filings it would create a burden on competition such that it would impair the Exchange's ability to make necessary technology driven changes, such as bifurcating its 10Gb ULL network, because it would be unable to monetize or recoup costs related to that change and compete with larger, non-legacy exchanges.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange received one comment letter on the Initial Proposal.[151] In its letter, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. To the extent the sole commenter has attempted to raise new issues in its letter, the Exchange believes those issues are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filing. Among other things, the commenter is requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[152] and Rule 19b–4(f)(2) [153] 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–2023–08 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2023–08. 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–2023–08 and should be submitted on or before April 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[154]

**Sherry R. Haywood,**

*Assistant Secretary.*

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[151] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP to Vanessa Countryman, Secretary, Commission, dated February 7, 2023.

[152] 15 U.S.C. 78s(b)(3)(A)(ii).

[153] 17 CFR 240.19b–4(f)(2).

[154] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97080; File No. SR–MIAX–2023–07]**

## Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Fees for the ToM Market Data Product and Establish Fees for the cToM Market Data Product

March 8, 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 February 23, 2023, Miami International Securities Exchange, LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 Fee Schedule (''Fee Schedule'') 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 immediately effective. The Exchange initially filed the proposal on December 28, 2022 (SR–MIAX–2022–49) (the ''Initial Proposal'').[3] The Exchange recently withdrew the Initial Proposal and replaced it with this current proposal (SR–MIAX–2023–07).

The Exchange previously filed several proposals to adopt fees for cToM.[4] The Exchange notes that these prior proposals included an analysis of the costs underlying the compilation and dissemination of the proposed cToM fees. The Exchange previously included a cost analysis in the Initial Proposal. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (MIAX PEARL, LLC (''MIAX Pearl''), separately among MIAX Pearl Options and MIAX Pearl Equities, and MIAX Emerald, LLC (''MIAX Emerald,'' together with MIAX Pearl, the ''affiliated markets'')) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated markets. Although the baseline cost analysis used to justify the proposed fees was made in the Initial Proposal, the fees themselves have not changed since the Initial Proposal and the Exchange still proposes fees that are intended to cover the Exchange's cost of providing ToM and cToM, with a reasonable mark-up over those costs. 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, accounting for ongoing increases in expenses.[5] 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[6] 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[7] and quotes[8] entered into the System[9] and resting on the Exchange's Simple Order Book[10] as well as administrative messages.[11] The Exchange currently charges Internal Distributors[12] $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

[3] *See* Securities Exchange Act Release No. 96626 (January 10, 2023), 88 FR 2699 (January 17, 2023) (SR–MIAX–2022–49).

[4] *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).

[5] For example, the New York Stock Exchange, Inc.'s (''NYSE'') Secure Financial Transaction Infrastructure (''SFTI'') network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

[6] 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.

[7] The term ''order'' means a firm commitment to buy or sell option contracts. *See* Exchange Rule 100.

[8] 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.

[9] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[10] The term ''Simple Order Book'' means ''the Exchange's regular electronic book of orders and quotes.'' *See* Exchange Rule 518(a)(15).

[11] *See* Fee Schedule, Section 6)a).

[12] 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).

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 [13] on the System in 2016.[14] At that time, the Exchange also adopted cToM and expressly waived fees for cToM to incentivize market participants to subscribe.[15] 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,[16] *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 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'').[17] 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.[18] 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

[13] *See* Exchange Rule 518(a)(5) for the definition of Complex Orders.

[14] *See* Securities Exchange Act Release No. 79072 (October 7, 2016), 81 FR 71131 (October 14, 2016) (SR–MIAX–2016–26) (Order Approving a Proposed Rule Change to Adopt New Rules to Govern the Trading of Complex Orders).

[15] *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).

[16] The ''Strategy Book'' is the Exchange's electronic book of complex orders and complex quotes. *See* Exchange Rule 518(a)(17).

[17] *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.

[18] 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'').

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'').[19] 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.[20] 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'').[21] 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).[22] 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.[23] 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'').[24] 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.[25] 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).[26] 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 is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members—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,[27] and Rule 19b–4 thereunder,[28] with respect to the types of information self-regulatory organizations (''SROs'') should provide when filing fee changes, and Section 6(b) of the Act,[29] which requires, among other things, that exchange fees be reasonable and equitably allocated,[30] not designed to permit unfair discrimination,[31] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[32] 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.[33]

[19] *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).

[20] *See* Market at a Glance, U.S. Options Market Volume Summary, *available at https://www.miaxoptions.com/* (last visited December 20, 2022).

[21] 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.*

[22] *See supra* note 19.

[23] *Id.*

[24] *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.*

[25] *See* supra note 20.

[26] *Id.*

[27] 15 U.S.C. 78s(b)(1).

[28] 17 CFR 240.19b–4.

[29] 15 U.S.C. 78f(b).

[30] 15 U.S.C. 78f(b)(4).

[31] 15 U.S.C. 78f(b)(5).

[32] 15 U.S.C. 78f(b)(8).

[33] 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*

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.[34] 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'').

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets. That total cost was then divided among the Exchange and each of its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.,* price time or pro-rata), which may impact message traffic, individual system architectures that impact platform size,[35] storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time. This will result in different allocation percentages among the Exchange and its affiliated markets. Meanwhile this allocation methodology ensures that no portion of any cost was allocated twice or double-counted between the Exchange and its affiliated markets.

Next, the Exchange adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange pursuant to the above methodology should be allocated within the Exchange 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%). This next level of the allocation methodology at the individual exchange level also took into account a number of factors similar to those set forth under the first allocation methodology described above, to determine the appropriate allocation to connectivity or market data versus what is to be allocated to providing other services. The allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each Cost Driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction, access, membership, regulatory, and market data fees. Accordingly, the Exchange generally must cover its expenses from these four primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and, the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive 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

Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019) *available at https://www.sec.gov/tm/staff-guidancesro-rule-filings-fees.*

[34] 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.

[35] For example, the Exchange maintains 24 matching engines, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, and MIAX Emerald maintains 12 matching engines.

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 | % 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 and its affiliated markets have 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. Specifically, twice a year and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine that market's individual Human Resources expense. Then, again managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

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).[36]

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.[37]

Monthly 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

[36] 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.

[37] This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl, because, unlike the Exchange, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX Pearl.

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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

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 [38] 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 will decrease over time [39]), 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 is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (''IEX'') and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings can allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies associated with shared costs across multiple platforms.[40] The Exchange and its affiliated markets must share a single cost, which results in cost efficiencies that cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or similar to competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Commission Staff must consider whether the proposed fee level is comparable to, or on parity with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. If it is the case that the Commission Staff is making determinations as to appropriate profit margins, the Exchange believes that Staff should be clear to all market participants as to what they determine is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect. Further, 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.

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

[38] *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.*

[39] Assuming the U.S. inflation rate continues at its current rate, the projected profit margins in this proposal will decrease and may reach single to negative digit levels in approximately 18 to 24 months. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited February 15, 2023).

[40] The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR–IEX–2022–02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See, e.g., supra* note 34. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

supra-competitive profits, and the Exchange believes the Cost Analysis and related projections demonstrate this fact.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. It is possible, however, that 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 changes will be immediately effective.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) [41] of the Act in general, and furthers the objectives of Section 6(b)(4) [42] 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) [43] 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) [44] 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.[45] 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

[41] 15 U.S.C. 78f.

[42] 15 U.S.C. 78f(b)(4).

[43] 15 U.S.C. 78f(b)(5).

[44] 15 U.S.C. 78f(b)(5).

[45] *See supra* note 20.

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.[46]

*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.[47]

*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 and MIAX Emerald), must first execute, among other things, the MIAX Exchange Group Exchange Data Agreement (the ''Exchange Data Agreement'').[48] 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.[49] External Distributors may distribute the Exchange's market data to persons who are not officers, employees or affiliates of the External Distributor,[50] 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.[51] 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.

[46] *See supra* notes 19, 21, and 24, and accompanying text.

[47] *See, e.g., supra* notes 19, 21, and 24.

[48] *See* Exchange Data Agreement, *available at https://miaxweb2.pairsite.com/sites/default/files/page-files/MIAX_Exchange_Group_Data_Agreement_09032020.pdf.*

[49] *See id.*

[50] *See id.*

[51] *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.*

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,[52] 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.[53] 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,[54] and Rule 19b–4(f)(2)[55] 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–2023–07 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2023–07. 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

[52] 15 U.S.C. 78f(b)(8).

[53] *See supra* notes 19, 21, and 24, and accompanying text.

[54] 15 U.S.C. 78s(b)(3)(A)(ii).

[55] 17 CFR 240.19b–4(f)(2).

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–2023–07 and should be submitted on or before April 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–05127 Filed 3–13–23; 8:45 am]

**BILLING CODE 8011–01–P**

[56] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97078; File No. SR–EMERALD–2023–04]**

## Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Fees for the ToM Market Data Product and Establish Fees for the cToM Market Data Product

March 8, 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 February 23, 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the ''Fee Schedule'') 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.

*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 immediately effective. The Exchange initially filed the proposal on December 28, 2022 (SR–EMERALD–2022–37) (the ''Initial Proposal'').[3] The Exchange recently withdrew the Initial Proposal and replaced it with this current proposal (SR–EMERALD–2023–04).

The Exchange previously filed several proposals to adopt fees for cToM.[4] The Exchange notes that these prior proposals included an analysis of the costs underlying the compilation and dissemination of the proposed cToM fees. The Exchange previously included a cost analysis in the Initial Proposal. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (MIAX PEARL, LLC (''MIAX Pearl''), separately among MIAX Pearl Options and MIAX Pearl Equities, and Miami International Securities Exchange, LLC (''MIAX,'' together with MIAX Pearl, the ''affiliated markets'')) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated markets. Although the baseline cost analysis used to justify the proposed fees was made in the Initial Proposal, the fees themselves have not changed since the Initial Proposal and the Exchange still proposes fees that are intended to cover the Exchange's cost of providing ToM and cToM, with a reasonable mark-up over those costs. 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, accounting for ongoing increases in expenses.[5] 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[6] or market participant subscribe to ToM or cToM or any other data feed offered by the Exchange.

[3] *See* Securities Exchange Act Release No. 96625 (January 10, 2023), 88 FR 2688 (January 17, 2023) (SR–EMERALD–2022–37).

[4] *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).

[5] For example, the New York Stock Exchange, Inc.'s (''NYSE'') Secure Financial Transaction Infrastructure (''SFTI'') network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

[6] 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.

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 [7] and quotes [8] entered into the System [9] and resting on the Exchange's Simple Order Book [10] as well as administrative messages.[11] The Exchange currently charges Internal Distributors [12] $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 [13] on the MIAX Emerald System in 2018,[14] 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.[15] 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,[16] *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 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

[7] The term ''order'' means a firm commitment to buy or sell option contracts. *See* Exchange Rule 100.

[8] 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.

[9] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[10] The term ''Simple Order Book'' means ''the Exchange's regular electronic book of orders and quotes.'' *See* Exchange Rule 518(a)(15).

[11] *See* Fee Schedule, Section 6(a).

[12] 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).

[13] *See* Exchange Rule 518(a)(5) for the definition of Complex Orders.

[14] *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).

[15] *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).

[16] The ''Strategy Book'' is the Exchange's electronic book of complex orders and complex quotes. *See* Exchange Rule 518(a)(17).

example, the MIAX Emerald Order Feed (''MOR'').[17] 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.[18] 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'').[19] 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.[20] 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'').[21] 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).[22] 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.[23] 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'').[24] 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.[25] 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).[26] 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.

[17] *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.

[18] 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'').

[19] *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).

[20] *See* Market at a Glance, U.S. Options Market Volume Summary, *available at https://www.miaxoptions.com/* (last visited December 20, 2022).

[21] 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.*

[22] *See supra* note 19.

[23] *Id.*

[24] *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.*

[25] *See* supra note 20.

[26] *Id.*

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 is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members—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,[27] and Rule 19b–4 thereunder,[28] with respect to the types of information self-regulatory organizations (''SROs'') should provide when filing fee changes, and Section 6(b) of the Act,[29] which requires, among other things, that exchange fees be reasonable and equitably allocated,[30] not designed to permit unfair discrimination,[31] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[32] 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.[33]

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.[34] 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'').

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets. That total cost was then divided among the Exchange and each of its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.,* price time or pro-rata), which may impact message traffic, individual system architectures that impact platform size,[35] storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time. This will result in different allocation percentages among the Exchange and its affiliated markets. Meanwhile this allocation methodology ensures that no portion of any cost was allocated twice or double-counted between the Exchange and its affiliated markets.

Next, the Exchange adopted an allocation methodology with thoughtful and consistently principles to guide how much of a particular cost amount allocated to the Exchange pursuant to the above methodology should be allocated within the Exchange 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%). This next level of the allocation methodology at the individual exchange level also took into account a number of factors similar to those set forth under the first allocation methodology described above, to determine the appropriate allocation to connectivity or market data versus what is to be allocated to providing other services. The allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each Cost Driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction, access, membership, regulatory, and market data fees. Accordingly, the Exchange generally must cover its expenses from these four 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

[27] 15 U.S.C. 78s(b)(1).

[28] 17 CFR 240.19b–4.

[29] 15 U.S.C. 78f(b).

[30] 15 U.S.C. 78f(b)(4).

[31] 15 U.S.C. 78f(b)(5).

[32] 15 U.S.C. 78f(b)(8).

[33] 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.*

[34] 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.

[35] For example, the Exchange maintains 12 matching engines, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, and MIAX maintains 24 matching engines.

may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and, the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive 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 $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 and its affiliated markets have 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. Specifically, twice a year and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine that market's individual Human Resources expense. Then, again managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

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).[36]

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.[37]

Monthly 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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

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[38] 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 will decrease over time[39]), 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 is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (''IEX'') and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings can allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies associated with shared costs across multiple platforms.[40] The

[36] 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 34. 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.

[37] This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl, because, unlike the Exchange, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX Pearl.

[38] *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.*

[39] Assuming the U.S. inflation rate continues at its current rate, the projected profit margins in this proposal will decrease and may reach single to negative digit levels in approximately 18 to 24 months. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited February 15, 2023).

[40] The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR–IEX–2022–02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See, e.g., supra* note 34. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing

Exchange and its affiliated markets must share a single cost, which results in cost efficiencies that cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or similar to competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Commission Staff must consider whether the proposed fee level is comparable to, or on parity with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. If it is the case that the Commission Staff is making determinations as to appropriate profit margins, the Exchange believes that Staff should be clear to all market participants as to what they determine is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, 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.

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.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. It is possible, however, that 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 changes will be immediately effective.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) [41] of the Act in general, and furthers the objectives of Section 6(b)(4) [42] 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) [43] 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) [44] 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.[45] 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

to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

[41] 15 U.S.C. 78f.

[42] 15 U.S.C. 78f(b)(4).

[43] 15 U.S.C. 78f(b)(5).

[44] 15 U.S.C. 78f(b)(5).

[45] *See supra* note 20.

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.[46]

*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.[47]

*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 and MIAX), must first execute, among other things, the MIAX Exchange Group Exchange Data Agreement (the ''Exchange Data

[46] *See supra* notes 19, 21, and 24, and accompanying text.

[47] *See, e.g., supra* notes 19, 21, and 24.

Agreement'').[48] 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.[49] External Distributors may distribute the Exchange's market data to persons who are not officers, employees or affiliates of the External Distributor,[50] 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.[51] 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,[52] 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.[53] 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

[48] *See* Exchange Data Agreement, *available at https://miaxweb2.pairsite.com/sites/default/files/page-files/MIAX_Exchange_Group_Data_Agreement_09032020.pdf.*

[49] *See id.*

[50] *See id.*

[51] *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.*

[52] 15 U.S.C. 78f(b)(8).

[53] *See supra* notes 19, 21, and 24, and accompanying text.

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,[54] and Rule 19b–4(f)(2) [55] 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–2023–04 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–2023–04. 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–2023–04 and should be submitted on or before April 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–05125 Filed 3–13–23; 8:45 am]

**BILLING CODE 8011–01–P**

[54] 15 U.S.C. 78s(b)(3)(A)(ii).

[55] 17 CFR 240.19b–4(f)(2).

[56] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97065; File No. SR–NYSEARCA–2023–18]**

## Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Certificate of Incorporation

March 8, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on February 23, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''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 its certificate of incorporation to provide that the board of directors of its ultimate parent or that board's compensation committee may fix the compensation of the board of directors of the Exchange, and make certain clarifying, technical and conforming changes to the certificate of incorporation. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend the Amended and Restated Certificate of Incorporation of the Exchange (''Certificate'') to (a) provide that the board of directors of its ultimate parent, Intercontinental Exchange, Inc. (''ICE,'' and its board of directors, the ''ICE Board''), or the compensation committee of the ICE Board (the ''ICE Compensation Committee'') may fix the compensation of the board of directors of the Exchange (the ''Exchange Board''), and (b) make certain clarifying, technical and conforming changes to the Certificate.

The changes described herein would become operative upon the Certificate becoming effective pursuant to its filing with the Secretary of State of the State of Delaware.

Proposed Amendment to Article 6

Currently, the Exchange Board sets its own compensation. Through an amendment to Article 6 of the Certificate, the Exchange proposes to

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

have the ICE Board or the ICE Compensation Committee set director compensation instead.

The Exchange is wholly owned by NYSE Group, which in turn is wholly owned by NYSE Holdings LLC, a wholly owned subsidiary of Intercontinental Exchange Holdings, Inc. Intercontinental Exchange Holdings, Inc. is wholly owned by ICE, a public company listed on the New York Stock Exchange LLC (''NYSE'').[4]

To make the change, the Exchange proposes to amend Article 6 of the Certificate as follows (proposed additions italicized):

6. Except as set forth in *this Article 6 and* Article 9 of this *Amended and Restated* Certificate of Incorporation, the Exchange shall be managed by or under the direction of the Board of Directors which shall exercise all powers conferred under the laws of the State of Delaware. *The Board of Directors of Intercontinental Exchange, Inc. or the compensation committee thereof shall have the authority to fix the compensation of directors of the Exchange. The directors of the Exchange may be paid their expenses, if any, of attendance at each meeting of the Board of Directors of the Exchange and may be paid a fixed sum for attendance at each meeting of the Board of Directors of the Exchange or a stated salary as director (which amounts may be paid in cash or such other form as the Board of Directors of Intercontinental Exchange, Inc. or the compensation committee thereof may from time to time authorize). No such payment shall preclude any director from serving the Exchange in any other capacity and receiving compensation therefor.*

If the ICE Board fixed the compensation of the Exchange Board, the decision would be made by a body that was required to have at least a majority of its members be independent.[5] The requirement is in accordance with NYSE listing requirements, which require that listed companies have a majority of independent directors.[6]

If the ICE Compensation Committee fixed the Exchange Board compensation,[7] compensation decisions would be made by a body that is made up of independent members. As a company listed on the NYSE, ICE is required to have a compensation committee that is composed entirely of independent directors that satisfy the additional independence requirements specific to compensation committee members.[8]

The proposed rule text is comprehensive. Rather than just setting forth what body fixes director compensation, it would provide that directors may be paid their expenses for attending board meetings and that they may receive compensation on a per-meeting basis or as a salary, clarify the form of compensation that may be granted, and note that the payment does not preclude a director from serving the Exchange in another capacity.

The Exchange operates as a separate self-regulatory organization and has rules, membership rosters and listings distinct from the rules, membership rosters and, where applicable, listings of its affiliates the NYSE, NYSE American LLC, NYSE Chicago, Inc., and NYSE National, Inc. (collectively with the Exchange, the ''NYSE Group Exchanges''). At the same time, however, the Exchange believes it is important for each of the NYSE Group Exchanges to have a consistent approach to corporate governance in certain matters, to simplify complexity and create greater consistency among the NYSE Group Exchanges.[9] To that end, each of the NYSE Group Exchanges is proposing a substantially similar change to its governing documents.[10]

The proposed amendment is based on Article III, Section 3.13 (Compensation of Directors) of the ICE Bylaws.[11]

Additional Proposed Amendments

The Exchange proposes to make the following non-substantive technical and conforming changes to the Certificate:[12]

- Move the definition of ''Corporation'' from the second paragraph to the first paragraph.
- Throughout the Certificate, add ''Amended and Restated'' before ''Certificate of Incorporation'' or ''certificate of incorporation'' and capitalize the latter.
- Update the dates in Article 13 and the signature line and update the time in Article 13.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,[13] in general, and furthers the objectives of Section 6(b)(1)[14] in particular, in that it enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,[15] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove

[4] *See* Exchange Act Release No. 72157 (May 13, 2014), 79 FR 28792 (May 19, 2014) (SR–NYSEArca–2014–52) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Name Changes of Its Ultimate Parent, IntercontinentalExchange Group, Inc., and Its Indirect Parents, IntercontinentalExchange, Inc. and NYSE Euronext Holdings LLC).

[5] *See* Securities Exchange Act Release No. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (SR–NYSE–2013–42; SR–NYSEMKT–2013–50; SR–NYSEArca–2013–62) (Order Granting Approval of Proposed Rule Change Relating to a Corporate Transaction in which NYSE Euronext Will Become a Wholly-Owned Subsidiary of IntercontinentalExchange Group, Inc.). IntercontinentalExchange Group, Inc., subsequently changed its name to IntercontinentalExchange, Inc. *See* 79 FR 28792, *supra* note 4. The ICE Board is subject to the requirements of the Independence Policy of the Board of Directors of Intercontinental Exchange, Inc., available at *https://s2.q4cdn.com/154085107/files/doc_downloads/governance_docs/ICE-Independence-Policy.pdf.* The bylaws of ICE require that the members of the ICE Board take into consideration the effect that ICE's actions would have on the ability of the Exchange to carry out its responsibility under Exchange Act. *See* the Ninth Amended and Restated Bylaws of Intercontinental Exchange, Inc. (''ICE Bylaws''), Article III, Section 3.14. The ICE Bylaws are available at *https://s2.q4cdn.com/154085107/files/doc_downloads/governance_docs/2022/ICE-Ninth-Amended-and-Restated-Bylaws.pdf.*

[6] *See* NYSE Listed Company Manual Sections 303A.01 (Independent Directors) and 303A.02(a)(ii) (Independence Tests), and ICE Bylaws, Article III, Section 3.4.

[7] Pursuant to its Charter, the Compensation Committee of the ICE Board is charged with, among other things, reviewing and approving compensation for the members of the board of directors of any ICE subsidiary, which includes the Exchange. *See* Charter of the Compensation Committee of the Board of Directors of ICE, at *https://s2.q4cdn.com/154085107/files/doc_downloads/governance_docs/2022/Intercontinental-Exchange-Inc.-Compensation-Committee-Charter-March-3-2022.pdf. See also* NYSE Listed Company Manual Section 303A.05(b).

[8] *See* NYSE Listed Company Manual Section 303A.05(a) (Compensation Committee). *See also* NYSE Listed Company Manual Section 303A.02(a)(ii) and ICE annual report on Form 10–K for the fiscal year ended December 31, 2021, at 19, available at *https://www.sec.gov/ix?doc=/Archives/edgar/data/1571949/000157194922000006/ice-20211231.htm.*

[9] *See* Exchange Act Release No. 84648 (November 26, 2018), 83 FR 61692 (November 30, 2018) (SR–NYSEArca–2018–85).

[10] *See* SR–NYSE–2023–13; SR–NYSEAmer–2023–15, SR–NYSECHX–2023–10, and SR–NYSENat–2023–08. Presently, three different entities fix the compensation of the boards of directors of the NYSE Group Exchanges: NYSE Group fixes the compensation of the directors of the NYSE, NYSE American LLC, and NYSE National, Inc.; NYSE Chicago Holdings, Inc. fixes the compensation of the directors of NYSE Chicago, Inc.; and the board of directors of NYSE Arca fixes its own compensation.

[11] *See* ICE Bylaws, Article III, Section 3.13.

[12] *See* 83 FR 61692, *supra* note 9, at 61693–61694 (proposing to make technical and conforming changes to the Certificate of Incorporation of the Exchange).

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(1).

[15] 15 U.S.C. 78f(b)(5).

impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that, because at least a majority of the members of the ICE Board and all of the ICE Compensation Committee must be independent, there is no substantial likelihood of a potential conflict of interest. Indeed, the Exchange believes that the proposal lessens the potential for conflicts of interest by eliminating the current practice, where the Exchange Board sets its own compensation. The Exchange believes that it is more advisable to have compensation determinations made by a body that is not the same as the one that will receive the compensation. Further, the governing documents of ICE require that the members of the ICE Board take into consideration the effect that ICE's actions—including actions by the ICE Board or ICE Compensation Committee—would have on the ability of the Exchange ''to carry out [its] responsibilities under the Exchange Act'' and ''to engage in conduct that fosters and does not interfere with the ability of the Exchange[ ] . . . to remove impediments to and perfect the mechanisms of a free and open market in securities and a U.S. national securities market system; and . . . to protect investors and the public interest.'' [16] For the foregoing reasons, the Exchange believes that the proposed change would allow the Exchange to be so organized as to have the capacity to carry out the purposes of the Exchange Act and comply with the provisions of the Exchange Act by its members and persons associated with members, and would contribute to the orderly operation of the Exchange and would promote the maintenance of a fair and orderly market, the protection of investors and the protection of the public interest.

Indeed, the change would be consistent with prior practice, as when the New York Stock Exchange, Inc. combined with Archipelago Holdings, Inc. under NYSE Group in 2006, NYSE Group was publicly traded, required to have an independent board of directors, and subject to an independence policy.[17] That changed when NYSE Group combined with Euronext N.V. After that combination, NYSE Euronext, the publicly traded parent company, had an independent board of directors subject to an independence policy, and the board of directors of NYSE Group, which became a subsidiary of NYSE Euronext, did not.[18] When ICE acquired NYSE Euronext, the requirement to have a majority of independent directors moved to ICE.[19]

Moreover, the Exchange believes that the proposal would promote greater consistency in the compensation philosophy and director compensation structure across affiliated exchanges, thereby promoting the maintenance of a fair and orderly markets, the protection of investors and the public interest. As noted above, the other NYSE Group Exchanges are filing similar proposed changes to their governing documents. By locating the authority to fix compensation in the hands of the ICE Board or the ICE Compensation Committee, the proposed change would permit compensation for each board of directors of an NYSE Group Exchange to be set centrally and with greater uniformity and consistency across affiliated exchanges. The Exchange believes that such conformity would streamline the NYSE Group Exchanges' corporate processes and create more equivalent compensation processes among them, to the benefit of both investors and the public interest. The proposal also reflects the fact that, no matter the size or role of the relevant NYSE Group Exchange, every NYSE Group Exchange board of directors must manage its business while considering the government of the exchange as an ''exchange'' within the meaning of the Exchange Act.[20]

The Exchange also believes that the comprehensive provision would remove impediments to and perfect the mechanism of a free and open market, as it would make the provision relating to director compensation comprehensive and transparent for market participants, making it so that they can more easily navigate and understand the governing documents. There is currently no provision regarding compensation other than the general statement that the Exchange Board has all the powers conferred under the laws of the State of Delaware. The proposed text would set forth detail regarding the compensation that directors may receive, such as whether expenses for attending board meetings may be paid, whether directors may receive compensation on a per-meeting basis or as a salary, and what form of compensation may be granted, and would clarify that payment does not preclude a director from serving the Exchange in another capacity. The Exchange believes that the level of detail would add transparency and clarity to the Exchange's governing documents and would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing potential confusion.

Finally, the proposed non-substantive technical and conforming changes would remove impediments to and perfect the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the governing documents. The proposed non-substantive amendments also would not be inconsistent with the public interest and the protection of

[16] *See* ICE Bylaws, Article III, Section 3.14(a). The NYSE Arca Rules set forth additional review and reporting requirements for listed ICE affiliate securities. *See* Rule 5.1–E(c) (Listing of an Affiliate or Entity that Operates and/or Owns a Trading System or Facility of the Exchange).

[17] *See* Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77) (Order Granting Approval of Proposed Rule Change and Amendment Nos. 1, 3, and 5 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 6 and 8 Relating to the NYSE's Business Combination With Archipelago Holdings, Inc.). The NYSE Group was expected to fix the compensation of the Exchange Board through a compensation committee. *Id.* at 11256 (''It is expected that, upon completion of the Merger, the NYSE Group board of directors will have [a] . . . compensation committee'') and 11257 (''[T]he board of directors of New York Stock Exchange LLC is not expected to have its own committees and that any necessary functions with respect to . . . compensation . . . will be performed by the relevant committee[ ] of the NYSE Group board of directors''). Having ICE, a public company, or the ICE Compensation Committee, which is required to be made up of independent directors, fix Exchange Board compensation would be consistent with this practice. *See also* Securities Exchange Act Release No. 53383 (February 7, 2006), 71 FR 11271 (March 6, 2006) (SR–PCX–2005–134) (Order Approving Proposed Rule Change and Amendment No. 1 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 Relating to the Certificate of Incorporation and Bylaws of Archipelago Holdings, Inc.).

[18] *See* Securities Exchange Act Release No. 55294 (February 14, 2007), 72 FR 8046 (February 22, 2007) (SR–NYSEArca–2007–05) (Order Granting Accelerated Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 Regarding a Proposed Combination Between NYSE Group, Inc. and Euronext N.V.). *See also* Exhibit 5E to SR–NYSEArca–2007–05, Section 3.2 (deleting the independence requirements for the NYSE Group board of directors).

[19] *See supra* note 5.

[20] *See* Bylaws of NYSE Arca, Article III, Section 3.01 (Powers); Thirteenth Amended and Restated Operating Agreement of NYSE, Article II, Section 2.03(k) (Board); Twelfth Amended and Restated Operating Agreement of NYSE American, Inc., Article II, Section 2.03(k) (Board); Second Amended and Restated Bylaws of NYSE Chicago, Inc., Article II, Section 1 (Powers) and Article IX, Sec. 1 (Management of the Corporation); and Seventh Amended and Restated By-laws of NYSE National, Inc., Article III, Section 3.1 (Powers) and Article X, Section 10.1 (Management of the Exchange).

investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing potential confusion.

*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 Exchange Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with the corporate governance of the Exchange.

*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**

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) of the Act [21] and Rule 19b–4(f)(6) thereunder.[22]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [23] of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2023–18 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2023–18. 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–NYSEARCA–2023–18, and should be submitted on or before April 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–05123 Filed 3–13–23; 8:45 am]

**BILLING CODE 8011–01–P**

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[23] 15 U.S.C. 78s(b)(2)(B).

[24] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97082; File No. SR–PEARL–2023–05]**

## 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

March 8, 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 February 23, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange is filing a proposal to amend the MIAX Pearl Options 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.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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,[9] the Exchange experienced ongoing increases in expenses, particularly internal expenses.[10] As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $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.[11] The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The Exchange initially filed the proposal on December 30, 2022 (SR–PEARL–2022–62) (the ''Initial Proposal'').[12] The Exchange recently withdrew the Initial Proposal and replaced it with this current proposal (SR–PEARL–2023–05).

The Exchange previously included a cost analysis in the Initial Proposal. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (separately among MIAX Pearl Options and MIAX Pearl Equities, MIAX and MIAX Emerald, LLC (''MIAX Emerald,'' together with MIAX and MIAX Pearl Options and MIAX Pearl Equities, the ''affiliated markets'')) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated exchanges. Although the baseline cost analysis used to justify the proposed fees was made in the Initial Proposal, the fees themselves have not changed since the Initial Proposal and the Exchange still proposes fees that are intended to cover the Exchange's cost of providing 10Gb ULL connectivity and Full Service MEO Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision* [13] 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.[14] 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

[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] For example, the New York Stock Exchange, Inc.'s (''NYSE'') Secure Financial Transaction Infrastructure (''SFTI'') network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

[11] The Exchange notes that MIAX will make a similar filing to increase its 10Gb ULL connectivity fees.

[12] *See* Securities Exchange Act Release No. 96632 (January 10, 2023), 88 FR 2707 (January 17, 2023) (SR–PEARL–2022–62).

[13] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[14] *Id.*

constrained by significant competitive forces and that these fees were consistent with the Act.[15] 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'').[16] 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.'' [17] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[18] 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.'' [19] 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.[20] 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.'' [21] 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.'' [22] 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.'' [23]

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* [24] and remanded for further proceedings consistent with its opinion.[25] 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.'' [26] 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.[27] 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.*'' [28] 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.[29]

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.'' [30] As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the ''record'' or ''review'' earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission's related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has

[15] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[16] *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).

[17] *Id.* at page 2.

[18] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[19] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[20] *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).

[21] *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'').

[22] *Id.*

[23] *Id.*

[24] *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.

[25] *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.*

[26] *Id.* at *2; see also *id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[27] *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'').

[28] *Id.*

[29] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[30] *See supra* note 14, at page 2.

negatively impacted smaller, nascent, non-legacy exchanges (''non-legacy exchanges''), while favoring larger, incumbent, entrenched, legacy exchanges (''legacy exchanges'').[31] 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 [32] 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.[33] 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.[34] 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 [35] and $80,383,000 for 2021.[36] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020 [37] and $22,843,000 for 2021.[38] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020 [39] and $44,800,000 for 2021.[40] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020 [41] and $30,687,000 for 2021.[42] 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.[43] 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.'' [44]

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,[45] new products and other

[31] 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.*

[32] 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.

[33] *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).

[34] 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.

[35] 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.*

[36] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[37] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[38] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[39] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[40] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[41] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[42] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[43] 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.*

[44] *See* PHLX Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.* The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

[45] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

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. . .'',[46] this is not the reality experienced by exchanges such as MIAX Pearl. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. The Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[47] However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act[48] in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[49] 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;[50] 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.[51]

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.[52] Recently, the

[46] *See supra* note 21, at note 1.

[47] *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).

[48] 15 U.S.C. 78f(b)(4).

[49] 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.

[50] 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.*

[51] 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.

[52] *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);

Continued

Commission Staff has not afforded the Exchange the same flexibility.[53] 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.[54] 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 via the 1Gb network.

The Exchange bifurcated the Exchange and MIAX 10Gb ULL networks on January 23, 2023. The Exchange issued an alert on August 12, 2022 publicly announcing the planned network change and implementation plan and dates to provide market participants adequate time to prepare.[55] 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[56] 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'').[57] 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.

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,[58] a Full Service MEO Port-Single,[59] and a Limited Service MEO Port.[60] For one monthly price, a Member may be allocated two (2) Full-Service MEO Ports of either type per matching engine[61] 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

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).

[53] 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).

[54] *See supra* note 8.

[55] *Id.*

[56] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[57] Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section (4)(c) of the Exchange's fee schedule. *See* Section (4)(c) of the Exchange's fee schedule *available at https://www.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.'').

[58] ''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.

[59] ''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.

[60] ''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.

[61] 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.

its Affiliates [62] on the Exchange, across all origin types, not including Excluded Contracts [63], as compared to the Total Consolidated Volume (''TCV''),[64] in all MIAX Pearl-listed options. The Exchange adopted a tier-based fee structure based upon the volume-based tiers detailed in the definition of ''Non-Transaction Fees Volume-Based Tiers'' described in the Definitions section of the Fee Schedule. The Exchange assesses these and other monthly Port fees to Members in each month the market participant is credentialed to use a Port in the production environment.

Full Service MEO Port (Bulk) Fee Changes

*Current Full Service MEO Port (Bulk) Fees.* The Exchange currently assesses all Members (Market Makers [65] and Electronic Exchange Members [66] (''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.[67] 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.[68]

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.[69] 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

[62] ''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.

[63] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[64] ''TCV'' means total consolidated volume calculated as the total national volume in those classes listed on MIAX Pearl for the month for which the fees apply, excluding consolidated volume executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in the option classes of the affected Matching Engine). *See* the Definitions Section of the Fee Schedule.

[65] 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.

[66] 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.

[67] *See* MIAX Fee Schedule, Section (5)(d)(ii) and MIAX Emerald Fee Schedule, Section 5)d)ii).

[68] *See id.*

[69] 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.

proposes to adopt footnote ''**'' following the Market Maker Full Service MEO Port (Bulk) fee table for these Monthly Full Service MEO Port (Bulk) tier levels. New proposed footnote ''**'' will provide that if the Market Maker's total monthly executed volume during the relevant month is less than 0.040% of the total monthly TCV for MIAX Pearl-listed option classes for that month, then the fee will be $6,000 instead of the fee otherwise applicable to such level.

The purpose of the alternative lower fee designated in proposed footnote ''**'' is to provide a lower fixed fee to those Market Makers who are willing to quote the entire Exchange market (or substantial amount of the Exchange market), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on the Exchange. The Exchange believes that, by offering lower fixed fees to Market Makers that execute less volume, the Exchange will retain and attract smaller-scale Market Makers, which are an integral component of the option marketplace, but have been decreasing in number in recent years, due to industry consolidation. Since these smaller-scale Market Makers utilize less Exchange capacity due to lower overall volume executed, the Exchange believes it is reasonable and equitable to offer such Market Makers a lower fixed fee. The Exchange notes that the Exchange's affiliates, MIAX and MIAX Emerald, also provide lower MIAX Express Interface (''MEI'') Port fees (the comparable ports on those exchanges) for Market Makers who quote the entire MIAX and MIAX Emerald markets (or substantial amount of those markets), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on MIAX or MIAX Emerald.[70] 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,[71] the Exchange offers Full Service MEO Ports as a package and provides Members with the option to receive up to two Full Service MEO Ports (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.[72] This fee had been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.[73] 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 |

[70] *See* MIAX Fee Schedule, Section 5(d)(ii), note ''*'' and MIAX Emerald Fee Schedule, Section 5(d)(ii), note ''■''.

[71] *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.

[72] *Id. See also infra* notes 97 to 104 and accompanying text.

[73] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

Full Service MEO Port (Single) Fee Changes

*Current Full Service MEO Port (Single) Fees.* The Exchange currently assesses all Members (Market Makers and EEMs) monthly Full Service MEO Port (Single) fees as follows:

(i) if its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $2,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $3,375; and

(iii) if its volume falls within the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $3,750.

*Proposed Full Service MEO Port (Single) Fees.* The Exchange proposes to amend the calculation and amount of Full Service MEO Port (Single) fees for EEMs and Market Makers. In particular, the Exchange proposes to move away from the above-described volume tier-based fee structure and instead charge all Members that utilize Full Service MEO Ports (Single) a flat monthly fee of $4,000. For this flat monthly fee, all Members will continue to be entitled to two (2) Full Service MEO Ports (Single) for each Matching Engine for the single monthly fee of $4,000.

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, MEO ports allow for a higher throughput and can handle much higher quote/order rates than FIX ports. Members that are Market Makers or high frequency trading firms utilize these ports (typically coupled with 10Gb ULL connectivity) because they transact in significantly higher amounts of messages being sent to and from the Exchange, versus FIX port users, who are traditionally customers sending only orders to the Exchange (typically coupled with 1Gb connectivity). The different types of ports cater to the different types of Exchange Memberships and different capabilities of the various Exchange Members. Certain Members need ports and connections that can handle using far more of the network's capacity for message throughput, risk protections, and the amount of information that the System has to assess. Those Members account for the vast majority of network capacity utilization and volume executed on the Exchange, as discussed throughout. For example, three (3) Members account for 64% of all 10Gb 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,[74] 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.[75] This concept is, therefore, not new or novel.

*Implementation.* The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[76] in general, and furthers the objectives of Section 6(b)(4) of the Act[77] 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[78] 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[79] and the Staff Guidance,[80] 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.''[81] 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.''[82] 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.''[83]

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 with legacy exchanges, which largely set fees prior to the Revised Review Process. The

[74] *See id.*

[75] *See* Exchange Fee Schedule, Section (5)(d)(ii); MIAX Emerald Fee Schedule, Section (5)(d)(ii).

[76] 15 U.S.C. 78f(b).

[77] 15 U.S.C. 78f(b)(4).

[78] 15 U.S.C. 78f(b)(5).

[79] *See supra* note 20.

[80] *See supra* note 21.

[81] *Id.*

[82] *Id.*

[83] *Id.*

much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, 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 [84] 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.[85] 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.[86]

Later in 2018, as the Exchange's market share increased,[87] the Exchange adopted nominal fees for Full Service MEO Ports.[88] The Exchange last increased the fees for its 10Gb ULL fiber connections from $9,300 to $10,000 per month on January 1, 2021.[89] 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'. . . .'' [90]

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.'' [91]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [92] 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.'' [93] Accordingly, ''the existence of significant competition provides a substantial basis for finding

[84] *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.*

[85] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR–PEARL–2017–10).

[86] *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).

[87] 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.*

[88] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[89] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

[90] *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)).

[91] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[92] *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.'').

[93] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [94] 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.'' [95]

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are competitive and reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that 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 and other offerings.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the 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) [96]. | 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:<br>$5,000—up to 10 classes or up to 20% of classes by volume.<br>$7,500 **—up to 40 classes or up to 35% of classes by volume.<br>$10,000 **—up to 100 classes or up to 50% of classes by volume.<br>$12,000 **—over 100 classes or over 50% of all classes by volume up to all classes (or $500 per port per matching engine).<br>** 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 [97] (equity options market share of 7.14% for the month of November 2022) [98]. | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port [99] | 1–5 ports: $1,500 per port.<br>6–20 ports: $1,000 per port.<br>21 or more ports: $500 per port. |
| NASDAQ ISE LLC (''ISE'') [100] (equity options market share of 6.19% for the month of November 2022) [101]. | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port | $1,100 per port. |
| NYSE American LLC (''NYSE American'') [102] (equity options market share of 6.93% for the month of November 2022) [103]. | 10Gb LX LCN connection | $22,000 per connection. |
| | Order/Quote Entry Port | 1–40 ports: $450 per port.<br>41 or more ports: $150 per port. |
| NASDAQ GEMX, LLC (''GEMX'') [104] (equity options market share of 1.93% for the month of November 2022) [105]. | 10Gb Ultra connection | $15,000 per connection. |
| | SQF Port | $1,250 per port. |

[94] *Id.*

[95] *See* Staff Guidance, *supra* note 21.

[96] *See supra* note 87.

[97] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[98] *See supra* note 87.

[99] Similar to the Exchange's MEO Ports, SQF ports are primarily utilized by Market Makers.

[100] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.

[101] *See supra* note 87.

[102] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[103] *See supra* note 87.

[104] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.

[105] *See supra* note 87.

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.[106] On the Exchange, this is not the case. The Exchange provides each Member or non-Member access, but does not require they connect to, all twelve (12) matching engines.

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market participants may choose to become a member of one or more options exchanges based on the market participant's assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, one Market Maker terminated their MIAX Pearl 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.[107] 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.[108]

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.[109] 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 Market Maker terminated their MIAX Pearl membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl. 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.[110] 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.[111]

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,[112] or

[106] *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.

[107] 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.''

[108] Service Bureaus may obtain ports on behalf of Members.

[109] *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.

[110] *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.*

[111] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[112] 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.

request sponsored access [113] through a member of an exchange in order to submit a trade directly to an options exchange.[114] 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).[115] 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.[116] 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. This is again evidenced by the fact that one MIAX Pearl Market Maker terminated their MIAX Pearl membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl. If a market participant chooses to become a Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Bifurcation of 10Gb ULL Connectivity and Related Fees

The Exchange began to operate on a single shared network with MIAX when MIAX Pearl commenced operations as a national securities exchange on February 7, 2017.[117] The Exchange and MIAX have operated on a single shared network to provide Members with a single convenient set of access points for both exchanges. Both the Exchange and MIAX offer two methods of connectivity, 1Gb and 10Gb ULL connections. The 1Gb connection services are supported by a discrete set of switches providing 1Gb access ports to Members. The 10Gb ULL connection services are supported by a second and mutually exclusive set of switches providing 10Gb ULL access ports to Members. Previously, both the 1Gb and 10Gb ULL shared extranet ports allow Members to use one connection to access both exchanges, namely their trading platforms, market data systems, test systems, and disaster recovery facilities.

The Exchange stresses that bifurcating the 10Gb ULL connectivity between the Exchange and MIAX was not designed with the objective to generate an overall increase in access fee revenue. Rather, the proposed change was necessitated by 10Gb ULL connectivity experiencing a significant decrease in port availability mostly driven by connectivity demands of latency sensitive Members that seek to maintain multiple 10Gb ULL connections on every switch in the network. Operating two separate national securities exchanges on a single shared network provided certain benefits, such as streamlined connectivity to multiple exchanges, and simplified exchange infrastructure. However, doing so was no longer sustainable due to ever-increasing capacity constraints and current system limitations. The network is not an unlimited resource. As described more fully in the proposal to bifurcate the 10Gb ULL network,[118] the connectivity needs of Members and market participants has increased every year since the launch of MIAX Pearl and the operations of the Exchange and MIAX on a single shared 10Gb ULL network is no longer feasible. This required constant System expansion to meet Member demand for additional ports and 10Gb ULL connections has resulted in limited available System headroom, which eventually became operationally problematic for both the Exchange and its customers.

As stated above, the shared network is not an unlimited resource and its expansion was constrained by MIAX's and MIAX Pearl's ability to provide fair and equitable access to all market participants of both markets. Due to the ever-increasing connectivity demands, the Exchange found it necessary to bifurcate 10Gb ULL connectivity to the Exchange's and MIAX's Systems and networks to be able to continue to meet

[113] 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.

[114] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[115] *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).

[116] 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.

[117] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (establishing MIAX Pearl Fee Schedule and establishing that the MENI can also be configured to provide network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facility of the MIAX Pearl's affiliate, MIAX, via a single, shared connection).

[118] *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).

ongoing and future 10Gb ULL connectivity and access demands.[119]

Unlike the switches that provide 1Gb connectivity, the availability for additional 10Gb ULL connections on each switch had significantly decreased. This was mostly driven by the connectivity demands of latency sensitive Members (*e.g.,* Market Makers and liquidity removers) that sought to maintain connectivity across multiple 10Gb ULL switches. Based on the Exchange's experience, such Members did not typically use a shared 10Gb ULL connection to reach both the Exchange and MIAX due to related latency concerns. Instead, those Members maintain dedicated separate 10Gb ULL connections for the Exchange and separate dedicated 10Gb ULL connections for MIAX. This resulted in a much higher 10Gb ULL usage per switch by those Members on the shared 10Gb ULL network than would otherwise be needed if the Exchange and MIAX had their own dedicated 10Gb ULL networks. Separation of the Exchange and MIAX 10Gb ULL networks naturally lends itself to reduced 10Gb ULL port consumption on each switch and, therefore, increased 10Gb ULL port availability for current Members and new Members.

Prior to bifurcating the 10Gb ULL network, the Exchange and MIAX continued to add switches to meet ongoing demand for 10Gb ULL connectivity. That was no longer sustainable because simply adding additional switches to expand the current shared 10Gb ULL network would not adequately alleviate the issue of limited available port connectivity. While it would have resulted in a gain in overall port availability, the existing switches on the shared 10Gb ULL network in use would have continued to suffer from lack of port headroom given many latency sensitive Members' needs for a presence on each switch to reach both the Exchange and MIAX. This was because those latency sensitive Members sought to have a presence on each switch to maximize the probability of experiencing the best network performance. Those Members routinely decide to rebalance orders and/or messages over their various connections to ensure each connection is operating with maximum efficiency. Simply adding switches to the extranet would not have resolved the port availability needs on the shared 10Gb ULL network since many of the latency sensitive Members were unwilling to relocate their connections to a new switch due to the potential detrimental performance impact. As such, the impact of adding new switches and rebalancing ports would not have been effective or responsive to customer needs. The Exchange has found that ongoing and continued rebalancing once additional switches are added has had, and would have continued to have had, a diminishing return on increasing available 10Gb ULL connectivity.

Based on its experience and expertise, the Exchange found the most practical way to increase connectivity availability on its switches was to bifurcate the existing 10Gb ULL networks for the Exchange and MIAX by migrating the exchanges' connections from the shared network onto their own set of switches. Such changes accordingly necessitated a review of the Exchange's previous 10Gb ULL connectivity fees and related costs. The proposed fees necessary to allow the Exchange to cover ongoing costs related to providing and maintaining such connectivity, described more fully below. The ever increasing connectivity demands that necessitated this change further support that the proposed fees are reasonable because this demand reflects that Members and non-Members believe they are getting value from the 10Gb ULL connections they purchase.

The Exchange announced on August 12, 2022 the planned network change and January 23, 2023 implementation date to provide market participants adequate time to prepare.[120] Since August 12, 2022, the Exchange has worked with current 10Gb ULL subscribers to address their connectivity needs ahead of the January 23, 2023 date. Based on those interactions and subscriber feedback, the Exchange experienced a minimal net increase of 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 optimizing its operations and deploying innovative technology to the benefit of market participants if it believes the Commission would later prevent that exchange from covering its costs and monetizing its operational enhancements, thus adversely impacting competition. Also, as noted above, the economic consequences of not being able to better establish fee parity with other exchanges for non-transaction fees hampers the Exchange's ability to compete on transaction fees.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[121] and Rule 19b–4 thereunder,[122] with respect to the types of information SROs should provide when filing fee changes, and Section 6(b) of the Act,[123] which requires, among other things, that exchange fees be reasonable and equitably allocated,[124] not designed to permit unfair discrimination,[125] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[126] This rule change proposal addresses those requirements, and the analysis and data

[119] Currently, the Exchange maintains sufficient headroom to meet ongoing and future requests for 1Gb connectivity. Therefore, the Exchange did not propose to alter 1Gb connectivity and continues to provide 1Gb connectivity over a shared network.

[120] *See supra* note 8.

[121] 15 U.S.C. 78s(b)(1).

[122] 17 CFR 240.19b–4.

[123] 15 U.S.C. 78f(b).

[124] 15 U.S.C. 78f(b)(4).

[125] 15 U.S.C. 78f(b)(5).

[126] 15 U.S.C. 78f(b)(8).

in each of the sections that follow are designed to clearly and comprehensively show how they are met.[127] The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at $11,567,509 (or approximately $963,959 per month, rounded to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Full Service MEO Ports at $1,644,132 (or approximately $137,012 per month, rounded to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its Users (both Members and non-Members [128]) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of $13,500 per month for each physical 10Gb ULL connection and to remove language providing for a shared 10Gb ULL network between the Exchange and MIAX. The Exchange also proposes to modify its Fee Schedule to charge tiered rates for Full Service MEO Ports (Bulk) depending on the number of classes assigned or the percentage of national ADV, which is in line with how the Exchange's affiliates, MIAX and MIAX Emerald, assess fees for their comparable MEI Ports.

In 2019, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[129] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers'').

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets. That total cost was then divided among the Exchange and each of its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.,* price time or pro-rata), which may impact message traffic, individual system architectures that impact platform size,[130] storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time. This will result in different allocation percentages among the Exchange and its affiliated markets. Meanwhile this allocation methodology ensures that no portion of any cost was allocated twice or double-counted between the Exchange and its affiliated markets.

Next, the Exchange adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange pursuant to the above methodology should be allocated within the Exchange 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%). This next level of the allocation methodology at the individual exchange level also took into account a number of factors similar to those set forth under the first allocation methodology described above, to determine the appropriate allocation to connectivity or market data versus what is to be allocated to providing other services. The allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

[127] *See* Staff Guidance, *supra* note 21.

[128] 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.

[129] 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.

[130] For example, the Exchange maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, MIAX maintains 24 matching engines and MIAX Emerald maintains 12 matching engines.

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).

| Cost drivers | Annual cost [131] | Monthly cost [132] | % 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 and its affiliated markets have 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. Specifically, twice a year and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine that market's individual Human Resources expense. Then, again managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

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

[131] The Annual Cost includes figures rounded to the nearest dollar.

[132] 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.

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 cost described above.[133] 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.[134]

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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

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.[135] 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

[133] This allocation may differ from MIAX Pearl Equities due to the different amount of proprietary market data feeds the Exchange purchases for its options and equities trading platforms. For options, the Exchange primarily relies on data purchased from OPRA. For equities, the Exchange does not solely rely on data purchased from the consolidated tape plans (*e.g.,* Nasdaq UTP, CTA, and CQ plans), but rather purchases multiple proprietary market data feeds from other equities exchanges. *See, e.g.,* Exchange Rule 2613 (setting forth the data feeds the Exchange subscribes to for each equities exchange and trading center).

[134] This expense may be greater than the Exchange's affiliated markets, specifically MIAX and MIAX Emerald, because, unlike MIAX and MIAX Emerald, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX and MIAX Emerald.

[135] 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.

overall Human Resources cost to offering Full Service MEO Ports).

| Cost drivers | Annual cost [136] | Monthly cost [137] | % 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). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing 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 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.[138] 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. The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall

[136] *See supra* note 131 (describing rounding of Annual Costs).

[137] *See supra* note 132 (describing rounding of Monthly Costs based on Annual Costs).

[138] This allocation may differ from MIAX Pearl Equities due to the different amount of proprietary market data feeds the Exchange purchases for its options and equities trading platforms. For options, the Exchange primarily relies on data purchased from OPRA. For equities, the Exchange does not solely rely on data purchased from the consolidated tape plans (*e.g.,* Nasdaq UTP, CTA, and CQ plans), but rather purchases multiple proprietary market data feeds from other equities exchanges. *See, e.g.,* Exchange Rule 2613 (setting forth the data feeds the Exchange subscribes to for each equities exchange and trading center). The Exchange separately notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

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 based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42.9%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 12.3% to Full Service MEO Ports and the remaining 44.8% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 16.9% for 10Gb ULL connectivity or 17.3% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (6.0% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Full Service MEO Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Full Service MEO Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 26.9% of its personnel costs to providing 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 equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 62.1% of the Exchange's overall depreciation and amortization expense to connectivity services (58.2% attributed to 10Gb ULL physical connections and 3.9% to Full Service MEO Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 37.9%) toward the cost of providing transaction services, membership services, other port services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Full Service MEO Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. It is possible however that 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 [139]

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 an estimated profit margin of 34% when compared to the cost of providing 10Gb ULL connectivity services, which will decrease over time.[140] 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, which will decrease over time.[141] 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 that deviates from that of other exchanges 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.[142] 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 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. 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.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (''IEX'') and MEMX,

[139] 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.

[140] Assuming the U.S. inflation rate continues at its current rate, the projected profit margins in this proposal will decrease and may reach single to negative digit levels in approximately 18 to 24 months. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited February 15, 2023).

[141] *Id.*

[142] 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.*

which are currently each operating only one exchange, in their recent non-transaction fee filings can allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies associated with shared costs across multiple platforms. The Exchange and its affiliated markets must share a single cost, which results in cost efficiencies that cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or similar to competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Commission Staff must consider whether the proposed fee level is comparable to, or on parity with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. If it is the case that the Commission Staff is making determinations as to appropriate profit margins, the Exchange believes that Staff should be clear to all market participants as to what they determine is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, 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.[143] 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.[144] 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 Exchange Act.[145] 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

[143] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[144] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[145] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

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,[146] 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.[147] Members will continue to receive two (2) Full Service MEO Ports to each matching engine to which they are connected for the single flat monthly fee. Assuming a Member connects to all twelve (12) matching engines during the month, and achieves the highest Tier for that month, with two Full Service MEO Ports (Bulk) per matching engine, this would result in a cost of $500 per Full Service MEO Port ($12,000 divided by 24).

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Full Service MEO Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2017 [148] 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.

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 Market Maker terminated their membership on January 1, 2023 as a direct result of the proposed fee changes.[149] 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

[146] *See supra* notes 97 to 104 and accompanying text.

[147] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[148] *See supra* note 142.

[149] The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR–IEX–2022–02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See, e.g., supra* note 52. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

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.[150] 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.[151] 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.'' [152] 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.[153]

The proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[154] 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.[155] 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.'' [156] 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.[157]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[158] 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

[150] *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.

[151] *Id.* at 71676.

[152] *Id.*

[153] *Id.* at 71676.

[154] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *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.[159]

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.[160] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[161] 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.[162] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[163] BZX,[164] and Cboe EDGA Exchange, Inc.[165]

The Cboe fee proposals described herein were filed subsequent to the D.C. Circuit decision in *Susquehanna Int'l Grp., LLC* v. *SEC,* 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as this proposal. In summary, the Exchange requests the Commission apply the same standard of review to this proposal which was applied to the various Cboe and Cboe affiliated markets' filings with respect to non-transaction fees. If the Commission were to apply a different standard of review to this proposal than it applied to other exchange fee filings it would create a burden on competition such that it would impair the Exchange's ability to make necessary technology driven changes, such as bifurcating its 10Gb ULL network, because it would be unable to monetize or recoup costs related to that change and compete with larger, non-legacy exchanges.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange received one comment letter on the Initial Proposal.[166] In its letter, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. To the extent the sole commenter has attempted to raise new issues in its letter, the Exchange believes those issues are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filing. Among other things, the commenter is requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[167] and Rule 19b–4(f)(2) [168] 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–2023–05 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2023–05. 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

[159] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011).

[160] *Id.* at 18426.

[161] *Id.*

[162] *Id.*

[163] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[164] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[165] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeBZX–2022–021).

[166] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP to Vanessa Countryman, Secretary, Commission, dated February 7, 2023.

[167] 15 U.S.C. 78s(b)(3)(A)(ii).

[168] 17 CFR 240.19b–4(f)(2).

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–2023–05 and should be submitted on or before April 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[169]

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–05129 Filed 3–13–23; 8:45 am]

**BILLING CODE 8011–01–P**

[169] 17 CFR 200.30–3(a)(12).

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #17804 and #17805; CALIFORNIA Disaster Number CA–00374]**

### Presidential Declaration of a Major Disaster for Public Assistance Only for the Bear River Band of the Rohnerville Rancheria

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the Bear River Band of the Rohnerville Rancheria (FEMA–4692–DR), dated 03/08/2023. Incident: Earthquake. Incident Period: 12/20/2022 through 01/01/2023.

**DATES:** Issued on 03/08/2023.

*Physical Loan Application Deadline Date:* 05/08/2023.

*Economic Injury (EIDL) Loan Application Deadline Date:* 12/08/2023.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 03/08/2023, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

*Primary Area:* Bear River Band of the Rohnerville Rancheria.

The Interest Rates are:

| | Percent |
|---|---|
| *For Physical Damage:* | |
| Non-Profit Organizations with Credit Available Elsewhere | 2.375 |
| Non-Profit Organizations without Credit Available Elsewhere | 2.375 |
| *For Economic Injury:* | |
| Non-Profit Organizations without Credit Available Elsewhere | 2.375 |

The number assigned to this disaster for physical damage is 17804 2 and for economic injury is 17805 0.

(Catalog of Federal Domestic Assistance Number 59008)

**Rafaela Monchek,**

*Acting Associate Administrator, Office of Disaster Recovery & Resilience.*

[FR Doc. 2023–05214 Filed 3–13–23; 8:45 am]

**BILLING CODE 8026–09–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #17806 and #17807; TENNESSEE Disaster Number TN–00142]**

### Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Tennessee

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notice.

**SUMMARY:** This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Tennessee (FEMA–4691–DR), dated 03/08/2023. Incident: Severe Winter Storm. Incident Period: 12/22/2022 through 12/27/2022.

**DATES:** Issued on 03/08/2023.

*Physical Loan Application Deadline Date:* 05/08/2023.

*Economic Injury (EIDL) Loan Application Deadline Date:* 12/08/2023.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that as a result of the President's major disaster declaration on 03/08/2023, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

*Primary Counties:* Cocke, Coffee, Davidson, Greene, Henderson, Knox, Maury, Perry, Putnam, Shelby, Washington.

The Interest Rates are:

| | Percent |
|---|---|
| *For Physical Damage:* | |
| Non-Profit Organizations with Credit Available Elsewhere | 2.375 |
| Non-Profit Organizations without Credit Available Elsewhere | 2.375 |
| *For Economic Injury:* | |
| Non-Profit Organizations without Credit Available Elsewhere | 2.375 |

The number assigned to this disaster for physical damage is 17806 B and for economic injury is 17807 0.

(Catalog of Federal Domestic Assistance Number 59008)

**Rafaela Monchek,**

*Acting Associate Administrator, Office of Disaster Recovery & Resilience.*

[FR Doc. 2023–05212 Filed 3–13–23; 8:45 am]

**BILLING CODE 8026–09–P**

## SOCIAL SECURITY ADMINISTRATION

**[Docket No. SSA–2022–0054]**

### Privacy Act of 1974; Matching Program

**AGENCY:** Social Security Administration (SSA).

**ACTION:** Notice of a new matching program.

**SUMMARY:** In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the United States Department of Health and Human Services, Office of Child Support Enforcement (OCSE). Under this

matching program, OCSE will disclose quarterly wage (QW) information to SSA to establish or verify eligibility, continuing entitlement, or payment amounts, or all of the above, of individuals under the title II Disability Insurance (DI) program of the Social Security Act (Act).

**DATES:** The deadline to submit comments on the proposed matching program is April 13, 2023. The matching program will be applicable on June 23, 2023, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

**ADDRESSES:** You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2022–0054 so that we may associate your comments with the correct notice. Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at *https://www.regulations.gov.* Use the *Search* function to find docket number SSA–2022–0054 and then submit your comments. The system will issue you a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each submission manually. It may take up to a week for your comments to be viewable.

2. *Fax:* Fax comments to (833) 410–1631.

3. *Mail:* Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov.* Comments are also available for public viewing on the Federal eRulemaking portal at *https://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

**FOR FURTHER INFORMATION CONTACT:** Interested parties may submit general questions about the matching program to Cynthia Scott, Division Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–1943, or send an email to *Cynthia.Scott@ssa.gov.*

**SUPPLEMENTARY INFORMATION:** None.

**Matthew Ramsey,**

*Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.*

## Participating Agencies

SSA and OCSE.

## Authority for Conducting the Matching Program

This matching agreement between OCSE and SSA is executed pursuant to the Privacy Act of 1974, (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988, and otherwise; and the Office of Management and Budget (OMB) Final Guidance interpreting those Acts.

Section 224(h)(1) of the Act provides that the head of any Federal agency shall provide information within its possession as the Commissioner of Social Security may require for purposes of making a timely determination of the amount of the reduction, if any, required by section 224 in benefits payable under title II of the Act. 42 U.S.C. 424a(h). Section 453(j)(4) authorizes OCSE to provide the Commissioner of Social Security with all information in the National Directory of New Hires (NDNH). 42 U.S.C. 653(j)(4). Disclosures under this agreement shall be made in accordance with 5 U.S.C. 552a(b)(3), under a routine use published in a systems of records notice as required by the Privacy Act, and in compliance with the matching procedures in 5 U.S.C. 552a(o), (p), and (r), which describes matching agreements, verification by agencies of information, the opportunity for individuals to contest agency findings, and the obligations of agencies to report proposals to establish or change matching programs to Congress and OMB.

## Purpose(s)

This computer matching agreement, hereinafter ''agreement,'' governs a matching program between OCSE and SSA. The agreement covers the QW batch match for the DI program. This agreement also governs the use, treatment, and safeguarding of the QW information exchanged. OCSE is the ''source agency'' and SSA is the ''recipient agency,'' as defined by the Privacy Act. 5 U.S.C. 552a(a)(9) and (11).

The Privacy Act, as amended by the Computer Matching and Privacy Protection Act of 1988, provides that no record contained in a system of records may be disclosed for use in a computer matching program, except pursuant to a written agreement containing specified provisions. 5 U.S.C. 552a(o). SSA and OCSE are executing this agreement to comply with the Privacy Act of 1974, as amended, and the regulations and guidance promulgated thereunder. SSA and OCSE have entered into agreements and renewals for this match since November 5, 2015. See appendix A.

SSA will use the QW information to establish or verify eligibility, continuing entitlement, or payment amounts, or all of the above, of individuals under the DI program.

The SSA component responsible for this agreement and its contents is the Office of Privacy and Disclosure. The responsible component for OCSE is the Division of Federal Systems. This agreement is applicable to personnel, facilities, and information systems of SSA and OCSE involved in the processing and storage of NDNH information. Personnel are defined as employees, contractors, or agents of SSA and OCSE.

## Categories of Individuals

The individuals whose information is involved in this matching program are individuals who are applicants or recipients of title II benefits.

## Categories of Records

SSA will provide electronically to OCSE the following data elements in the finder file:

- Individual's Social Security number (SSN)
- Name (first, middle, last)

OCSE will disclose electronically to SSA the following data elements from the NDNH in the QW file:

- QW record identifier
- For employees:
  (1) Name (first, middle, last)
  (2) SSN
  (3) Verification request code
  (4) Processed date
  (5) Non-verifiable indicator
  (6) Wage amount
  (7) Reporting period
- For employers of individuals in the QW file of the NDNH:
  (1) Name (first, middle, last)
  (2) Employer identification number
  (3) Address(es)
- Transmitter agency code
- Transmitter state code
- State or agency name

## System(s) of Records

SSA's relevant systems of records (SORs) are the Master Beneficiary

Record (MBR), 60–0090, last fully published on January 11, 2006 at 71 **Federal Register** (FR) 1826, amended on December 10, 2007 at 72 FR 69723, on July 5, 2013 at 78 FR 40542, on July 3, 2018 at 83 FR 31250–31251, and last amended on November 1, 2018 at 83 FR 54969; the Completed Determination Record (CDR)-Continuing Disability Determinations (CDD) file, 60–0050, last fully published on January 11, 2006 at 71 FR 1813, amended on December 10, 2007 at 72 FR 69723, on November 1, 2018 at 83 FR 54969, and last amended on April 26, 2019 at 84 FR 17907.

OCSE will match SSA information in the MBR and CDR–CDD against the QW information maintained in the NDNH. The NDNH contains new hire, QW, and unemployment insurance information furnished by state and federal agencies and is maintained in the SOR ''OCSE National Directory of New Hires,'' System No. 09–80–0381, published in full at 87 FR 3553 (January 24, 2022). The disclosure of NDNH information by OCSE to SSA constitutes a ''routine use,'' as defined by the Privacy Act. 5 U.S.C. 552a(b)(3). Routine use (9) of the SOR authorizes the disclosure of NDNH records to SSA. 87 FR 3553, 3555 (January 24, 2022).

[FR Doc. 2023–05156 Filed 3–13–23; 8:45 am]

BILLING CODE 4191–02–P

## DEPARTMENT OF STATE

**[Public Notice: 12004]**

### 30-Day Notice of Proposed Information Collection: Application for A, G, or NATO Visa

**ACTION:** Notice of request for public comment and submission to OMB of proposed collection of information.

**SUMMARY:** The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to announce the initiation of a 30-day period for public comment.

**DATES:** Submit comments up to April 13, 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:** Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Andrea Lage, Acting Regulatory Coordinator, who may be reached at *PRA_BurdenComments@state.gov* or at (202) 485–7586.

**SUPPLEMENTARY INFORMATION:**

- *Title of Information Collection:* Application for A, G, or NATO Visa.
- *OMB Control Number:* 1405–0100.
- *Type of Request:* Renewal of a currently approved collection.
- *Originating Office:* Bureau of Consular Affairs, Visa Services (CA/VO).
- *Form Number:* DS–1648.
- *Respondents:* Foreign Government Officials.
- *Estimated Number of Respondents:* 30,000.
- *Estimated Number of Responses:* 30,000.
- *Average Time per Response:* 15 minutes.
- *Total Estimated Burden Time:* 7,500 hours.
- *Frequency:* Once per application for a A, G, or NATO Visa.
- *Obligation to Respond:* Required to Obtain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

#### Abstract of Proposed Collection

The Department of State uses Form DS–1648 to elicit information from applicants who are applying for an A, G, or NATO visa in the United States, excluding applicants for an A–3, G–5 or NATO–7 visa. Sections 101(a)(15)(A) and (G) of the Immigration and Nationality Act (INA), and Department regulations at 22 CFR 41.25, 41.26, and 41.27, describe the criteria for these nonimmigrant visa classifications.

#### Methodology

The DS–1648 will be submitted electronically to the Department. The applicant will be instructed to print a confirmation page containing a bar coded record locator, which will be scanned at the time of processing.

**Julia M. Stufft,**

*Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.*

[FR Doc. 2023–05116 Filed 3–13–23; 8:45 am]

BILLING CODE 4710–06–P

## DEPARTMENT OF STATE

**[Public Notice: 12005]**

### Notice of Public Meeting in Preparation for International Maritime Organization PPR 10 Meeting

The Department of State will conduct a public meeting at 1 p.m. on Tuesday, April 11, 2023, both in-person at Coast Guard Headquarters in Washington, DC, and via Microsoft Teams. The primary purpose of the meeting is to prepare for the 10th session of the International Maritime Organization's (IMO) Pollution Prevention and Response Sub-Committee (PPR 10) to be held in London, United Kingdom from April 24 to 28, 2023.

Members of the public may participate up to the capacity of the Microsoft Teams line or up to the seating capacity of the room if attending in-person. The meeting location will be the United States Coast Guard Headquarters, Ray Evans Conference Room: 6I10–01–A, and the Microsoft Teams information is Conference Call-in number = +1 410–874–6742; Phone Conference ID = 801252414#. To RSVP, participants should contact the meeting coordinator, Ms. Nicole M. Schindler, by email at *Nicole.M.Schindler@uscg.mil.* Ms. Schindler will provide access information for in-person and virtual attendance.

The agenda items to be considered at this meeting mirror those to be considered at PPR 10, and include:

- Adoption of the agenda
- Decisions of other IMO bodies
- Safety and pollution hazards of chemicals and preparation of consequential amendments to the IBC Code

- Development of an operational guide on the response to spills of Hazardous and Noxious Substances (HNS)
- Review of the 2011 Guidelines for the control and management of ships' biofouling to minimize the transfer of invasive aquatic species (resolution MEPC.207(62))
- Reduction of the impact on the Arctic of Black Carbon emissions from international shipping
- Standards for shipboard gasification of waste systems and associated amendments to regulation 16 of MARPOL Annex VI
- Development of amendments to MARPOL Annex VI and the $NO_X$ Technical Code on the use of multiple engine operational profiles for a marine diesel engine
- Revision of regulation 13.2.2 of MARPOL Annex VI to clarify that a marine diesel engine replacing a boiler shall be considered a replacement engine
- Development of measures to reduce risks of use and carriage of heavy fuel oil as fuel by ships in Arctic waters
- Review of the IBTS Guidelines and amendments to the IOPP Certificate and Oil Record Book
- Revision of MARPOL Annex IV and associated guidelines
- Follow-up work emanating from the Action Plan to address marine plastic litter from ships
- Unified interpretation of provisions of IMO environment-related conventions
- Biennial agenda and provisional agenda for PPR 11
- Election of Chair and Vice-Chair for 2024
- Any other business
- Report to the Marine Environment Protection Committee

*Please note:* The IMO may, on short notice, adjust the PPR 10 agenda to accommodate the constraints associated with the meeting format. Any changes to the agenda will be reported to those who RSVP.

Those who plan to participate should contact the meeting coordinator, Ms. Nicole M. Schindler, by email at *Nicole.M.Schindler@uscg.mil,* by phone at (202) 372–1403, or in writing at United States Coast Guard (CG–OES), ATTN: Ms. Nicole M. Schindler, 2703 Martin Luther King Jr. Ave. SE, Stop 7509, Washington, DC 20593–7509 not later than April 5, 2023. Please note, that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Douglas A. Munro Coast Guard Headquarters Building at St. Elizabeth's. This building is accessible by taxi, public transportation, and privately owned conveyance (upon request). Additionally, members of the public needing reasonable accommodation should advise the meeting coordinator not later than April 5, 2023. Requests made after that date will be considered but might not be possible to fulfill.

Additional information regarding this and other IMO public meetings may be found at: *https://www.dco.uscg.mil/IMO.*

(Authority: 22 U.S.C. 2656 and 5 U.S.C. 552)

**Emily A. Rose,**

*Coast Guard Liaison Officer, Office of Ocean and Polar Affairs, Department of State.*

[FR Doc. 2023–05205 Filed 3–13–23; 8:45 am]

**BILLING CODE 4710–09–P**

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### Reallocation of Unused Fiscal Year 2023 WTO Tariff-Rate Quota Volume for Raw Cane Sugar

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Notice.

**SUMMARY:** The Office of the United States Trade Representative (USTR) is providing notice of country-by-country reallocations of the fiscal year (FY) 2023 in-quota quantity of the World Trade Organization (WTO) tariff-rate quota (TRQ) for imported raw cane sugar.

**DATES:** This notice is applicable on March 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** Erin Nicholson, Office of Agricultural Affairs, at 202–395–9419 or *erin.h.nicholson@ustr.eop.gov.*

**SUPPLEMENTARY INFORMATION:** Pursuant to Additional U.S. Note 5 to chapter 17 of the Harmonized Tariff Schedule of the United States (HTSUS), the United States maintains WTO TRQs for imports of raw cane and refined sugar. Section 404(d)(3) of the Uruguay Round Agreements Act (19 U.S.C. 3601(d)(3)) authorizes the President to allocate the in-quota quantity of a TRQ for any agricultural product among supplying countries or customs areas. The President delegated this authority to the U.S. Trade Representative under Presidential Proclamation 6763 (60 FR 1007).

On July 11, 2022, the Secretary of Agriculture established the FY 2023 TRQ for imported raw cane sugar at the minimum quantity to which the United States is committed pursuant to the WTO Uruguay Round Agreements (1,117,195 metric tons raw value (MTRV) conversion factor: 1 metric ton = 1.10231125 short tons). On July 21, 2022, USTR provided notice of country-by-country allocations of the FY 2023 in-quota quantity of the WTO TRQ for imported raw cane sugar. *See* 87 FR 43593. Based on consultation with quota holders, the U.S. Trade Representative has determined to reallocate 224,240 MTRV of the original TRQ quantity from those countries that have stated they do not plan to fill their FY 2023 allocated raw cane sugar quantities. The U.S. Trade Representative is allocating the 224,240 MTRV to the following countries in the amounts specified below:

| Country | FY 2023 raw sugar unused reallocation (MTRV) |
|---|---|
| Argentina | 12,682 |
| Australia | 24,479 |
| Barbados | 500 |
| Belize | 3,244 |
| Bolivia | 2,360 |
| Brazil | 42,765 |
| Colombia | 7,078 |
| Costa Rica | 4,424 |
| Dominican Republic | 40,000 |
| Ecuador | 3,244 |
| El Salvador | 7,668 |
| Eswatini (Swaziland) | 4,719 |
| Fiji | 2,654 |
| Guatemala | 14,157 |
| Guyana | 3,539 |
| Honduras | 2,949 |
| India | 2,360 |
| Malawi | 2,949 |
| Mauritius | 3,539 |
| Mozambique | 3,834 |
| Panama | 8,553 |
| Peru | 12,092 |
| South Africa | 6,783 |
| Thailand | 4,129 |
| Zimbabwe | 3,539 |

The allocations of the raw cane sugar WTO TRQ to countries that are net importers of sugar are conditioned on receipt of the appropriate verifications of origin. Certificates for quota eligibility must accompany imports from any country for which an allocation has been provided.

**Douglas McKalip,**

*Chief Agricultural Negotiator, Office of the United States Trade Representative.*

[FR Doc. 2023–05164 Filed 3–13–23; 8:45 am]

**BILLING CODE 3290–F3–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request for Form 1098

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning mortgage interest and reporting requirements for recipients of points paid on residential mortgages (Form 1098, *Mortgage Interest Statement*).

**DATES:** Written comments should be received on or before May 15, 2023 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Andrés Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Please include, ''OMB Number: 1545–1380—Public Comment Request Notice'' in the Subject line.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to Ronald J. Durbala, at (202) 317–5746, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *RJoseph.Durbala@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Reporting Requirements for Recipients of Points Paid on Residential Mortgages and Mortgage Interest Statement.

*OMB Number:* 1545–1380.

*Form Number:* Form 1098.

*Regulation Project Number:* TD 8191 as amended by TD 8507, TD 8571, TD 8734, and TD 9849.

*Abstract:* Section 6050H provides that an information return must be made by any person who is engaged in a trade or business and who, during that trade or business, receives from any individual $600 or more of interest on any mortgage in a calendar year. Any person required to make an information return under section 6050H also must furnish a statement to the payor of record on or before January 31 of the year following the calendar year in which the interest was received. Form 1098, *Mortgage Interest Statement,* is used to report mortgage interest (including points) received during the year.

*Current Actions:* There is an increase in the estimated number of respondents previously approved by OMB. IRS has increased the number of respondents by 16,708,000 based on the projected number of filers from IRS Publication 6961. This update to the agency estimate has increased the burden by 4,187,000 hours.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 97,358,960.

*Estimated Time per Respondent:* 25 minutes.

*Estimated Total Annual Burden Hours:* 24,318,656.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Desired Focus of Comments:* The Internal Revenue Service (IRS) 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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: March 9, 2023.

**Ronald J. Durbala,**

*IRS Tax Analyst.*

[FR Doc. 2023–05182 Filed 3–13–23; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Agency Information Collection Activities; Proposed Collection; Comment Request; New Markets Tax Credit Program Community Development Entity (CDE) Certification Application

**AGENCY:** Community Development Financial Institutions Fund, U.S. Department of the Treasury.

**ACTION:** Notice and request for public comment.

**SUMMARY:** The Community Development Financial Institutions Fund (CDFI Fund), U.S. Department of the Treasury, is soliciting comments concerning the New Markets Tax Credit Program (NMTC Program) Community Development Entity (CDE) Certification Application as required by the Paperwork Reduction Act of 1995 (PRA).

**DATES:** Written comments must be received on or before May 15, 2023 to be assured of consideration.

**ADDRESSES:** Submit your comments via email to Michelle Dickens, Office of Certification, Policy and Evaluation (OCPE) Program Manager, CDFI Fund, at *ccme@cdfi.treas.gov.*

**FOR FURTHER INFORMATION CONTACT:** Michelle Dickens, OCPE Program Manager, CDFI Fund, U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220 or (202) 653–0335 (not a toll free number). Other information regarding the CDFI Fund and its programs may be obtained through the CDFI Fund's website at *http://www.cdfifund.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* New Markets Tax Credit Program Community Development Entity (CDE) Certification Application.

*OMB Control Number:* 1559–0014.

*Abstract:* Title I, subtitle C, section 121 of the Community Renewal Tax Relief Act of 2000 (the Act), as enacted in the Consolidated Appropriations Act, 2001 (Pub. L. 106–554, December 21, 2000), amended the Internal Revenue Code (IRC) by adding IRC 45D and created the NMTC Program. The Department of the Treasury, through the

CDFI Fund, administers the NMTC Program, which provides an incentive to investors in the form of tax credits over seven years, expected to stimulate the provision of private investment capital that, in turn, will facilitate economic and community development in low-income communities. In order to qualify for an allocation of tax credits through the NMTC Program, an entity must be certified as a qualified CDE and submit an allocation application to the CDFI Fund. Nonprofit entities and for-profit entities may be certified as CDEs by the CDFI Fund. In order to be certified as a CDE, an entity must be a domestic corporation or partnership, that: (1) has a primary mission of serving or providing investment capital for low-income communities or low-income persons; and (2) maintains accountability to residents of low-income communities through their representation on any governing or advisory board of the entity.

*Current Actions:* Renewal of existing information collection.

*Type of Review:* Regular review.

*Affected Public:* CDEs and entities seeking CDE certification, including business or other for-profit institutions, nonprofit entities, and State, local and Tribal entities.

*Estimated Number of Respondents:* 300.

*Estimated Annual Time per Respondent:* 4 hours.

*Estimated Total Annual Burden Hours:* 1,200 hours.

*Requests for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record and may be published on the CDFI Fund website at *http://www.cdfifund.gov.* Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the CDFI Fund, including whether the information shall have practical utility; (b) the accuracy of the CDFI Fund'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 to provide information.

*Authority:* 44 U.S.C. 3501 *et seq.*

**Spencer W. Clark,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2023–05089 Filed 3–13–23; 8:45 am]

**BILLING CODE 4810–70–P**

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## DEPARTMENT OF THE TREASURY

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Return of Excise Taxes Related to Employee Benefit Plans and Application for Automatic Extension of Time To File an Exempt Organization Return

**AGENCY:** Departmental Offices, U.S. Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** The Internal Revenue Service (IRS), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning the Return of Excise Taxes Related to Employee Benefit Plans and Application for Automatic Extension of Time to File an Exempt Organization Return.

**DATES:** Comments should be received on or before April 13, 2023 to be assured of consideration.

**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. Copies of the submissions may be obtained from Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

**SUPPLEMENTARY INFORMATION:**

**Internal Revenue Service (IRS)**

*Title:* Return of Excise Taxes Related to Employee Benefit Plans and Application for Automatic Extension of Time to File an Exempt Organization Return.

*OMB Control Number:* 1545–0575.

*Form Number:* 5330 and 8868.

*Abstract:* Internal Revenue Code sections 4965, 4971, 4972, 4973(a)(3), 4975, 4976, 4977, 4978, 4979, 4979A, 4980 and 4980F impose various excise taxes in connection with employee benefit plans. Form 5330 is used to compute and collect these taxes.

*Current Actions:* The Form 8868 will be revised to allow extensions for Form 5330—Return of Excise Taxes Related to Employee Benefit Plans. Form 8868 will only allow for the extension to file, and will not extend the payment of the excise tax.

The Form 8868 burden attributed to pension plans will be captured under OMB Control Number 1545–0575.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Business or other for profit organizations, individuals and households, not-for profit institutions, and farms.

*Estimated Number of Respondents:* 26,460.

*Estimated Number of Responses per Respondent:* 1.

*Estimated Number of Annual Responses:* 26,460.

*Estimated Total Annual Burden Hours:* 1,255,149.

*Authority:* 44 U.S.C. 3501 *et seq.*

**Melody Braswell,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2023–05115 Filed 3–13–23; 8:45 am]

**BILLING CODE 4830–01–P**

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## DEPARTMENT OF THE TREASURY

### Open Meeting of the Federal Advisory Committee on Insurance

**AGENCY:** Departmental Offices, U.S. Department of the Treasury.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces that the U.S. Department of the Treasury's Federal Advisory Committee on Insurance (FACI) will meet in the Cash Room at the U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Washington, DC, and also via videoconference on Wednesday, March 29, 2023, from 1:30 p.m.–4:30 p.m. Eastern Time. The meeting is open to the public. The FACI provides non-binding recommendation and advice to the Federal Insurance Office (FIO) in the U.S. Department of the Treasury.

**DATES:** The meeting will be held in the Cash Room at the U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Washington, DC, and also via videoconference on Wednesday, March 29, 2023, from 1:30 p.m.–4:30 p.m. Eastern Time.

*Attendance:* The meeting will be held in the Cash Room, Department of the Treasury, 1500 Pennsylvania Ave. NW, Washington, DC 20220 and via videoconference. The meeting is open to the public, and the site is accessible to individuals with disabilities.

**ADDRESSES:** The Committee meeting will be held in the Cash Room, Department of the Treasury, 1500 Pennsylvania Ave. NW, Washington, DC 20220 and also via teleconference. The meeting will be open to the public. Because the meeting will be held in a secured facility, members of the public who plan to attend the meeting must register online. Attendees may visit *https://events.treasury.gov/s/event-template/a2m3d0000000dGlAAI* and fill out a secure online registration form. A valid email address will be required to complete online registration. (Note: online registration will close on March 23rd or when capacity is reached.) The public can also attend remotely via live webcast: *www.yorkcast.com/treasury/events/2023/03/29/faci.*

The webcast will also be available through the FACI's website: *https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/federal-advisory-committee-on-insurance-faci.* Please refer to the FACI website for up-to-date information on this meeting. Requests for reasonable accommodations under Section 504 of the Rehabilitation Act should be directed to Snider Page, Office of Civil Rights and Equal Employment Opportunity, Department of the Treasury at (202) 622–0341, or *snider.page@treasury.gov.*

**FOR FURTHER INFORMATION CONTACT:** John Gudgel, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220, at (202) 622–1748 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is provided in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 10(a)(2), through implementing regulations at 41 CFR 102–3.150.

*Public Comment:* Members of the public wishing to comment on the business of the FACI are invited to submit written statements by either of the following methods:

*Electronic Statements*

• Send electronic comments to *faci@treasury.gov.*

*Paper Statements*

• Send paper statements in triplicate to the Federal Advisory Committee on Insurance, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220.

In general, the Department of the Treasury will make submitted comments available upon request without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. Requests for public comments can be submitted via email to *faci@treasury.gov.* The Department of the Treasury will also make such statements available for public inspection and copying in the Department of the Treasury's Library, 720 Madison Place NW, Room 1020, Washington, DC 20220, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect statements by telephoning (202) 622–2000. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

*Tentative Agenda/Topics for Discussion:* This will be the first FACI meeting of 2023. In this meeting, the FACI will continue to discuss topics related to climate-related financial risk and the insurance sector, and will also discuss cyber insurance developments and international insurance issues. The FACI will also receive status updates from each of its subcommittees and from FIO on its activities, as well as consider any new business.

**Steven Seitz,**

*Director, Federal Insurance Office.*

[FR Doc. 2023–05155 Filed 3–13–23; 8:45 am]

BILLING CODE 4810–AK–P

## DEPARTMENT OF VETERANS AFFAIRS

### Notice of Request for Information on the Department of Veterans Affairs Therapeutic Medical Physicists Standard of Practice

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Request for information.

**SUMMARY:** The Department of Veterans Affairs (VA) is requesting information to assist in developing a national standard of practice for VA Therapeutic Medical Physicists Standard of Practice. VA seeks comments on various topics to help inform VA's development of this national standard of practice.

**DATES:** Comments must be received on or before May 15, 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: *https://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 a potential rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Ethan Kalett, Office of Regulations, Appeals and Policy (10BRAP), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, 202–461–0500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

#### Authority

Chapters 73 and 74 of 38 of U.S.C. and 38 U.S.C. 303 authorize the Secretary to regulate the professional activities of VA health care professions to make certain that VA's health care system provides safe and effective health care by qualified health care professionals to ensure the well-being of those Veterans who have borne the battle.

On November 12, 2020, VA published an interim final rule confirming that VA health care professionals may practice their health care profession consistent with the scope and requirements of their VA employment, notwithstanding any State license, registration, certification, or other requirements that unduly interfere with their practice. 38 CFR 17.419; 85 FR 71838. Specifically, this rulemaking confirmed VA's current practice of allowing VA health care professionals to deliver health care services in a State other than the health care professional's State of licensure, registration, certification, or other State requirement, thereby enhancing beneficiaries' access to critical VA health care services. The rulemaking also confirmed VA's authority to establish national standards of practice for its health care professionals which

would standardize a health care professional's practice in all VA medical facilities.

The rulemaking explained that a national standard of practice describes the tasks and duties that a VA health care professional practicing in the health care profession may perform and may be permitted to undertake. Having a national standard of practice means that individuals from the same VA health care profession may provide the same type of tasks and duties regardless of the VA medical facility where they are located or the State license, registration, certification, or other State requirement they hold. We emphasized in the rulemaking and reiterate here that VA will determine, on an individual basis, that a health care professional has the necessary education, training, and skills to perform the tasks and duties detailed in the national standard of practice and will only be able to perform such tasks and duties after they have been incorporated into the individual's privileges, scope of practice, or functional statement. The rulemaking explicitly did not create any such national standards and directed that all national standards of practice would be subsequently created via policy.

**Need for National Standards of Practice**

As the Nation's largest integrated health care system, it is critical that VA develops national standards of practice to ensure beneficiaries receive the same high-quality care regardless of where they enter the system and to ensure that VA health care professionals can efficiently meet the needs of beneficiaries when practicing within the scope of their VA employment. National standards are designed to increase beneficiaries' access to safe and effective health care, thereby improving health outcomes. The importance of this initiative has been underscored by the COVID–19 pandemic. With an increased need for mobility in our workforce, including through VA's Disaster Emergency Medical Personnel System, creating a uniform standard of practice better supports VA health care professionals who already frequently practice across State lines. In addition, the development of national standards of practice aligns with VA's long-term deployment of a new electronic health record (EHR). National standards of practice are critical for optimal EHR implementation to enable the specific roles for each health care profession in EHR to be consistent across the Veterans Health Administration (VHA) and to support increased interoperability between VA and the Department of Defense (DoD). DoD has historically standardized practice for certain health care professionals, and VHA closely partnered with DoD to learn from their experience.

**Process To Develop National Standards of Practice**

Consistent with 38 CFR 17.419, VA is developing national standards of practice via policy. There will be one overarching national standard of practice directive that will generally describe VHA's policy and have each individual national standard of practice as an appendix to the directive. The directive and all appendices will be accessible on VHA Publications website at: *https://vaww.va.gov/vhapublications/* (internal) and *https://www.va.gov/vhapublications/* (external) once published.

To develop these national standards, VA is using a robust, interactive process that is consistent with the guidance outlined in Executive Order (E.O.) 13132 to preempt State law. The process includes consultation with internal and external stakeholders, including State licensing boards, VA employees, professional associations, Veterans Service Organizations, labor partners, and others. For each identified VA occupation, a workgroup comprised of health care professionals conducts State variance research to identify internal best practices that may not be authorized under every State license, certification, or registration, but would enhance the practice and efficiency of the profession throughout the agency. The workgroup is comprised of VA employees who are health care professionals in the identified occupation; they may consult with internal stakeholders at any point throughout the process. If a best practice is identified that is not currently authorized by every State, the workgroup determines what education, training, and skills are required to perform such task or duty. The workgroup then drafts a proposed VA national standard of practice using the data gathered during the State variance research and incorporates internal stakeholder feedback to date.

The proposed national standard of practice is internally reviewed, to include by an interdisciplinary workgroup consisting of representatives from Quality Management; Field Chief of Staff; Academic Affiliates; Field Chief Nursing Officer; Ethics; Workforce Management and Consulting; Surgery; Credentialing and Privileging; Field Chief Medical Officer; and EHR Modernization.

Externally, the proposed national standard of practice is provided to our partners in DoD. In addition, VA labor partners are engaged informally as part of a pre-decisional collaboration. Consistent with E.O. 13132, a letter is sent to each State board and certifying organization that includes the proposed national standard and an opportunity to further discuss the national standard with VA. After the States and certifying organizations have received notification, the proposed national standard of practice is published to the **Federal Register** for 60 days to obtain feedback from the public, including professional associations and unions. At the same time, the proposed national standard is published on an internal VA site to obtain feedback from VA employees. Feedback from State boards, professional associations, unions, VA employees, and any other person or organization who informally provides comments via the **Federal Register** will be reviewed. VA will make appropriate revisions in light of the comments, including those that present evidence-based practice and alternatives that help VA meet our mission and goals, and that are better for Veterans or VA health care professionals. We will publish a collective response to all comments at *https://www.va.gov/standardsofpractice*.

After the national standard of practice is finalized, approved, and published in VHA policy, VA will implement the tasks and duties authorized by that national standard of practice. Any tasks or duties included in the national standard will be incorporated into an individual health care professional's privileges, scope of practice, or functional statement following any training and education necessary for the health care professional to perform those functions. Implementation of the national standard of practice may be phased in across all medical facilities, with limited exemptions for health care professionals as needed.

**National Standard for Therapeutic Medical Physicists**

The proposed format for national standards of practice when there are State licenses and a national certifying organization is as follows. The first paragraph provides general information about the profession and what the health care professionals can do. The second paragraph references the education and certification needed to practice this profession at VA. The third paragraph confirms that this profession follows the standard of practice set by the national standards body. A final statement explains that while VA only

requires a national certification, some States also require licensure for this profession. The standard includes information on which States offer an exemption for Federal employees and where VA will preempt State laws, if applicable.

We note that the proposed standards of practice do not contain an exhaustive list of every task and duty that each VA health care professional can perform. Rather, it is designed to highlight whether there are any areas of variance in how this profession can practice across States and how this profession will be able to practice within VA notwithstanding their State license, certification, registration, and other requirements.

Therapeutic Medical Physicists are health care professionals who are specifically educated and trained in the administration or supervision of radiation oncology. VA qualification standards require Therapeutic Medical Physicists to have an active, current, full, and unrestricted certification from the American Board of Radiology (ABR), the American Board of Medical Physics (ABMP), or the Canadian College of Physicists in Medicine (CCPM). While ABMP discontinued certification in Therapeutic Medical Physics in December 2002, Therapeutic Medical Physicists who obtained a certification from ABMP prior to that date also have a Letter of Certification Equivalence by ABR. All three certifications follow the Medical Physics Practice Guidelines (MPPG) standards from the American Association of Physicists in Medicine (AAPM). VA also researched other alternative certifications and State requirements and found that four States also require a license for Therapeutic Medical Physicists. All four State licenses align with the national MPPG standards from AAPM. Therefore, there is no variance in how Therapeutic Medical Physicists practice in any State.

VA proposes to adopt a standard of practice consistent with the MPPG standard that all three certifying bodies follow; therefore, VA Therapeutic Medical Physicists will continue to follow the standard set by their national certification. The MPPG standard by AAPM can be found here: *https://www.aapm.org/pubs/MPPG/default.asp.*

*Because the practice of Therapeutic Medical Physicists is not changing, there will be no impact on the practice of this occupation when this national standard of practice is implemented.*

**Proposed National Standard of Practice for Therapeutic Medical Physicists**

Therapeutic Medical Physicists (TMPs) assure the safe and effective use of radiation in radiation oncology. TMPs perform or oversee the scientific and technical aspects of radiotherapy procedures necessary to achieve this objective. In the clinical setting, this involves the use of ionizing or nonionizing radiation in the planning and delivery of radiotherapy treatments. TMPs collaborate with radiation oncologists and monitor equipment to ensure each patient's safety.

Therapeutic Medical Physicists in the Department of Veterans Affairs (VA) possess the education and certification from the American Board of Radiology (ABR), the American Board of Medical Physics (ABMP), or the Canadian College of Physicists in Medicine (CCPM) required by VA qualification standards, as more specifically described in VA Handbook 5005, Staffing, Part II, Appendix G48.

This national standard of practice confirms that VA Therapeutic Medical Physicists practice in accordance with the Medical Physics Practice Guidelines (MPPG) standards from the American Association of Physicists in Medicine (AAPM), available at: *https://www.aapm.org/.* As of November 2022, all three certifications from ABR, AMBP, and CCPM follow MPPG standards.

Although VA only requires a certification, four States require a State license in order to practice occupation in that State: Hawaii, Florida, New York, and Texas. As of November 2022, all four States follow the MPPG standards so there is no variance in how VA Therapeutic Medical Physicists practice in any State.

**Request for Information**

1. Are there any required trainings for the aforementioned practices that we should consider?
2. Are there any factors that would inhibit or delay the implementation of the aforementioned practices for VA health care professionals in any States?
3. Is there any variance in practice that we have not listed?
4. What should we consider when preempting conflicting State laws, regulations, or requirements regarding supervision of individuals working toward obtaining their license or unlicensed personnel?
5. Is there anything else you would like to share with us about this national standard of practice?

**Signing Authority**

Denis McDonough, Secretary of Veterans Affairs, approved this document on February 21, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

**Luvenia Potts,**

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

[FR Doc. 2023–05141 Filed 3–13–23; 8:45 am]

BILLING CODE 8320–01–P

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0851]**

## Agency Information Collection Activity: Status of Loan Account—Foreclosure or Other Liquidation

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs

**ACTION:** Notice.

**SUMMARY:** Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before May 15, 2023.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0851'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

**FOR FURTHER INFORMATION CONTACT:** Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0851'' in any correspondence.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each

collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Authority:* Public Law 104–13; 44 U.S.C. 3501–3521.

*Title:* Status of Loan Account—Foreclosure or Other Liquidation.

*OMB Control Number:* 2900–0851.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA Form 26–0971 is used when requesting the repurchase of a loan. The holder of a delinquent vendee account is legally entitled to repurchase the loan by VAwhen the loan has been continuously in default for 3 months and the amount of thedelinquency equals or exceeds the sum of 2 monthly installments.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 5 hours.

*Estimated Average Burden per Respondent:* 30 minutes.

*Frequency of Response:* One-time.

*Estimated Number of Respondents:* 10.

By direction of the Secretary.

**Maribel Aponte,**

*VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.*

[FR Doc. 2023–05176 Filed 3–13–23; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Notice of Request for Information on the Department of Veterans Affairs Orthotist, Prosthetist, and Prosthetist-Orthotist Standard of Practice

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Request for information.

**SUMMARY:** The Department of Veterans Affairs (VA) is requesting information to assist in developing a national standard of practice for VA Orthotists, Prosthetists, and Prosthetist-Orthotists. VA seeks comments on various topics to help inform VA's development of this national standard of practice.

**DATES:** Comments must be received on or before May 15, 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: *https://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 a potential rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Ethan Kalett, Office of Regulations, Appeals and Policy (10BRAP), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, 202–461–0500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

#### Authority

Chapters 73 and 74 of 38 U.S.C. and 38 U.S.C. 303 authorize the Secretary to regulate the professional activities of VA health care professions to make certain that VA's health care system provides safe and effective health care by qualified health care professionals to ensure the well-being of those Veterans who have borne the battle.

On November 12, 2020, VA published an interim final rule confirming that VA health care professionals may practice their health care profession consistent with the scope and requirements of their VA employment, notwithstanding any State license, registration, certification, or other requirements that unduly interfere with their practice. 38 CFR 17.419; 85 FR 71838. Specifically, this rulemaking confirmed VA's current practice of allowing VA health care professionals to deliver health care services in a State other than the health care professional's State of licensure, registration, certification, or other State requirement, thereby enhancing beneficiaries' access to critical VA health care services. The rulemaking also confirmed VA's authority to establish national standards of practice for its health care professionals which would standardize a health care professional's practice in all VA medical facilities.

The rulemaking explained that a national standard of practice describes the tasks and duties that a VA health care professional practicing in the health care profession may perform and may be permitted to undertake. Having a national standard of practice means that individuals from the same VA health care profession may provide the same type of tasks and duties regardless of the VA medical facility where they are located or the State license, registration, certification, or other State requirement they hold. We emphasized in the rulemaking and reiterate here that VA will determine, on an individual basis, that a health care professional has the necessary education, training and skills to perform the tasks and duties detailed in the national standard of practice and will only be able to perform such tasks and duties after they have been incorporated into the individual's privileges, scope of practice, or functional statement. The rulemaking explicitly did not create any such national standards and directed that all national standards of practice would be subsequently created via policy.

#### Need for National Standards of Practice

As the Nation's largest integrated health care system, it is critical that VA develops national standards of practice to ensure beneficiaries receive the same high-quality care regardless of where they enter the system and to ensure that VA health care professionals can efficiently meet the needs of beneficiaries when practicing within the scope of their VA employment. National standards are designed to increase beneficiaries' access to safe and effective health care, thereby improving health outcomes. The importance of this initiative has been underscored by the COVID–19 pandemic. With an increased need for mobility in our workforce, including through VA's Disaster Emergency Medical Personnel System, creating a uniform standard of practice better supports VA health care professionals who already frequently practice across State lines. In addition, the development of national standards of practice aligns with VA's long-term

deployment of a new electronic health record (EHR). National standards of practice are critical for optimal EHR implementation to enable the specific roles for each health care profession in EHR to be consistent across the Veterans Health Administration (VHA) and to support increased interoperability between VA and the Department of Defense (DoD). DoD has historically standardized practice for certain health care professionals, and VHA closely partnered with DoD to learn from their experience.

**Process To Develop National Standards of Practice**

Consistent with 38 CFR 17.419, VA is developing national standards of practice via policy. There will be one overarching national standard of practice directive that will generally describe VHA's policy and have each individual national standard of practice as an appendix to the directive. The directive and all appendices will be accessible on VHA Publications website at: *https://vaww.va.gov/vhapublications/* (internal) and *https://www.va.gov/vhapublications/* (external) once published.

To develop these national standards, VA is using a robust, interactive process that is consistent with the guidance outlined in Executive Order (E.O.) 13132 to preempt State law. The process includes consultation with internal and external stakeholders, including State licensing boards, VA employees, professional associations, Veterans Service Organizations, labor partners, and others. For each identified VA occupation, a workgroup comprised of health care professionals conducts State variance research to identify internal best practices that may not be authorized under every State license, certification, or registration, but would enhance the practice and efficiency of the profession throughout the agency. The workgroup is comprised of VA employees who are health care professionals in the identified occupation; they may consult with internal stakeholders at any point throughout the process. If a best practice is identified that is not currently authorized by every State, the workgroup determines what education, training, and skills are required to perform such task or duty. The workgroup then drafts a proposed VA national standard of practice using the data gathered during the State variance research and incorporates internal stakeholder feedback to date.

The proposed national standard of practice is internally reviewed, to include by an interdisciplinary workgroup consisting of representatives from Quality Management; Field Chief of Staff; Academic Affiliates; Field Chief Nursing Officer; Ethics; Workforce Management and Consulting; Surgery; Credentialing and Privileging; Field Chief Medical Officer; and EHR Modernization.

Externally, the proposed national standard of practice is provided to our partners in DoD. In addition, VA labor partners are engaged informally as part of a pre-decisional collaboration. Consistent with E.O. 13132, a letter is sent to each State board and certifying organization that includes the proposed national standard and an opportunity to further discuss the national standard with VA. After the States and certifying organizations have received notification, the proposed national standard of practice is published to the **Federal Register** for 60 days to obtain feedback from the public, including professional associations and unions. At the same time, the proposed national standard is published on an internal VA site to obtain feedback from VA employees. Feedback from State boards, professional associations, unions, VA employees, and any other person or organization who informally provides comments via the **Federal Register** will be reviewed. VA will make appropriate revisions in light of the comments, including those that present evidence-based practice and alternatives that help VA meet our mission and goals, and that are better for Veterans or VA health care professionals. We will publish a collective response to all comments at *https://www.va.gov/standardsofpractice.*

After the national standard of practice is finalized, approved and published in VHA policy, VA will implement the tasks and duties authorized by that national standard of practice. Any tasks or duties included in the national standard will be incorporated into an individual health care professional's privileges, scope of practice, or functional statement following any training and education necessary for the health care professional to perform those functions. Implementation of the national standard of practice may be phased in across all medical facilities, with limited exemptions for health care professionals as needed.

**National Standard for Orthotist, Prosthetist, and Prosthetist-Orthotist**

The proposed format for national standards of practice when there are State licenses and a national certifying organization is as follows. The first paragraph provides general information about the profession and what the health care professionals can do. The second paragraph references the education and certification needed to practice this profession at VA. The third paragraph confirms that this profession follows the standard of practice set by the national certifying body. A final statement explains that while VA only requires a national certification, some States also require licensure for this profession. The standard includes information on which States offer an exemption for Federal employees and where VA will preempt State laws, if applicable.

We note that the proposed standards of practice do not contain an exhaustive list of every task and duty that each VA health care professional can perform. Rather, it is designed to highlight whether there are any areas of variance in how this profession can practice across States and how this profession will be able to practice within VA notwithstanding their State license, certification, registration, and other requirements.

VA Orthotists, Prosthetists, and Prosthetist-Orthotists are health care professionals who are specifically educated and trained to manage comprehensive orthotic and/or prosthetic patient care. VA qualification standards require Orthotists, Prosthetists, and Prosthetist-Orthotists to have an active, current, full, and unrestricted certification from either the American Board of Certification (ABC) in Orthotics, Prosthetics & Pedorthics or from the Board of Certification (BOC). VA reviewed whether there are any alternative certifications or State requirements that could be required for Orthotists, Prosthetists, and Prosthetist-Orthotists and found that 15 States require a license to practice as an Orthotist, Prosthetist, and Prosthetist-Orthotist. Of those, VA found that all 15 States exempt Federal employees from their State license requirements.

While VA qualification standards for Orthotists, Prosthetists, and Prosthetist-Orthotists require one certification from either ABC or BOC, VA proposes to adopt a standard of practice consistent with the ABC certification. There is no variance between these two national certifications; however, ABC standards set more specific expectations for education, training, and practice areas. Therefore, VA Orthotists, Prosthetists, and Prosthetist-Orthotists will follow the standard as set by this national certification. The standard for the ABC certification can be found here: *https://www.abcop.org/publication/scope-of-practice.*

**Proposed National Standard of Practice for Orthotist, Prosthetist and Prosthetist-Orthotist**

Orthotists, Prosthetists and Prosthetist-Orthotists are health care professionals who are specifically educated and trained to manage comprehensive orthotic and/or prosthetic patient care. This includes patient assessment, formulation of a treatment plan, implementation of the treatment plan, follow-up, and practice management. Documentation by the Orthotists, Prosthetists and Prosthetist-Orthotists is part of the patient's medical record and assists with establishing medical necessity for orthotic and/or prosthetic care.

Orthotists, Prosthetists and Prosthetist-Orthotists in the Department of Veterans Affairs (VA) possess the education and certification from either the American Board of Certification (ABC) or Board of Certification (BOC) required by VA qualification standards, as more specifically described in VA Handbook 5005, Staffing, Part II, Appendix G32.

This national standard of practice confirms that Orthotists, Prosthetists and Prosthetist-Orthotists practice according to the Orthotist and Prosthetist standards from the American Board of Certification, available at: *https://www.abcop.org.* As of March 2022, all Orthotists, Prosthetists and Prosthetist-Orthotists in VA follow the standards associated with this national certification.

Although VA only requires a certification, 15 States require a State license in order to practice as an Orthotist, Prosthetist and Prosthetist-Orthotist in that State: Alabama, Arkansas, Florida, Georgia, Illinois, Iowa, Kentucky, Minnesota, New Jersey, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, and Washington. However, all 15 States exempt Federal employees from their State license requirements.

As of March 2022, there is no variance in how VA Orthotists, Prosthetists and Prosthetist-Orthotists practice in any State.

**Request for Information**

1. Are there any required trainings for the aforementioned practices that we should consider?
2. Are there any factors that would inhibit or delay the implementation of the aforementioned practices for VA health care professionals in any States?
3. Is there any variance in practice that we have not listed?
4. What should we consider when preempting conflicting State laws, regulations, or requirements regarding supervision of individuals working toward obtaining their license or unlicensed personnel?
5. Is there anything else you would like to share with us about this national standard of practice?

**Signing Authority**

Denis McDonough, Secretary of Veterans Affairs, approved this document on February 21, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

**Luvenia Potts,**

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

[FR Doc. 2023–05142 Filed 3–13–23; 8:45 am]

BILLING CODE 8320–01–P

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## DEPARTMENT OF VETERANS AFFAIRS

### Notice of Request for Information on the Department of Veterans Affairs Registered Dietitian Nutritionists Standard of Practice

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Request for information.

**SUMMARY:** The Department of Veterans Affairs (VA) is requesting information to assist in developing a national standard of practice for VA Registered Dietitian Nutritionists (RDN). VA seeks comments on various topics to help inform VA's development of this national standard of practice.

**DATES:** Comments must be received on or before May 15, 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: *https://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 a potential rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Ethan Kalett, Office of Regulations, Appeals and Policy (10BRAP), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, 202–461–0500. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

**Authority**

Chapters 73 and 74 of 38 U.S.C. and 38 U.S.C. 303 authorize the Secretary to regulate the professional activities of VA health care professions to make certain that VA's health care system provides safe and effective health care by qualified health care professionals to ensure the well-being of those Veterans who have borne the battle.

On November 12, 2020, VA published an interim final rule confirming that VA health care professionals may practice their health care profession consistent with the scope and requirements of their VA employment, notwithstanding any State license, registration, certification, or other requirements that unduly interfere with their practice. 38 CFR 17.419; 85 FR 71838. Specifically, this rulemaking confirmed VA's current practice of allowing VA health care professionals to deliver health care services in a State other than the health care professional's State of licensure, registration, certification, or other State requirement, thereby enhancing beneficiaries' access to critical VA health care services. The rulemaking also confirmed VA's authority to establish national standards of practice for its health care professionals which would standardize a health care professional's practice in all VA medical facilities.

The rulemaking explained that a national standard of practice describes the tasks and duties that a VA health care professional practicing in the health care profession may perform and may be permitted to undertake. Having a national standard of practice means that individuals from the same VA health care profession may provide the same type of tasks and duties regardless of the VA medical facility where they are located or the State license, registration, certification, or other State requirement they hold. We emphasized in the rulemaking and reiterate here that VA will determine, on an individual basis, that a health care professional has

the necessary education, training, and skills to perform the tasks and duties detailed in the national standard of practice and will only be able to perform such tasks and duties after they have been incorporated into the individual's privileges, scope of practice, or functional statement. The rulemaking explicitly did not create any such national standards and directed that all national standards of practice would be subsequently created via policy.

**Need for National Standards of Practice**

As the Nation's largest integrated health care system, it is critical that VA develops national standards of practice to ensure beneficiaries receive the same high-quality care regardless of where they enter the system and to ensure that VA health care professionals can efficiently meet the needs of beneficiaries when practicing within the scope of their VA employment. National standards are designed to increase beneficiaries' access to safe and effective health care, thereby improving health outcomes. The importance of this initiative has been underscored by the COVID–19 pandemic. With an increased need for mobility in our workforce, including through VA's Disaster Emergency Medical Personnel System, creating a uniform standard of practice better supports VA health care professionals who already frequently practice across State lines. In addition, the development of national standards of practice aligns with VA's long-term deployment of a new electronic health record (EHR). National standards of practice are critical for optimal EHR implementation to enable the specific roles for each health care profession in EHR to be consistent across the Veterans Health Administration (VHA) and to support increased interoperability between VA and the Department of Defense (DoD). DoD has historically standardized practice for certain health care professionals, and VHA closely partnered with DoD to learn from their experience.

**Process To Develop National Standards of Practice**

Consistent with 38 CFR 17.419, VA is developing national standards of practice via policy. There will be one overarching national standard of practice directive that will generally describe VHA's policy and have each individual national standard of practice as an appendix to the directive. The directive and all appendices will be accessible on VHA Publications website at: *https://vaww.va.gov/vhapublications/* (internal) and *https://www.va.gov/vhapublications/* (external) once published.

To develop these national standards, VA is using a robust, interactive process that is consistent with the guidance outlined in Executive Order (E.O.) 13132 to preempt State law. The process includes consultation with internal and external stakeholders, including State licensing boards, VA employees, professional associations, Veterans Service Organizations, labor partners, and others. For each identified VA occupation, a workgroup comprised of health care professionals conducts State variance research to identify internal best practices that may not be authorized under every State license, certification, or registration, but would enhance the practice and efficiency of the profession throughout the agency. The workgroup may consult with internal stakeholders at any point throughout the process. If a best practice is identified that is not currently authorized by every State, the workgroup determines what education, training, and skills are required to perform such task or duty. The workgroup then drafts a proposed VA national standard of practice using the data gathered during the State variance research and incorporates internal stakeholder feedback to date.

The proposed national standard of practice is internally reviewed, to include by an interdisciplinary workgroup consisting of representatives from Quality Management; Field Chief of Staff; Academic Affiliates; Field Chief Nursing Officer; Ethics; Workforce Management and Consulting; Surgery; Credentialing and Privileging; Field Chief Medical Officer; and EHR Modernization.

Externally, the proposed national standard of practice is provided to our partners in DoD. In addition, VA labor partners are engaged informally as part of a pre-decisional collaboration. Consistent with E.O. 13132, a letter is sent to each State board and certifying organization that includes the proposed national standard and an opportunity to further discuss the national standard with VA. After the States and certifying organization have received notification, the proposed national standard of practice is published to the **Federal Register** for 60 days to obtain feedback from the public, including professional associations and unions. At the same time, the proposed national standard is published on an internal VA site to obtain feedback from VA employees. Feedback from State boards, professional associations, unions, VA employees, and any other person or organization who informally provides comments via the **Federal Register** will be reviewed. VA will make appropriate revisions in light of the comments, including those that present evidence-based practice and alternatives that help VA meet our mission and goals, and that are better for Veterans or VA health care professionals. We will publish a collective response to all comments at *https://www.va.gov/standardsofpractice.*

After the national standard of practice is finalized, approved, and published in VHA policy, VA will implement the tasks and duties authorized by that national standard of practice. Any tasks or duties included in the national standard will be incorporated into an individual health care professional's privileges, scope of practice, or functional statement following any training and education necessary for the health care professional to perform those functions. Implementation of the national standard of practice may be phased in across all medical facilities, with limited exemptions for health care professionals as needed.

**National Standard for Registered Dietitian Nutritionists**

The proposed format for national standards of practice when there are State licenses and a national registration is as follows. The first paragraph provides general information about the profession and what the health care professionals can do. The second paragraph references the education and registration needed to practice this profession at VA. The third paragraph confirms that this profession follows the standard set by the national registration body. A final statement explains that while VA only requires a national registration, some States also require licensure for this profession. The standard includes information on which States offer an exemption for Federal employees and where VA will preempt State laws, if applicable.

We note that the proposed standards of practice do not contain an exhaustive list of every task and duty that each VA health care professional can perform. Rather, it is designed to highlight whether there are any areas of variance in how this profession can practice across States and how this profession will be able to practice within VA notwithstanding their State license, certification, registration, and other requirements.

VA Registered Dietitian Nutritionists (RDNs) are experts in the disciplines of nutrition and food. They translate the complex science of nutrition into healthy, real-world solutions. VA qualification standards require

Registered Dietitian Nutritionists (RDNs) to have an active, current, full, and unrestricted registration from the Commission on Dietetic Registration, the credentialing branch of the Academy of Nutrition and Dietetics. VA reviewed whether there are any alternative registrations, certifications, or State requirements that could be required for a RDN and found that 46 States require a license to practice as a RDN in that State. Of those, 34 States exempt Federal employees from their State license requirements. The standard set forth in the licensure requirements for all 46 States are consistent with what is permitted under the national registration. Therefore, there is no variance in how any RDN practices in any State.

VA proposes to adopt a standard of practice consistent with the national registration; therefore, VA RDNs will continue to follow the same standard as set by their national registration. Standard of practice for the registration can be found here: *Academy of Nutrition and Dietetics: Revised 2017 Scope of Practice for the Registered Dietitian Nutritionist—Journal of the Academy of Nutrition and Dietetics (jandonline.org).*

*Because the practice of RDN is not changing, there will be no impact on the practice of this occupation when this national standard of practice is implemented.*

**Proposed National Standard of Practice for Registered Dietitian Nutritionist**

RDNs are experts in the disciplines of nutrition and food. They translate the complex science of nutrition into healthy, real-world solutions. RDNs within the Department of Veterans Affairs (VA) are fully integrated into a health care team and work within a variety of settings including inpatient, outpatient, long term care, food operations, and community clinics. Clinical RDNs are responsible for utilizing the nutrition care process framework to provide patient-centered care using evidence-based guidelines to make decisions. RDNs in the food service setting are responsible for scientific preparation and service of high-quality food by selection, requisition, receipt, storage, issuance, and transportation of food and supplies. They assure sanitation, safety, competency, and training programs are robust and effective.

RDNs employed by VA possess the education and registration from the Commission on Dietetic Registration (CDR) required by VA qualification standards, as more specifically described in VA Handbook 5005, Staffing, Part II, Appendix G20.

This national standard of practice confirms RDNs practice in accordance with the Registered Dietitian Nutritionist standards from the Academy of Nutrition and Dietetics, available at: *www.eatright.org.* As of March 2022, RDNs in VA follow the standards associated with this national registration.

Although VA only requires a registration, 46 States require a State license in order to practice as RDNs in that State: Alabama, Alaska, Arkansas, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

Of those, the following States exempt Federal employees from its State license requirements: Alabama, Alaska, Arkansas, Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Wisconsin, and Wyoming.

As of May 2022, there is no variance in how VA RDNs practice in any State.

**Request for Information**

1. Are there any required trainings for the aforementioned practices that we should consider?

2. Are there any factors that would inhibit or delay the implementation of the aforementioned practices for VA health care professionals in any States?

3. Is there any variance in practice that we have not listed?

4. What should we consider when preempting conflicting State laws, regulations, or requirements regarding supervision of individuals working toward obtaining their license or unlicensed personnel?

5. Is there anything else you would like to share with us about this national standard of practice?

**Signing Authority**

Denis McDonough, Secretary of Veterans Affairs, approved this document on February 21, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

**Luvenia Potts,**

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

[FR Doc. 2023–05143 Filed 3–13–23; 8:45 am]

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Part II

## Nuclear Regulatory Commission

10 CFR Parts 20, 21, 26, et al.

Enhanced Weapons, Firearms Background Checks, and Security Event Notifications; Final Rule

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Parts 20, 21, 26, 50, 70, 72, 73, 74, and 76**

**[NRC–2011–0014; NRC–2011–0015; NRC–2011–0017; NRC–2011–0018]**

**RIN 3150–AI49**

# Enhanced Weapons, Firearms Background Checks, and Security Event Notifications

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule and guidance.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations to implement its authority under Section 161A of the Atomic Energy Act of 1954, as amended. This final rule applies to several classes of facilities as well as activities involving the transportation of radioactive material and other property designated by the NRC. This final rule also revises the physical security event notification requirements for different classes of facilities and the transportation of radioactive material to add consistency and clarity. Further, the NRC is adding new event notification requirements associated with the possession of enhanced weapons and imminent or actual hostile acts, and new reporting requirements for suspicious activity. The NRC also is issuing a final implementation guidance for this final rule.

**DATES:**

*Effective date:* This final rule is effective April 13, 2023.

*Compliance date:* Compliance with this final rule is required by January 8, 2024, for those licensed under parts 50, 52, 60, 63, 70, and 72 of title 10 of the *Code of Federal Regulations* (10 CFR) and subject to §§ 73.1200, 73.1205, 73.1210, and 73.1215.

**ADDRESSES:** Please refer to Docket IDs NRC–2011–0014, NRC–2011–0015, NRC–2011–0017, and NRC–2011–0018 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket IDs NRC–2011–0014, NRC–2011–0015, NRC–2011–0017, or NRC–2011–0018. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then 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.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the **SUPPLEMENTARY INFORMATION** section. For the convenience of the reader, instructions about obtaining materials referenced in the document are also 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, Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Stewart Schneider, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–4123; email: *Stewart.Scheider@nrc.gov;* or Philip Brochman, Office of Nuclear Security and Incident Response, telephone: 301–287–3691; email: *Phil.Brochman@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

**SUPPLEMENTARY INFORMATION:**

## Executive Summary

This final rule has three distinct parts. Part 1 implements the Commission's authority under Section 161A of the Atomic Energy Act of 1954, as amended (AEA). Section 161A authorizes the Commission to designate those classes of licensees permitted to use firearms, weapons, ammunition, or devices, notwithstanding local, State, and certain Federal firearms laws and regulations prohibiting such use. Part 2 revises the requirements for physical security event notifications and adds two new notification requirements associated with imminent or actual hostile acts and possession of enhanced weapons. Additionally, Part 2 simplifies and reorganizes existing physical security event notification requirements into several timeliness categories (*e.g.,* 15-minute, 1-hour, 4-hour, and 8-hour notifications). Part 3 adds requirements for reporting suspicious activities to law enforcement agencies and the NRC.

### *A. Need for the Regulatory Action*

Part 1 of this final rule amends the NRC's regulations to implement the Commission's authority under Section 161A of the AEA (Section 161A authority). Without implementing regulations, the Commission would need to grant Section 161A authority through confirmatory orders. This process is unnecessarily inefficient for licensees and the NRC. Additionally, this process lacks the transparency and regulatory certainty provided by regulations. These amendments will establish a clear and consistent regulatory process to enable licensees to apply for and effectively implement the Commission's Section 161A authority.

Part 2 of this final rule amends the NRC's regulations in 10 CFR part 73 to modify the physical security event notification requirements. Currently, all physical security event notifications must be submitted to the NRC within 1-hour. The revised regulations provide a graded approach that takes into account the security significance of the physical security event, which in most cases will provide licensees greater flexibility. Additionally, this final rule adds new requirements to notify the NRC following actual or imminent hostile action as well as lost or stolen enhanced weapons. These new requirements will ensure licensees provide notification to the NRC of all appropriate physical security events.

Part 3 of this final rule amends the NRC's regulations in 10 CFR part 73 to add requirements for licensees to report suspicious activities. Currently, licensees voluntarily report suspicious activities. Licensee implementation of voluntary suspicious activity reporting has been inconsistent in terms of both the types of data reported and the timeliness of reports. Because licensees' timely and consistent submission of suspicious activity reports (SARs) to the NRC and to law enforcement is an important part of the U.S. government's efforts to disrupt or dissuade malevolent acts against the nation's critical infrastructure, it is necessary to make suspicious activity reporting mandatory.

### *B. Major Provisions*

Major provisions of this final rule include:

- Implementation of the Commission's Section 161A authority.

Section 161A authorizes the Commission to designate those classes of licensees eligible to apply for stand-alone preemption authority or combined preemption authority and enhanced weapons authority. Stand-alone preemption authority allows regulated entities to possess and use weapons that would otherwise be prohibited by State, local, and certain Federal firearms laws. Combined preemption authority and enhanced weapons authority allows a regulated entity to possess and use a certain category of covered weapon called an ''enhanced weapon.'' Enhanced weapons include machine guns, short-barreled shotguns, and short-barreled rifles.

- Modification of the requirements for physical security event notifications using a graded approach that reflects the security significance of the event. Additionally, this final rule adds new notification requirements for imminent or actual hostile actions and lost or stolen enhanced weapons.
- Establishment of new suspicious activity reporting requirements to clarify and ensure consistency in reporting to law enforcement agencies and the NRC.

Concurrent with this final rule, the NRC is issuing Regulatory Guide (RG) 5.86, ''Enhanced Weapons Authority, Preemption Authority, and Firearms Background Checks''; RG 5.62, Revision 2, ''Physical Security Event Notifications, Reports and Records''; and RG 5.87, ''Suspicious Activity Reports.''

*C. Costs and Benefits*

The NRC has prepared a regulatory analysis to determine the expected quantitative costs and benefits of this final rule, as well as qualitative factors considered in the NRC's rulemaking decision. The quantitative analyses evaluate four attributes-industry implementation, industry operation, NRC implementation, and NRC operation. Qualitative analyses were prepared because monetizing the full impact of each attribute is not possible or practical. Monetizing the impact of these attributes would require estimation of factors such as the frequency of security-related events and the consequences of such events.

The analysis concluded that this final rule will result in net quantified costs to the industry and the NRC. The total cost of the rule reflects, in part, the costs that will be incurred by eight NRC licensees at seven sites that were granted, by confirmatory order, stand-alone preemption authority and will need to update their applicable procedures, instructions, and training to reflect the requirements in this final rule.

The total cost of the rule also reflects the implementation and operations costs to comply with the new physical security event notification and suspicious activity reporting requirements. These costs apply to the following licensed sites: production or utilization facilities licensed under § 50.21 or § 50.22 (including both operating and decommissioning power reactors and non-power reactors); away-from-reactor independent spent fuel storage installations (ISFSIs); and facilities that are licensed to possess special nuclear material (SNM). The costs result from these licensees having to update their procedures to reflect the new requirements, and estimated costs associated with providing event notification and suspicious activity reporting.

NRC costs to implement this final rule include costs associated with oversight of licensees' transitioning from the confirmatory orders to the requirements of the final rule. NRC operational costs include reviewing and receiving both the physical security event notifications and SARs. The benefits to the NRC are avoided costs associated with not issuing confirmatory orders to future licensees requesting Section 161A authority. The regulatory analysis concludes that this final rule results in an estimated cost of between $2.85 million at a 7-percent discount rate and $3.07 million at a 3-percent discount rate.

The regulatory analysis also considered the following qualitative considerations and associated benefits: security-related attributes, such as the occurrence of a possible attack and the successful thwarting and mitigation of the attack, flexibility of response to physical security events, suspicious activity reporting, and enhancements to regulatory efficiency. Based on the assessment of the costs and benefits of this final rule, including those benefits which are unquantified, the NRC has concluded that the final rule provisions are justified to protect public health and safety and the common defense and security. For more information, please see the regulatory analysis (ADAMS Accession No. ML19045A003).

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## I. Background

*A. Section 161A of the Atomic Energy Act of 1954 (AEA), as Amended*

On August 8, 2005, President George W. Bush signed into law the Energy Policy Act of 2005 (EPAct), Public Law 109–58, 119 Stat. 594 (2005). Section 653 of the EPAct amended the AEA by adding a new Section 161A, ''Use of Firearms by Security Personnel'' (42 U.S.C. 2201a). Section 161A of the AEA provides the NRC with authority to permit a licensee's or certificate holder's security personnel to transfer, receive, possess, transport, import, and use weapons, devices, ammunition, or other firearms, notwithstanding State, local, and certain Federal firearms laws (and implementing regulations) that may prohibit or restrict these actions. This could include, if approved by the NRC, the use of enhanced weapons such as machine guns, short-barreled shotguns, and short-barreled rifles.

The Commission designates the classes of NRC licensees eligible to apply for Section 161A authority. Designated licensees may request permission from the Commission to transfer, receive, possess, transport, import, and use firearms, ammunition, or devices, notwithstanding local, State, and certain Federal firearms laws and regulations prohibiting such possession and use. For the purposes of this rule, this type of authority is referred to as ''stand-alone preemption authority.'' Additionally, designated licensees may request permission to transfer, receive, possess, transport, import, and use firearms, ammunition, or devices that require registration under the National Firearms Act (26 U.S.C. Chapter 53). These types of weapons are typically referred to as ''enhanced weapons'' and for the purposes of this rule this type of authority is referred to as ''combined preemption authority and enhanced weapons authority.'' Enhanced weapons include machine guns, short-barreled shotguns and short-barreled rifles.

Section 161A.b requires that licensees ensure that their security personnel that receive, possess, transport, import, or use a weapon, ammunition, or device otherwise prohibited by State, local, or certain Federal laws, including

regulations, shall be subject to a fingerprint-based background check by the U.S. Attorney General (AG) and a firearms background check against the Federal Bureau of Investigation's (FBI) National Instant Criminal Background Check System (NICS).

*B. The Firearms Guidelines*

Section 161A.d of the AEA requires that the Commission, with the approval of the AG, develop and publish guidelines for the implementation of the authority granted to the Commission under section 161A. The Firearms Guidelines provide guidance on how the Commission intends to implement the authority conferred on it by Section 161A of the AEA. On September 11, 2009, the NRC published the Firearms Guidelines in the **Federal Register** (74 FR 46800). Section 161A of the AEA took effect upon publication of the Firearms Guidelines. The NRC, with the approval of the AG, revised the Firearms Guidelines (Revision 1) and published them in the **Federal Register** on June 25, 2014 (79 FR 36100). Subsequently, the NRC, with the approval of the AG, revised the Firearms Guidelines again (Revision 2) and published them in the **Federal Register** on March 8, 2019 (84 FR 8546). The Firearms Guidelines are available at *https://www.regulations.gov* under Docket ID NRC–2008–0465.

*C. October 2006 Proposed Rule*

In 2006, the NRC initiated a rulemaking that would, among other changes: (1) implement the new authority granted to the Commission in Section 161A of the AEA and (2) modify existing physical security event notification requirements. On October 26, 2006, the NRC published a proposed rule, ''Power Reactor Security Requirements,'' in the **Federal Register** (71 FR 62664) to implement the provisions of Section 161A as one component of a larger proposed amendment to its regulations under 10 CFR parts 50, 72, and 73.

That portion of the proposed rule implementing the authority granted the Commission under Section 161A of the AEA was consistent with ongoing discussions between the NRC and the U.S. Department of Justice on the development of the Firearms Guidelines. In those discussions, the NRC had proposed that the provisions of Section 161A of the AEA would apply only to nuclear power reactor facilities, including both operating and decommissioning nuclear power reactors, and Category I strategic special nuclear material (SSNM) facilities (*i.e.,* facilities possessing or using formula quantities or greater of SSNM). This structure was proposed to permit these two highest-risk classes of licensed facilities to apply to the NRC for Section 161A authority. The NRC had also indicated that it would consider making Section 161A authority available to additional classes of facilities, radioactive material, or other property (including ISFSIs) in a separate, future rulemaking.

On March 27, 2009, the NRC published the final rule, ''Power Reactor Security Requirements'' in the **Federal Register** (74 FR 13926). The requirements in the proposed rule to implement the NRC's authority under Section 161A of the AEA were not included in that final rule because the Firearms Guidelines had not been published and therefore the NRC's authority under Section 161A had not yet taken effect. Consequently, final regulations implementing the Commission's Section 161A authority could not be promulgated at that time. The physical security event notification regulations were also not included in the ''Power Reactor Security Requirements'' rule because the NRC intended to add new requirements associated with notifying local law enforcement of the theft or loss of enhanced weapons.

*D. February 2011 Proposed Rule*

On February 3, 2011, the NRC published a proposed rule, ''Enhanced Weapons, Firearms Background Checks, and Security Event Notifications,'' in the **Federal Register** (76 FR 6200). The proposed enhanced weapons rule was consistent with the approved 2009 Firearms Guidelines. With the publication of the Firearms Guidelines, Section 161A of the AEA took effect. The 2011 proposed rule included provisions to implement the Commission's authority under Section 161A of the AEA. It also made several changes to the physical security event notification requirements in 10 CFR part 73 to address imminent attacks or threats against nuclear power reactors, as well as suspicious activities that could be indicative of potential preoperational reconnaissance, surveillance, or challenges to security systems by adversaries (hereinafter referred to as the event notifications part of the rule, which at that time also included the suspicious activity reporting part of the rule). The initial public comment period to review and comment on the 2011 proposed rule and associated guidance was 90 days. The comment period was extended to 180 days at the request of stakeholders.

*E. Preemption Designation Orders and Confirmatory Orders*

Subsequent to the publication of the 2011 proposed rule, the NRC received requests from ten licensees (located at eight separate sites) to obtain stand-alone preemption authority. In response to these requests, the NRC issued designation Order EA–13–092 on June 14, 2013 (78 FR 35984).

Order EA–13–092 designated the ten licensees as an interim class of licensed facilities eligible to apply for stand-alone preemption authority under Section 161A of the AEA. Order EA–13–092 also contained direction related to completing firearms background checks for security personnel whose official duties require access to covered weapons, and contained direction for the licensees on submitting applications and supporting information to obtain stand-alone preemption authority via a confirmatory order. Subsequent to the NRC's issuance of Order EA–13–092, two licensees (located at the same site) withdrew their applications for stand-alone preemption authority.

The NRC approved applications for stand-alone preemption authority for the eight remaining licensees at seven sites under Order EA–15–006 on September 4, 2015 (80 FR 53588), and under Orders EA–14–134, EA–14–135, EA–14–136, EA–14–137, EA–14–138, EA–14–139, and EA–14–140 on January 15, 2016 (81 FR 2247).

*F. January 2013 Supplemental Proposed Rule*

On January 10, 2013, the NRC published a supplemental proposed rule, ''Enhanced Weapons, Firearms Background Checks, and Security Event Notifications,'' (78 FR 2214) to add at-reactor ISFSIs as a class of designated facilities eligible to apply for Section 161A authority under the proposed § 73.18(c) [renumbered § 73.15(c) in this final rule]. The NRC had concluded that including at-reactor ISFSIs in the proposed rule would ensure a consistent transition from the designation order and confirmatory orders to the final implementing regulations for reactor licensees and any ISFSIs co-located at the reactor site.

When a reactor facility and an ISFSI share a common security guard force, as is the case for at-reactor ISFSIs, the NRC staff recognizes that if the licensee applies for stand-alone preemption authority and is approved, it may be beneficial for both facilities at the site to have that authority. In the 2013 supplemental proposed rule, the NRC indicated that other classes of facilities and activities (*e.g.,* away-from-reactor

ISFSIs and transportation of spent nuclear fuel) would be addressed in a separate, future rulemaking (as originally discussed by the NRC in the October 2006 proposed rule). The public comment period for the 2013 supplemental proposed rule was 45 days.

*G. December 2013 Bifurcation of the Cyber Security Event Notification Requirements*

On December 20, 2013, in COMSECY–13–0031, ''Bifurcation of the Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Rule'' (ADAMS Accession No. ML13280A366), the NRC staff requested approval from the Commission to bifurcate the cyber security event notification (CSEN) requirements from the event notifications part of the enhanced weapons rule and to address these requirements in a separate rulemaking. In SRM–COMSECY–13–0031, ''Bifurcation of the Enhanced Weapons, Firearms Background Checks, and Security Event Notification Rule'' (ADAMS Accession No. ML14023A860), the Commission approved the NRC staff's plan to bifurcate the CSEN requirements from the enhanced weapons rule. The NRC received comments on the proposed CSEN requirements contained in the 2011 proposed enhanced weapons rule. The NRC's responses to these comments were addressed in the ''Cyber Security Event Notifications'' final rule published in the **Federal Register** on November 2, 2015 (80 FR 67264) and are not addressed in this rulemaking.

Additionally, draft Regulatory Guide (DG) 5019, Revision 1, ''Reporting and Recording Safeguards Events'' (ADAMS Accession No. ML100830413), was issued for public comment on February 3, 2011 (76 FR 6085). The portions of DG–5019, Revision 1, related to CSEN were also bifurcated from the original draft guide, and are now included in the final CSEN guidance in RG 5.83, ''Cyber Security Event Notifications'' (ADAMS Accession No. ML14269A388).

Accordingly, the NRC has removed all CSEN provisions from this final rule and associated guidance.

*H. September 2015 Supplemental Proposed Rule*

On September 22, 2015, the NRC published a second supplemental proposed rule, ''Enhanced Weapons, Firearms Background Checks, and Security Event Notifications'' (80 FR 57106), to conform Part 1 of the rule with the 2014 Revision 1 to the Firearms Guidelines. The 2009 Firearms Guidelines provided that the security personnel for all licensees and certificate holders that fall within the designated classes of facilities must undergo firearms background checks, whether or not a particular licensee or certificate holder intends to seek Section 161A authority. The NRC staff determined that this requirement placed an unnecessary cost on licensees who had not applied for Section 161A authority without serving any relevant security purpose. Consequently, under Revision 1 of the 2014 Firearms Guidelines, the requirement for background checks applies to only those licensees and certificate holders who apply for Section 161A authority.

In addition to conforming the 2011 proposed rule to Revision 1 of the 2014 Firearms Guidelines, the 2015 supplemental proposed rule also made three other changes. First, the 2015 supplemental proposed rule made several clarifying and corrective changes to the process for obtaining stand-alone preemption authority and the requirements for firearms background checks. This was based upon language approved by the Commission in the designation and confirmatory orders issued by the NRC, subsequent to the publication of the 2011 proposed rule (*i.e.,* Orders EA–13–092, EA–14–134, EA–14–135, EA–14–136, EA–14–137, EA–14–138, EA–14–139, EA–14–140, and EA–15–006).

Second, the NRC made several additional changes to clarify the agency's review and acceptance criteria for evaluating applications for stand-alone preemption authority. These changes were based on lessons learned by the NRC staff in developing confirmatory orders for those licensees requesting stand-alone preemption authority, as well as comments received in response to prior versions of the proposed rule. Furthermore, to ensure consistency between processes, the NRC planned to make corresponding changes to the proposed process for obtaining combined preemption authority and enhanced weapons authority.

Third, the NRC staff implemented Commission direction from SRM–SECY–12–0125, ''Interim Actions to Execute Commission Preemption Authority Under Section 161A of the Atomic Energy Act of 1954, as Amended'' (ADAMS Accession No. ML12326A653). In SRM–SECY–12–0125, the Commission directed the NRC staff to include a plan ''to sunset [withdraw] the interim designation order and the confirmatory orders'' in the final rule. Accordingly, the NRC included new language in §§ 73.18(s) and 73.19(r) [renumbered §§ 73.15(s) and 73.17(r) in this final rule] of the 2015 supplemental proposed rule to accomplish the Commission's direction.

Other changes in the 2015 supplemental proposed rule included the removal of the definition of ''standard weapon'' and the removal of references to standard weapons in the definitions of ''covered weapon'' and ''enhanced weapon.''

## II. Discussion

This final rule reflects the proposed changes from the 2011 proposed rule and the 2013 and 2015 supplemental proposed rules. Part 1 of the rule implements the NRC's authority under Section 161A of the AEA to permit a licensee security personnel to transfer, receive, possess, transport, import, and use weapons, devices, ammunition, or other firearms notwithstanding State, local, and certain Federal firearms laws (and any implementing regulations) that may prohibit or restrict these actions. The types of weapons include, for example, machine guns, semiautomatic assault weapons, and large-capacity ammunition feeding devices (*i.e.,* magazines). As indicated in the 2011 proposed rule, an NRC licensee may voluntarily apply to the NRC to obtain Section 161A authority (either stand-alone preemption authority or combined preemption authority and enhanced weapons authority). This part applies to nuclear power reactors, Category I SSNM facilities, ISFSIs, and the transportation of spent nuclear fuel (SNF).

Part 2 of this final rule modifies existing physical security event notifications, written follow-up reports, and recordkeeping regulations, and adds new requirements for certain facilities or activities (*e.g.,* transportation). The existing regulations require that all physical security event notifications be reported in one hour. This reporting requirement may not reflect the event's actual security significance. In this final rule, the NRC has applied a graded approach to these new and revised physical security event notification requirements that reflects the security significance of the event, the urgency of the notification, and the underlying security risks to public health and safety or to the common defense and security that are posed by the affected facility or material being transported. The final rule groups physical security events requiring notification into several timeliness categories, with events having a greater security significance requiring quicker notifications.

These requirements apply to the following licensees:

• production or utilization facilities licensed under §§ 50.21 or 50.22 (including both operating and decommissioning power reactors and non-power reactors);
• facilities that possess Category I, II, or III quantities of SSNM;
• facilities that possess Category II or III quantities of SNM;
• hot cell facilities subject to 10 CFR 73.50;
• ISFSIs;
• monitored retrievable storage installations (MRSs); and
• geologic repository operations areas (GROAs).

The physical security event notification requirements also apply to the transportation of Category I, II, or III quantities of SSNM, Category II or III quantities of SNM, SNF, and high-level radioactive waste (HLW). This final rule also separates the physical security event notification requirements, written follow-up reports, and recordable security events into separate regulations to improve regulatory clarity and ease of use, and to improve the quality of information provided to the NRC. The NRC is also incorporating clarifying and editorial changes to these regulations.

The NRC has also revised existing notification requirements for licensees transporting Category II quantities of SNM (*i.e.,* SNM enriched to greater than 10 percent U–235) based upon a higher assessed security risk from this material.

Additionally, the NRC has exempted most licensees subject to § 73.67 from certain, but not all, of the physical security event notification requirements in § 73.1200. For example, the actual or attempted introduction of contraband into a controlled access area has been excluded given the existing physical security requirements of § 73.67. These exemptions apply to licensees: (1) possessing Category III quantities of SSNM (Agreement State and NRC licensees); or (2) possessing Category II or III quantities of SNM (*e.g.,* non-power reactors or fuel cycle facilities).

Finally, the NRC has determined that the imposition of certain recordkeeping requirements in 10 CFR 73.1210(c) and (d) on licensees subject to § 73.67 that possess or ship Category III quantities of SSNM (NRC and Agreement State licensees), or Category II or III quantities of SNM (NRC licensees only) is not warranted, given the low security risk associated with this material. Therefore, the staff has revised the draft final rule to exempt these licensees from these specific recordkeeping requirements. However, licensees subject to § 73.67 (*e.g.,* non-power reactors) that ship spent nuclear fuel under § 73.37, ''Requirements for physical protection of irradiated reactor fuel in transit,'' remain subject to the existing recordkeeping requirements but only during spent nuclear fuel shipping activities.

Following the events of September 11, 2001, the NRC issued guidance requesting licensees to voluntarily notify the NRC of actual or imminent hostile acts. This final rule makes these voluntary notification requirements mandatory and adds new reporting requirements for those licensees possessing enhanced weapons. Licensees that obtain combined preemption authority and enhanced weapons authority are required to notify the NRC when the licensee makes a separate notification to the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the applicable local law enforcement agency (LLEA) regarding a stolen or lost enhanced weapon. These requirements apply to nuclear power reactors, ISFSIs, Category I SSNM facilities, or those licensees engaged in the transportation of Category I SSNM or SNF.

Part 3 of this final rule establishes new requirements for licensees to report suspicious activities to the LLEA, the FBI, the NRC, and the Federal Aviation Administration (FAA) if the suspicious activity involves an aircraft. Following the events of September 11, 2001, the NRC issued security advisories and other guidance on suspicious activities and requested that such activity be voluntarily reported to the NRC. The new requirements make the reporting of suspicious activities to these various agencies mandatory for certain licensees.

Licensees' timely submission of SARs to the NRC and to law enforcement is an important part of the U.S. government's efforts to disrupt or dissuade malevolent acts against the nation's critical infrastructure. Attack planning and preparation generally proceed through several predictable stages, including intelligence gathering and pre-attack surveillance. Reporting suspicious activities that could be indicative of preoperational surveillance or reconnaissance efforts, challenges to security systems and protocols, or elicitation of non-public information related to security or emergency response programs, offer law enforcement and security personnel the greatest opportunity to disrupt or dissuade acts of terrorism before they occur. Additionally, licensees' timely submission of SARs to the NRC supports one of the agency's primary mission essential functions of threat assessment for licensed facilities, materials, and shipping activities.

In this new regulation, the NRC is seeking to balance agency and national objectives of reporting suspicious activities, while not imposing unnecessary or undue costs on licensees. In this regard, it is not the NRC's intent to dispute a licensee's conclusions about whether an event is considered to be suspicious. Accordingly, the NRC intends to focus any inspection and enforcement efforts regarding this new regulation on programmatic aspects (*e.g.,* adherence to established procedures, training, points of contact, and the reporting process). The NRC objective is to increase the flow of information to the law enforcement and intelligence communities and thus, potentially disrupt or dissuade potential terrorist attacks. These new suspicious activity reporting requirements apply to:
• production or utilization facilities licensed under § 50.21 or § 50.22 (including both operating and decommissioning power reactors and non-power reactors);
• fuel cycle facilities that possess a Category I quantity of SSNM;
• enrichment facilities that possess Category II or III quantities of SNM and use Restricted Data (RD) materials, technology, and information in the enrichment process;
• hot cell facilities subject to 10 CFR 73.50;
• ISFSIs;
• MRSs; and
• GROAs.

These new suspicious activity reporting requirements also apply to licensees shipping SNF and Category I quantities of SSNM. This final rule does not apply these reporting requirements to licensees engaged in the fabrication of new fuel assemblies containing Category II or III quantities of SNM; NRC and Agreement State licensees possessing Category III quantities of SSNM; licensees possessing SSNM or SNM in a form that has been encapsulated into sealed sources that are used for research, development, and testing purposes; and licensees engaging in the transportation of Category II and III quantities of SSNM or SNM. The NRC has taken this approach because of the decreased security risk given the lower enrichment level, lower quantity possessed, or physical form of these materials. However, the NRC has applied these suspicious activity reporting requirements to Category II and III SNM enrichment facilities given the national security non-proliferation concerns associated with RD materials, technology, and information.

The proposed rule contained the term ''certificate holder.'' As used in the

proposed rule, the term referred only to entities holding a 10 CFR part 76 certificate of compliance (CoC), not to entities holding a 10 CFR part 72 CoC. Entities possessing a part 72 CoC are not authorized to possess radioactive material. Consequently, these entities have no need for Section 161A authority. Subsequent to the publication of the 2015 supplemental proposed rule, the NRC terminated the remaining CoC for gaseous diffusion facilities certified to enrich SNM under 10 CFR part 76. The NRC does not expect to issue any new CoCs under 10 CFR part 76. Therefore, consistent with plain language objectives and increased regulatory clarity, this final rule eliminates the terms ''certificate holder'' and ''certificate of compliance'' from the final rule text.

The proposed rule also contained physical security event notification and recordkeeping requirements regarding the loss or theft of Safeguards Information. The NRC has reevaluated the need to address the loss or theft of Safeguards Information in the final rule. Based on this reevaluation, these provisions have been removed as the NRC has determined that it is preferable to retain the existing notification procedures in licensee security plans.

*Withdrawal of Orders*

On June 14, 2013, the Commission issued Order EA–13–092, ''Order Designating an Interim Class of NRC-Licensed Facilities that are Eligible to Apply to the Commission for Authorization to Use the Authority Granted Under the Provisions of Section 161a of the Atomic Energy Act of 1954, as Amended.'' Between September 2015 and January 2016 the Commission issued seven confirmatory orders to eight licensees authorizing them to use stand-alone preemption authority at seven sites.

In SRM–SECY–12–0125, the Commission directed the NRC staff to include in the final rule a plan ''to sunset [withdraw] the interim designation order and the confirmatory orders'' that would later be issued by the Commission. This final rule designates the classes of facilities eligible to apply to use the Commission's Section 161A authority. Additionally, this final rule specifies that those licensees subject to confirmatory orders granting them stand-alone preemption authority must update their applicable procedures, instructions, and training, and come into compliance with the requirements of the rule as of the compliance date specified in the final rule. In accordance with the Commission's direction in SRM–SECY–12–0125, this final rule includes language in 10 CFR 73.15, ''Authorization for use of enhanced weapons and preemption of firearms laws,'' and 10 CFR 73.17, ''Firearms background checks for armed security personnel,'' to withdraw the designation order and confirmatory orders 300 days from the date of publication of the final rule.

## III. Opportunity for Public Comment

As stated in the background section, the NRC published the proposed rule and the two supplemental proposed rules for public comment in the **Federal Register**. Additionally, the NRC staff hosted three public meetings to discuss issues associated with the proposed rule, supplemental proposed rules, and the final rule. A public meeting was held at NRC Headquarters on June 1, 2011, to discuss the proposed implementation plan for the 2011 proposed rule published on February 3, 2011 (76 FR 6200). A summary of the June 2011 public meeting is available in ADAMS under Package Accession No. ML111720007. The NRC did not hold a public meeting to discuss the 2013 supplemental proposed rule because of the limited scope of the proposed change. Another public meeting was held at NRC Headquarters on November 19, 2015, to discuss the 2015 supplemental proposed rule that was published for public comment on September 22, 2015 (80 FR 57106), and to discuss the implementation period for the final rule. A summary of the November 2015 public meeting is available in ADAMS under Accession No. ML15348A082. The feedback from the two public meetings informed the NRC staff's recommended schedule for both the implementation of the background check requirements and for the implementation of the physical security event notification and suspicious activity reporting requirements.

A third public meeting was held at NRC Headquarters on May 30, 2019, to inform stakeholders of the final changes the staff was planning to make in this final rule. The NRC did not accept public comments at this meeting. A summary of the May 2019 public meeting is available in ADAMS under Accession No. ML19176A143.

## IV. Public Comment Analysis

The NRC received a total of 18 comment submissions on this rulemaking effort. Private citizens provided 8 comment submissions, 5 licensees provided comment submissions, 1 Federal agency provided a comment submission, 2 nuclear industry organizations provided 3 comment submissions, and 1 U.S. Congressman provided a comment submission. Most comment submissions were generally supportive of the regulatory action. The public comment submittals are available on the Federal e-Rulemaking website at *https://www.regulations.gov* under Docket ID Nos. NRC–2011–0014, NRC–2011–0015, NRC–2011–0017, and NRC–2011–0018.

The NRC staff prepared a summary and analysis of public comments received on the 2011 proposed rule and the 2013 and 2015 supplemental proposed rules, respectively. This summary and analysis is available in ADAMS under Accession No. ML16264A004. Of the 18 comment submissions received, 6 included comments on the associated draft regulatory guides and draft weapons safety assessment document. The NRC prepared a separate summary and analysis of the public comments received on these guides and document, which is available in ADAMS under Accession No. ML17123A319.

Responses to the public comments, including a description of how the final rule text or guidance changed as a result of the public comments, can be found in the two public comment analysis documents identified above. For more information about the associated supporting and guidance documents see the ''Availability of Guidance'' section of this final rule.

## V. Section-by-Section Analysis

The following paragraphs describe the specific changes that are reflected in this final rule.

*§ 20.2201 Reports of Theft or Loss of Licensed Material*

Paragraph 20.2201(c) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1205. This final rule updates the cross reference.

*§ 21.2 Scope*

Paragraph 21.2(c) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in §§ 73.1200 and 73.1205. This final rule updates the cross reference.

*§ 26.417 Recordkeeping and Reporting*

Paragraph (b)(1) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 26.719 Reporting Requirements*

Paragraph (a) contains a cross reference to § 73.71. The relevant

regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 50.55 Conditions of Construction Permits, Early Site Permits, Combined Licenses, and Manufacturing Licenses*

Paragraph 50.55(e)(8) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1205. This final rule updates the cross reference.

*§ 50.72 Immediate Notification Requirements for Operating Nuclear Power Reactors*

Paragraph 50.72(a), footnote 1, contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 70.20a General License To Possess Special Nuclear Material for Transport*

Paragraph 70.20a(e)(2) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 70.20b General License for Carriers of Transient Shipments of Formula Quantities of Strategic Special Nuclear Material, Special Nuclear Material of Moderate Strategic Significance, Special Nuclear Material of Low Strategic Significance, and Irradiated Reactor Fuel*

Paragraphs 70.20b(c), (d), and (e) contain a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 72.74 Reports of Accidental Criticality or Loss of Special Nuclear Material*

Paragraph (c) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*Part 73—Physical Protection of Plants and Materials*

This final rule restructures 10 CFR part 73 to add Subparts A through T. The new structure uses subparts to provide a logical structure and increase clarity for part 73. These new subparts incorporate existing regulations, add new regulations, and provide for future regulations, within this logical structure. Subparts J through S are reserved for future rulemakings. The subpart structure is as follows:

- *Subpart A—General Provisions:* contains existing §§ 73.1 through 73.8. Detailed descriptions of the revisions to §§ 73.2 and 73.8 are provided later in this section. No amendments are made to the requirements for the remaining sections.
- *Subpart B—Enhanced Weapons, Preemption, and Firearms Background Checks:* contains new sections §§ 73.15 and 73.17. These sections contain the requirements associated with implementation of stand-alone preemption authority, combined preemption authority and enhanced weapons authority, and firearms background checks pursuant to Section 161A of the AEA. Detailed descriptions of those sections are provided later in this section.
- *Subpart C—General Performance Objective of Strategic Special Nuclear Material:* contains the existing § 73.20. No amendments are made to this section.
- *Subpart D—Protection of Safeguards Information:* contains the existing §§ 73.21 through 73.23. Detailed descriptions of the revisions to §§ 73.22 and 73.23 are provided later in this section. No amendments are made to the requirements for the remaining sections.
- *Subpart E—Physical Protection Requirements of Special Nuclear Material and Spent Nuclear Fuel in Transit:* contains the existing §§ 73.24 through 73.38. Detailed descriptions of the revisions to §§ 73.27 and 73.37 are provided later in this section. No amendments are made to the requirements for the remaining sections.
- *Subpart F—Physical Protection Requirements at Fixed Sites:* contains the existing §§ 73.40 through 73.55. Detailed descriptions of the revisions to §§ 73.46, 73.51, and 73.55 are provided later in this section. No amendments are made to the requirements for the remaining sections.
- *Subpart G—Background Check and Access Authorization Requirements:* contains the existing §§ 73.56 through 73.67. Detailed descriptions of revisions to § 73.67 are provided later in this section. No amendments are made to the requirements for the remaining sections.
- *Subpart H—Records and Postings:* contains the existing §§ 73.70 through 73.75. Section 73.71 has been removed and reserved. No amendments are made to the requirements for the remaining sections.
- *Subpart I—Enforcement:* contains the existing §§ 73.76 through 73.81 with no amendments to the requirements in those sections.
- *Subparts J through S—Reserved*
- *Subpart T—Security Notifications, Reports, and Recordkeeping:* contains new §§ 73.1200, 73.1205, 73.1210, and 73.1215. These requirements were previously located in § 73.71 and appendix G to 10 CFR part 73. This final rule also removes and reserves both § 73.71 and appendix G to 10 CFR part 73. Detailed descriptions of those sections are provided later in this section.

*§ 73.2 Definitions*

This final rule adds new terms to the list of defined terms in § 73.2 and revises one existing term. Added terms include new definitions of *Adverse firearms background check, Combined preemption authority and enhanced weapons authority, Covered weapon, Enhanced weapon, Firearms background check, NICS, NICS response, NICS transaction number, Satisfactory firearms background check,* and *Stand-alone preemption authority.* These terms are used in the Firearms Guidelines and in the new enhanced weapons regulations to describe the types of weapons, background check characteristics, and authority relevant to Section 161A of the AEA.

Other new terms being added to clarify the physical event notification requirements, include: *Contraband, Greater than class C waste, High-level radioactive waste, Independent spent fuel storage installation, Restricted Data, Special nuclear material, Spent nuclear fuel or spent fuel,* and *Time of discovery.* This final rule also revises the existing term *Movement control center.*

Additionally, this final rule adds new paragraphs (b) and (c) to § 73.2, which provide cross references to appropriate ATF and FBI regulations for terms that are relevant to Section 161A activities (*e.g., Handgun, Machine gun,* or *Short-barreled shotgun*), which fall under the original purview of these agencies.

*§ 73.8 Information Collection Requirements: OMB Approval*

This final rule revises paragraphs (b) and (c) of § 73.8 to update the list of paragraphs in 10 CFR part 73 that contain information collection requirements. Paragraph (b) removes § 73.71 and appendix G (which are removed from 10 CFR part 73) and adds new §§ 73.1200, 73.1205, 73.1210, and 73.1215 (which contain notification, reporting, and recordkeeping requirements in 10 CFR part 73).

Paragraph (c) references three forms and their associated OMB control numbers. These control numbers are separate from the control number associated with 10 CFR part 73 itself. Two existing forms (*NRC Form 366* and *FBI Form FD–258)* are used by NRC licensees and are added to this paragraph as a corrective change under

OMB control numbers 3150–0104 (NRC) and 1110–0046 (FBI), respectively. New *NRC Form 754* is added to this paragraph under OMB control number 3150–0204. The *NRC Form 754* is used by licensees to submit security personnel for a firearms background check under the provisions of § 73.17. The NRC has also made conforming changes to *NRC Form 366* to reflect the submission of written follow-up security event reports (under § 73.1205) following notifications made by licensees, pursuant to § 73.1200. Conforming changes to *NRC Form 366* were necessary to reflect the restructuring of the physical security event notifications requirements in 10 CFR part 73.

*§ 73.15 Authorization for Use of Enhanced Weapons and Preemption of Firearms Laws*

New § 73.15 contains requirements for a licensee to apply for: (1) stand-alone preemption authority or (2) combined preemption authority and enhanced weapons authority, under Section 161A of the AEA.

Paragraph (a) describes the purpose of the section and paragraph (b) contains general requirements applicable to both types of authority.

Paragraph (c) lists the designated classes for either stand-alone preemption authority or combined preemption authority and enhanced weapons authority.

Paragraph (d) sets forth the requirements and process for licensees who are included within the designated classes of facilities, radioactive material, and other property specified in § 73.15(c)(1) and desire to voluntarily apply for stand-alone preemption authority under Section 161A of the AEA.

Paragraph (e) sets forth the requirements and process for eligible licensees (as specified in § 73.15(c)(2)) who choose to voluntarily apply for combined preemption authority and enhanced weapons authority under Section 161A of the AEA. Paragraph (e) requires that the licensee in its application provide sufficient information to justify its request for combined preemption authority and enhanced weapons authority and how that authority will be implemented. Applicants for combined preemption authority and enhanced weapons authority that already have stand-alone preemption authority under § 73.15(d) are not required to reapply for stand-alone preemption authority in their § 73.15(e) application.

Paragraph (f) requires the licensee to submit additional information to the NRC in support of a request for combined preemption authority and enhanced weapons authority addressing the specific enhanced weapons that the licensee requests permission to use and the required training for security personnel whose official duties require access to the enhanced weapons.

Paragraph (g) requires licensees to provide a copy of the NRC's letter approving the licensee's request for combined preemption authority and enhanced weapons authority to the entity that will be transferring the enhanced weapons to the licensee. The ATF must approve, in advance, all transfers of enhanced weapons to an NRC licensee. This final rule revises § 73.15(g)(1) and adds new subparagraphs (g)(2) and (g)(3) to cross-reference NRC-licensee responsibilities to comply with relevant ATF regulations in 27 CFR part 479.

Paragraph (h) requires licensees to ensure that security personnel complete training and qualification on any enhanced weapons prior to their use. Recurring training and requalification on any enhanced weapons are also required in accordance with the licensee's approved training and qualification plan.

Paragraph (i) is reserved.

Paragraph (j) lists those sections of part 73 that contain requirements applicable to the use of enhanced weapons by licensee security personnel.

Paragraph (k) requires NRC licensees to notify the NRC of any adverse ATF inspection or enforcement findings received by the licensee regarding the receipt, possession, or transfer of enhanced weapons.

Paragraph (l) is reserved.

Paragraph (m) defines what constitutes a transfer of enhanced weapons. The paragraph describes requirements for the transfer of enhanced weapons including, but not limited to, prior approval from the ATF as well as records and reporting requirements. The issuance of an enhanced weapon by a licensee to a security individual with the subsequent return of the weapon to the licensee upon the individual's completion of official duties would not constitute a transfer under ATF's regulations.

Paragraph (n) describes requirements to transport enhanced weapons for activities that are not considered a transfer of the enhanced weapons. Additionally, this final rule adds new subparagraph (6) to § 73.15(n) to clarify that NRC licensees planning interstate transport of enhanced weapons must obtain prior ATF approval, as required by 27 CFR 478.28.

Paragraph (o) describes requirements for conducting periodic inventories of enhanced weapons to verify that these weapons are not stolen or lost. These inventories include a monthly inventory that involves counting the number of enhanced weapons that are present at the licensee's facility and an annual inventory that verifies the serial number of each weapon that is present at the licensee's facility. The paragraph requires that records be maintained on inventory results. The paragraph also provides minimum requirements for tamper-indicating devices used for securing enhanced weapons. Finally, the paragraph requires that inventory discrepancies be resolved within 24 hours of identification. Otherwise, the discrepancy should be treated as if an enhanced weapon had been stolen or lost.

This final rule adds new subparagraph (8) to § 73.15(o) to clarify that NRC licensees conducting periodic inventories while enhanced weapons are offsite for an authorized purpose must document the absence of such weapons in the periodic inventory.

Paragraph (p) describes requirements for notification of the NRC and local law enforcement officials of lost or stolen enhanced weapons.

Paragraph (q) describes the records requirements for licensees relating to the receipt, transfer, and transportation of enhanced weapons. Licensees are permitted to integrate any records required under this paragraph with records required by ATF relating to the possession of enhanced weapons. This final rule also includes conforming changes to § 73.15(q)(1) to clarify the records requirements for the inventories in paragraph (o).

Paragraph (r) describes requirements regarding the termination, modification, suspension, and revocation of a licensee's Section 161A authority. Licensees seeking termination or modification of their authority to possess enhanced weapons, or different types, calibers, gauges, or quantities of enhanced weapons, are required to apply to the NRC in accordance with § 73.4 and the license amendment provisions of §§ 50.90, 70.34, or 72.56 of this chapter. Licensees are required to transfer any enhanced weapons that they will no longer be authorized to possess to an appropriate party in accordance with ATF's requirements. Alternatively, the weapons can be surrendered to the ATF for destruction.

This final rule revises paragraphs (r)(1) and (2) to include a cross reference to the license amendment application regulations in § 72.56. This conforming change is made as a result of including

all ISFSIs within the scope of the rule. Additionally, consistent with the global removal of the term ''certificate holders'' from the final rule text, this final rule also removes the cross reference to § 76.45 (for amendments to a 10 CFR part 76 CoC) from paragraphs (r)(1) and (r)(2).

Paragraph (s) adds provisions to provide for licensees' transitions from stand-alone preemption authority or combined preemption authority and enhanced weapons authority previously approved by the NRC via orders to the requirements of this final rule. The NRC expects that a licensee would complete its transition to the requirements of this final rule without the need for any additional applications or notifications to the NRC. Paragraph (s)(4) of § 73.15 provides that as of January 8, 2024, any orders implementing the Commission's Section 161A authority are withdrawn.

*§ 73.17 Firearms Background Checks for Armed Security Personnel*

New § 73.17 contains requirements for a licensee to conduct firearms background checks mandated under Section 161A of the AEA. Only licensees that voluntarily apply for Section 161A authority under § 73.15 are required to conduct firearms background checks under § 73.17.

Paragraph (a) states that the firearms background checks are intended to verify that the licensee's armed security personnel are not prohibited from receiving, possessing, transporting, importing, or using covered weapons under Federal, State, or local law or regulations.

Paragraph (b) provides general requirements regarding the completion of firearm background checks, including the establishment and implementation of a Firearms Background Check Plan. The Firearms Background Check Plan is a component of the licensee's 10 CFR part 73, appendix B, required Training and Qualification plan for security personnel whose official duties require access to covered weapons.

Paragraph (b)(2) describes the groups of individuals included within the phrase *security personnel whose official duties require access to covered weapons.*

Paragraph (b)(3) specifies the elements of the Firearms Background Check Plan.

Paragraphs (b)(4) through (b)(8) address the requirements for conducting firearms background checks and specify, among other things, that the licensee can only assign security personnel who have completed a satisfactory firearms background check to duties requiring access to covered weapons. This section also includes a requirement to remove individuals from duties requiring access to covered weapons, without delay, if they receive a ''denied'' or ''delayed'' NICS response.

Paragraph (b)(9) requires licensees to complete a new satisfactory firearms background check for security personnel who experience a break-in-service.

Paragraph (b)(10) specifies that changes in license ownership or changes in the licensee's security guard contractor do not constitute a break-in-service that would require a new firearms background check.

Paragraph (b)(11) prohibits licensees from using a satisfactory firearms background check in lieu of completing other required criminal history records checks or background investigations specified in the NRC's access authorization or personnel security clearance programs under other provisions of 10 CFR chapter I.

Paragraph (b)(12) specifies that a new firearms background check is not required for security personnel who have completed a satisfactory firearms background check, pursuant to a Commission designation order issued before the effective date of this final rule. However, these security personnel remain subject to the periodic firearms background checks and the break-in-service firearms background check requirements of § 73.17.

Paragraph (b)(13) requires a licensee to stop conducting firearms background checks if it withdraws its application for Section 161A authority.

Paragraph (b)(14) requires a licensee to discontinue conducting firearms background checks if the NRC rescinds or revokes the licensee's Section 161A authority, in accordance with § 73.15.

Paragraph (c) is reserved.

Paragraph (d) describes the components of a firearms background check. A firearms background check consists of two parts: (1) a check of an individual's fingerprints against the FBI's fingerprint system, and (2) a check of the individual's identity against the FBI's NICS databases.

Paragraph (e) describes the information that a licensee must submit to the NRC for each individual subject to a firearms background check. This paragraph also specifies how long the licensee must retain this information as a record.

Paragraph (f) describes the requirements for periodic firearms background checks, which are to be completed at least once every 5 calendar years. The paragraph also specifies an allowance period for completion of a satisfactory periodic firearms background check of midnight of the end of the month that is 5 years from the date of the most recent firearms background check. Security personnel may remain assigned to duties requiring access to covered weapons, while pending completion of a periodic firearms background check (started before the end of the allowance period). However, if a satisfactory firearms background check is not completed by the end of the allowance period, then the security personnel must be removed from duties requiring access to covered weapons. Paragraph (f) also specifies that an individual who receives a ''denied'' or ''delayed'' NICS response during a periodic firearms background check must be removed, without delay, from duties requiring access to covered weapons.

Paragraph (g) requires affected licensees to notify the NRC that an individual with access to covered weapons has been removed from all duties requiring such access because of the discovery of a disqualifying status condition or disqualifying event under applicable Federal, State, or local law. The licensee is required to maintain records of such removals under the Firearms Background Check Plan, as required under revised paragraph (b)(3)(vi).

Paragraph (h) requires affected security personnel to make timely disclosure within 72 hours of the occurrence of a disqualifying event or status condition specified in 27 CFR 478.32 that would prevent them from receiving or possessing firearms.

Paragraph (i) is reserved.

Paragraph (j) requires training for security personnel who are subject to firearms background checks under the licensee's Firearms Background Check Plan on the following: (1) Federal and State disqualifying status conditions or disqualifying events specified in 27 CFR 478.32, (2) ATF's implementing regulations defining such status conditions or disqualifying events, (3) the ongoing obligation of security personnel who are subject to a firearms background check to notify their licensee's security management of the occurrence of such a disqualifying status condition or disqualifying event, and (4) the process for appealing adverse firearms background check results. Finally, periodic refresher training on these modules is required annually.

Paragraph (k) describes the requirements for processing fingerprint checks as part of the firearms background checks. This includes the submission of fingerprint cards or electronic fingerprint records to the NRC.

Paragraph (l) is reserved.

Paragraph (m) describes the requirements for fees associated with processing firearms background checks. The amount of the fee will be specified on the NRC's public website.

Paragraph (n) describes NRC responsibilities regarding the processing of firearms background checks.

Paragraph (o) is reserved.

Paragraph (p) states that licensees may not assign security personnel who have received a ''denied'' or a ''delayed'' NICS response to any official duties requiring access to covered weapons during the pendency of an appeal of the firearms background check.

Paragraph (q) requires licensees to establish and maintain a system of files and procedures to protect the firearms background check, NRC Form 754 records, and personal information from unauthorized disclosure.

Paragraph (r) provides a cross reference to § 73.15(s) for the withdrawal of the orders issued under Section 161A of the AEA.

*§ 73.22 Protection of Safeguards Information: Specific Requirements*

Paragraph (f)(3) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 73.23 Protection of Safeguards Information-Modified Handling: Specific Requirements*

Paragraph (f)(3) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 73.27 Notification Requirements*

Paragraph (c) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in §§ 73.1200 and 73.1205. This final rule updates the cross reference.

*§ 73.37 Requirements for Physical Protection of Irradiated Reactor Fuel in Transit*

Paragraphs (b)(3)(iii) and (b)(3)(v)(C) contain a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross references.

New paragraph (b)(3)(viii) requires a licensee to ensure that the firearms background check requirements of § 73.17 are met for all armed escorts whose official duties require access to covered weapons or who inventory enhanced weapons.

*§ 73.46 Fixed Site Physical Protection Systems, Subsystems, Components, and Procedures*

This final rule updates paragraph (b) to cross reference to the firearms background check requirements of § 73.17 and requires that security personnel subject to § 73.46 and who are using covered weapons are also subject to the firearms background check requirements in § 73.17.

*§ 73.51 Requirements for the Physical Protection of Stored Spent Nuclear Fuel and High-Level Radioactive Waste*

New paragraph (b)(4)(i) is added to § 73.51 to cross reference to the firearms background check requirements of § 73.17.

Paragraph (d)(13) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1210. This final rule updates the cross reference.

Paragraph (e) is amended to add a paragraph heading.

Paragraph (f) is added as a conforming change to § 73.15(j) to reflect the potential for a specific license ISFSI to possess covered weapons. This modified provision follows from the change described in § 73.15(c) in which all ISFSI licensees are included in the scope of this final rule, meaning all ISFSI licensees are eligible to apply for Section 161A authority. Paragraph (f) also requires ISFSI licensees employing covered weapons to train their security personnel on the use of sufficient force, including deadly force.

*§ 73.55 Requirements for Physical Protection of Licensed Activities in Nuclear Power Reactors Against Radiological Sabotage*

This final rule updates § 73.55(b)(12) to cross reference to the firearms background check requirements of § 73.17. Additionally, § 73.55(p)(3) is updated to reflect the reporting requirements for suspension of security measures in accordance with §§ 73.1200 and 73.1205 instead of § 73.71.

*§ 73.67 Licensee Fixed Site and In-Transit Requirements for the Physical Protection of Special Nuclear Material of Moderate and Low Strategic Significance*

This final rule updates § 73.67(e)(3)(vii) and (g)(3)(iii) to update the cross reference to the new §§ 73.1200 and 73.1205.

*§ 73.71 Reporting of Safeguard Events*

This final rule removes and reserves § 73.71. The regulations on physical security event notifications, written follow-up reports, and lesser-significance recordable physical security events that were previously located in § 73.71 and appendix G to 10 CFR part 73 are relocated to new §§ 73.1200, 73.1205, and 73.1210, respectively.

*§ 73.1200 Notification of Physical Security Events*

This final rule adds new § 73.1200 on physical security event notifications. This section describes categories of physical security events and the timeframes by which the licensee must notify the NRC of these events.

Paragraph (a) adds a 15-minute notification requirement for a licensee's initiation of a security response based on an imminent or actual hostile action against its facility or for a licensee being notified by LLEA or government officials of potential hostile action or sabotage anticipated within the next 12 hours. These notification requirements apply only to nuclear power reactors, fuel cycle facilities authorized to possess and use Category I quantities of SSNM, and ISFSIs. In addition, these requirements will apply to future licensees such as MRSs, GROAs, and production facilities.

Paragraph (b) adds a 15-minute notification requirement for a licensee's initiation of a security response based on an imminent or actual hostile actions against shipments or for a licensee being notified by LLEA or government officials of potential sabotage anticipated within the next 12 hours. These notification requirements apply only to shipments of Category I SSNM, SNF, and HLW.

Paragraph (c) clarifies the 1-hour notifications for significant security events against facilities. These notifications apply to:

- production or utilization facilities licensed under § 50.21 or § 50.22 (including both operating and decommissioning power reactors and non-power reactors);
- facilities that possess Category I, II, or III quantities of SSNM;
- facilities that possess Category II or III quantities of SNM;
- hot cell facilities subject to 10 CFR 73.50;
- ISFSIs;
- MRSs; and
- GROAs.

Significant security events requiring notification include actual, attempted, or a threat to cause: theft or diversion of Category I, II, or III quantities of SSNM or Category II or III quantities of SNM; significant physical damage to a facility; unauthorized operation, manipulation, or tampering that results in interruption of normal operation of a

reactor or an accidental criticality at a Category I SSNM facility; for facilities with a vehicle barrier, introduction of a quantity of explosives that exceeds the facility's adversary characteristics beyond a protected area's vehicle barrier system; and notification from LLEA or other government agency of potential hostile action or sabotage against a nuclear power reactor, SNF storage or disposal facility, or a Category I SSNM facility that is anticipated to occur in more than 12 hours.

Paragraph (d) adds 1-hour notifications for significant security events against shipments. These notifications apply to shipments of Category I, II, or III quantities of SSNM; SNF; HLW; and Category II or III quantities of SNM. The types of significant security events requiring notification include actual, attempted, or threat to cause: theft or diversion of a shipment; significant physical damage to a conveyance (vehicle) transporting a Category I or II quantity of SSNM, Category II quantity of SNM, SNF, or HLW, or to the material itself; discovery of the loss of, and recovery or accounting for, a lost shipment of Category I SSNM; and notification from LLEA or other government agency of potential hostile action or sabotage against a shipment of Category I SSNM, SNF, or HLW that is anticipated within greater than the next 12 hours.

Paragraph (e) adds 4-hour notifications for security events against facilities. These notifications apply to the same classes of facilities as specified under paragraph (c). Examples of events that require notification include but are not limited to: actual or attempted entry of an unauthorized individual into a protected area (PA), vital area (VA), material access area (MAA), or controlled access area (CAA); actual or attempted introduction of contraband into a PA, VA, or MAA; and an authorized weapon is lost or uncontrolled inside a PA, VA, or MAA.

Paragraph (f) adds 4-hour notifications for security events against shipments. These notifications apply to many of the classes of shipments specified under paragraph (d). Examples of events that require notification include but are not limited to: actual or attempted entry of unauthorized persons into a transport vehicle or the material being transported, which involves shipment of a Category I or II quantity of SSNM, a Category II quantity of SNM, SNF, or HLW; and actual or attempted introduction of contraband into a transport vehicle or the material being transported, which involves shipment of a Category I or II quantity of SSNM, a Category II quantity of SNM, SNF, or HLW.

Paragraph (g) adds 8-hour notifications for security program failure events at facilities. These notifications apply to the same classes of facilities as specified under paragraph (c). A security program failure is a programmatic failure of a security system, process, or procedure. Examples of security program failures include but are not limited to: the failure, degradation, or vulnerability of a security system, process, or procedure (for which compensatory measures have not been implemented) that could have allowed an unauthorized individual into a PA, VA, MAA, or CAA, or could have allowed contraband into a PA, VA, or MAA or that could have allowed a quantity of explosives exceeding the facility's adversary characteristics beyond a vehicle barrier; and the unauthorized operation, manipulation, or tampering with a nuclear reactor's controls or structures, systems, or components (SSCs) that does not interrupt the normal operation of a reactor.

Paragraph (h) adds 8-hour notifications for security program failure events for those classes of shipments as specified under paragraph (d). Examples of security program failures include but are not limited to: failure, degradation, or discovered vulnerability (for which compensatory measures have not been implemented) that could have allowed an unauthorized individual or contraband into a transport vehicle or the material being transported.

Paragraphs (i), (j), (k), and (l) are reserved.

Paragraph (m) adds a requirement for licensees to notify the ATF immediately upon the discovery of any stolen or lost enhanced weapons. After which, licensees must notify the NRC as soon as possible, but not later than 1 hour.

Paragraph (n) adds a requirement for a 24-hour notification to the NRC when a licensee receives an adverse inspection finding, enforcement finding, or other adverse notice from the ATF regarding any ATF-issued federal firearms license or the licensee's possession, receipt, transfer, transportation, or storage of enhanced weapons.

Paragraph (o) adds requirements for making telephonic notifications to the NRC Headquarters Operations Center (*i.e.,* the notification process) under § 73.1200. Provisions address the communication of security events where the information contains safeguards or classified information.

Paragraph (p) adds requirements for licensees providing significant supplementary information to a previously submitted notification to the NRC in compliance with paragraph (o).

Paragraph (q) adds provisions regarding retraction of previous security event reports. Based upon the NRC's response to public comments, the retraction provisions have been expanded from only ''invalid'' security events to also include ''not reportable'' security events.

Paragraphs (r) and (s) add provisions clarifying the importance of emergency notifications and eliminating unnecessary duplication.

Paragraph (t) adds provisions regarding the deliberate disclosure, theft, loss, compromise, or possible compromise of classified documents, information, or material. For such events, the licensee's notification should be made in accordance with the requirements of § 95.57.

*§ 73.1205 Written Follow-Up Reports of Physical Security Events*

This final rule adds new § 73.1205 addressing the submission of written follow-up reports following a licensee's telephonic notification of a physical security event under § 73.1200. This section is applicable to licensees who are also subject to the various provisions of § 73.1200.

Paragraph (a) adds the general requirement to submit written follow-up reports to the NRC within 60 days of the licensee's notification made under § 73.1200. Paragraph (a) also adds several exemptions to the requirement to submit written follow-up reports for certain security events.

Paragraph (b) adds criteria for written follow-up report development and submission, including the development of significant supplemental information.

Paragraph (c) adds requirements on the contents of a written follow-up report.

Paragraph (d) adds requirements regarding the transmission of a written follow-up report to the NRC.

Paragraph (e) adds requirements for licensees to retain records of written follow-up reports submitted to the NRC for 3 years from the date of the report.

*§ 73.1210 Recordkeeping of Physical Security Events*

This final rule adds new § 73.1210 addressing the recordkeeping of less significant physical security events and conditions adverse to security. It consolidates and clarifies the safeguards event log requirements into this new section. This section is applicable to licensees who are also subject to the various provisions of § 73.1200.

Paragraph (a) specifies the categories of events and conditions that must be recorded and adds the objective and purpose for recording such events. The recording of appropriate events is intended to facilitate the licensee's monitoring of the effectiveness of its physical security program as part of the licensee's overall quality assurance program.

Paragraph (b) adds the general requirement to record the events or conditions specified in § 73.1210(c) through (f) within 24 hours of the time of discovery. Paragraph (b)(2) provides record retention requirements. Paragraph (b)(3) adds flexibility by allowing licensees to record these events or conditions in either a standalone safeguards event log or in the licensee's corrective action program. Licensees must implement information security requirements of 10 CFR parts 73 or 95, as applicable, on the protection of this information. Paragraph (b)(4) describes the content of the information in these records. Paragraph (b)(5) specifies that an event or condition, for which a notification was made under § 73.1200, is not also required to be recorded under § 73.1210. Paragraph (b)(6) specifies that an event or condition, for which a SAR was made under § 73.1215, is not also required to be recorded under § 73.1210.

Paragraph (c) specifies compensated events which must be recorded pursuant to paragraph (b)(1). Compensated events include any failure, degradation, or discovered vulnerability in a security or safeguards system for which compensatory measures were established within the required timeframe and that could have resulted in a security event (*e.g.,* entry of unauthorized personnel into a PA, VA, MAA, CAA, transport vehicle, or transported material; entry of contraband into a PA, VA, or MAA).

Paragraph (d) specifies ammunition events which must be recorded pursuant to paragraph (b)(1). Ammunition events involve lost or uncontrolled small quantities of ammunition.

Paragraph (e) is reserved.

Paragraph (f) requires that events or conditions involving other decreases in the effectiveness of the physical security program be recorded in accordance with paragraph (b)(1).

Paragraph (g) requires that events or conditions involving infractions, losses, compromises, or possible compromise of classified information or classified documents be recorded under the requirements found in § 95.57.

Paragraph (h) adds exemptions to the recording of physical security events for licensees who are subject to § 73.67 and who possess or transport a Category III quantity of SSNM or a Category II or III quantity of SNM.

*§ 73.1215 Suspicious Activity Reports*

This final rule adds a new § 73.1215, which requires that licensees report suspicious activities to their LLEA, their FBI local field office, the NRC, and the local FAA control tower (for suspicious activities involving aircraft), as soon as possible, but within 4 hours of the time of discovery. The NRC's objective is to encourage licensees to use their best judgement to promptly assess whether an activity is suspicious and must be reported. As part of this assessment, licensees may discuss the activity with local authorities or review electronic information, such as surveillance video, before concluding that the activity is suspicious. The new suspicious activity reporting requirements are applicable to all licensees subject to the provisions of § 73.20, § 73.45, § 73.46, § 73.50, § 73.51, § 73.55, § 73.60, or § 73.67 with the exceptions noted in paragraphs (d) and (g).

Paragraphs (a) and (b) add the NRC's purpose and objective of this new requirement.

Paragraph (c) adds general requirements for the reporting of suspicious activities, the establishment of points of contact with the licensee's LLEA, local FBI field office, and local FAA control tower (for suspicious activities involving aircraft) and the inclusion of this information in security communication procedures.

Paragraph (d) adds reporting of suspicious activities for facilities and material involving: challenges to the licensee's security systems and procedures; elicitation of non-public information from knowledgeable personnel relating to security or emergency response programs; or observed preoperational surveillance or reconnaissance activities. Paragraphs (d)(1) through (3) also specify which licensees are subject to suspicious activity reporting.

Paragraph (e) adds reporting of suspicious activities for shipments involving: challenges to transportation communication systems or security systems; interference with in-progress shipments; elicitation of non-public information from knowledgeable personnel relating to security or emergency response programs; or observed preoperational surveillance or reconnaissance activities.

Paragraph (f) adds reporting of suspicious activities for facilities engaged in the enrichment of SNM using RD technology. Such suspicious activities include, but are not limited to: aggressive noncompliance by visitors involving willful departure from tour groups or unauthorized entry into restricted areas; unauthorized recording or imaging of RD information, technology, or materials; or elicitation of non-public information from knowledgeable individuals regarding physical and information systems for protecting RD information, technology, or materials.

Paragraph (f)(2) adds an exemption for the reporting of a licensee's identification of alleged or suspected activities involving actual, attempted, or conspiracies to obtain RD, communicate RD, remove RD, or disclose RD in violation of Sections 224, 225, 226, and 227 of the AEA under § 95.57 instead of § 73.1215.

Paragraph (g) adds exemptions to the reporting of suspicious activities for (1) NRC and Agreement State licensees who are subject to § 73.67 and who possess SSNM in quantities greater than 15 grams but less than the quantity necessary to form a critical mass per § 150.11(a); and (2) a particular NRC licensee who is authorized for possession of SSNM or SNM in the form of sealed sources that are used for research, development, and testing purposes.

*Appendix A to Part 73—U.S. Nuclear Regulatory Commission Offices and Classified Mailing Addresses*

This final rule updates appendix A to 10 CFR part 73 to add a secure email address for licensees authorized to transmit classified information to the NRC Headquarters Operations Center. Paragraphs III and IV are also added to appendix A to require the use of classified telephone numbers, secure telephones, and secure email when licensees are communicating classified information to the NRC Headquarters Operations Center unless directed otherwise by the NRC.

*Appendix B to Part 73—General Criteria for Security Personnel*

This final rule updates appendix B to 10 CFR part 73, section VI, paragraph B.1(a)(4), which contains a cross reference to § 73.19. The relevant regulations from proposed § 73.19 are now found in § 73.17. This final rule corrects this cross reference. Appendix B is also revised to clarify employment suitability for armed security personnel.

*Appendix G to Part 73—Reportable Safeguards Events*

This final rule removes and reserves appendix G to 10 CFR part 73. The regulations on physical security event

notifications, written follow-up reports, and lesser-significance recordable physical security events and conditions adverse to security, which were previously located in § 73.71 and appendix G to 10 CFR part 73, are relocated to new §§ 73.1200, 73.1205, and 73.1210, respectively.

*§ 74.11 Reports of Loss or Theft or Attempted Theft or Unauthorized Production of Special Nuclear Material*

Paragraph 74.11(c) contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 76.113 Formula Quantities of Strategic Special Nuclear Material—Category I*

Paragraph (b) to § 76.113 contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 76.115 Special Nuclear Material of Moderate Strategic Significance—Category II*

Paragraph (b) to § 76.115 contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

*§ 76.117 Special Nuclear Material of Low Strategic Significance—Category III*

Paragraph (b) to § 76.117 contains a cross reference to § 73.71. The relevant regulations from § 73.71 are now found in § 73.1200. This final rule updates the cross reference.

## VI. Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. This final rule affects only the licensing, operation of, and transportation by:

- production or utilization facilities licensed under § 50.21or § 50.22 (including both operating and decommissioning power reactors and non-power reactors);
- facilities that possess Category I, II, or III quantities of SSNM;
- facilities that possess Category II or III quantities of SNM;
- hot cell facilities subject to 10 CFR 73.50;
- ISFSIs;
- MRSs; and
- GROAs.

The companies, universities, and government agencies that own and operate these facilities do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

## VII. Regulatory Analysis

The NRC has prepared a regulatory analysis for this final rule. The analysis examines the costs and benefits of the alternatives considered by the NRC. The final regulatory analysis can be found under ADAMS Accession No. ML19045A003. The NRC requested comment on the draft regulatory analyses prepared for the 2011 proposed rule and the 2015 supplemental proposed rule. No public comments were received.

## VIII. Backfitting and Issue Finality

The provisions of this final rule implementing the statutory authority of Section 161A of the AEA are voluntary in nature. These amendments do not impose modifications or additions to existing licensee SSCs, designs, procedures, or organizations required to operate an NRC-licensed facility. Accordingly, the provisions of this final rule do not constitute backfitting, as defined in §§ 50.109, 70.76, and 72.62, and are not otherwise inconsistent with any issue finality provision in 10 CFR part 52.

This final rule contains three requirements that were not imposed by order on the eight licensees with stand-alone preemption authority: notification of disqualifying events or conditions (§ 73.17(g)), training supporting notification of disqualifying events or conditions and information for appealing an adverse firearms background check to the FBI (§ 73.17(j)), and protection of information from unauthorized disclosure (§ 73.17(q)). Although these amendments represent new requirements, they involve recordkeeping, reporting requirements or an appeals process, which do not constitute backfitting as defined in 10 CFR Chapter I or a violation of issue finality in 10 CFR part 52.

This final rule also imposes new physical security event notification and suspicious activity reporting requirements. These amendments involve information collection and reporting activities, which are outside the purview of the backfitting and issue finality provisions. Therefore, a backfit analysis is not required and has not been prepared for this final rule.

## IX. Cumulative Effects of Regulation

Cumulative Effects of Regulation (CER) consists of the challenges licensees may face in addressing the implementation of new regulatory positions, programs, and requirements (*e.g.,* rulemaking, guidance, generic letters, backfits, inspections). The CER may manifest in several ways, including the total impact on licensees from simultaneous or consecutive regulatory actions that can adversely affect the licensee's capability to implement those requirements, while continuing to operate or construct its facility in a safe and secure manner.

The goals of the NRC's CER effort were met throughout the development of this final rule. The NRC staff has engaged external stakeholders at public meetings and by soliciting public comments on the proposed rules and associated draft guidance documents. The proposed rule (76 FR 6199) was issued on February 3, 2011, for public comment. The staff also issued the draft guidance for public comment at the same time as the February 2011 proposed rule (February 3, 2011; 76 FR 6085). A public meeting was held at NRC Headquarters on June 1, 2011 (ADAMS Package Accession No. ML111720007), to discuss the proposed implementation plan for the February 2011 proposed rule (76 FR 6199). The staff also issued two supplemental proposed rules that: (1) expanded the scope of the rulemaking to include at-reactor ISFSIs (January 10, 2013; 78 FR 2214) and (2) revised the firearms background check requirements to align with the updated Firearms Guidelines from 2014 (September 22, 2015; 80 FR 57106). A second public meeting was held at NRC Headquarters on November 19, 2015 (ADAMS Accession No. ML15348A082), to discuss the supplemental proposed rule that was published on September 22, 2015 (80 FR 57106) and to discuss the implementation period for the final rule. The feedback from these two public meetings informed the staff's implementation schedule for both the background check requirements and the physical security event notifications requirements. The staff held a third public meeting at NRC Headquarters on May 30, 2019 (ADAMS Accession No. ML19176A143), to inform stakeholders of the final changes the staff was planning to make in this final rule. NRC did not accept public comments at this meeting.

Based upon input from the public and affected licensees, and in consideration of the need to promulgate the regulations on Section 161A authority and to update the regulations on physical security event notifications, the NRC has specified that this final rule will take effect 30 days from the date of publication of this notice. The NRC is

not providing licensees a compliance period to apply for Section 161A authority because such application is voluntary. However, in §§ 73.15 and 73.17, the NRC is specifying a compliance period of 300 days from the date of publication of this final rule for licensees who have applied for and received stand-alone preemption authority via confirmatory orders to transition to the requirements of this final rule. Finally, the NRC is also specifying a compliance period of 300 days from the date of publication of this final rule for licensees to implement and train key personnel on the revised physical security event notification and suspicious activity reporting requirements. Information on the effective and compliance dates for the various provisions of this final rule are found in the **DATES** section of this notice.

## X. Plain Writing

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

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

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in 10 CFR part 51 subpart A that this final rule will not have a significant effect on the quality of the human environment and, therefore, an environmental impact statement is not required. The principal effect of this action is to revise the security regulations to implement Section 161A of the AEA, to clarify existing requirements for notification of physical security events, and to add several new requirements for physical security event notification and suspicious activity reporting.

Many of the changes in this final rule fall under a categorical exclusion for which the Commission has previously determined that such actions, neither individually nor cumulatively, will have significant impacts on the human environment. The NRC has determined that Parts 2 and 3 of this final rule regarding physical security event notifications and the suspicious activity reporting requirements are subject to the exemptions in §§ 51.22(c)(3)(ii), 51.22(c)(3)(iii), and 51.22(c)(3)(iv). The NRC has also determined that the cross-reference changes are subject to the exemption in § 51.22(c)(2).

The remaining changes in this final rule not qualifying for a categorical exclusion were evaluated for their environmental impacts and the effects of these changes are addressed in the Environmental Assessment. The determination of this Environmental Assessment is that there will be no significant radiological or non-radiological environmental impacts associated with this rule. The environmental assessment is available as indicated under the ''Availability of Documents'' section.

## XII. Paperwork Reduction Act

This final rule contains new or amended collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et. seq). The collections of information were approved by the Office of Management and Budget, approval numbers 3150–0253, 3150–0104, and 3150–0204.

The burden to the public for the information collections is estimated to average 2.4 hours per response for information collection requirements contained in part 73 and 2.2 hours per response for NRC Form 754, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. There is no additional burden for NRC Form 366.

The information collection contained in part 73 is being conducted to implement Section 161A of the AEA and to add several new requirements to event notification requirements that resulted from insights from implementation of the security orders, review of site security plans, and implementation of the enhanced baseline inspection program and force-on-force exercises. Responses to this collection of information are voluntary in the case of Section 161A authority. This information will be used by the NRC to review and approve applications for Section 161A authority. In the case of the physical security event notifications, responses to this collection of information are required under the new § 73.1200. In the case of the written follow-up reports associated with the physical security event notifications, responses to this collection of information are required under the new § 73.1205. The information will be used by the NRC to provide oversight of security events at licensed facilities. Information submitted on NRC Form 754 is being collected to fulfill requirements for the firearms background checks from Section 161A of the AEA. Use of NRC Form 754 is voluntary under Section 161A of the AEA and only those licensees that apply for Section 161A authority will be required to use the form to submit security personnel for firearms background checks against the FBI's NICS system. Confidential and proprietary information submitted to the NRC is protected in accordance with NRC regulations at §§ 9.17(a), 9.301(a), and 2.390(b) of chapter I.

You may submit comments on any aspect of the information collections, including suggestions for reducing the burden, by the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2011–0018.
- *Mail comments to:* FOIA, Library, and Information Collections Branch, Office of the Chief Information Officer, Mail Stop: T6–A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001 or to the OMB reviewer at: OMB Office of Information and Regulatory Affairs (3150–0253, 3150–0104, and 3150–0204), Attn: Desk Officer for the Nuclear Regulatory Commission, 725 17th Street NW, Washington, DC 20503; email: *oira_submission@omb.eop.gov.*

### Public Protection Notification

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

## XIII. Congressional Review Act

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

## XIV. Criminal Penalties

For the purposes of Section 223 of the AEA, the NRC is issuing this final rule that amends 10 CFR part 73 under one or more of Sections 161b, 161i, or 161o of the AEA. Willful violations of the rule are subject to criminal enforcement. Criminal penalties as they apply to regulations in 10 CFR part 73 are already discussed in § 73.81. Accordingly, §§ 73.15, 73.17, 73.1200, 73.1205, 73.1210, and 73.1215 will not be included in § 73.81(b).

## XV. Compatibility of Agreement State Regulations

Under the ''Agreement State Program Policy Statement'' approved by the Commission on October 2, 2017, and published in the **Federal Register** (82

FR 48535; October 18, 2017), this rule is classified as compatibility ''NRC.'' Compatibility is not required for Category ''NRC'' regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the AEA or the provisions of 10 CFR, and although an Agreement State may not adopt program elements reserved to the NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws but does not confer regulatory authority on the State.

## XVI. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies, unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this final rule, the NRC is using standards from applicable firearms standards developed by nationally recognized firearms organizations or standard setting bodies or from standards developed by: (1) Federal agencies, such as the U.S. Department of Homeland Security's Federal Law Enforcement Training Center, the U.S. Department of Energy's National Training Center, and the U.S. Department of Defense; (2) State law-enforcement training centers; or (3) State Division (or Department) of Criminal Justice Services Training Academies.

## XVII. Availability of Guidance

The NRC is issuing the following new or revised guidance documents in support of the implementation of the requirements set forth in this final rule:

- RG 5.62, Revision 2, ''Physical Security Event Notifications, Reports, and Records'';
- RG 5.86, ''Enhanced Weapons Authority, Preemption Authority, and Firearms Background Checks'';
- RG 5.87, ''Suspicious Activity Reports'';
- ''Weapons Safety Assessment,'' Volumes 1–4; and
- ''WSA Reference Information.''

Revision 2 to RG 5.62, new RG 5.86, and new RG 5.87 are publicly available and may be found in ADAMS under Accession Nos. ML17131A285, ML17131A296, and ML17138A384, respectively. Volumes 1–4 of the Weapons Safety Assessment may be found in ADAMS under Package Accession No. ML18108A014. The WSA Reference Information volume may be found in ADAMS under Accession No. ML18115A418 but is not publicly available. Information and comment submissions related to the guidance can be accessed by searching on *https://www.regulations.gov* under Docket IDs NRC–2011–0014, NRC–2011–0015, and NRC–2011–0017. Analysis of public comments received on these guidance documents are discussed in Section IV, ''Public Comment Analysis.''

The NRC is issuing RG 5.86 that contains detailed guidance on the implementation of the proposed requirements on applying for combined preemption authority and enhanced weapons authority, stand-alone preemption authority, and conducting firearms background checks. The associated draft regulatory guide (DG–5020) and Revision 1 to DG–5020 were published for public comment in conjunction with the 2011 proposed rule and the 2015 supplemental proposed rule, respectively. These draft regulatory guides and public comments can be found under docket ID NRC–2011–0015. The final guidance reflects public comments received on both draft regulatory guides.

The NRC has published a four volume ''Weapons Safety Assessment'' document as an acceptable method to assist licensees in completing the weapons safety assessment required under § 73.15(e) as part of an application for combined preemption authority and enhanced weapons authority. Volumes 1 and 3 contain introductory and explanatory material. Volume 2 contains a weapons safety assessment template that licensees may complete and submit with their applications under § 73.15. Licensees are not required to use the Volume 2 template in their application but may use their own methodology to evaluate the onsite and offsite risks associated with the deployment and potential use of a specific enhanced weapon and the need to implement preventive or mitigative measures to address those risks. Volume 4 contains a completed sample template for a hypothetical power reactor facility. The WSA Reference Information volume contains information on weapons capabilities and characteristics and is not publicly available for security reasons. Licensees that are considering applying for combined preemption authority and enhanced weapons authority may request the WSA Reference Information volume through their NRC licensing project manager. The NRC considered public comments in developing the final weapons safety assessment. Additional information can be found under docket ID NRC–2011–0017.

The NRC is also issuing a revision to RG 5.62. Revision 2 to RG 5.62 provides guidance on the implementation of physical security event notification requirements, as modified by this final rule. The NRC published DG–5019, Revision 1, on February 3, 2011 (76 FR 6085) for public comment after the publication of the 2011 proposed rule. The final guidance reflects public comments received on the draft regulatory guide.

The NRC has bifurcated the guidance in DG–5019, Revision 1, regarding suspicious activity reporting into a separate new RG 5.87. The final guidance reflects public comments received on the draft regulatory guide.

The NRC is temporarily withdrawing NUREG–1304, ''Reporting of Safeguards Events,'' dated February 1988, (ADAMS Accession No. ML16012A188). NUREG–1304 contains a set of questions and answers on physical security event notifications and reports. Since the new and old physical security event notification regulations differ, the NRC will temporarily withdraw this NUREG to prevent confusion. The NRC will conduct a workshop after licensees have implemented the revised physical security event notification, written follow-up report, and recordkeeping requirements. The NRC will publish the results of the workshop as NUREG–1304, Revision 1. The NRC will also conduct a separate workshop after licensees have implemented the suspicious activity reporting requirements and publish those results as a separate NUREG.

The NRC is withdrawing Generic Letter (GL) 91–03, ''Reporting of Safeguards Events'' (ADAMS Accession No. ML031140131). This GL is no longer consistent with the revised physical security event notification regulations in §§ 73.1200 and 73.1205 and will be withdrawn to prevent confusion. The staff has incorporated relevant topics from GL 91–03 into the new revision of RG 5.62.

## XVIII. Availability of Documents

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

| Document | ADAMS Accession No./ **Federal Register** citation |
|---|---|
| Firearms Guidelines (September 11, 2009) | 74 FR 46800. |
| Firearms Guidelines, Revision 1 (June 25, 2014) | 79 FR 36100. |
| Firearms Guidelines, Revision 2 (March 8, 2019) | 84 FR 8546. |
| Environmental Assessment (July 2006 proposed rule) | ML061920093. |
| Environmental Assessment for Final Rule | ML16270A086. |
| Regulatory Analysis Regulatory Analysis–appendices (May 2006 proposed rule) | ML061380803.<br>ML061380796.<br>ML061440013. |
| Regulatory Analysis for Final Rule | ML19045A003. |
| Information Collection Analysis | ML092640277. |
| NRC Form 754, ''Armed Security Personnel Firearms Background Check'' | ML11321A240. |
| Commission: SECY–08–0050, ''Firearms Guidelines Implementing Section 161A of the Atomic Energy Act of 1954 and Associated Policy Issues'' (April 17, 2008). | ADAMS Package—ML072920478.[1] |
| Commission: SECY–08–0050A, ''Firearms Guidelines Implementing Section 161A of the Atomic Energy Act of 1954 and Associated Policy Issues—Supplemental Information'' (July 8, 2008). | ML081910207. |
| Commission: SRM–SECY–08–0050/0050A, ''Firearms Guidelines Implementing Section 161A of the Atomic Energy Act of 1954 and Associated Policy Issues'' (August 15, 2008). | ML082280364. |
| Letter Opinion from Bureau of Alcohol, Tobacco, Firearms and Explosives' Office of Enforcement on the Transfer of Enhanced Weapons (January 5, 2009). | ML090080191. |
| Commission: SECY–10–0085, ''Proposed Rule: Enhanced Weapons, Firearms Background Checks and Security Event Notifications (RIN: 3150–AI49)'' (June 27, 2010). | ML101110121. |
| Commission: SRM–SECY–10–0085, ''Proposed Rule: Enhanced Weapons, Firearms Background Checks and Security Event Notifications (RIN: 3150–AI49)'' (October 19, 2010). | ML102920342. |
| Proposed Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Rule (February 3, 2011). | 76 FR 6199. |
| Supplemental Proposed Enhanced Weapons Firearms Background Checks and Security Event Notifications Rule (January 10, 2013). | 78 FR 2214. |
| Supplemental Proposed Enhanced Weapons Firearms Background Checks and Security Event Notifications Rule (September 22, 2015). | 80 FR 57106. |
| Annotated Public Comments on: Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Rule and Supporting Regulatory Guidance Documents. | ML22287A158. |
| Public Comment Analysis for the Final Rule | ML16264A004. |
| Public Comment Analysis for the Final Rule Supporting Regulatory Guides and Weapons Safety Assessment. | ML17123A319. |
| DG–5019, Revision 0, ''Reporting and Recording Safeguards Events'' (June 2007) | ML071710233. |
| DG–5019, Revision 1, ''Reporting and Recording Safeguards Events'' (January 2011) | ML100830413. |
| DG–5020, Revision 0, ''Applying for Enhanced Weapons Authority, Applying for Preemption Authority, and Accomplishing Firearms Background Checks under 10 CFR Part 73'' (January 2011). | ML100321956. |
| DG–5020, Revision 1, ''Applying for Enhanced Weapons Authority, Applying for Preemption Authority, and Accomplishing Firearms Background Checks under 10 CFR Part 73'' (September 2015). | ML14322A847. |
| Regulatory Guide 5.62, Revision 2, ''Physical Security Event Notifications, Reports, and Records'' | ML17131A285. |
| Regulatory Guide 5.86, ''Enhanced Weapons Authority, Preemption Authority, and Firearms Background Checks''. | ML17131A296. |
| Regulatory Guide 5.87, ''Suspicious Activity Reports'' | ML17138A384. |
| Commission: SECY–12–0027, ''Preemption Authority Pursuant to Section 161A, 'Use of Firearms by Security Personnel,' of the Atomic Energy Act of 1954, as Amended'' (February 17, 2012). | ML113130015. |
| Commission: SRM–SECY–12–0027, ''Preemption Authority Pursuant to Section 161A, 'Use of Firearms by Security Personnel,' of the Atomic Energy Act of 1954, as Amended'' (May 3, 2012). | ML12124A377. |
| Commission: SECY–12–0125, ''Interim Actions to Execute Commission Preemption Authority Under Section 161A of the Atomic Energy Act of 1954, as Amended'' (September 20, 2012). | ADAMS Package—ML12164A839. |
| Commission: SRM–SECY–12–0125, ''Interim Actions to Execute Commission Preemption Authority Under Section 161A of the Atomic Energy Act of 1954, as Amended'' (November 21, 2012). | ML12326A653. |
| NUREG/BR–0058, ''Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission,'' Revision 4 (September 30, 2004). | ML042820192. |
| Order EA–13–092, ''Order Designating an Interim Class of NRC-Licensed Facilities That are Eligible to Apply to the Commission for Authorization to Use the Authority Granted Under the Provisions of Section 161a of the Atomic Energy Act of 1954, as Amended'' (June 14, 2013). | 78 FR 35984. |
| Order EA–15–004, ''BWXT Preemption Order'' (September 4, 2015) | 80 FR 53588. |
| Orders EA–14–134, EA–14–135, EA–14–136, EA–14–137, EA–14–138, EA–14–139, and EA–14–140, ''Reactor Preemption Orders'' (January 15, 2016). | 81 FR 2247. |
| Draft OMB Supporting Statement for the second supplemental proposed rule | ML15035A633. |
| OMB Supporting Statements for the Final Rule and Associated Forms | ADAMS Package—ML17067A164. |
| ''Weapons Safety Assessment'', Volumes 1–4 | ADAMS Package—ML18108A014. |
| ''WSA Reference Information (non-publicly available) | ML18115A418. |
| Generic Letter 1991–003, ''Reporting of Safeguards Events'' (March 6, 1991) | ML031140131. |
| Commission: SECY–18–0058, ''Draft Final Rule—Enhanced Weapons, Firearms Background Checks, and Security Event Notifications'' (May 22, 2018). | ADAMS Package—ML16264A000. |
| Commission: ''Supplement to SECY–18–0058: Draft Final Rule—Enhanced Weapons, Firearms Background Checks, And Security Event Notifications'' (February 4, 2020). | ML19017A025. |

[1] Enclosure 1 to SECY–08–0050 is not publicly available.

Throughout the development of this rule, the NRC has posted documents related to this rule, including public comments, on the Federal Rulemaking website at *https://www.regulations.gov* under Docket IDs NRC–2011–0014, NRC–2011–0015, NRC–2011–0017, and NRC–2011–0018.

**List of Subjects**

*10 CFR Part 20*

Byproduct material, Criminal penalties, Hazardous waste, Licensed material, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Packaging and containers, Penalties, Radiation protection, Reporting and recordkeeping requirements, Source material, Special nuclear material, Waste treatment and disposal.

*10 CFR Part 21*

Nuclear power plants and reactors, Penalties, Radiation protection, Reporting and recordkeeping requirements.

*10 CFR Part 26*

Administrative practice and procedure, Alcohol abuse, Alcohol testing, Appeals, Chemical testing, Drug abuse, Drug testing, Employee assistance programs, Fitness for duty, Management actions, Nuclear power plants and reactors, Privacy, Protection of information, Radiation protection, Reporting and recordkeeping requirements.

*10 CFR Part 50*

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

*10 CFR Part 70*

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

*10 CFR Part 72*

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

*10 CFR Part 73*

Criminal penalties, Exports, Hazardous materials transportation, Imports, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Security measures.

*10 CFR Part 74*

Accounting, Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear energy, Nuclear materials, Packaging and containers, Penalties, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Special nuclear material.

*10 CFR Part 76*

Certification, Criminal penalties, Nuclear energy, Penalties, Radiation protection, Reporting and record keeping requirements, Security measures, Special nuclear material, Uranium, Uranium enrichment by gaseous diffusion.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 20, 21, 26, 50, 70, 72, 73, 74, and 76:

## PART 20—STANDARDS FOR PROTECTION AGAINST RADIATION

■ 1. The authority citation for part 20 continues to read as follows:

**Authority:** Atomic Energy Act of 1954, secs. 11, 53, 63, 65, 81, 103, 104, 161, 170H, 182, 186, 223, 234, 274, 1701 (42 U.S.C. 2014, 2073, 2093, 2095, 2111, 2133, 2134, 2201, 2210h, 2232, 2236, 2273, 2282, 2021, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); Low-Level Radioactive Waste Policy Amendments Act of 1985, sec. 2 (42 U.S.C. 2021b); 44 U.S.C. 3504 note.

### § 20.2201 [Amended]

■ 2. In § 20.2201(c), remove the reference ''73.71'' and add in its place the reference ''73.1205''.

## PART 21—REPORTING OF DEFECTS AND NONCOMPLIANCE

■ 3. The authority citation for part 21 continues to read as follows:

**Authority:** Atomic Energy Act of 1954, secs. 53, 63, 81,103, 104, 161, 223, 234, 1701 (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2201, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 135, 141 (42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note.

### § 21.2 [Amended]

■ 4. In § 21.2(c), remove the reference ''§ 73.71'' and add in its place the reference ''§§ 73.1200 and 73.1205''.

## PART 26—FITNESS FOR DUTY PROGRAMS

■ 5. The authority citation for part 26 continues to read as follows:

**Authority:** Atomic Energy Act of 1954, secs. 53, 103, 104, 107, 161, 223, 234, 1701 (42 U.S.C. 2073, 2133, 2134, 2137, 2201, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

### § 26.417 [Amended]

■ 6. In § 26.417(b)(1), remove the reference ''73.71'' and add in its place the reference ''73.1200''.

### § 26.719 [Amended]

■ 7. In § 26.719(a), remove the reference ''73.71'' and add in its place the reference ''73.1200''.

## PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

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

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

### § 50.55 [Amended]

■ 9. In § 50.55(e)(8), remove the reference ''73.71'' and add in its place the reference ''73.1205''.

### § 50.72 [Amended]

■ 10. In § 50.72(a), footnote 1, remove the reference ''73.71'' and add in its place the reference ''73.1200''.

## PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

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

**Authority:** Atomic Energy Act of 1954, secs. 51, 53, 57(d), 108, 122, 161, 182, 183,

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

**§ 70.20a [Amended]**

■ 12. In § 70.20a(e)(2), remove the reference ''73.71'' and add in its place the reference ''73.1200''.

**§ 70.20b [Amended]**

■ 13. In § 70.20b:
■ a. In paragraph (c), remove the reference ''73.71(b)'' and add in its place the reference ''73.1200'';
■ b. In paragraph (d), remove the reference ''73.71(b)'' and add in its place the reference ''73.1200''; and
■ c. In paragraph (e), remove the reference ''73.71(b)'' and add in its place the reference ''73.1200''.

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

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

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

**§ 72.74 [Amended]**

■ 15. In § 72.74(c), remove the reference ''§ 73.71'' and add in its place the reference ''§ 73.1200''.

## PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

■ 16. The authority citation for part 73 is revised to read as follows:

**Authority:** Atomic Energy Act of 1954, secs. 53, 147, 149, 161, 161A, 170D, 170E, 170H, 170I, 223, 229, 234, 1701 (42 U.S.C. 2073, 2167, 2169, 2201, 2201a, 2210d, 2210e, 2210h, 2210i, 2273, 2278a, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); Nuclear Waste Policy Act of 1982, secs. 135, 141 (42 U.S.C. 10155, 10161); 44 U.S.C. 3504 note.

Section 73.37(b)(2) also issued under Sec. 301, Public Law 96–295, 94 Stat. 789 (42 U.S.C. 5841 note).

■ 17. Remove undesignated center headings ''General Provisions,'' ''Physical Protection of Special Nuclear Material in Transit,'' ''Physical Protection Requirements at Fixed Sites,'' ''Physical Protection of Special Nuclear Material or Moderate and Low Strategic Significance,'' ''Records and Reports,'' and ''Enforcement.''

**§ § 73.1 through 73.8 [Designated as Subpart A]**

■ 18. Designate §§ 73.1 through 73.8 as subpart A and add a heading for newly designated subpart A to read as follows:

### Subpart A—General Provisions

■ 19. In § 73.2:
■ a. In paragraph (a) remove the phrase ''and 70'' and add in its place the phrase ''70, and 95'';
■ b. Add, in alphabetical order, the definitions for ''Adverse firearms background check'', ''Combined preemption authority and enhanced weapons authority'', ''Contraband'', ''Covered weapon'', ''Enhanced weapon'', ''Firearms background check'', ''Greater than class C waste'', ''High-level radioactive waste'', and ''Independent spent fuel storage installation'';
■ c. Revise the definition for *Movement control center;*
■ d. Add, in alphabetical order, the definitions for ''NICS'', ''NICS response'', ''NICS transaction number'', ''Restricted Data'', ''Satisfactory firearms background check'', ''Special nuclear material (SNM)'', ''Spent nuclear fuel (SNF) or spent fuel'', ''Stand-alone preemption authority'', and ''Time of discovery''; and
■ e. Add paragraphs (b) and (c).

The additions and revision read as follows:

**§ 73.2 Definitions.**

* * * * *

(a) * * *

*Adverse firearms background check* means a firearms background check that has resulted in a ''denied'' or ''delayed'' NICS response from the Federal Bureau of Investigation (FBI).

* * * * *

*Combined preemption authority and enhanced weapons authority* means the authority granted to the Commission, pursuant to 42 U.S.C. 2201a, to authorize licensees or the designated security personnel of a licensee to transfer, receive, possess, transport, import, and use one or more categories of enhanced weapons, notwithstanding any State, local, or certain Federal firearms laws, including regulations, that prohibit or restrict such conduct.

* * * * *

*Contraband* means unauthorized firearms, explosives, incendiaries, or other dangerous materials (*e.g.,* disease causing agents), which are capable of causing acts of sabotage against a licensed facility or licensed radioactive material, as specified under 42 U.S.C. 2284. For licensees that possess or conduct activities involving classified national security information or classified Restricted Data (RD) as defined in § 95.5 of this chapter, contraband also means unauthorized electronic devices or unauthorized electronic media that are capable of facilitating acts of espionage; unauthorized communication, transmission, disclosure, or receipt of RD; or tampering with RD, pursuant to 18 U.S.C. 793 or 42 U.S.C. 2274–2276, respectively. Contraband items are banned from a licensee's protected area, vital area, materials access area, or controlled access area.

* * * * *

*Covered weapon* means any handgun, rifle, shotgun, short-barreled shotgun, short-barreled rifle, semiautomatic assault weapon, machine gun, ammunition for any such weapons, or large capacity ammunition feeding device otherwise prohibited by State, local, or certain Federal firearms laws, including regulations, as specified under 42 U.S.C. 2201a(b).

* * * * *

*Enhanced weapon* means any short-barreled shotgun, short-barreled rifle, or machine gun. Enhanced weapons do not include destructive devices as defined in 18 U.S.C. 921(a).

* * * * *

*Firearms background check* means a background check by the U.S. Attorney General pursuant to 42 U.S.C. 2201a that includes a check against the Federal Bureau of Investigation's (FBI's) fingerprint system and the National Instant Criminal Background Check System.

* * * * *

*Greater than Class C waste* or *GTCC waste* has the same meaning as defined in § 72.3 of this chapter.

* * * * *

*High-level radioactive waste or HLW* has the same meaning as defined in § 72.3 of this chapter.

* * * * *

*Independent spent fuel storage installation or ISFSI* has the same

meaning as defined in § 72.3 of this chapter.

* * * * *

*Movement control center* means an operations center which is remote from the transport activity and which maintains position information on the movement of special nuclear material or radioactive material; receives reports of actual or attempted attacks, thefts, or sabotage; provides a means for notifying these and other problems to the NRC and appropriate agencies; and can request and coordinate appropriate aid.

* * * * *

*NICS* means the National Instant Criminal Background Check System established by Section 103(b) of the Brady Handgun Violence Prevention Act, Public Law 103–159 (107 Stat. 1536), that is operated by the FBI's Criminal Justice Information Services Division.

*NICS response* means a response provided by the FBI, as the result of a firearms background check against the NICS. A NICS response provided by the FBI may be ''proceed,'' ''delayed,'' or ''denied.''

*NICS transaction number* or *NTN* means the identification number created by the FBI to track firearms background checks upon entry of the information into the FBI's system. The NICS response and the NTN are the information returned by the FBI, following a firearms background check.

* * * * *

*Restricted Data or RD* has the same meaning as defined in § 95.5 of this chapter.

* * * * *

*Satisfactory firearms background check* means a firearms background check that has resulted in a ''proceed'' NICS response.

* * * * *

*Special nuclear material (SNM)* has the same meaning as defined in § 70.4 of this chapter.

* * * * *

*Spent nuclear fuel (SNF) or spent fuel* means the fuel that has been withdrawn from a nuclear reactor following irradiation and has not been chemically separated into its constituent elements by reprocessing. Spent nuclear fuel includes the special nuclear material, byproduct material, source material, and other radioactive materials associated with a fuel assembly.

* * * * *

*Stand-alone preemption authority* means the authority granted to the Commission, pursuant to 42 U.S.C. 2201a, to authorize licensees or the designated security personnel of a licensee to transfer, receive, possess, transport, import, and use one or more categories of covered weapons, notwithstanding any State, local, or certain Federal firearms laws, including regulations, that prohibit or restrict such conduct. Such covered weapons do not include enhanced weapons as defined in this part.

* * * * *

*Time of discovery* means the time at which a cognizant individual observes, identifies, or is notified of a security-significant event or condition. A cognizant individual is considered anyone who, by position, experience, and/or training, is expected to understand that a particular condition or event adversely impacts security.

* * * * *

(b) The terms ''ammunition,'' ''handgun,'' ''rifle,'' ''machine gun,'' ''large capacity ammunition feeding device,'' ''semiautomatic assault weapon,'' ''short-barreled shotgun,'' ''short-barreled rifle,'' and ''shotgun'' specified in §§ 73.15 and 73.17 have the same meaning as provided for these terms in the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives' regulations at 27 CFR 478.11.

(c) The terms ''delayed,'' ''denied,'' and ''proceed'' that are used in NICS responses specified in this section have the same meaning provided these terms in the FBI's regulations at 28 CFR 25.2.

■ 20. In § 73.8, paragraphs (b) and (c) are revised to read as follows:

**§ 73.8 Information collection requirements: OMB approval.**

* * * * *

(b) The approved information collection requirements contained in this part appear in §§ 73.5, 73.15, 73.17, 73.20, 73.21, 73.24, 73.25, 73.26, 73.27, 73.37, 73.40, 73.45, 73.46, 73.50, 73.54, 73.55, 73.56, 73.57, 73.58, 73.60, 73.67, 73.70, 73.72, 73.73, 73.74, 73.1200, 73.1205, 73.1210, 73.1215, and appendices B and C to this part.

(c) This part contains information collection requirements in addition to those approved under the control number specified in paragraph (a) of this section. These information collection requirements and control numbers under which they are approved are as follows:

(1) In § 73.17, NRC Form 754 is approved under control number 3150–0204;

(2) In §§ 73.17 and 73.57, Federal Bureau of Investigation Form FD–258 is approved under control number 1110–0046; and

(3) In § 73.1205, NRC Form 366 is approved under control number 3150–0104.

■ 21. Add subpart B to read as follows:

## Subpart B—Enhanced Weapons, Preemption, and Firearms Background Checks

Sec.

73.15 Authorization for use of enhanced weapons and preemption of firearms laws.
73.17 Firearms background checks for armed security personnel.

**§ 73.15 Authorization for use of enhanced weapons and preemption of firearms laws.**

(a) *Purpose.* This section presents the requirements for licensees to obtain approval to use the authority provided to the Commission under Section 161A of the Atomic Energy Act of 1954, as amended (AEA), in protecting Commission-designated classes of facilities, radioactive material, or other property. This authority includes ''stand-alone preemption authority'' and ''combined preemption authority and enhanced weapons authority.''

(b) *General Requirements.* (1) Licensees of facilities, activities, and other property listed in paragraph (c) of this section may apply to the NRC, in accordance with the provisions of this section, to receive stand-alone preemption authority or combined preemption authority and enhanced weapons authority.

(2) With respect to the possession and use of firearms by all other NRC licensees, the Commission's requirements in effect before April 13, 2023 remain applicable, except to the extent that those requirements are modified by an NRC order or regulations applicable to these licensees.

(c) *Applicability.* (1) Stand-alone preemption authority. The license holders for the following classes of facilities, radioactive material, or other property are designated by the Commission as eligible to apply for stand-alone preemption authority pursuant to 42 U.S.C. 2201a—

(i) Nuclear power reactor facilities;

(ii) Facilities authorized to possess or use a formula quantity or greater of strategic special nuclear material, where the material has a radiation level less than or equal to 1 Gray (Gy) (100 Rad) per hour at a distance of 1 meter (m) (3.3 feet (ft)), without regard to any intervening shielding;

(iii) Independent spent fuel storage installations; and

(iv) Spent nuclear fuel transportation.

(2) Combined preemption authority and enhanced weapons authority. The license holders for the following classes of facilities, radioactive material, or other property are designated by the Commission as eligible to apply for

combined enhanced weapons authority and preemption authority pursuant to 42 U.S.C. 2201a—

(i) Nuclear power reactor facilities;

(ii) Facilities authorized to possess or use a formula quantity or greater of strategic special nuclear material, where the material has a radiation level less than or equal to 1 Gy (100 Rad) per hour at a distance of 1 m (3.3 ft), without regard to any intervening shielding;

(iii) Independent spent fuel storage installations; and

(iv) Spent nuclear fuel transportation.

(d) *Application process for stand-alone preemption authority.* (1) Only licensees included within the classes of facilities, radioactive material, and other property listed in paragraph (c)(1) of this section may apply to the NRC for stand-alone preemption authority.

(2) Licensees applying for stand-alone preemption authority must submit an application to the NRC using the procedures specified in this section.

(3) The contents of the application must include the following information:

(i) A statement indicating that the licensee is applying for stand-alone preemption authority;

(ii) The Commission-designated facility, radioactive material, or other property to be protected by the licensee's security personnel using the covered weapons;

(iii) A description of the licensee's purposes and objectives in requesting stand-alone preemption authority. This description must include whether these covered weapons are currently employed as part of the licensee's existing protective strategy or whether these covered weapons will be used in a revised protective strategy; and

(iv) A description of the licensee's Firearms Background Check Plan, as required by § 73.17 of this part.

(4) Once a licensee has been notified that its application for stand-alone preemption authority has been accepted for review by the NRC, the licensee must provide the following supplemental information once it becomes available:

(i) A confirmation that a sufficient number of security personnel have completed a satisfactory firearms background check to meet the licensee's security personnel minimum staffing requirements, as specified in its physical security plan and any applicable fatigue requirements under part 26 of this chapter;

(ii) A confirmation that the necessary training modules and notification procedures have been developed under its Firearms Background Check Plan; and

(iii) A confirmation that all security personnel whose official duties require access to covered weapons have been trained on these modules and notification procedures.

(5) The licensee must submit both the application and the supplementary information to the NRC in writing, under oath or affirmation, and in accordance with § 73.4 of this part.

(6) Upon the effective date of the NRC's approval of its application for stand-alone preemption authority, the licensee must only assign security personnel who have completed a satisfactory firearms background check to duties requiring access to any covered weapons.

(e) *Application process for combined preemption authority and enhanced weapons authority.*

(1) Only licensees included within the classes of facilities, radioactive material, and other property listed in paragraph (c)(2) of this section may apply to the NRC for combined preemption authority and enhanced weapons authority.

(2) Licensees applying for combined preemption authority and enhanced weapons authority must submit an application to the NRC using the procedures specified in this section.

(3) The contents of the application must include the following information:

(i) A statement indicating that the licensee is applying for combined preemption authority and enhanced weapons authority;

(ii) The Commission-designated facility, radioactive material, or other property to be protected by the licensee's security personnel using the covered weapons, including enhanced weapons;

(iii) A description of the licensee's purposes and objectives in requesting combined preemption authority and enhanced weapons authority. This must include whether these enhanced weapons are currently employed as part of the licensee's existing protective strategy or whether these enhanced weapons will be used in a revised protective strategy;

(iv) The total quantities of enhanced weapons, including the types and calibers or gauges, requested; and

(v) A description of the licensee's Firearms Background Check Plan, required by § 73.17 of this part.

(vi) If the NRC has previously approved the licensee's application for stand-alone preemption authority under either paragraph (d) of this section or under an NRC Order issued before April 13, 2023, then the licensee must include the effective date of the NRC's approval for stand-alone preemption authority in its application for combined preemption authority and enhanced weapons.

(4) The licensee must include with its application the additional technical information required by paragraph (f) of this section.

(5) Once a licensee has been notified that its application for combined preemption authority and enhanced weapons authority has been accepted for review by the NRC, the licensee must provide the following supplemental information once it becomes available:

(i) A confirmation that a sufficient number of security personnel have completed a satisfactory firearms background check to meet the licensee's security personnel minimum staffing requirements, as specified in its physical security plan, and any applicable fatigue requirements under part 26 of this chapter;

(ii) A confirmation that the necessary training modules and notification procedures have been developed under its Firearms Background Check Plan; and

(iii) A confirmation that security personnel, whose official duties require access to enhanced weapons, have been trained on these modules and notification procedures.

(iv) Exceptions: Licensees that were previously approved by the NRC for stand-alone preemption authority do not have to submit the supplemental information required by paragraph (e)(5) since it has been previously submitted under paragraph (d)(4) of this section or in response to an NRC Order.

(6) The licensee must submit its application in accordance with the applicable license amendment provisions specified in § 50.90, § 70.34, or § 72.56 of this chapter. The licensee must submit both the application and the supplementary information to the NRC in writing, under oath or affirmation, and in accordance with § 73.4 of this part.

(7) If a licensee wishes to use a different type or caliber or gauge of an enhanced weapon or obtain a different quantity of enhanced weapons from that previously approved by the Commission under this section, then the licensee must submit a new application to the NRC in accordance with paragraph (e) of this section (to address these different weapons or different quantities of weapons).

(8) Upon the effective date of the NRC's approval of its application for combined preemption authority and enhanced weapons authority, the licensee must only assign security personnel who have completed a satisfactory firearms background check

to duties requiring access to any covered weapons.

(f) *Application for combined preemption authority and enhanced weapons authority additional technical information.* (1) A licensee must also submit to the NRC for prior review and approval the following plans and assessments. These plans and assessments must be specific to the facility, radioactive material, or other property being protected.

(i) A new or revised physical security plan, security personnel training and qualification plan, and safeguards contingency plan; and

(ii) A new weapons safety assessment.

(2) In addition to other requirements presented in this part, these plans and assessments must—

(i) For the physical security plan, identify the quantities, types, and calibers or gauges of enhanced weapons that will be deployed;

(ii) For the training and qualification plan, address the training and qualification requirements to use these specific enhanced weapons;

(iii) For the safeguards contingency plan—

(A) The licensee must address how these enhanced weapons will be employed by the security personnel in implementing the protective strategy, including tactical approaches and maneuvers;

(B) In such instances where the addition of the enhanced weapons would not affect the content of the safeguards contingency plan, the required information on how the weapons will be employed may instead be incorporated into the licensee's physical security plan or an addendum thereto;

(C) Furthermore, in such instances, the licensee's application shall indicate that the proposed enhanced weapons do not affect the content of the NRC-approved safeguards contingency plan and it remains unchanged; and

(iv) For the weapons safety assessment, assess any potential safety impact by the use of enhanced weapons—

(A) At the facility, radioactive material, or other property being protected;

(B) On public or private facilities, public or private property, or on members of the public in areas outside of the site boundary; and

(C) On public or private facilities, public or private property, or on members of the public from the use of these enhanced weapons at training facilities; and

(D) Such assessments must consider both accidental and deliberate discharge of the enhanced weapons. However, licensees are not required to assess malevolent discharges of these enhanced weapons by trained and qualified security personnel, who have been screened and evaluated by the licensee's insider mitigation or human reliability programs.

(3) The licensee's training and qualification plan for enhanced weapons must be based upon applicable firearms standards developed by nationally-recognized firearms organizations or standard setting bodies or from standards developed by—

(i) Federal agencies, such as the U.S. Department of Homeland Security's Federal Law Enforcement Training Center, the U.S. Department of Energy's National Training Center, and the U.S. Department of Defense;

(ii) State law-enforcement training centers; or

(iii) State Division (or Department) of Criminal Justice Services Training Academies.

(g) *Conditions of approval.* (1) Licensees that have been approved by the NRC for combined preemption authority and enhanced weapons authority must provide a copy of the NRC's authorization to the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) Federal firearms license (FFL) holder (*i.e.,* the transferor) for inclusion with the application to request ATF's pre-approval of the transfer and registration of the enhanced weapons to the NRC licensee (*i.e.,* the transferee).

(2) Licensees receiving enhanced weapons must comply with applicable ATF regulations in 27 CFR part 479.

(3) All enhanced weapons possessed by the licensee must be registered under the name of the licensee. Enhanced weapons may not be registered under the name of a licensee's security contractor.

(4) Licensees obtaining enhanced weapons may, at their discretion, also apply to ATF to obtain an FFL or a special occupational tax stamp, in conjunction with obtaining these enhanced weapons.

(h) *Completion of training and qualification before deployment of enhanced weapons.* (1) Licensees that have received combined preemption authority and enhanced weapons authority must ensure that their security personnel with access to enhanced weapons have completed the required firearms training and qualification, in accordance with the licensee's training and qualification plan.

(2) Initial training and qualification on enhanced weapons must be completed before the security personnel's deployment of enhanced weapons to implement the licensee's protective strategy.

(3) Recurring training and qualification on enhanced weapons by security personnel must be completed in accordance with the licensee's training and qualification plan.

(4) All training must be documented in accordance with the requirements of the licensee's training and qualification plan.

(i) [Reserved]

(j) *Use of enhanced weapons.* The requirements regarding the use of force by the licensee's security personnel, in the performance of their official duties, are contained in §§ 73.46, 73.51, and 73.55 and in appendices B, C, and H of this part, as applicable.

(k) *Notification of adverse ATF findings.* Requirements on notification of adverse ATF inspection or enforcement findings can be found under § 73.1200 of this part.

(l) [Reserved]

(m) *Transfer of enhanced weapons.* (1)(i) A licensee's issuance of enhanced weapons to its security personnel is not considered a transfer of those weapons as specified under ATF's regulations in 27 CFR part 479, provided the enhanced weapons remain within the site of a facility.

(ii) Remaining within the site of a facility means within the site boundary, as defined by the licensee's safety analysis report submitted to the NRC.

(2) A licensee's issuance of enhanced weapons to its security personnel for the permissible reasons specified in paragraph (m)(3) of this section, for activities that are outside of the facility's site boundary, are not considered a transfer under the provisions of 26 U.S.C. chapter 53, as specified under ATF's regulations in 27 CFR part 479, provided—

(i) The security personnel possessing the enhanced weapons are employees of the licensee; or

(ii) The security personnel possessing the enhanced weapons are employees of a contractor providing security services to the licensee and these contractor security personnel are under the direction of, and accompanied by, an authorized licensee employee.

(3) Permissible reasons for removal of enhanced weapons from the licensee's facility include—

(i) Removal of enhanced weapons for use at a firing range or training facility that is used by the licensee in accordance with its NRC-approved training and qualification plan for enhanced weapons;

(ii) Removal of enhanced weapons for use in escorting shipments of

radioactive material or other property designated under paragraph (c) of this section that are being transported to or from the licensee's facility; or

(iii) Removal of an enhanced weapon from a licensee's facility to a gunsmith for the purposes of repair or maintenance and the subsequent return of the enhanced weapon to the licensee's facility.

(4) A licensee that has authorized the removal of enhanced weapons from its facility for any of the permissible reasons listed under paragraph (m)(3) of this section must verify that these weapons are returned to the facility upon the completion of the authorized activity.

(5) Removal of enhanced weapons from and/or return of these weapons to the licensee's facility must be documented in accordance with the records requirements of paragraph (q) of this section.

(6) Removal of enhanced weapons from a licensee's facility for reasons other than those set forth in paragraph (m)(3) of this section are considered a transfer as specified under ATF's regulations in 27 CFR part 479.

(7) The licensee may only transfer enhanced weapons pursuant to an ATF application to transfer and register the weapons that is approved by ATF in advance of the transfer, as required by ATF's regulations under 27 CFR part 479. Examples of transfers include, but are not limited to:

(i) Sale or disposal of an enhanced weapon to another authorized NRC licensee;

(ii) Sale or disposal of an enhanced weapon to an authorized Federal firearms license holder, government agency, or official police organization; or

(iii) Abandonment of an enhanced weapon to ATF.

(8) Following the completion of their official duties, security personnel must either—

(i) Return issued enhanced weapons to a licensee's authorized enhanced weapons storage location, as specified in the licensee's physical security plan, or

(ii) Turn over responsibility for the issued enhanced weapon to another on-shift security personnel authorized to use enhanced weapons as part of their official duties.

(9) Enhanced weapons that are not returned to the licensee's facility, following permissible removal, must be considered a transfer of a weapon under this paragraph, or a stolen or lost weapon under paragraph (p) of this section, as applicable. Information on the transfer, theft, or loss of an enhanced weapon must be documented, as required under paragraph (q) of this section.

(n) *Transport of weapons.* (1) Security personnel transporting enhanced weapons to or from a firing range or training facility used by the licensee must ensure that these weapons are unloaded and locked in a secure container during transport. Unloaded weapons and ammunition may be transported in the same locked secure container.

(2) Security personnel transporting enhanced weapons to or from a licensee's facility following the completion of, or in preparation for, escorting shipments of radioactive material or other property must ensure that these weapons are unloaded and locked in a secure container during transport. Security personnel may transport unloaded weapons and ammunition in the same locked secure container.

(3) Security personnel using enhanced weapons to protect shipments of radioactive material or other property that are being transported to or from the licensee's facility must ensure that these weapons are maintained in a state of loaded readiness and available for immediate use, except when otherwise prohibited by 18 U.S.C. 922(q).

(4) Security personnel transporting enhanced weapons to or from the licensee's facility must also comply with the requirements of § 73.17 of this part.

(5) Situations where security personnel transport enhanced weapons to or from the licensee's facility are not considered transfers of these weapons under ATF's regulations in 27 CFR part 479, provided—

(i) The security personnel transporting the enhanced weapons are employees of the licensee; or

(ii) The security personnel transporting the enhanced weapons are employees of a contractor providing security services to the licensee; and these contractor security personnel are under the direction of, and accompanied by, an authorized licensee employee.

(6) For the interstate transportation of enhanced weapons, pursuant to this section, the licensee must obtain prior written approval from ATF, as required by 27 CFR part 478.

(o) *Periodic inventories of enhanced weapons.* (1) Licensees possessing enhanced weapons under this section must conduct the following periodic accountability inventories of the enhanced weapons in their possession to verify the continued presence of each enhanced weapon that the licensee is authorized to possess.

(2)(i) Licensees must conduct a monthly inventory to verify that the authorized quantity of enhanced weapons are present at the licensee's facility.

(ii) Licensees must verify the presence of each individual enhanced weapon.

(iii) Licensees that store enhanced weapons in a locked secure weapons container (*e.g.,* a ready-service arms locker) located within a protected area, vital area, or material access area may verify the presence of an intact tamper-indicating device (TID) on the locked secure weapons container, instead of verifying the presence of each individual weapon.

(iv) Verification of the presence of enhanced weapons via the presence of an intact TID must be documented in the inventory records and include the serial number of the TID.

(v) Licensees may use electronic technology (*e.g.,* bar-codes on the weapons) in conducting such inventories.

(vi) The time interval from the previous monthly inventory must not exceed 30 + 7 days.

(3)(i) Licensees must conduct an annual inventory to verify that each authorized enhanced weapon is present at the licensee's facility through the verification of the serial number of each enhanced weapon.

(ii) Licensees must verify the presence of each enhanced weapon located in a locked secure weapons container (*e.g.,* a ready-service arms locker) through the verification of the serial number of each enhanced weapon located within the container.

(iii) The time interval from the previous annual inventory must not exceed 365 + 7 days.

(iv) Licensees conducting an annual inventory may substitute this annual inventory in lieu of conducting the normal monthly inventory for that particular month, as required under paragraph (o) of this section.

(4) Licensees must conduct periodic inventories of enhanced weapons using either a two-person team or a single individual, provided the individual is subject to the licensee's behavioral observation or human reliability programs.

(5) The results of any periodic inventories of enhanced weapons must be retained in accordance with the records requirements of paragraph (q) of this section.

(6) Licensees must inventory any locked secure weapons container that was sealed with a TID and has subsequently been opened and must

verify the serial number for each of the enhanced weapons stored in the weapons container. The inventoried weapons container must be relocked and resealed with a new TID and the new TID's serial number must be recorded in the periodic inventory records. The inventory must be conducted in accordance with the requirements of paragraph (o)(4) of this section.

(i) Licensees must use TIDs with unique serial numbers on locked secure weapons containers containing enhanced weapons.

(ii) Licensees must store unused TIDs in a manner similar to other security access control devices (*e.g.,* keys, lock cores, etc.) and must maintain a log of issued TID serial numbers.

(7) Licensees must resolve any discrepancies identified during periodic inventories within 24 hours of their identification; otherwise, the discrepancy must be treated as a stolen or lost enhanced weapon and notifications must be made in accordance with paragraph (p) of this section.

(8) As an exception, enhanced weapons that are offsite for authorized purposes, in accordance with paragraphs (m) and (n) of this section, are required to be included in a periodic inventory but are not considered lost or stolen solely because they are offsite. The licensee must document the absence of these weapon(s) from the licensee's facility in the report of the results of a completed periodic enhanced weapons inventory, as required under paragraph (q) of this section.

(p) *Stolen or lost enhanced weapons.* (1) Licensees that discover that any enhanced weapons they are authorized to possess under this section are stolen or lost, must notify the NRC and local law enforcement officials in accordance with § 73.1200 of this part.

(2) Licensees that discover that any enhanced weapons they are authorized to possess under this section are stolen or lost are also required to notify ATF in accordance with ATF's regulations in 27 CFR part 479.

(q) *Records requirements.* (1) Licensees possessing enhanced weapons under this section must maintain records relating to the receipt, transfer, transportation, and inventory of such enhanced weapons.

(2) Licensees must maintain the following minimum records regarding the receipt of each enhanced weapon, including—

(i) Date of receipt of the weapon;

(ii) Name and address of the transferor who transferred the weapon to the licensee;

(iii) Name of the manufacturer of the weapon, or the name of the importer (for weapons manufactured outside the U.S.); and

(iv) Serial number, type, and caliber or gauge of the weapon.

(3) Licensees must maintain the following minimum records regarding the transfer of each enhanced weapon—

(i) Date of shipment of the weapon;

(ii) Name and address of the transferee who received the weapon; and

(iii) Serial number, type, and caliber or gauge of the weapon.

(4) Licensees must maintain the following minimum records regarding the transportation of each enhanced weapon away from the licensee's facility—

(i) Date of departure of the weapon;

(ii) Date of return of the weapon;

(iii) Purpose of the weapon's removal from the facility;

(iv) Name(s) of the security personnel transporting the weapon;

(v) Name(s) of the licensee employee accompanying and directing the transportation, where the security personnel transporting the weapons are employees of a security contractor providing security services to the licensee;

(vi) Name of the person/facility to whom the weapon is being transported; and

(vii) Serial number, type, and caliber or gauge of the weapon.

(5) Licensees possessing enhanced weapons pursuant to this section must document in these records the discovery that any of these enhanced weapons are stolen or lost.

(6) Licensees possessing enhanced weapons pursuant to this section must maintain records relating to the inventories of enhanced weapons for a period of up to one year after the licensee's authority to possess enhanced weapons is terminated, suspended, or revoked under paragraph (r) of this section and all enhanced weapons have been transferred from the licensee's facility.

(7) Licensees may integrate any records required by this section with records maintained by the licensee pursuant to ATF's regulations.

(8) Licensees must make any records required by this section available to NRC staff and ATF staff upon request.

(r) *Termination, modification, suspension, or revocation of Section 161A authority.*

(1)(i) Licensees seeking to terminate their stand-alone preemption authority must apply to the NRC in writing, under oath or affirmation, and in accordance with § 73.4.

(ii) Licensees seeking to terminate their combined enhanced weapons authority and preemption authority must apply to the NRC in writing, under oath or affirmation, and in accordance with § 73.4, and the license amendment provisions of § 50.90, § 70.34, or § 72.56 of this chapter, as applicable. These licensees must have transferred or disposed of any enhanced weapons, in accordance with the provisions of paragraph (m) of this section, prior to the NRC approval of a request for termination of their authority.

(2) Licensees seeking to modify their combined preemption authority and enhanced weapons authority, issued under this section, must apply to the NRC in writing, under oath or affirmation, and in accordance with § 73.4, and the license amendment provisions of § 50.90, § 70.34, or § 72.56 of this chapter, as applicable. Licensees' applications to modify their enhanced weapons authority must provide the information required under paragraphs (e) and (f) of this section.

(i) Licensees seeking to replace their enhanced weapons with different types of enhanced weapons must amend their original application to include the different quantities, types, and calibers or gauges of the new enhanced weapons. This amended application must include a plan to transfer or dispose of their existing enhanced weapons once the new weapons are deployed.

(ii) Licensees adding additional quantities or types of enhanced weapons do not require a transfer or disposal plan.

(3) The Commission may revoke, suspend, or modify, in whole or in part, any approval issued under this section for any material false statement in the application or other statement of fact required of the licensee; or because of conditions revealed by the application or statement of fact or any report, record, inspection, or other means that would warrant the Commission refusing to grant approval of an original application; or for violation of, or for failure to observe, any of the terms and provisions of the act, regulations, license, permit, approval, or order of the Commission, or for any other reason that the Commission determines is appropriate.

(4) Licensees that have their stand-alone preemption authority or combined preemption authority and enhanced weapons authority terminated, suspended, or revoked may reapply for such authority by filing a new

application under the provisions of this section.

(5) The NRC will notify ATF within 3 business days after taking action to terminate, modify, suspend, or revoke a licensee's stand-alone preemption authority or combined preemption authority and enhanced weapons authority issued under this section.

(s) *Withdrawal of orders.* For licensees that received an order issued under Section 161A (42 U.S.C. 2201a) prior to April 13, 2023, the following provisions apply.

(1) Licensees are not required to reapply for this authority.

(2) The requirements of such orders are superseded in their entirety by the requirements of this section and § 73.17 of this part.

(3) Licensees must complete their transition from the confirmatory orders to the requirements of this rule by January 8, 2024.

(4) On January 8, 2024 the following orders are withdrawn:

(i) Order EA–13–092, ''Order Designating an Interim Class of NRC-Licensed Facilities that are Eligible to Apply to the Commission for Authorization to Use the Authority Granted Under the Provisions of Section 161a of the Atomic Energy Act of 1954, as Amended'' (78 FR 35984; June 14, 2013);

(ii) Confirmatory Order EA–15–006, ''In the Matter of BWXT Nuclear Operations Group, Inc.'' (80 FR 53588; September 4, 2015);

(iii) Confirmatory Orders EA–14–135 and EA–14–136, ''In the Matter of Entergy Nuclear Operations Inc.; Entergy Nuclear Indian Point 2, LLC; and Entergy Nuclear Indian Point 3, LLC (Indian Point Nuclear Generating Unit (Nos. 1, 2, and 3)'' (81 FR 2247; January 15, 2016);

(iv) Confirmatory Order EA–14–137, ''In the Matter of Entergy Nuclear Fitzpatrick, LLC and Entergy Nuclear Operations Inc. (James A. Fitzpatrick Nuclear Power Plant)'' (81 FR 2247; January 15, 2016);

(v) Confirmatory Order EA–14–138, ''In the Matter of Exelon Generation Company, LLC (Nine Mile Point Nuclear Station Units 1 and 2)'' (81 FR 2247; January 15, 2016);

(vi) Confirmatory Order EA–14–139, ''In the Matter of Exelon Generation Company, LLC (R.E. Ginna Nuclear Power Plant)'' (81 FR 2247; January 15, 2016);

(vii) Confirmatory Order EA–14–134, ''In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2, and DCPP Independent Spent Fuel Storage Installation)'' (81 FR 2247; January 15, 2016); and

(viii) Confirmatory Order EA–14–140, ''In the Mater of Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3, and Independent Spent Fuel Storage Installation)'' (81 FR 2247; January 15, 2016).

**§ 73.17 Firearms background checks for armed security personnel.**

(a) *Purpose.* This section presents the requirements for completion of firearms background checks pursuant to Section 161A of the Atomic Energy Act, as amended (AEA) (42 U.S.C. 2201a), for security personnel whose official duties require access to covered weapons at Commission-designated classes of facilities, radioactive material, or other property specified in § 73.15(c). Firearms background checks are intended to verify that such armed security personnel are not prohibited from receiving, possessing, transporting, importing, or using covered weapons under applicable Federal, State, or local law.

(b) *General Requirements.* (1) Licensees that have applied to the NRC under § 73.15 of this part for stand-alone preemption authority or for combined preemption authority and enhanced weapons authority must comply with the provisions of this section. Such licensees must establish a Firearms Background Check Plan. Licensees must establish this plan as part of their overall NRC-approved Training and Qualification plan for security personnel whose official duties require access to covered weapons.

(2) For the purposes of § 73.15 and this section only, the term security personnel whose official duties require access to covered weapons includes, but is not limited to, the following groups of individuals:

(i) Security officers using covered weapons to protect a Commission-designated facility, radioactive material, or other property;

(ii) Security officers undergoing firearms training on covered weapons;

(iii) Firearms-training instructors conducting training on covered weapons;

(iv) Armorers conducting maintenance, repair, and testing of covered weapons;

(v) Individuals with access to armories and weapons storage lockers containing covered weapons;

(vi) Individuals conducting inventories of enhanced weapons;

(vii) Individuals removing enhanced weapons from the site for repair, training, and escort-duty purposes; and

(viii) Individuals whose duties require access to covered weapons, whether the individuals are employed directly by the licensee or employed by a security contractor who provides security services to the licensee.

(3) The Firearms Background Check Plan must describe how the licensee will accomplish the following objectives:

(i) Completing firearms background checks for all security personnel whose duties require, or will require, access to covered weapons;

(ii) Establishing a process for completing initial, periodic, and break-in-service firearms background checks;

(iii) Defining the training objectives and modules for security personnel who are subject to firearms background checks;

(iv) Completing the initial and periodic training for security personnel whose official duties require access to covered weapons;

(v) Maintaining records of completed firearms background checks, required training, and any supporting documents;

(vi) Maintaining records of a decision to remove security personnel from duties requiring access to covered weapons, due to the identification or occurrence of any Federal or State disqualifying status condition or disqualifying event; and

(vii) Developing and implementing procedures for notifying the NRC of the removal of security personnel from access to covered weapons, due to the identification or occurrence of any Federal or State disqualifying status condition or disqualifying event.

(4)(i) Licensees that have applied to the NRC for stand-alone preemption authority or for combined preemption authority and enhanced weapons authority under § 73.15 must ensure that a satisfactory firearms background check has been completed for all security personnel whose official duties require access to covered weapons.

(ii) Security personal may continue to have access to covered weapons pending the results of the initial firearms background check.

(5) Only licensees that have applied for Section 161A authority under § 73.15 may conduct the firearms background checks required by this section.

(6) The licensee must commence firearms background checks only after receiving notification from the NRC that the agency has accepted for review its application for stand-alone preemption authority or for combined preemption authority and enhanced weapons authority.

(7)(i) Applicants for a license who have also submitted an application for Section 161A authority must only commence firearms background checks after:

(A) The NRC has issued its license; and

(B) The NRC has accepted its application for stand-alone preemption authority or for combined preemption authority and enhanced weapons authority for review.

(ii) Subsequent to April 13, 2023, applicants for a license who have also applied for Section 161A authority and been issued their license must ensure that a satisfactory firearms background check (as defined in § 73.2) has been completed for all security personnel who require access to covered weapons, before the licensee's initial receipt of any source material, special nuclear material, or radioactive material specified under the license.

(8) In response to an adverse firearms background check (as defined in § 73.2),

(i) The licensee must remove, without delay, from duties requiring access to covered weapons, any security personnel who receive a ''denied'' or ''delayed'' NICS response.

(ii) If the security personnel to be removed is on duty at the time of removal, then the licensee must fill the vacated position within the timeframe specified in its physical security plan.

(9)(i) The licensee must complete a new satisfactory firearms background check for any of its security personnel that has had a break-in-service greater than 1 week.

(ii) The licensee must complete a new satisfactory firearms background check if the security personnel has transferred from a different licensee.

(iii) A break-in-service means the security personnel's cessation of employment with the licensee or its security contractor, notwithstanding that the previous licensee completed a satisfactory firearms background check on the individual within the last 5 years.

(iv) Exceptions: (A) For the purposes of this section, a break-in-service does not include a security personnel's temporary active duty with the U.S. military reserves or National Guard.

(B) The licensee, in lieu of completing a new satisfactory firearms background check, may instead verify, via an industry-wide information-sharing database, that the security personnel has completed a satisfactory firearms background check within the previous 12 months, provided that this previous firearms background check included a duty station location in the State or Territory where the licensee (who would otherwise be accomplishing the firearms background check) is located or the activity is solely occurring.

(10) Changes in the licensee's ownership or its security contractor services are not considered a break-in-service for current security personnel whose duties require access to covered weapons. Licensees are not required to conduct a new firearms background check for these security personnel.

(11) With regard to accomplishing the requirements for other background (*e.g.,* criminal history records) checks or personnel security investigations under the NRC's access authorization or personal security clearance program requirements of this chapter, the licensee may not substitute a satisfactory firearms background check in lieu of completing these other required background checks or security investigations.

(12) If a licensee has completed initial satisfactory firearms background checks pursuant to an NRC order issued before April 13, 2023, then the licensee is not required to conduct a new initial firearms background check for its current security personnel. However, the licensee must conduct initial firearms background checks on new security personnel and periodic and break-in-service firearms background checks on current security personnel in accordance with the provisions of this section.

(13) A licensee who withdraws its application for Section 161A authority or who has its application disapproved by the NRC, must discontinue conducting firearms background checks.

(14) A licensee whose authority under Section 161A has been rescinded or whose authority has been revoked by the NRC must discontinue conducting firearms background checks.

(c) [Reserved]

(d) *Firearms background check requirements.* A firearms background check for security personnel must include—

(1) A check of the individual's fingerprints against the Federal Bureau of Investigation's (FBI's) fingerprint system; and

(2) A check of the individual's identifying information against the FBI's National Instant Criminal Background Check System (NICS).

(e) *Firearms background check submittals.* (1) Licensees must submit to the NRC, in accordance with § 73.4, for all security personnel requiring a firearms background check under this section—

(i) A set of fingerprint impressions, in accordance with paragraph (k) of this section; and

(ii) A completed NRC Form 754.

(2) In lieu of submitting a copy of each individual completed NRC Form 754 to the NRC, licensees may submit a single document consolidating the NRC Forms 754 data for multiple security personnel.

(3) Licensees submitting to the NRC via an electronic method an individual NRC Form 754 or consolidated data from multiple NRC Forms 754 must ensure that any personally identifiable information contained within these documents is protected in accordance with § 2.390 of this chapter.

(4) Licensees must retain a copy of all NRC Forms 754 submitted to the NRC for one year subsequent to the termination or denial of an individual's access to covered weapons.

(5) Licensees that are Federal agencies with authority to submit fingerprints directly to the FBI may do so provided that they also include the requested information from NRC Form 754. However, such licensees are still required to comply with the other provisions of this section.

(f) *Periodic firearms background checks.* (1) Licensees must complete a satisfactory periodic firearms background check at least once every 5 calendar years for security personnel whose continuing duties require access to covered weapons.

(2) Licensees must complete a periodic firearms background check within the same calendar month as the initial, or most recent, firearms background check with an allowance period to midnight (local time) of the last day of the calendar month of expiration.

(3) The licensee may conduct periodic firearms background checks at an interval of less than once every 5 calendar years, at its discretion.

(4)(i) Licensees may assign security personnel to duties requiring access to covered weapons while the results of the periodic firearms background check are pending.

(ii) Licensees must remove security personnel from duties requiring access to covered weapons if the satisfactory completion of a periodic firearms background check does not occur before the expiration of the allowance period.

(5) Licensees must remove, without delay, from duties requiring access to covered weapons, any security personnel who receive either a ''denied'' or ''delayed'' NICS response during a periodic firearms background check.

(g) *Notification of removal.* (1) Licensees must notify the NRC Headquarters Operations Center by telephone within 72 hours after removing security personnel from duties

requiring access to covered weapons due to the identification or occurrence of any Federal or State disqualifying status condition or disqualifying event that would prohibit them from possessing, receiving, or using firearms or ammunition. Licensees must contact the NRC Headquarters Operations Center at the phone numbers specified in Table 1 of appendix A of this part.

(2) The NRC will subsequently inform the FBI of any notifications received under this paragraph.

(h) *Security personnel responsibilities.* Security personnel assigned to duties requiring access to covered weapons must notify the licensee's security management within 72 hours of the identification or occurrence of any Federal or State disqualifying status condition or disqualifying event that would prohibit the individual from possessing, receiving, or using firearms or ammunition. This requirement is applicable to security personnel directly employed by the licensee or employed by a contractor providing security services to the licensee.

(i) [Reserved]

(j) *Training for security personnel subject to firearms background checks on disqualifying status conditions and disqualifying events.* (1) Licensees must include, within their Firearms Background Check Plan, training modules for security personnel assigned to official duties requiring access to covered weapons that provide training on the following topics:

(i) Federal disqualifying status conditions or disqualifying events specified in 27 CFR 478.32;

(ii) Applicable State disqualifying status conditions or disqualifying events;

(iii) The responsibility of security personnel subject to a firearms background check and assigned to official duties that require access to covered weapons to promptly notify their employing licensee of the occurrence of any disqualifying status condition or disqualifying event; and

(iv) Information for appealing an adverse firearms background check (*i.e.,* a ''denied'' or ''delayed'' NICS response) to the FBI.

(2) Licensees must conduct periodic refresher training on these modules at an annual frequency for security personnel assigned official duties requiring access to covered weapons.

(k) *Procedures for processing fingerprint checks.* (1) Licensees, using an appropriate method listed in § 73.4, must manually or electronically submit to the NRC one completed, legible standard fingerprint card (FBI Form FD–258, ORIMDNRCOOOZ) or, where practicable, other electronic fingerprint records for each individual requiring a firearms background check. Information on how to obtain FBI Form FD–258 and the process for manual or electronic submission of fingerprint records to the NRC is on the NRC's public website at: *https://www.nrc.gov/security/chp.html.*

(2) Licensees must indicate on the fingerprint card (or other electronic fingerprint records) that the submittal is part of a firearms background check for personnel whose duties require, or will require, access to covered weapons. Licensees must add the following information to the FBI Form FD–258 fingerprint card or the electronic fingerprint records submitted to the NRC:

(i) For fingerprints submitted to the NRC for the completion of a firearms background check only, the licensee must enter the terms ''MDNRCNICZ'' in the ''ORI'' field and ''Firearms'' in the ''Reasons Fingerprinted'' field of the FBI Form FD–258 or the electronic fingerprint records submitted to the NRC.

(ii) For fingerprints submitted to the NRC for the completion of both an access authorization check or personnel security clearance check and a firearms background check, the licensee must enter the terms ''MDNRC000Z'' in the ''ORI'' field and ''Employment and Firearms'' in the ''Reasons Fingerprinted'' field of the FBI Form FD–258 or the electronic fingerprint records submitted to the NRC.

(3) Licensees must establish procedures that produce high-quality fingerprint images, cards, and records with a minimal rejection rate.

(4) The NRC will review fingerprints for firearms background checks for completeness. Any FBI Form FD–258 or other electronic fingerprint records containing omissions or evident errors will be returned to the licensee for correction. The fee for processing fingerprint checks includes one free resubmission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free resubmission must have the FBI Transaction Control Number reflected on the resubmission. If additional submissions are necessary, they will be treated as an initial submittal and require a second payment of the processing fee. The payment of a new processing fee entitles the submitter to an additional free resubmittal, if necessary. Previously rejected submissions may not be included with the third submission because the submittal will be rejected automatically.

(5) The NRC will forward to the submitting licensee all data received from the FBI as a result of the licensee's application(s) for a firearms background check. This will include the FBI's ''proceed,'' ''delayed,'' or ''denied'' NICS response and the NICS transaction number.

(l) [Reserved]

(m) *Fees.* (1) Fees for the processing of firearms background checks are due upon application. The fee for the processing of a firearms background check consists of a fingerprint fee and a NICS check fee. Licensees must submit payment with the application for the processing of fingerprints, and payment must be made by corporate check, certified check, cashier's check, money order, or electronic payment, made payable to ''U.S. Nuclear Regulatory Commission.'' Combined payment for multiple applications is acceptable. Licensees can find fee information for firearms background checks on the NRC's public website at: *https://www.nrc.gov/security/chp.html.*

(2) The application fee for the processing of fingerprint checks is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint records submitted by the NRC on behalf of a licensee, and an administrative processing fee assessed by the NRC. The NRC processing fee covers administrative costs associated with NRC handling of licensee fingerprint submissions.

(3) The application fee for the processing of NICS checks is an administrative processing fee assessed by the NRC.

(4) Licensees that are also Federal agencies and submit fingerprints and information contained in the NRC Form 754 directly to the FBI are not assessed an application fee by the NRC.

(n) *Processing of the NICS portion of a firearms background check.* (1) The NRC will forward the information contained in the submitted NRC Form 754 to the FBI for evaluation against the NICS databases. Upon completion of the NICS portion of the firearms background check, the FBI will inform the NRC of the results with one of three responses under 28 CFR part 25; ''proceed,'' ''delayed,'' or ''denied,'' and the associated NICS transaction number (NTN). The NRC will forward these results and the associated NTN to the submitting licensee.

(2) Licensees that are Federal agencies and submit fingerprints and information contained in the NRC Form 754 directly to the FBI for evaluation against the NICS databases will receive one of three responses under 28 CFR part 25;

''proceed,'' ''delayed,'' or ''denied,'' and the associated NTN.

(3) The submitting licensee must provide these results to the individual who completed the NRC Form 754.

(o) [Reserved]

(p) *Appeals and resolution of adverse firearms background checks.* (1) Licensees may not assign security personnel who have received a ''denied'' or a ''delayed'' NICS response to any official duties requiring access to covered weapons—

(i) During the pendency of an appeal to the FBI of a ''denied'' NICS response; or

(ii) During the pendency of providing to the FBI any necessary additional information to resolve a ''delayed'' NICS response.

(2) Licensees must provide the NICS Transaction Number (NTN) or NTNs associated with the adverse firearms background check to the affected individual. It is the affected individual's responsibility to initiate an appeal or resolution of a ''delayed'' or ''denied'' NICS response.

(3) Licensees may assign security personnel to official duties requiring access to covered weapons subsequent to the individual's satisfactorily resolving a ''denied'' or ''delayed'' NICS response.

(q) *Protection of information.* (1) Each licensee that obtains a firearms background check and NRC Form 754 information on individuals under this section shall establish and maintain a system of files and procedures to protect these records and any enclosed personally identifiable information (PII) from unauthorized disclosure.

(2) The licensee may not disclose these records or PII to persons other than the subject individual, his/her representative, or to those with a need to have access to the information in performing assigned duties in the process of granting access to covered weapons. No individual authorized to have access to this information may disseminate the information to any other individual who does not have a need to know.

(3) The record or PII may be disclosed to an appropriate Federal or State agency in the performance of its official duties, in the course of an administrative or judicial proceeding, or in response to a Congressional inquiry.

(4) The licensee must make firearms background check records and NRC Forms 754 obtained under this section available for examination by an authorized representative of the NRC to determine compliance with applicable regulations and laws.

(5) The record obtained on an individual from a firearms background check may be transferred to another licensee—

(i) Upon an individual's written request to transfer the individual's record to the licensee identified in the written request; and

(ii) Upon verification from the gaining licensee of the individual's name, date of birth, social security number, and sex.

(r) *Withdrawal of orders.* In accordance with the provisions of § 73.15(s), orders issued under Section 161A (42 U.S.C. 2201a) prior to April 13, 2023 are withdrawn. Accordingly, the requirements of those orders are superseded in their entirety by the requirements of §§ 73.15 and 73.17.

#### § 73.20 [Designated as Subpart C]

■ 22. Designate § 73.20 as subpart C and add a heading for the newly created subpart C to read as follows:

### Subpart C—General Performance Objective for Protection of Strategic Special Nuclear Material

#### § § 73.21 through 73.23 [Designated as Subpart D]

■ 23. Designate §§ 73.21 through 73.23 as subpart D and add a heading for the newly created subpart D to read as follows:

### Subpart D—Protection of Safeguards Information

#### § 73.22 [Amended]

■ 24. In § 73.22(f)(3), remove the reference ''73.71'' and add in its place the reference ''73.1200''.

#### § 73.23 [Amended]

■ 25. In § 73.23(f)(3), remove the reference ''73.71'' and add in its place the reference ''73.1200''.

#### § § 73.24 through 73.38 [Designated as Subpart E]

■ 26. Designate §§ 73.24 through 73.38 as subpart E and add a heading for the newly created subpart E to read as follows:

### Subpart E—Physical Protection Requirements of Special Nuclear Material and Spent Nuclear Fuel in Transit

#### § 73.27 [Amended]

■ 27. In § 73.27 (c), remove the reference ''§ 73.71'' and add in its place the reference ''§§ 73.1200 and 73.1205''.

■ 28. In § 73.37:

■ a. In paragraphs (b)(3)(iii) and (b)(3)(v)(C), remove the reference ''73.71'' and add in its place the reference ''73.1200''; and

■ b. Add paragraph (b)(3)(viii).

The additions and revision read as follows:

#### § 73.37 Requirements for physical protection of irradiated reactor fuel in transit.

* * * * *

(b) * * *

(3) * * *

(viii)(A) The licensee must ensure that the firearms background check requirements of § 73.17 are met for all armed escorts whose official duties require access to covered weapons or who inventory enhanced weapons.

(B) The provisions of this paragraph are only applicable to licensees subject to this section who are also subject to the firearms background check provisions of § 73.17.

(C) The provisions of this paragraph are not applicable to members of local law enforcement agencies serving as armed escorts or ship's officers serving as unarmed escorts.

* * * * *

#### § § 73.40 through 73.55 [Designated as Subpart F]

■ 29. Designate §§ 73.40 through 73.55 as subpart F and add a heading for newly created subpart F to read as follows:.

### Subpart F—Physical Protection Requirements at Fixed Sites

■ 30. In § 73.46, add paragraph (b)(13) to read as follows:

#### § 73.46 Fixed site physical protection systems, subsystems, components, and procedures.

* * * * *

(b) * * *

(13)(i) The licensee must ensure that the firearms background check requirements of § 73.17 are met for all members of the security organization whose official duties require access to covered weapons or who inventory enhanced weapons.

(ii) The provisions of this paragraph are only applicable to licensees subject to this section who are also subject to the firearms background check provisions of § 73.17 of this part.

* * * * *

■ 31. In § 73.51:

■ a. In paragraph (d)(13), remove the reference ''73.71'' and add in its place the reference ''73.1210''.

■ b. Add paragraph (b)(4), a heading to paragraph (e), and paragraph (f) to read as follows:

The additions and revision read as follows:

**§ 73.51 Requirements for the physical protection of stored spent nuclear fuel and high-level radioactive waste.**

* * * * *

(b) * * *

(4)(i) The licensee must ensure that the firearms background check requirements of § 73.17 of this part are met for all members of the security organization whose official duties require access to covered weapons or who inventory enhanced weapons.

(ii) The provisions of this paragraph are only applicable to licensees subject to this section who are also subject to the firearms background check provisions of § 73.17 of this part.

* * * * *

(e) *GROA exemption.* * * *

(f) *Response requirements.* Licensees must train each armed member of the security organization with access to enhanced weapons on the use of deadly force when the armed member of the security organization has a reasonable belief that the use of deadly force is necessary in self-defense or in the defense of others, or any other circumstances as authorized by applicable State or Federal law.

■ 32. In § 73.55, add paragraph (b)(12) and revise paragraph (p)(3) to read as follows:

**§ 73.55 Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage.**

* * * * *

(b) * * *

(12)(i) The licensee must ensure that the firearms background check requirements of § 73.17 of this part are met for all members of the security organization whose official duties require access to covered weapons or who inventory enhanced weapons.

(ii) The provisions of this paragraph are only applicable to licensees subject to this section that are also subject to the firearms background check provisions of § 73.17 of this part.

* * * * *

(p) * * *

(3) The suspension of security measures must be reported and documented in accordance with the provisions of §§ 73.1200 and 73.1205 of this part.

* * * * *

**§§ 73.56 through 73.67 [Designated as Subpart G]**

■ 33. Designate §§ 73.56 through 73.67 as subpart G and add a heading to the newly created subpart G to read as follows:

## Subpart G—Access Authorization and Access Control Requirements for the Physical Protection of Special Nuclear Material

■ 34. In § 73.67, revise paragraphs (e)(3)(vii) and (g)(3)(iii) to read as follows:

**§ 73.67 Licensee fixed site and in-transit requirements for the physical protection of special nuclear material of moderate and low strategic significance.**

* * * * *

(e) * * *

(3) * * *

(vii) Notify the NRC Operations Center after the discovery of the loss of the shipment and after recovery of or accounting for such lost shipment, in accordance with the provisions of §§ 73.1200 and 73.1205 of this part.

* * * * *

(g) * * *

(3) * * *

(iii)(A) Immediately conduct a trace investigation of any shipment that is lost or unaccounted for after the estimated arrival time; and

(B) Notify the NRC Operations Center after the discovery of the loss of the shipment and after recovery of or accounting for such lost shipment, in accordance with the provisions of §§ 73.1200 and 73.1205 of this part.

* * * * *

**§§ 73.70 through 73.75 [Designated as Subpart H]**

■ 35. Designate §§ 73.70 through 73.75 as subpart H and add a heading to newly created subpart H to read as follows:

## Subpart H—Records and Postings

**§ 73.71 [Reserved]**

■ 36. Remove and reserve § 73.71.

**§§ 73.77 through 73.81 [Designated as Subpart I]**

■ 37. Designate §§ 73.77 through 73.81 as subpart I and add a heading to newly created subpart I to read as follows:

## Subpart I—Enforcement

## Subparts J through S [Reserved]

■ 38. Add and reserve subparts J through S.

■ 39. Add subpart T to read as follows:

## Subpart T—Security Notifications, Reports, and Recordkeeping

Sec.

73.1200 Notification of physical security events.
73.1205 Written follow-up reports of physical security events.
73.1210 Recordkeeping of physical security events.
73.1215 Suspicious activity reports.

**§ 73.1200 Notification of physical security events.**

(a) *15-minute notifications—facilities.* Each licensee subject to the provisions of § 73.20, § 73.45, § 73.46, § 73.51, or § 73.55 of this part must notify the NRC Headquarters Operations Center, as soon as possible but within 15 minutes after—

(1) The licensee's initiation of a security response in accordance with its safeguards contingency plan or protective strategy, based on an imminent or actual hostile action against a licensee's facility; or

(2) The licensee's notification by law enforcement or government officials of a potential hostile action or act of sabotage anticipated within the next 12 hours against a licensee's facility.

(3) Licensee notifications to the NRC must:

(i) Identify the facility's name; and

(ii) Briefly describe the nature of the hostile action or event, including:

(A) The type of hostile action or event (*e.g.,* armed assault, vehicle bomb, bomb threat, sabotage, etc.); and

(B) The current status (*i.e.,* imminent, in progress, or neutralized).

(4) Notifications must be made according to paragraph (o) of this section, as applicable.

(5) The licensee is not required to notify the NRC of security responses initiated as a result of threat or warning information communicated to the licensee from the NRC.

(6) The licensee's request for immediate local law enforcement agency (LLEA) assistance or initiation of a contingency response may take precedence over the notification to the NRC. However, in such instances, the licensee must notify the NRC as soon as possible thereafter.

(b) *15-minute notifications—shipments.* Each licensee subject to the provisions of § 73.20, § 73.25, § 73.26, or § 73.37 or its designated movement control center must notify the NRC Headquarters Operations Center, as soon as possible but within 15 minutes after—

(1) The licensee's initiation of a security response in accordance with its safeguards contingency plan or protective strategy, based on an imminent or actual hostile action against a shipment of Category I SSNM, spent nuclear fuel (SNF), or high-level radioactive waste (HLW); or

(2) The licensee's notification by law enforcement or government officials of a potential hostile action or attempted act

of sabotage anticipated within less than the next 12 hours against a shipment of Category I SSNM, SNF, or HLW.

(3) Licensee notifications to the NRC must:

(i) Identify the name of the facility making the shipment, the material being shipped, and the last known location of the shipment; and

(ii) Briefly describe the nature of the threat or event, including:

(A) Type of hostile threat or event (*e.g.,* armed assault, vehicle bomb, theft of shipment, sabotage, etc.); and

(B) Threat or event status (*i.e.,* imminent, in progress, or neutralized).

(4) Notifications must be made according to paragraph (o) of this section, as applicable.

(5) The licensee is not required to notify the NRC of security responses initiated as a result of threat or warning information communicated to the licensee from the NRC.

(6) The licensee's request for immediate LLEA assistance may take precedence over the notification to the NRC. However, in such instances, the licensee must notify the NRC as soon as possible thereafter.

(c) *One-hour notifications—facilities.* (1) Each licensee subject to the provisions of § 73.20, § 73.45, § 73.46, § 73.50, § 73.51, § 73.55, § 73.60, or § 73.67 must notify the NRC Headquarters Operations Center as soon as possible but no later than 1 hour after the time of discovery of the following significant facility security events involving—

(i) Any event in which there is reason to believe that a person has committed or caused, or attempted to commit or cause, or has made a threat to commit or cause:

(A) The theft or diversion of a Category I, II, or III quantity of SSNM or a Category II or III quantity of special nuclear material (SNM);

(B) Significant physical damage to any nuclear power reactor, to a facility possessing a Category I or II quantity of SSNM, or to a facility storing or disposing of SNF and/or HLW;

(C) The unauthorized operation, manipulation, or tampering with any nuclear power reactor's controls or with structures, systems, and components (SSCs) that results in the interruption of normal operation of the reactor; or

(D) The unauthorized operation, manipulation, or tampering with any Category I SSNM facility's SSCs that results in an accidental criticality.

(ii)(A) For licensees required to have a vehicle barrier system protecting their facility, the introduction beyond the vehicle barrier of a quantity of unauthorized explosives that meets or exceeds the relevant facility's adversary characteristics.

(B) This provision is applicable to facilities where the vehicle barrier system protecting the facility is located at the Protected Area boundary.

(iii) The licensee's notification by law enforcement or government officials of a potential hostile action or act of sabotage anticipated within greater than 12 hours against a licensee's facility.

(2) Notifications must be made according to paragraph (o) of this section, as applicable.

(3) Notifications made under paragraph (a) of this section are not required to be repeated under this paragraph.

(4) As an exemption, licensees subject to § 73.50, § 73.60, or § 73.67 are not required to make notifications for events listed under paragraph (c)(1)(iii) of this section.

(d) *One-hour notifications—shipments.* (1) Each licensee subject to the provisions of § 73.20, § 73.25, § 73.26, § 73.27, § 73.37, or § 73.67 or its designated movement control center must notify the NRC Headquarters Operations Center as soon as possible but no later than 1 hour after the time of discovery of the following significant transportation security events involving—

(i) Any event in which there is reason to believe that a person has committed or caused, or attempted to commit or cause, or has made a threat to commit or cause:

(A) The theft or diversion of the Category I, II, or III quantity of SSNM; a Category II or III quantity of SNM; SNF; or HLW being transported;

(B) Significant physical damage to any vehicle transporting a Category I or II quantity of SSNM, a Category II quantity of SNM, SNF, or HLW; or

(C) Significant physical damage to the Category I or II quantity of SSNM, a Category II quantity of SNM, SNF, or HLW being transported.

(ii) The discovery of the loss of a shipment of Category I SSNM.

(iii) The recovery of, or accounting for, a lost shipment of Category I SSNM.

(iv) The licensee's notification by law enforcement or government officials of a potential hostile action or attempted act of sabotage anticipated within greater than the next 12 hours against a shipment of Category I quantities of SSNM, SNF, or HLW.

(2) Notifications must be made according to paragraph (o) of this section, as applicable.

(3) Notifications made under paragraph (b) of this section are not required to be repeated under this paragraph.

(e) *Four-hour notifications—facilities.* (1) Each licensee subject to the provisions of § 73.20, § 73.45, § 73.46, § 73.50, § 73.51, § 73.55, § 73.60, or § 73.67 of this part must notify the NRC Headquarters Operations Center within 4 hours after time of discovery of the following facility security events involving—

(i) The actual access of an unauthorized person into a facility's protected area (PA), vital area (VA), material access area (MAA), or controlled access area (CAA);

(ii) The attempted access of an unauthorized person into a PA, VA, MAA, or CAA;

(iii) The actual introduction of contraband into a PA, VA, or MAA;

(iv) The attempted introduction of contraband into a PA, VA, or MAA.

(v)(A) The discovery that a weapon that is authorized by the licensee's security plan is lost or uncontrolled within a PA, VA, or MAA;

(B) Uncontrolled authorized weapons are defined as weapons that are authorized by the licensee's security plan and are not in the possession of authorized personnel or are not in an authorized weapons storage location;

(vi) The unauthorized operation, manipulation, or tampering with any nuclear reactor or Category I SSNM facility's controls or SSCs that could prevent the implementation of the licensee's protective strategy for protecting any target set;

(vii) The identification or discovery of a previously unrecognized or unidentified vulnerability that could prevent the implementation of the licensee's protective strategy for protecting any target set; or

(viii)(A) For licensees required to have a vehicle barrier system protecting their facility, the identification or discovery at or beyond the vehicle barrier of unauthorized explosives.

(B) This provision is applicable to facilities where the vehicle barrier system protecting the facility is located at a distance from the Protected Area boundary greater than that assumed in the facility's blast analysis.

(2) An event related to the licensee's implementation of their security program for which a notification was made to local, State, or Federal law enforcement officials provided that the event does not otherwise require a notification under paragraphs (a) through (h) of this section.

(3)(i) An event involving a law enforcement response to the facility that could reasonably be expected to result in public or media inquiries and that does not otherwise require a notification under paragraphs (a) through (h) of this

section, or in other NRC regulations such as § 50.72(b)(2)(xi) of this chapter.

(ii) As an exemption, licensees need not report law enforcement responses to minor incidents, such as traffic accidents.

(4) For licensees subject to the provisions of § 73.55 of this part, an event involving the licensee's suspension of security measures.

(5) Notifications must be made according to paragraph (o) of this section, as applicable.

(6) Notifications made under paragraphs (a) and (c) of this section are not required to be repeated under this paragraph.

(f) *Four-hour notifications—shipments.* (1) Each licensee subject to the provisions of § 73.20, § 73.25, § 73.26, § 73.27, § 73.37, or § 73.67 or its designated movement control center must notify the NRC Headquarters Operations Center within 4 hours after time of discovery of the following transportation security events involving—

(i) The actual access of an unauthorized person into a transport vehicle transporting a Category I or II quantity of SSNM, a Category II quantity of SNM, SNF, or HLW;

(ii) The attempted access of an unauthorized person into a transport vehicle transporting a Category I or II quantity of SSNM, a Category II quantity of SNM, SNF, or HLW;

(iii) The actual access of an unauthorized person into the Category I or II quantity of SSNM, Category II quantity of SNM, SNF, or HLW being transported;

(iv) The attempted access of an unauthorized person into the Category I or II quantity of SSNM, Category II quantity of SNM, SNF, or HLW being transported;

(v) The actual introduction of contraband into a transport vehicle transporting a Category I or II quantity of SSNM, a Category II quantity of SNM, SNF, or HLW;

(vi) The attempted introduction of contraband into a transport vehicle transporting a Category I or II quantity of SSNM, a Category II quantity of SNM, SNF, or HLW;

(vii) The actual introduction of contraband into the Category I or II quantity of SSNM, Category II quantity of SNM, SNF, or HLW being transported;

(viii) The attempted introduction of contraband into the Category I or II quantity of SSNM, Category II quantity of SNM, SNF, or HLW being transported;

(ix) The discovery of the loss of a shipment of Category II or III quantities of SSNM, Category II or III quantities of SNM, SNF, or HLW; or

(x) The recovery of or accounting for a lost shipment of Category II or III quantities of SSNM, Category II or III quantities of SNM, SNF, or HLW.

(2) An event related to the licensee's implementation of their security program for which a notification was made to local, State, or Federal law enforcement officials, provided that the event does not otherwise require a notification under paragraphs (a) through (h) of this section.

(3) Notifications must be made according to paragraph (o) of this section, as applicable.

(4) Notifications made under paragraphs (b) and (d) of this section are not required to be repeated under this paragraph.

(g) *Eight-hour notifications—facilities.* (1) Each licensee subject to the provisions of § 73.20, § 73.45, § 73.46, § 73.50, § 73.51, § 73.55, § 73.60, or § 73.67 must notify the NRC Headquarters Operations Center within 8 hours after time of discovery of the following facility security program failures involving—

(i) Any failure, degradation, or vulnerability in a security or safeguards system, for which compensatory measures have not been employed within the required timeframe, that could allow unauthorized or undetected access of—

(A) Unauthorized personnel into a PA, VA, MAA, or CAA; or

(B) Contraband into a PA, VA, or MAA;

(ii) The unauthorized operation, manipulation, or tampering with any nuclear power reactor's controls or with SSCs that does not result in the interruption of normal operation of the reactor; or

(iii) The unauthorized operation, manipulation, or tampering with any Category I SSNM facility's SSCs that does not result in the interruption of normal operation of the facility or an accidental criticality.

(2) Notifications must be made according to paragraph (o) of this section, as applicable.

(3) Notifications made under paragraphs (a), (c), and (e) of this section are not required to be repeated under this paragraph.

(h) *Eight-hour notifications—shipments.* (1) Each licensee subject to the provisions of § 73.20, § 73.25, § 73.26, § 73.27, § 73.37, or § 73.67 or its designated movement control center must notify the NRC Headquarters Operations Center within 8 hours after time of discovery of the following transportation security program failures involving any failure, degradation, or vulnerability in a security or safeguards system, for which compensatory measures have not been employed within the required timeframe, that could allow unauthorized or undetected access of—

(i) Personnel or contraband into a transport vehicle transporting a Category I or II quantity of SSNM, a Category II quantity of SNM, SNF, or HLW; or

(ii) Personnel or contraband into the Category I or II quantity of SSNM, Category II quantity of SNM, SNF, or HLW being transported;

(2) Notifications must be made according to paragraph (o) of this section, as applicable.

(3) Notifications made under paragraphs (b), (d), and (f) of this section are not required to be repeated under this paragraph.

(i) through (l) [Reserved]

(m) *Enhanced weapons notifications—stolen or lost.* (1) Each licensee possessing enhanced weapons in accordance with § 73.15 must—

(i) Immediately notify the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) upon discovery of any stolen or lost enhanced weapons (see 27 CFR 479.141).

(ii) Notify the NRC Headquarters Operations Center as soon as possible, but not later than 1 hour, after notification to the ATF of the discovery of any stolen or lost enhanced weapons possessed by the licensee.

(iii) Notify the appropriate local law enforcement agency (LLEA) officials as soon as possible, but not later than 48 hours, after the discovery of stolen or lost enhanced weapons. This notification must be made by telephone or in person to the appropriate LLEA officials. Licensees must include appropriate point of contact information in their security event notification procedures.

(2) Notifications to the NRC must be made according to paragraph (o) of this section, as applicable.

(n) *Enhanced weapons—adverse ATF findings.* (1) Each licensee possessing enhanced weapons in accordance with § 73.15 must—

(i) Notify the NRC Headquarters Operations Center as soon as possible, but not later than 24 hours, after receipt of an adverse inspection finding, enforcement finding, or other adverse notice from the ATF regarding the licensee's possession, receipt, transfer, transportation, or storage of enhanced weapons; and

(ii) Notify the NRC Headquarters Operations Center as soon as possible, but not later than 24 hours after receipt

of an adverse inspection finding, enforcement finding or other adverse notice from the ATF regarding any ATF issued Federal firearms license to the NRC licensee.

(2) Notifications must be made according to paragraph (o) of this section, as applicable.

(o) *Notification process.* (1) Each licensee must make the telephonic notifications to the NRC required by paragraphs (a) through (n) of this section to the NRC Headquarters Operations Center via any available telephone system. Commercial telephone numbers for the NRC Headquarters Operations Center are specified in Table 1 of appendix A of this part.

(2) Licensees must make required telephonic notifications via any method that will ensure that a report is received by the NRC Headquarters Operations Center or other specified government officials within the timeliness requirements of paragraphs (a) through (n) of this section, as applicable.

(3) Notifications required by this section that contain Safeguards Information may be made to the NRC Headquarters Operations Center without using secure communications systems under the exception of § 73.22(f)(3) for the communication of emergency or extraordinary conditions.

(4)(i) Notifications required by this section that contain classified national security information and/or classified restricted data must be made to the NRC Headquarters Operations Center using secure communications systems appropriate to the classification level of the message. Licensees making classified telephonic notifications must contact the NRC Headquarters Operations Center at the commercial numbers specified in Table 1 of appendix A to this part and request a transfer to a secure telephone, as specified in paragraph III of appendix A to this part.

(ii) If the licensee's secure communications capability is unavailable (*e.g.,* due to the nature of the security event), the licensee must provide to the NRC the information required by this section, without revealing or discussing any classified information, in order to meet the timeliness requirements of this section. The licensee must also indicate to the NRC that its secure communications capability is unavailable.

(iii) Licensees using a non-secure communications capability may be directed by the NRC emergency response management, in accordance with 32 CFR 2001.52(a), to provide classified national security information to the NRC over the non-secure system, due to the significance of the ongoing security event. In such circumstances, the licensee must document this direction and any information provided to the NRC over a non-secure communications capability in the follow-up written report required in accordance with § 73.1205.

(5) For events reported under paragraph (a) of this section, the NRC may request that the licensee establish and maintain an open and continuous communications channel with the NRC Headquarters Operations Center as soon as possible.

(i) Licensees must establish the requested continuous communications channel once the licensee has completed other required notifications under this section, § 50.72 of this chapter, appendix E to part 50 of this chapter, § 70.50 of this chapter; or § 72.75 of this chapter; as appropriate.

(ii) Licensees must complete any immediate actions required to stabilize the plant, to place the plant in a safe condition, to implement defensive measures, or to request assistance from the LLEA.

(iii) When established, the continuous communications channel must be staffed by a knowledgeable individual in the licensee's security, operations, or emergency response organizations from a location deemed appropriate by the licensee.

(iv) The continuous communications channel may be established via any available telephone system.

(6) For events reported under paragraph (b) of this section, the NRC may request that the licensee or its movement control center establish and maintain an open and continuous communications channel with the NRC Headquarters Operations Center as soon as possible.

(i) Licensees must establish the requested continuous communications channel once the licensee or the movement control center has completed other required notifications under this section, § 50.72 of this chapter, appendix E to part 50 of this chapter, or § 70.50 of this chapter; § 72.75 of this chapter; or requested assistance from the LLEA, as appropriate.

(ii) When established, the continuous communications channel must be staffed by a knowledgeable individual in the licensee's security, operations, or emergency response organizations or the movement control center monitoring the shipment.

(iii) The continuous communications channel may be established via any available telephone system.

(7)(i) For events reported under paragraphs (c), (e), (g), and (m) of this section, the NRC may request that the licensee establish and maintain an open and continuous communications channel with the NRC Headquarters Operations Center.

(ii) When established, the continuous communications channel must be staffed by a knowledgeable individual in the licensee's security, operations, or emergency response organizations from a location deemed appropriate by the licensee.

(iii) The continuous communications channel may be established via any available telephone system.

(8)(i) For events reported under paragraphs (d), (f), and (h) of this section, the NRC may request that the licensee or the movement control center establish and maintain an open and continuous communications channel with the NRC Headquarters Operations Center.

(ii) When established, the continuous communications channel must be staffed by a knowledgeable individual in the movement control center monitoring the shipment.

(iii) The continuous communications channel may be established via any available telephone system.

(p) *Significant supplemental information.* Licensees identifying significant supplemental information for events reported under paragraphs (a) through (h), (m), and (n) of this section, subsequent to the initial telephonic notification to the NRC Headquarters Operations Center, must notify the NRC Headquarters Operations Center of such supplemental information under paragraph (o) of this section.

(q) *Retraction of previous security event reports.* (1) Licensees desiring to retract a previous physical security event notification made under paragraphs (a) through (h), (m), and (n) of this section, which have been determined to be invalid, not reportable in accordance with the requirements of paragraphs (a) through (h), (m), and (n) of this section, or recharacterized as recordable under § 73.1210 of this part (instead of reportable under § 73.1200), must telephonically notify the NRC Headquarters Operations Center in accordance with paragraph (o) of this section and indicate the report that is being retracted and the basis for the retraction.

(2) Invalid, not reportable, or recharacterized events include, but are not limited to, events for which the licensee subsequently receives new information regarding the event or relevant information from an external entity (*e.g.,* the initial information on a reportable event is subsequently determined to be incorrect or a law

enforcement determination is made on the absence of a malevolent intent).

(r) *Declaration of emergencies.* Licensees notifying the NRC of the declaration of an emergency class must do so in accordance with §§ 50.72, 63.73, 70.50, and 72.75 of this chapter, as applicable.

(s) *Elimination of duplication.* Licensees with notification obligations under paragraphs (a) through (h), (m), and (n) of this section and §§ 50.72, 63.73, 70.50, and 72.75 of this chapter may notify the NRC of events in a single communication. This communication must identify each regulation under which the licensee is reporting.

(t) *Classified information.* Licensee notifications regarding security events associated with the deliberate disclosure, theft, loss, compromise, or possible compromise of classified documents, information, or material must comply with the requirements found in § 95.57 of this chapter.

**§ 73.1205 Written follow-up reports of physical security events.**

(a) *General requirements.* (1) Licensees making a telephonic notification under § 73.1200 of this part must also submit a written follow-up report to the NRC within 60 days of such notifications, in accordance with § 73.4.

(2) As an exemption, licensees are not required to submit a written follow-up report subsequent to a telephonic notification made—

(i) Under the provisions of § 73.1200(e) and (f) regarding interactions with a Federal, State, or local law-enforcement agency;

(ii) Under the provisions of § 73.1200(m) regarding lost or stolen enhanced weapons; or

(iii) Under the provisions of § 73.1200(n) regarding adverse findings from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for enhanced weapons possessed by the licensee.

(3)(i) Licensees are not required to submit a written follow-up report if the licensee subsequently retracts a telephonic notification made under § 73.1200 as invalid, not reportable under § 73.1200, or recharacterized as recordable under § 73.1210 (instead of reportable under § 73.1200), and has not yet submitted a written follow-up report under this section.

(ii) If the licensee subsequently retracts a telephonic notification made under § 73.1200 after it has submitted a written follow-up report under this section, then the licensee must submit a revised written follow-up report documenting the retraction.

(b) *Submission criteria.* (1) Each licensee must submit to the NRC written follow-up reports that contain sufficient information for NRC analysis and evaluation and are of a quality that will permit legible reproduction and processing.

(2)(i) Licensees subject to § 50.73 of this chapter must prepare the written follow-up report on NRC Form 366.

(ii) Licensees not subject to § 50.73 of this chapter must prepare the written follow-up report in a letter format.

(3)(i) If significant supplemental information becomes available after the submission of the initial written follow-up report, then the licensee must submit a revised report with the revisions indicated.

(ii) The revised written follow-up report must replace the previous written report in its entirety. The update must be complete and not be limited to only supplementary or revised information.

(iii) Errors discovered in a written follow-up report must be corrected in a revised report with the revisions indicated.

(c) *Contents.* A written follow-up report must contain:

(1) A brief abstract describing the major occurrences during the event or condition, including all component or system failures that contributed to the event or condition, and significant corrective actions taken or planned to prevent recurrence.

(2) A clear, specific, narrative description of what occurred so that a knowledgeable reader conversant with general security program requirements, but not familiar with the security requirements for the specific facility or activity, can understand the complete event.

(3) The narrative description must include, as a minimum, the following information, as applicable—

(i) The date and time the event or condition was discovered;

(ii) The date and time the event or condition occurred;

(iii) The affected structures, systems, components, equipment, or procedures;

(iv) The environmental conditions at the time of the event or occurrence, if relevant;

(v) The root cause of the event or condition;

(vi) Whether any human performance errors were the cause or were a contributing factor to the event or condition, including: personnel errors, inadequate procedures, or inadequate training;

(vii) Whether previous events or conditions are relevant to the current event or condition and whether corrective actions to prevent recurrence were ineffective or insufficient;

(viii) Whether this event or condition is a recurring failure of a structure, system, component, or procedure important to security;

(ix) What compensatory measures, if any, were implemented in response to the event or condition;

(x) What corrective actions, if any, were taken in response to the event or condition; and

(xi) When corrective actions, if any, were taken or will be completed.

(d) *Transmission criteria.* (1) In addition to the addressees specified in § 73.4, the licensee must also provide one copy of the written follow-up report addressed to the Director, Office of Nuclear Security and Incident Response (NSIR).

(2) For copies of a classified written follow-up report, the licensee must transmit them to the NRC via either the NRC Headquarters classified mailing address specified in Table 2 of appendix A to this part or via the NRC's secure email address specified in Table 1 of appendix A to this part.

(3) Each written follow-up report containing classified information must be created, stored, marked, labeled, handled, transmitted to the NRC, and destroyed in accordance with the requirements of part 95 of this chapter.

(4) Each written follow-up report containing Safeguards Information must be created, stored, marked, labeled, handled, transmitted to the NRC, and destroyed in accordance with the requirements of §§ 73.21 and 73.22.

(e) *Records retention.* Licensees must maintain a copy of a written follow-up report as a record for a period of 3 years from the date of the report or until termination of the license, whichever is later.

**§ 73.1210 Recordkeeping of physical security events.**

(a) *Objective and purpose.* (1) Licensees with facilities or shipment activities subject to the provisions of § 73.20, § 73.25, § 73.26, § 73.27, § 73.37, § 73.45, § 73.46, § 73.50, § 73.51, § 73.55, § 73.60, or § 73.67, must record the physical security events and conditions adverse to security that are specified in paragraphs (c) through (f) of this section.

(2) These records facilitate the licensee's monitoring of the effectiveness of its physical security program. These records also facilitate the licensee's effective tracking, trending, and performance monitoring of these security events and conditions adverse to security; and the subsequent identification and implementation of corrective actions to prevent recurrence.

(3) These physical security events and conditions adverse to security include,

but are not limited to, human performance security errors; failure to comply with security procedures; insufficient or inadequate security procedures; security equipment failures and malfunctions; security structures, systems, and components design deficiencies; and inadequate or insufficient security structures, systems, and components. This includes events or conditions where the licensee has implemented compensatory measures within the required timeframe specified in its physical security plan.

(b) *General requirements.* (1) Licensees must record within 24 hours of the time of discovery the physical security events and conditions adverse to security specified in paragraphs (c) through (f) of this section.

(2) Licensees must retain these records for a period up to 3 years after the last entry is recorded, or until their license is terminated, whichever is later.

(3)(i) Licensees must record these physical security events and conditions adverse to security in either a stand-alone safeguards event log or as part of the licensee's corrective action program, as specified under the applicable quality assurance program provisions of parts 50, 52, 60, 63, 70, and 72 of this chapter, or both.

(ii) Licensees choosing to use their corrective action program to record these physical security events and conditions adverse to security must ensure that the records contain sufficient information to permit the effective tracking, trending, and performance monitoring of these events and conditions and the implementation of corrective actions.

(iii) Licensees must ensure that Safeguards Information or classified security information associated with these records is created, stored, and handled in accordance with the provisions of § 73.21, or of part 95 of this chapter, as applicable.

(iv) Licensees choosing to use their corrective action program for these records may also choose to bifurcate the information in such records systems so as to maximize the use and advantages of their corrective action programs' tracking, trending, and performance monitoring capabilities while simultaneously compartmenting sensitive security information and security vulnerabilities (*i.e.,* by controlling access and limiting need to know to necessary personnel), in order to ensure information protection requirements are effectively implemented.

(4) These records must include, but are not limited to, information on the following data elements, as applicable—

(i) The date and time the event or condition was discovered;

(ii) The date and time the event or condition occurred;

(iii) The affected structures, systems, components, equipment, or procedures;

(iv) A description of the event or condition;

(v) The environmental conditions at the time of the event or occurrence, if relevant;

(vi) The root cause of the event or condition;

(vii) Whether any human performance errors were the cause or were a contributing factor of the event or condition, including: personnel errors, inadequate procedures, or inadequate training;

(viii) Whether previous events or conditions are relevant to the current event or condition and whether corrective actions were ineffective or insufficient;

(ix) Whether this event or condition is a recurring failure of a structure, system, component, or procedure;

(x) What compensatory measures, if any, were implemented in response to the event or condition;

(xi) What corrective actions, if any, were taken in response to the event or condition; and

(xii) When corrective actions, if any, were taken or will be completed.

(5) Physical security events and conditions adverse to security for which notifications were made to the NRC under § 73.1200 are not required to be recorded under this section.

(6) Suspicious activities that are reported under § 73.1215 are not required to be recorded under this section.

(7) Enhanced weapons events that are reported under § 73.1200 are not required to be recorded under this section.

(c) *Compensated security events.* The requirements of this section apply to any failure, degradation, or discovered vulnerability in a security or safeguards system for which compensatory measures were established within the required timeframe and for which the following could have resulted in—

(1) Undetected access of unauthorized explosives beyond a required vehicle barrier;

(2) Unauthorized personnel gaining access into a protected area (PA), vital area (VA), material access area (MAA), or controlled access area (CAA);

(3) Undetected access of contraband into a PA, VA, or MAA;

(4) Unauthorized personnel accessing a vehicle transporting a Category I or II quantity of strategic special nuclear material (SSNM), spent nuclear fuel (SNF), or high-level radioactive waste (HLW);

(5) Unauthorized personnel accessing a Category I or II quantity of SSNM, SNF, or HLW being transported;

(6) Undetected introduction of contraband into a vehicle transporting a Category I or II quantity of SSNM, SNF, or HLW; or

(7) Undetected introduction of contraband into the Category I or II quantity of SSNM, SNF, or HLW being transported.

(d) *Ammunition events.* (1) For licensees with armed security personnel, the discovery that greater than a small quantity of live ammunition authorized by the licensee's security plan:

(i) Has been lost inside a PA, VA, or MAA; or

(ii) Has been found uncontrolled inside a PA, VA, or MAA.

(2)(i) The discovery that greater than a small quantity of unauthorized live ammunition is inside a PA, VA, or MAA.

(ii) A small quantity of live ammunition means five rounds or fewer of ammunition.

(iii) Uncontrolled authorized ammunition means ammunition authorized by the licensee's security plans that is not in the possession of authorized personnel or is not in an authorized ammunition storage location.

(iv) Unauthorized ammunition means ammunition that is not authorized by the licensee's security plans.

(3) As exemptions, licensees are not required to record:

(i) Ammunition that is in the possession of Federal, State, or local law-enforcement personnel performing official duties inside a PA, VA, or MAA is considered controlled and authorized; or

(ii) Blank ammunition used for training purposes by the licensee.

(e) [Reserved]

(f) *Decreases in the effectiveness of the physical security program.* The requirements of this section apply to any other threatened, attempted, or committed act not previously defined in this section that has resulted in or has the potential for decreasing the effectiveness of the licensee's physical security program below that committed to in a licensee's NRC-approved physical security plan.

(g) *Classified Information.* Licensee recordkeeping requirements regarding any security events or conditions adverse to security involving any infractions, losses, compromises, or possible compromise of classified information or classified documents are found in § 95.57 of this chapter.

(h) *Recordkeeping—exemptions.* Licensees subject to § 73.67 who possess or transport SSNM or special nuclear material (SNM) in the following categories are exempt from the provisions of this section:

(1) Category III quantity of SSNM;

(2) Category II quantity of SNM; or

(3) Category III quantity of SNM.

**§ 73.1215 Suspicious activity reports.**

(a) *Purpose.* This section sets forth the reporting criteria and process for licensees to use in reporting suspicious activities. Licensees are required to report suspicious activities to the local law enforcement agency (LLEA), the Federal Bureau of Investigation (FBI) local field office, the NRC, and the Federal Aviation Administration (FAA) local control tower if aircraft are a part of the suspicious activity.

(b) *Objective.* (1) A licensee's timely submission of suspicious activity reports (SARs) to Federal and local law enforcement agencies is an important part of the U.S. government's efforts to disrupt or dissuade malevolent acts against the nation's critical infrastructure. Despite the increasingly fluid and unpredictable nature of the threat environment, some elements of terrorist tactics, techniques, and procedures remain constant. For example, attack planning and preparation generally proceed through several predictable stages, including intelligence gathering and preattack surveillance or reconnaissance. These preattack stages, in particular, offer law enforcement and security personnel a significant opportunity to identify and disrupt or dissuade acts of terrorism before they occur. However, to use this information most effectively, timely reporting of suspicious activities by licensees to both Federal and local law enforcement is of vital importance.

(2) Licensee's timely submission of SARs to the NRC supports one of the agency's primary mission essential functions of threat assessment for licensed facilities, materials, and shipping activities.

(c) *General requirements.* (1)(i) Licensees subject to paragraphs (d), (e), and (f) of this section must report suspicious activities that are applicable to their facility, material, or shipping activity.

(ii) If a suspicious activity requires a physical security event notification pursuant to § 73.1200, then the licensee is not required to also report the occurrence as a suspicious activity pursuant to this section.

(iii) If a suspicious activity report results in a LLEA response the licensee must notify the NRC in accordance with the requirements of § 73.1200.

(2)(i) Licensees must promptly assess whether an activity is suspicious. Licensees may review additional information as part of an assessment process, including interactions with their LLEA. However, such assessments and any subsequent reporting must be completed as soon as possible, but within 4 hours of the time of discovery. The licensee must base its assessment upon its best available information on the activity, which may include its knowledge of its locale and the local population.

(ii) The licensee's assessment of a potential suspicious activity, and any discussion of this activity with its LLEA, does not constitute a conclusion, in and of itself, that the activity is suspicious.

(iii) Licensees are not required to report activities that, based on their assessment, appear to be innocent or innocuous.

(3) For a suspicious activity specified under paragraph (d) of this section, the licensee must make the following reports:

(i) First, to their LLEA;

(ii) Second, to their applicable FBI local field office;

(iii) Third, to the NRC Headquarters Operations Center; and

(iv) Lastly, to the local FAA control tower if the suspicious activity involves aircraft overflights in proximity to the licensee's facility.

(4) For a suspicious activity specified under paragraphs (e) and (f) of this section, the licensee or its designated movement control center must make the following reports, in the order indicated:

(i) First, to the applicable LLEA;

(ii) Second, to the applicable FBI local field office; and

(iii) Lastly, to the NRC Headquarters Operations Center.

(iv) For licensees making such reports related to shipping activities, the licensee responsible for the security of the shipment must contact the applicable FBI local field office.

(v) For a movement control center making such reports related to shipping activities, the applicable FBI local field office is as requested by the FBI. As such, the FBI may direct the use of the FBI local field office applicable to the movement control center itself or to the FBI local field office applicable to the licensee responsible for the security of the shipment.

(5)(i) Licensees subject to paragraphs (d) and (f) of this section must establish a point of contact with their local FBI field office.

(ii) Licensees subject to paragraph (d) of this section must establish a point of contact with their local FAA control tower.

(6)(i) For licensees subject to paragraph (e) of this section who are responsible for the security of the shipment(s), the licensee must establish a point of contact with their local FBI field office.

(ii) For licensees subject to paragraph (e) of this section who are employing the services of a movement control center, the movement control center must establish a point of contact with its local FBI field office.

(7) Licensees and movement control centers reporting suspicious activities to the NRC must notify the NRC Headquarters Operations Center via the telephone number specified in Table 1 of appendix A of this part.

(8)(i) Licensees and movement control centers reporting suspicious activities must document the LLEA and FBI points of contact in written security communication procedures or route approvals, as applicable.

(ii) Licensees reporting suspicious aircraft overflight activities must document the FAA point of contact in written communication procedures.

(d) *Suspicious activities—facilities and materials.* (1) For licensees subject to the provisions of § 73.20, § 73.45, § 73.46, § 73.50, § 73.51, § 73.55, § 73.60, or § 73.67, the licensees must report activities they assess are suspicious. Examples include, but are not limited to, the following:

(i) Challenges to the licensee's security systems and procedures;

(ii) Elicitation of non-public information from knowledgeable licensee or contractor personnel regarding the licensee's security or emergency response programs;

(iii) Observed surveillance or reconnaissance activity from within posted or restricted areas (*i.e.,* non-public areas), including surface activity, underwater activity, manned aerial activity, and unmanned aerial activity;

(iv) Observed surveillance activity from public spaces outside of the licensee's control; or

(v) Unauthorized aircraft activities in close proximity to the facility (*i.e.,* above or near), involving either manned or unmanned aircraft, operating in a manner potentially indicative of surveillance or reconnaissance activity.

(2) As an exemption, this paragraph does not apply to:

(i) Licensees who are subject to the provisions of § 73.67, and who are also engaged in the enrichment of special nuclear material using Restricted Data

(RD) information, technology, or materials.

(ii) Licensees who are subject to the provisions of § 73.67 of this part, and who are also engaged in the fabrication of new fuel assemblies.

(3) Licensees are not required to report commercial or military aircraft activity that is assessed as routine or non-threatening.

(e) *Suspicious activity—shipping activities.* (1) For licensees subject to the provisions of § 73.20, § 73.25, § 73.26, § 73.27, or § 73.37, the licensee must report activities they assess are suspicious. Examples include, but are not limited to, the following:

(i) Challenges to the licensee's or its transportation contractor's communications subsystems regarding the transport system;

(ii) Challenges to the licensee's or its transportation contractor's security subsystems for the transport system;

(iii) Interference with or harassment of in-progress shipments;

(iv) Elicitation of non-public information from knowledgeable licensee personnel or the licensee's transportation contractor personnel regarding transportation program elements, including: security programs, operations programs, communication protocols, shipment routes, safe haven locations, and emergency response programs; or

(v) Observed surveillance or reconnaissance activity of ongoing shipments.

(2) For licensees using a movement control center for shipments of radioactive material or special nuclear material (SNM), the movement control center may report suspicious activities to LLEA, the FBI, and the NRC, in lieu of the licensee making such reports.

(f) *Suspicious activities—enrichment facilities.* (1) For licensees subject to the provisions of § 73.67, who are also engaged in the enrichment of SNM using RD information, technology, or materials; the licensee must report activities they assess are suspicious. Examples include, but are not limited to, the following:

(i) Aggressive noncompliance by visitors to the licensee's facility involving willful unauthorized departure from a tour group or willful unauthorized entry into restricted areas;

(ii) Unauthorized recording or imaging of sensitive technology, equipment, or materials; or

(iii) Elicitation of non-public information from knowledgeable licensee or contractor personnel regarding physical or information security programs intended to protect RD information, technology, or materials.

(2)(i) Licensees must report, in accordance with § 95.57 of this chapter, alleged or suspected activities involving actual, attempted, or conspiracies to obtain RD, communicate RD, remove RD, or disclose RD in potential violation of Sections 224, 225, 226, and 227 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2274, 2275, 2276, and 2277).

(ii) As an exemption, the licensee is not required to also report such actual, attempted, or conspiracies to obtain RD, communicate RD, remove RD, or disclose RD as suspicious activities pursuant to this section.

(g) *Suspicious activities—exemptions.* (1) Licensees subject to § 73.67 who possess strategic special nuclear material in quantities greater than 15 grams but less than the quantity necessary to form a critical mass, as specified in § 150.11(a) of this chapter, are exempt from the provisions of this section.

(2) The following licensees are exempt from the provisions of this section:

(i) Docket number 70–7020; and

(ii) Docket number 70–7028.

■ 40. In appendix A to part 73, designate the first table as Table 1 and add a heading to and revise the first row in newly designated table 1, designate the second table as Table 2 and add a heading to newly designated table 2, and add paragraphs III and IV to read as follows:

## Appendix A to Part 73—U.S. Nuclear Regulatory Commission Offices and Classified Mailing Addresses

TABLE 1—MAILING ADDRESSES, TELEPHONE NUMBERS, AND EMAIL ADDRESSES

| | Address | Telephone (24-hour) | Email |
|---|---|---|---|
| NRC Headquarters Operations Center ..... | USNRC, Division of Preparedness and Response, Washington, DC 20555–0001. | (301) 816–5100; (301) 816–5151 (fax) ..... | *Hoo.Hoc@nrc.gov; Hoo1@nrc.sgov.gov* (secure). |

* * * * * * *

**Table 2—Classified Mailing Addresses**

III. Classified telephone calls must be made to the telephone numbers for the NRC Headquarters Operations Center in Table 1 of this appendix and the caller must request transfer to a secure telephone to communicate the classified information.

IV. Classified emails must be sent to the secure email address specified in Table 1 of this appendix.

■ 41. In appendix B to part 73:

■ a. Revise section I.A;

■ b. In section VI, paragraph B.1(a)(4), remove the reference ''10 CFR 73.19'' and add in its place the reference ''§ 73.17''.

The revision reads as follows:

## Appendix B to Part 73—General Criteria for Security Personnel

* * * * *

I. * * *

A. Employment Suitability and Qualification.

1. Suitability.

(a) Before employment, or assignment to the security organization, an individual shall:

(1) Possess a high school diploma or pass an equivalent performance examination designed to measure basic mathematical, language, and reasoning skills, abilities, and knowledge required to perform security duties and responsibilities;

(2) Have attained the age of 21 for an armed capacity or the age of 18 for an unarmed capacity;

(3) Not have any felony convictions that reflect on the individual's reliability; and

(4) Not be disqualified, in accordance with applicable state or Federal law from possessing or using firearms or ammunition.

(i) Licensees may use the information that has been obtained during the completion of the individual's background investigation for unescorted access to determine suitability; or

(ii) Licensees may use the satisfactory completion of a firearms background check for the individual under § 73.17 of this part to also fulfill this requirement.

(b) The qualification of each individual to perform assigned duties and responsibilities must be documented by a qualified training instructor and attested to by a security supervisor.

* * * * *

## Appendix G to Part 73 [Reserved]

■ 42. Remove and reserve appendix G to part 73.

## PART 74—MATERIAL CONTROL AND ACCOUNTING OF SPECIAL NUCLEAR MATERIAL

■ 44. The authority citation for part 74 continues to read as follows:

**Authority:** Atomic Energy Act of 1954, secs. 53, 57, 161, 182, 223, 234, 1701 (42 U.S.C. 2073, 2077, 2201, 2232, 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 202 (42 U.S.C. 5841, 5842); 44 U.S.C. 3504 note.

■ 45. In § 74.11, paragraph (c) is revised to read as follows:

### § 74.11 Reports of loss or theft or attempted theft or unauthorized production of special nuclear material.

* * * * *

(c) Notifications required under § 73.1200 of this chapter need not be duplicated under the requirements of this section.

## PART 76—CERTIFICATION OF GASEOUS DIFFUSION PLANTS

■ 46. The authority citation for part 76 continues to read as follows:

**Authority:** Atomic Energy Act of 1954, secs. 122, 161, 193(f), 223, 234, 1701 (42 U.S.C. 2152, 2201, 2243(f), 2273, 2282, 2297f); Energy Reorganization Act of 1974, secs. 201, 206, 211 (42 U.S.C. 5841, 5846, 5851); 44 U.S.C. 3504 note.

### § 76.113 [Amended]

■ 47. In § 76.113(b), remove the reference ''73.71'' and add in its place the reference ''73.1200''.

### § 76.115 [Amended]

■ 48. In § 76.115(b), remove the reference ''73.71'' and add in its place the reference ''73.1200''.

### § 76.117 [Amended]

■ 49. In § 76.117(b), remove the reference ''73.71'' and add in its place the reference ''73.1200''.

Dated: February 22, 2023.

For the Nuclear Regulatory Commission.

**Brooke P. Clark,**

*Secretary of the Commission.*

[FR Doc. 2023–03944 Filed 3–13–23; 8:45 am]

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