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# Contents

**Federal Register**

Vol. 88, No. 126

Monday, July 3, 2023

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

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

## CFR PARTS AFFECTED IN THIS ISSUE

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

**10 CFR**
72.....42587
**Proposed Rules:**
35.....42654
**13 CFR**
128.....42592
134.....42592
**14 CFR**
39 (8 documents) .....42593, 42598, 42600, 42602, 42604, 42606, 42609, 42611
71.....42614
**Proposed Rules:**
71.....42659
**15 CFR**
713.....42615
**33 CFR**
165 (2 documents) .....42619
**40 CFR**
52 (2 documents) .....42621, 42640
**42 CFR**
1003.....42820
1005.....42820
**50 CFR**
17.....42642
660.....42652
**Proposed Rules:**
17.....42661

# Rules and Regulations

Federal Register
Vol. 88, No. 126
Monday, July 3, 2023

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

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

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 72

**[NRC–2022–0109]**

**RIN 3150–AK86**

## List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 Through 15; Correction

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Direct final rule; correction and announcement of effective date.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is correcting and announcing the effective date for the direct final rule that was published in the **Federal Register** on February 13, 2023. The direct final rule renews the initial certificate (Amendment 0) and Amendment Nos. 1 through 15 of the Holtec International HI–STORM 100 Certificate of Compliance No. 1014 for 40 years and revises the certificate of compliance's conditions and technical specifications to address aging management activities related to the structures, systems, and components important to safety of the dry storage system to ensure that these will maintain their intended functions during the period of extended storage operations.

**DATES:** The effective date of the direct final rule published February 13, 2023 (88 FR 9106), which was delayed indefinitely on April 26, 2023 (88 FR 25271), is August 2, 2023, and the correction set out at the end of this document is effective August 2, 2023.

**ADDRESSES:** Please refer to Docket ID NRC–2022–0109 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–2022–0109. 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.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, 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 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room P1–B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Kristina Banovac, Office of Nuclear Materials Safety and Safeguards, telephone: 301–415–7116, email: *Kristina.Banovac@nrc.gov* and James Firth, Office of Nuclear Materials Safety and Safeguards, telephone: 301–415–6628, email: *James.Firth@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

**SUPPLEMENTARY INFORMATION:**

### I. Discussion

On February 13, 2023 (88 FR 9106), the NRC published a direct final rule amending its regulations in part 72 of title 10 of the *Code of Federal Regulations* (10 CFR) to revise the Holtec International HI–STORM 100 Cask System listing within the ''List of approved spent fuel storage casks'' to renew the initial certificate (Amendment No. 0) and Amendment Nos. 1 through 15 to Certificate of Compliance No. 1014. The renewal of the initial certificate and Amendment Nos. 1 through 15 for 40 years revised the certificate of compliance's conditions and technical specifications to address aging management activities related to the structures, systems, and components important to safety of the dry storage system to ensure that these will maintain their intended functions during the period of extended storage operations.

In the direct final rule, published on February 13, 2023, the NRC stated that if no significant adverse comments were received, the direct final rule would become effective on May 1, 2023. The comment period closed on March 15, 2023; however, on March 22, 2023, in response to requests for an extension of the public comment period, the NRC reopened the public comment period to allow the public more time to comment on the action (88 FR 17164). The re-opened comment period closed on April 14, 2023. On April 26, 2023 (88 FR 25271), the NRC published a document that indefinitely delayed the effective date of the direct final rule to provide the NRC staff sufficient time to evaluate and respond to public comments.

The NRC received eight comment submissions on the companion proposed rule published on February 13, 2023 (88 FR 9195). The comments were submitted by four individuals, and a joint comment was provided on behalf of five nongovernmental organizations. An electronic copy of the comment submissions can be obtained from the Federal rulemaking website *https://www.regulations.gov* under Docket ID NRC–2022–0109. The comments are also available in ADAMS using the Accession numbers shown in the table in the ''Availability of Documents'' section of this document.

The NRC binned the comments by topic and evaluated the comments using the criteria stated in the direct final rule. The NRC is providing a response to the comments in section II. of this document, ''Public Comment Responses.'' Some comments were not

unique to this action, in that they raised issues the NRC has addressed in previous spent fuel storage actions, (*e.g.,* guidance for evaluating the aging management programs). Other comments were on topics that are outside of the scope of this rulemaking, such as transportation, cask design bases, and storage at a consolidated interim storage facility. In addition, some comments pertain to the regulations in 10 CFR part 72 rather than the safety of the Holtec International HI–STORM 100 Cask System design and are also outside of the scope of this rulemaking.

For ease of reference, the criteria for a significant adverse comment are repeated here:

A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, a substantive response is required when:

(a) The comment causes the NRC to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC to make a change (other than editorial) to the rule, certificate of compliance, or technical specifications.

The NRC evaluated the comments against these criteria and determined that the public comments received on this action did not warrant any additions or changes (other than editorial) to the final rule, the certificates of compliance, or the accompanying technical specifications. The NRC is not making substantive changes to the rule; it is apparent that the rule is effective and acceptable as proposed, without the need for a substantive change or addition. The comments did not raise a relevant issue that was not previously addressed or considered by the NRC, and the comments did not cause the NRC to either: (1) reevaluate or reconsider its position, or (2) conduct additional analyses.

The NRC has determined that none of the comments were significant adverse comments. Therefore, the NRC is correcting and confirming the direct final rule amending the listing for Certificate of Compliance No. 1014, the Holtec International HI–STORM 100 Cask System design, to renew the NRC's approval of the certificate of compliance and is announcing the effective date.

## II. Public Comment Responses

*Comment:* The joint comment raised concerns regarding the transport of storage canisters under 10 CFR part 71.

*Response:* This rulemaking only applies to the use of the Holtec International HI–STORM 100 Cask System design in an independent spent fuel storage installation at power reactor sites. The use of a component of the Holtec International HI–STORM 100 Cask System design—the multi-purpose canister—in transportation, would fall under NRC's regulations in 10 CFR part 71, which is outside of the scope of this rulemaking. Allowing the Holtec International HI–STORM 100 Cask System design to be used for the storage of spent fuel under the general license issued by 10 CFR 72.210 neither affects nor contributes to the evaluation of its use during transportation.

*Comment:* The joint comment re-submitted a comment that had previously been submitted to the NRC on the Interim Storage Partners Consolidated Interim Storage Facility Project Draft Environmental Impact Statement regarding the need to consider the foreseeable environmental impacts of the entire project, including transporting spent nuclear fuel to and from the proposed Consolidated Interim Storage Facility in Texas.

*Response:* This rulemaking action only approves the use of the Holtec International HI–STORM 100 Cask System design under the renewed Certificate of Compliance No. 1014 for the initial certificate (Amendment No. 0) and Amendment Nos. 1 through 15 under the general license issued by 10 CFR 72.210, which involves the storage of spent nuclear fuel in an independent spent fuel storage installation at power reactor sites. This does not include the use of the Holtec International HI–STORM 100 Cask System design at a consolidated interim storage facility. This comment is outside the scope of this rulemaking. Additionally, the use of a Holtec International HI–STORM 100 Cask System design at a consolidated interim storage facility would be authorized under a specific license and, before such approval would be granted, there would be an opportunity to request a hearing and to petition to intervene.

*Comment:* Three comments raised concerns regarding the design bases for the Holtec International HI–STORM 100 Cask System design.

*Response:* Pursuant to 10 CFR part 72, the design bases for a cask system design include reference bounds for the design and analyses of postulated accidents caused by severe natural events and severe human-induced events. The renewal of the Holtec International HI–STORM 100 Cask System design does not involve reevaluation of the approved design bases, changes to the approved design bases, nor changes to the fabrication of the cask system. Rather, the renewal requires aging management programs to ensure that structures, systems, and components important to safety will continue to perform their intended functions, as designed, during the period of extended operation, thus maintaining the approved design bases during the period of extended operation. The issue of approved design bases is outside of the scope of this rulemaking.

*Comment:* The joint comment objected to the use of the direct final rule process by the NRC and requested the NRC withdraw the direct final rule. The comment stated that the direct final rule process was not appropriate because the rule appears to be controversial and because the process appears to violate the National Environmental Policy Act of 1969 and the Administrative Procedure Act (APA). The comment noted that the direct final rule does not fall within the good cause exception in 10 CFR 2.804(d).

*Response:* The NRC disagrees with this comment. Direct final rulemaking [1] is a process for expediting the issuance of noncontroversial rules and is a variation on section 553 notice-and-comment rulemaking under the APA. The NRC issued a direct final rule and a companion proposed rule in the same issue of the **Federal Register** and requested public comment. In the NRC's description of the direct final rulemaking process, the NRC explains that a direct final rule, while not explicitly delineated by the APA, does comply with the APA and includes all of the essential elements of rulemaking required by the APA. In this rulemaking, the NRC has provided

[1] The Administrative Conference of the United States (ACUS) has endorsed the use of the direct final rule process as a means for expediting rulemaking (see ACUS Recommendation 95–4, ''Procedures for Non-Controversial and Expedited Rulemaking'' (60 FR 43110; August 18, 1995)).

notice and opportunity for comment; a statement of basis and purpose; and publication of the rule not less than 30 days prior to its effective date (see, *https://www.nrc.gov/about-nrc/regulatory/rulemaking/rulemaking-process/direct-final-rule.html*).

The NRC's requirements at 10 CFR part 72 currently list 15 approved certificates of compliance for spent fuel storage casks. NRC has conducted rulemaking to renew six of these certificates of compliance. All six certificate of compliance renewals included aging management programs and involved 40-year terms. The Agency considers these prior rulemaking actions to be non-controversial because the NRC either did not receive any comments opposing the renewals or did not receive any significant adverse comments. The NRC's decision to use the direct final rulemaking process for the renewal of Certificate of Compliance No. 1014 (Holtec International HI–STORM 100 Cask System design) was based on this experience.

Additionally, this rulemaking did adhere to the requirements of the National Environmental Policy Act of 1969. In the direct final rule, the NRC published an environmental assessment and a final finding of no significant impact. The NRC previously considered the impacts from the continued storage of spent fuel, including in the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel: Final Report (NUREG–2157, Volumes 1 and 2) (2014).

*Comment:* One commenter requested the NRC make all the renewed amendments expire on the same day. The commenter noted the expiration dates for the early certificates (*i.e.,* the initial certificate (Amendment No. 0) and Amendment Nos. 1 through 6) have an expiration date of June 1, 2020; however, the later Amendment certificates have an expiration date of May 31, 2020.

*Response:* The NRC agrees with this comment regarding an editorial issue. This change has no substantive effect on the requirements; because this comment is limited to editorial changes that do not affect the renewal of the certificate of compliance, it is not considered to be a significant adverse comment. The NRC has made editorial corrections to the certificates of compliance in response to this comment.

*Comment:* The NRC received two comments on the topic of NRC's generic technical basis for canister cracking, the canister aging management program, and the need for periodic reviews and updates to the aging management programs based on new information from research and operating experience. The NRC also received a comment stating that NRC should track the U.S. Department of Energy's (DOE's) research efforts in this area and that the DOE's ongoing research does not support the NRC conclusions in its Safety Evaluation Report. This comment also noted that comparing the applicant's aging management program elements to program elements developed by industry does not constitute sufficient due diligence by NRC.

*Response:* The NRC previously considered and addressed these concerns during the development of its general technical basis for canister aging management. The NRC established a generic technical basis for the safety review of storage renewal applications through guidance in NUREG–2214, ''Managing Aging Processes in Storage (MAPS) Report.'' NUREG–2214 establishes a generic technical basis in terms of the evaluation of (1) aging mechanisms and effects that could affect the ability of structures, systems, and components important to safety to fulfill their safety functions in the period of extended operation (*i.e.,* credible aging mechanisms and effects) and (2) aging management approaches to address credible aging effects, including examples of aging management programs that are considered generically acceptable to address the credible aging effects to ensure that the design bases will be maintained in the period of extended operation.

The NRC sought public input during development of NUREG–2214 and related guidance. The NRC responded to the public comments on the draft guidance and finalized the guidance after considering the comments provided by the public. The NRC issued its responses at the time it announced the issuance of NUREG–2214 (84 FR 39022; August 8, 2019), NUREG–1927, Revision 1, ''Standard Review Plan for Renewal of Specific Licenses and Certificates of Compliance for Dry Storage of Spent Nuclear Fuel'' (81 FR 44054; July 6, 2016), and NUREG–2224, ''Dry Storage and Transportation of High Burnup Spent Nuclear Fuel'' (85 FR 77267; December 1, 2020). The comments submitted on this rulemaking did not provide new information that was not previously considered during the development of this NRC guidance.

The NRC disagrees with the commenter's assertion about the significance of ongoing research and the extent to which it supports or contradicts NRC staff conclusions. This ongoing research is compatible with the NRC's conclusions in the NRC's Safety Evaluation Report. The NRC has conducted and continues to conduct research associated with stress corrosion cracking and coordinates its research efforts with DOE in this area. In addition, the NRC collaborates with DOE and national counterparts, consensus committees, industry, and international partners to share research, knowledge, and operating experience related to degradation and aging of cask systems. The NRC considers this pool of information in its regulatory framework for spent fuel storage.

The NRC recognizes that there will be new information gained in the period of extended operation, including operating experience and findings from research and development. Therefore, as described in NUREG–1927, NUREG–2214, and Regulatory Guide 3.76, ''Implementation of Aging Management Requirements for Spent Fuel Storage Renewals'' (86 FR 38506; July 21, 2021), aging management programs include learning aspects designed to appropriately address and respond to new information. These learning programmatic features are called ''tollgates,'' which offer a structured approach for: (1) periodically reviewing site-specific and industrywide operating experience and data from applicable research and industry initiatives at specific times during the period of extended operation; and (2) performing a safety assessment that confirms the program's effectiveness or otherwise identifies a need to enhance or modify the program in a timely manner to address any emerging aging issues.

As aging management inspections of canisters are performed at independent spent fuel storage installations, licensees and certificate of compliance holders will upload the inspection results to the Independent Spent Fuel Storage Installation Aging Management Institute of Nuclear Power Operations Database (AMID), and this operating experience will be shared across the industry through licensee access to this database by the independent spent fuel storage installation sites and by certificate of compliance holders. The implementation of tollgate assessments and use of AMID provides reasonable assurance that the aging management programs will continue to effectively manage aging effects during the period of extended operation.

The NRC disagrees with the commenter's statement regarding the comparison of the applicant's aging management program elements to program elements developed by industry. During the NRC's review of Holtec International's renewal application for the HI–STORM 100 Cask System design, the NRC evaluated

Holtec International's technical basis for its aging management review and aging management programs and compared it to the generic technical basis in NUREG–2214. The generic technical basis in NUREG–2214 was developed by the NRC, not by the industry. The guidance in NUREG–2214 provides examples of aging management programs that are considered generically acceptable to address the credible aging mechanisms evaluated in the guidance to ensure that the design bases of the cask system will be maintained in the period of extended operation. The NRC found the Holtec International aging management program acceptable. The NRC Safety Evaluation Report documents the consistency between the applicant's canister aging management program and the NUREG–2214 canister aging management program.

*Comment:* The NRC received two comments regarding scratching and cracking of canisters. The first comment, from the joint comments, stated that NRC has not reviewed the long-term impact of the scraping, gouging, and scratching of canisters when they are loaded into the casks, including the potential for increased and accelerated corrosion. The second comment noted that the Holtec International HI–STORM 100 Cask System design above ground system may cause canisters to scratch and scrape against the carbon steel vertical channels in the overpack cask, leading to potential initiation of carbon-induced pit corrosion cracking and a serious accelerated canister degradation condition.

*Response:* The comments on the topic of scratching and cracking of canisters do not introduce new information that was not already considered during the NRC's development of NUREG–2214 and during the review of Holtec International's renewal application for the Holtec HI–STORM 100 Cask System design. Welded stainless steel dry storage canisters, like those used in the HI–STORM 100 Cask System design, may contact dissimilar metal surfaces, and may get scraped, scratched, or gouged during handling and loading into the storage overpack. During the development of NUREG–2214, the NRC considered these potential effects and the potential for handling practices to result in the contact and transfer of carbon steel onto the surface of the stainless-steel canister.

NUREG–2214 identifies stress corrosion cracking as a credible aging effect for canisters and includes an aging management program for canisters to identify and manage localized corrosion (a potential precursor to stress corrosion cracking) and stress corrosion cracking. NUREG–2214 notes the potential for handling practices to result in contact and transfer of iron (*i.e.,* carbon steel) onto the stainless-steel canister surface, which can create localized corrosion. The NUREG–2214 canister aging management program addresses aging effects and provides reasonable assurance that aging associated with any initial defects, scrapes, or effects of dissimilar materials being in contact will not compromise the intended functions of the canister during the period of extended operation.

NUREG–2214 provides examples of aging management programs that the NRC considers as being generically acceptable to address those credible aging mechanisms evaluated in the guidance to ensure that the design bases of dry storage systems will be maintained. In its review of the renewal application for the Holtec International HI–STORM 100 Cask System design, the NRC staff evaluated Holtec International's technical basis for its aging management review and aging management programs for the Holtec International HI–STORM 100 Cask System design and compared it to the generic technical basis in NUREG–2214. The NRC Safety Evaluation Report documents the consistency between the applicant's canister aging management program and the NUREG–2214 canister aging management program. Consistent with the NUREG–2214 canister aging management program, the Holtec International HI–STORM 100 Cask System design canister aging management program includes inspections of canister surfaces to identify the presence of red-orange corrosion deposits that may indicate iron transfer onto the stainless-steel canister surface. Any areas of corrosion that are found and identified are subject to additional examination and evaluation.

Additionally, the Holtec International HI–STORM 100 Cask System design canister aging management program includes criteria to inspect those canisters that are most susceptible to degradation. The aging management program for the Holtec International HI–STORM 100 Cask System design considers the susceptibility criteria in Electric Power Research Institute (EPRI) TR–3002005371, ''Susceptibility Assessment Criteria for Chloride-Induced Stress Corrosion Cracking (CISCC) of Welded Stainless-Steel Canisters for Dry Cask Storage Systems'' (referenced also in NUREG–2214). The EPRI report identifies areas of ''mechanical damage (*e.g.,* gouges)'' and ''scraping during handling'' as being the most susceptible to aging. The concerns expressed in the comments (*i.e.,* long-term effects of any scraping, gouging, and scratching of canisters or contact between dissimilar materials when canisters are loaded into the storage overpack including the potential for increased and accelerated corrosion) are addressed in the canister aging management program.

*Comment:* The joint comment expressed concern with radiation effects and dose limits.

*Response:* This comment raises issues that are outside of the scope of this rulemaking. The NRC establishes safety standards for protection against radiation, including public dose limits, in 10 CFR part 20, ''Standards for Protection against Radiation.'' The regulations in 10 CFR part 72 also include dose limits for spent fuel storage. The current requirements in 10 CFR parts 20 and 72 are protective of public health and safety and the environment.

## III. Availability of Documents

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

| Document | Adams Accession No./**Federal Register** citation |
|---|---|
| **Renewed Certificate of Compliance No. 1014, HI–STORM 100 Cask System Design** | |
| Renewal of Certificate of Compliance No. 1014, HI–STORM 100 Cask System. (Includes Renewed Certificates of Compliance; Approved Contents and Design Features; Technical Specifications; and Final Safety Evaluation Report). | ML23068A384 (package). |
| Final Safety Evaluation Report for the HI–STORM 100 Cask System: Certificate of Compliance No. 1014 Renewal, Docket No. 72–1014. | ML23068A455. |

| Document | Adams Accession No./**Federal Register** citation |
|---|---|
| **Rulemaking Documents** | |
| "List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 Through 15." Direct final rule. (Includes environmental assessment and final finding of no significant impact) (February 13, 2023). | 88 FR 9106. |
| "List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 Through 15." Proposed rule. (February 13, 2023). | 88 FR 9195. |
| "List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 Through 15;" Proposed rule; Reopening of comment period. (March 22, 2023). | 88 FR 17164. |
| "List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 Through 15; Delay of Effective Date." Direct final rule; Delay of effective date. (April 26, 2027). | 88 FR 25271. |
| Comment (001) from Brian Gutherman on PR–72—List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 through 15. | ML23046A406. |
| Comment (002) from Renante Baniaga on PR–72—List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 through 15. | ML23046A407. |
| Comment (003) from Michael Ford on PR–72—List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 through 15. | ML23073A116. |
| Comment (004) from Kalene Walker on PR–72—List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 through 15. | ML23075A156. |
| Comment Period Extension Request from Nuclear Information and Resource Service, et al. on PR–72—List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 through 15. | ML23073A095. |
| Comment (005) from Nuclear Information and Resource Service, et al. on PR–72—List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 through 15. | ML23107A144. |
| Comment (006) from Michael Ford on PR–72—List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 through 15. | ML23108A278. |
| Comment (007) from Kalene Walker on PR–72—List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System, Certificate of Compliance No. 1014, Renewal of Initial Certificate and Amendment Nos. 1 through 15. | ML23108A279. |
| **Environmental Documents** | |
| Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel: Final Report (NUREG–2157, Volumes 1 and 2) (2014). | ML14198A440 (package). |
| **Other Documents** | |
| ACUS Recommendation 95–4, "Procedures for Non-Controversial and Expedited Rulemaking" (August 18, 1995). | 60 FR 43110. |
| "Standard Review Plan for Renewal of Specific Licenses and Certificates of Compliance for Dry Storage of Spent Nuclear Fuel." NUREG–1927, Revision 1. Washington, DC. June 2016. | ML16179A148. |
| "Managing Aging Processes in Storage (MAPS) Report." Final Report. NUREG–2214. Washington, DC. July 2019.. | ML19214A111. |
| NUREG–2224, "Dry Storage and Transportation of High Burnup Spent Nuclear Fuel" (November 2020) ..... | ML20191A321. |
| "Implementation of Aging Management Requirements for Spent Fuel Storage Renewals." Regulatory Guide; Issuance (July 21, 2021). | 86 FR 38506. |
| Regulatory Guide 3.76, Revision 0, "Implementation of Aging Management Requirements for Spent Fuel Storage Renewals." July 2021. | ML21098A022. |
| "Standard Review Plan for Renewal of Specific Licenses and Certificates of Compliance for Dry Storage of Spent Nuclear Fuel." NUREG; Issuance. (July 6, 2016). | 81 FR 44054. |
| "Managing Aging Processes in Storage (MAPS) Report." NUREG; Issuance. (August 8, 2019) ..... | 84 FR 39022. |
| "Dry Storage and Transportation of High Burnup Spent Nuclear Fuel." NUREG; Issuance. (December 1, 2020). | 85 FR 77267. |
| EPRI TR–3002005371, "Susceptibility Assessment Criteria for Chloride-Induced Stress Corrosion Cracking (CISCC) of Welded Stainless-Steel Canisters for Dry Cask Storage Systems" (September 18, 2015). | *https://www.epri.com/research/products/3002005371.* |
| "Direct Final Rule" ..... | *https://www.nrc.gov/about-nrc/regulatory/rulemaking/rulemaking-process/direct-final-rule.html.* |

The direct final rule published on February 13, 2023 (88 FR 9106), which was delayed indefinitely on April 26, 2023 (88 FR 25271), is confirmed. The direct final rule is effective on August 2, 2023, and the following correction is effective August 2, 2023.

**Correction of Direct Final Rule**

■ In FR 2023–03002, published at 88 FR 9106 on February 13, 2023, on page 9116, in the second and third columns, remove the date ''May 1, 2023'' wherever it appears and add ''August 2, 2023'' in its place.

Dated: June 27, 2023.

For the Nuclear Regulatory Commission.

**Catherine Haney,**

*Acting Executive Director for Operations.*

[FR Doc. 2023–13992 Filed 6–30–23; 8:45 am]

**BILLING CODE 7590–01–P**

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Parts 128 and 134

**RIN 3245–AH69**

### Veteran-Owned Small Business and Service-Disabled, Veteran-Owned Small Business—Certification; Correction

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Correcting amendments.

**SUMMARY:** The U.S. Small Business Administration (SBA) is correcting a final rule that was published in the **Federal Register** on November 29, 2022. The rule implemented a statutory requirement to certify Veteran-Owned Small Business Concerns and Service-Disabled Veteran-Owned Small Business Concerns participating in the Veteran-Owned Small Business Federal Contracting Program. This document is making a correction to the final regulations.

**DATES:** This final rule is effective on July 3, 2023.

**FOR FURTHER INFORMATION CONTACT:** Ed Bender, U.S. Small Business Administration, Office of General Counsel, 409 Third Street SW, Washington, DC 20416; (202) 205–6455; *Edmund.bender@sba.gov.*

**SUPPLEMENTARY INFORMATION:** On November 29, 2022, SBA amended its regulations to establish a certification program for Veteran-Owned Small Businesses (VOSB) and Service-Disabled Veteran-Owned Small Businesses (SDVOSB) to implement section 862 of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, 128 Stat. 3292 (January 1, 2021). 87 FR 73400. This document is making the following corrections to the final regulations:

In the final rule at § 128.102, SBA incorrectly defined ''Applicant'' and ''Service-disabled veteran.'' The definition of ''Applicant'' is revised to reference Veteran Small Business Certification Program (VetCert) instead of the SBA's self-certification program and removes ''or a valid disability determination from the Department of Defense'' as proof of service-disabled veteran status from the definition of ''Service-disabled veteran.'' By law, SBA is required to verify the status of a veteran or service-disabled veteran with the Department of Veteran Affairs and cannot accept documentation from the Department of Defense as evidence of service-disabled veteran status.

The final rule at § 128.302(c) establishes that SBA may request additional documentation at any time during the eligibility determination process and that an applicant's failure to respond is grounds for denial. If SBA requests additional documentation which the applicant fails to submit in a timely manner or the information is incomplete, that applicant has not met its burden of proof. SBA inadvertently omitted the process by which SBA may deny certification. In such cases, SBA may make an adverse inference that missing information would result in a finding of ineligibility and may deny certification. While adverse inference is currently used by VetCert and SBA's other contracting certification programs, the final rule failed to adequately describe the process in § 128.302(c).

SBA amends § 128.401(a) to clarify that a firm must be certified at the time of offer on a VOSB or SDVOSB contract. SBA also corrects internal citations in the joint venture regulations at § 128.402 including paragraph (c)(7); paragraph (e)(2)(i)(B); paragraph (i)(2); and paragraph (j)(1), (2), and (3). SBA also revises § 128.402(d)(2) to correct a formatting issue with the word ''protégé.''

The final rule also amended part 134, subpart J, so that all VOSB and SDVOSB status protests are heard by SBA's Office of Hearing and Appeals (OHA). This correction makes several revisions to subpart J. First, § 134.1005(a)(2) failed to include a sentence which addresses specificity requirements that is included in other SBA contracting programs and previously used by SBA's SDVOSB self-certification program in part 125. This rule adds back that omitted sentence to § 134.1005(a)(2). Second, the final rule inadvertently retained language from previous versions of § 134.1007(j)(1) and (2). SBA corrects § 134.1007(j)(1) to remove references to the outdated process for VOSB and SDVOSB status protests. SBA also amends the effects of a decision in § 134.1007(j)(2) because the final rule included the previous approach used for OHA appeals of VA contracts. This approach is contrary to SBA's other contracting programs and inconsistent with SBA's intent for VetCert status protest. Accordingly, § 134.1007(j)(2) is amended so that, when an ineligible firm has been awarded a contract, the agency shall terminate the contract unless the contracting officer has made a written determination that termination is not in the best interests of the Government.

**List of Subjects**

*13 CFR Part 128*

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance, Veterans.

*13 CFR Part 134*

Administrative practice and procedure.

Accordingly, 13 CFR parts 128 and 134 are corrected by making the following correcting amendments:

## PART 128—VETERAN SMALL BUSINESS CERTIFICATION PROGRAM

■ 1. The authority citation for part 128 continues to read as follows:

**Authority:** 15 U.S.C. 632(q), 634(b)(6), 644, 645, 657f, 657f–1.

■ 2. Amend § 128.102 by revising the definitions of ''Applicant'' and ''Service-disabled veteran'' to read as follows:

**§ 128.102 What definitions are important in the Veteran Small Business Certification Program?**

*Applicant* means a firm applying for certification in the Veteran Small Business Certification Program.

* * * * *

*Service-disabled veteran* means a veteran who is registered in the Beneficiary Identification and Records Locator Subsystem or successor system, maintained by Department of Veterans Affairs' Veterans Benefits Administration as a service-disabled veteran.

* * * * *

■ 3. Amend § 128.302 by adding a sentence to the end of paragraph (c) to read as follows:

**§ 128.302 How does SBA process applications for certification?**

* * * * *

(c) * * * If an Applicant does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may draw an adverse inference and presume that the information that the Applicant failed to provide would

demonstrate ineligibility and deny certification on this basis.

* * * * *

■ 4. Amend § 128.401 by revising paragraph (a) to read as follows:

**§ 128.401 What requirements must a VOSB or SDVOSB meet to submit an offer on a contract?**

(a) *Certification requirement.* Only certified VOSBs and SDVOSBs are eligible to submit an offer on a specific VOSB or SDVOSB requirement. The concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract and be a certified VOSB or SDVOSB at the time of initial offer or response which includes price. Any small business concern that submits a complete certification application with to SBA on or before December 31, 2023, shall be eligible to self-certify for SDVOSB sole source or set-aside contracts (other than VA contracts) until SBA declines or approves the concern's application. Any small business concern that does not submit to SBA a complete SDVOSB certification application to SBA on or before December 31, 2023, will no longer be eligible to self-certify for SDVOSB sole source or set-aside contracts effective January 1, 2024.

* * * * *

■ 5. Amend § 128.402 by revising the first sentence of paragraph (c)(7), the introductory text of paragraph (d)(2), and paragraphs (e)(2)(i)(B), (i)(2), and (j)(1) through (3) to read as follows:

**§ 128.402 When may a joint venture submit an offer on a VOSB or SDVOSB contract?**

* * * * *

(c) * * *

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, where practical. * * *

* * * * *

(d) * * *

(2) The certified VOSB or SDVOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture, except that in the context of a joint venture between a protégé VOSB or SDVOSB and its SBA-approved mentor the VOSB or SDVOSB protégé must individually perform at least 40% of the work performed by the joint venture.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(B) The parties will perform the contract in compliance with the joint venture agreement and with the limitations on subcontracting requirements set forth in paragraph (d) of this section.

* * * * *

(i) * * *

(2) At the completion of every VOSB or SDVOSB contract awarded to a joint venture, the certified VOSB or SDVOSB partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

* * * * *

(j) * * *

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or limitations on subcontracting requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (h) of this section.

## PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 6. The authority citation for part 134 is revised to read as follows:

**Authority:** 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 15 U.S.C. 657f.

Subpart K issued under 15 U.S.C. 657f.

Subpart L issued under 15 U.S.C. 636(a)(36); Pub. L. 116–136, 134 Stat. 281; Pub. L. 116–139, 134 Stat. 620; Pub. L. 116–142, 134 Stat. 641; and Pub. L. 116–147, 134 Stat. 660.

Subpart M issued under 15 U.S.C. 657a; Pub. L. 117–81, 135 Stat. 1541.

■ 7. Amend § 134.1005 in paragraph (a)(2) by removing the semicolon and adding a period in its place and by adding a sentence at the end to read as follows:

**§ 134.1005 Contents of the VOSB or SDVOSB status protest.**

(a) * * *

(2) * * * A protest merely asserting that the protested concern is not an eligible VOSB or SDVOSB, without setting forth specific facts or allegations, is insufficient;

* * * * *

■ 8. Amend § 134.1007 by revising paragraphs (j)(1) and (2) to read as follows:

**§ 134.1007 Processing a VOSB or SDVOSB status protest.**

* * * * *

(j) * * *

(1) A contracting officer may award a contract to a protested concern after the Judge has determined either that the protested concern is eligible for inclusion in SBA's certification database or has dismissed all protests against it.

(2) A contracting officer shall not award a contract to a protested concern that the Judge has determined is not an eligible VOSB or SDVOSB. If the contract has already been awarded, the contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders.

* * * * *

**Larry Stubblefield,**

*Deputy Associate Administrator, Government Contracting and Business Development.*

[FR Doc. 2023–13439 Filed 6–30–23; 8:45 am]

**BILLING CODE 8026–09–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0169; Project Identifier MCAI–2022–00462–T; Amendment 39–22460; AD 2023–12–02]**

**RIN 2120–AA64**

## Airworthiness Directives; Bombardier, Inc., Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes. This AD was prompted by a determination that new or more restrictive airworthiness

limitations are necessary. This AD requires revising the existing maintenance or inspection program, as applicable, to incorporate more restrictive airworthiness limitations. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective August 7, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 7, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0169; 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 Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website *bombardier.com*.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2023–0169.

**FOR FURTHER INFORMATION CONTACT:** Gabriel Kim, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@faa.gov*.

**SUPPLEMENTARY INFORMATION:**

## 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 Bombardier, Inc., Model BD–700–1A10 and –1A11 airplanes. The NPRM published in the **Federal Register** on February 27, 2023 (88 FR 12276). The NPRM was prompted by AD CF–2022–15, dated April 7, 2022, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that during a design review, it was discovered that three candidate certification maintenance requirements (CCMRs) which were dispositioned as maintenance review board report (MRBR) tasks had reached or exceeded the limit for escalation and that exceeding the CCMR limitations could result in unsafe conditions. The MCAI also states that Bombardier issued certification maintenance requirements (CMRs) to prevent escalation and reduce the interval, as applicable, for these tasks, which consist of a functional test of the landing-gear emergency extension; an operational test of the brake shutoff valve; and a visual check of the passenger-door vent-flap mechanism.

In the NPRM, the FAA proposed to require revising the existing maintenance or inspection program as applicable to incorporate more restrictive airworthiness limitations. The FAA is issuing this AD to address the following unsafe conditions:

- Dormant failure of the landing gear emergency extension system, which could lead to failure to extend the landing gear when normal gear extension has failed. This unsafe condition, if not addressed, could result in an annunciated failure to extend both main landing gears or all landing gears.
- Dormant failure of the brake shut off valve in the open state. This unsafe condition, if not addressed, could result in uncommanded braking during takeoff.
- Dormant failure of the vent flap assembly where it fails in the closed position, which could result in the failure to prevent the initiation of cabin pressurization when the passenger door is not fully closed, latched and locked. This unsafe condition, if not addressed, could result in the passenger door opening under pressure on ground or during flight.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0169.

## Discussion of Final Airworthiness Directive

### Comments

The FAA received comments from an individual who supported the NPRM without change.

The FAA received additional comments from NetJets. The following presents the comments received on the NPRM and the FAA's response to each comment.

### Request for Clarification on Repetitive Intervals

NetJets requested that the FAA clarify the repetitive intervals for the CMR tasks after initial accomplishment. NetJets pointed to the language in paragraph B of Transport Canada AD CF–2022–15, which states that after doing the initial actions at the time specified in Table 1 of Transport Canada AD CF–2022–15 (similar to Figure 1 to paragraph (g) of this AD), accomplishing the CMR tasks are to be done at the intervals specified in the applicable TLMC manual identified in Table 2 of the Transport Canada AD CF–2022–15 (similar to Figure 2 to paragraph (g) of this AD).

The FAA agrees that the repetitive interval is not specified in this AD; however, operators can find this information in the corresponding TLMC as identified in Figure 2 to paragraph (g) of this AD. Although Transport Canada AD CF–2022–15 requires both revising the maintenance program to include limitations, and doing certain repetitive actions and/or maintaining CDCCLs, this AD only requires the revision of the maintenance program. Requiring a revision of the maintenance program rather than requiring individual repetitive actions or maintaining CDCCLs requires operators to record AD compliance only at the time the revision to the program is made. Repetitive actions or maintaining the CDCCLs specified in the airworthiness limitations must be complied with in accordance with 14 CFR 91.403(c). This AD has not been changed in this regard.

### Request To Clarify Initial Compliance Time for Certain Airplanes

NetJets requested clarification on initial compliance times for airplanes having more than 1,550 flight hours but have not previously accomplished the specific CMR or associated airplane maintenance manual (AMM) task.

The FAA agrees to clarify. For an airplane that has more than 1,550 flight hours, but has not previously accomplished an associated task, the initial compliance time is within 30 days after the effective date of this AD. Paragraph (g) of this AD specifies the initial compliance time is within the applicable time specified in Figure 1 to paragraph (g) of this AD, or within 30 days after the effective date of this AD, whichever occurs later. For example, for task 32–34–00–101, an airplane that has more than 1,550 flight hours is beyond the initial compliance time specified in Figure 1 to paragraph (g) of the AD, so the ''within 30 days after the effective date of this AD'' would come later. This AD has not been changed in this regard.

### 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 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 this product. Except for minor editorial changes, 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 the following AMM tasks from Bombardier.

- Tasks 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension;'' 32–43–25–101, ''Operational Test of the Brake Shutoff Valve;'' and 52–11–00–106, ''Visual Check of the Passenger-Door Vent-Flap Mechanism;'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global Express Time Limits/Maintenance Checks (TLMC), Publication No. BD–700 TLMC, Revision 34, dated March 1, 2022. (For obtaining the tasks for Bombardier Global Express TLMC, Publication No. BD–700 TLMC, use Document Identification No. GL 700 TLMC.)
- Tasks 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension;'' 32–43–25–101, ''Operational Test of the Brake Shutoff Valve;'' and 52–11–00–101, ''Visual Check of the Passenger-Door Vent-Flap Mechanism;'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global Express XRS TLMC, Publication No. BD–700 XRS TLMC, Revision 21, dated March 1, 2022. (For obtaining the tasks for Bombardier Global Express XRS TLMC, Publication No. BD–700 XRS TLMC, use Document Identification No. GL XRS TLMC.)
- Tasks 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension;'' 32–43–25–101, ''Operational Test of the Brake Shutoff Valve;'' and 52–11–00–106, ''Visual Check of the Passenger-Door Vent-Flap Mechanism;'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 5000 TLMC, Publication No. BD–700 TLMC, Revision 25, dated March 1, 2022. (For obtaining the tasks for Bombardier Global 5000 TLMC, Publication No. BD–700 TLMC, use Document Identification No. GL 5000 TLMC.)
- Tasks 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension;'' 32–43–25–101, ''Operational Test of the Brake Shutoff Valve;'' and 52–11–00–106, ''Visual Check of the Passenger-Door Vent-Flap Mechanism;'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 5000 Featuring Global Vision Flight Deck (GVFD) TLMC, Publication No. GL 5000 GVFD TLMC, Revision 15, dated March 1, 2022. (For obtaining the tasks for Bombardier Global 5000 Featuring GVFD TLMC, Publication No. GL 5000 GVFD TLMC, use Document Identification No. GL 5000 GVFD TLMC.)
- Tasks 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension;'' 32–43–25–101, ''Operational Test of the Brake Shutoff Valve;'' and 52–11–00–106, ''Visual Check of the Passenger-Door Vent-Flap Mechanism;'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, Revision 15, dated March 1, 2022. (For obtaining the tasks for Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, use Document Identification No. GL 6000 TLMC.)

This service information specifies more restrictive airworthiness limitations for CMRs. These documents are distinct since they apply to different airplane models in different configurations.

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

**Costs of Compliance**

The FAA estimates that this AD, if adopted as proposed, would affect 413 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

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

**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:

**2023–12–02 Bombardier, Inc.:** Amendment 39–22460; Docket No. FAA–2023–0169; Project Identifier MCAI–2022–00462–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective August 7, 2023.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes, certificated in any category, having serial numbers 9002 through 9860 inclusive, 9862 through 9871 inclusive, 9873 through 9879 inclusive, 60005, 60024, 60030, 60032, 60037, 60043, 60045, 60049, 60056, 60057, 60061 and 60068.

**(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 more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address the unsafe conditions identified in paragraphs (e)(1) through (3) of this AD.

(1) Dormant failure of the landing gear emergency extension system, which could lead to failure to extend the landing gear when normal gear extension has failed. This unsafe condition, if not addressed, could result in an annunciated failure to extend both main landing gears or all landing gears.

(2) Dormant failure of the brake shut off valve in the open state. This unsafe condition, if not addressed, could result in uncommanded braking during take-off.

(3) Dormant failure of the vent flap assembly where it fails in the closed position, which could result in the failure to prevent the initiation of cabin pressurization when the passenger door is not fully closed, latched and locked. This unsafe condition, if not addressed, could result in the passenger door opening under pressure on ground or during flight.

**(f) Compliance**

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

**(g) Maintenance or Inspection Program Revision**

Within 30 days from the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the certification maintenance requirements (CMR) tasks identified in Figure 1 to paragraph (g) of this AD of Part 2, ''Airworthiness Limitations,'' of the applicable Time Limits/Maintenance Checks (TLMC) manuals identified in Figure 2 to paragraph (g) of this AD. The initial compliance time for doing the tasks is at the applicable time specified in Figure 1 to paragraph (g) of this AD, or within 30 days after the effective date of this AD, whichever occurs later.

**Figure 1 to paragraph (g)**—*New CMR Tasks*

BILLING CODE 4910–13–P

| Chapter 5 Task Number | Task Title | Associated Airplane Maintenance Manual (AMM) Task Number | Initial Compliance Time |
|---|---|---|---|
| 32-34-00-101 | Functional Test of the Landing-Gear Emergency Extension | 32-34-00-720-801 | Before the accumulation of 1,550 total flight hours, or within 1,550 flight hours after the most recent accomplishment of the associated AMM task, whichever occurs later |
| 32-43-25-101 | Operational Test of the Brake Shutoff Valve | 32-43-25-710-801 | Before the accumulation of 750 total flight hours, or within 750 flight hours after the most recent accomplishment of the associated AMM task, whichever occurs later |
| 52-11-00-106 | Visual Check of the Passenger-Door Vent-Flap Mechanism | 52-11-00-210-807 | Before the accumulation of 750 total flight hours, or within 750 flight hours after the most recent accomplishment of the associated AMM task, whichever occurs later |

**Figure 2 to paragraph (g)**—*Applicable TLMCs*

| Airplane Model (Marketing Designation) | TLMC Manual Title | TLMC Revision Level | TLMC Revision Date |
|---|---|---|---|
| BD-700-1A10 airplanes (Global Express) | Bombardier Global Express TLMC, Publication No. BD-700 TLMC[1] | 34 | March 1, 2022 |
| BD-700-1A10 airplanes (Global Express XRS) | Bombardier Global Express XRS TLMC, Publication No. BD-700 XRS TLMC[2] | 21 | March 1, 2022 |
| BD-700-1A10 airplanes (Global 6000) | Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC[3] | 15 | March 1, 2022 |
| BD-700-1A11 airplanes (Global 5000) | Bombardier Global 5000 TLMC, Publication No. BD-700 TLMC[4] | 25 | March 1, 2022 |
| BD-700-1A11 airplanes (Global 5000 featuring Global Vision Flight Deck (GVFD)) | Bombardier Global 5000 Featuring Global Vision Flight Deck TLMC, Publication No. GL 5000 GVFD TLMC[5] | 15 | March 1, 2022 |

[1] For obtaining the tasks for Bombardier Global Express TLMC, Publication No. BD-700 TLMC, use Document Identification No. GL 700 TLMC.

[2] For obtaining the tasks for Bombardier Global Express XRS TLMC, Publication No. BD-700 XRS TLMC, use Document Identification No. GL XRS TLMC.

[3] For obtaining the tasks for Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, use Document Identification No. GL 6000 TLMC.

[4] For obtaining the tasks for Bombardier Global 5000 TLMC, Publication No. BD-700 TLMC, use Document Identification No. GL 5000 TLMC.

[5] For obtaining the tasks for Bombardier Global 5000 Featuring GVFD TLMC, Publication No. GL 5000 GVFD TLMC, use Document Identification No. GL 5000 GVFD TLMC.

BILLING CODE 4910–13–C

**(h) No Alternative Actions or Intervals**

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 the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (i)(1) of this AD.

**(i) Additional AD Provisions**

The following provisions also apply to this AD:

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

Continuing Operational Safety, at the address identified in paragraph (j)(2) of this AD or email to: *9-avs-nyaco-cos@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 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 Bombardier, Inc.'s Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

**(j) Additional Information**

(1) Refer to Transport Canada AD CF–2022–15, dated April 7, 2022, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–0169.

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

**(k) Material Incorporated by Reference**

(1) The Director of the Federal Register approved the incorporation by reference 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) Task 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global Express Time Limit/Maintenance Check manual (TLMC), Publication No. BD–700 TLMC, Revision 34, dated March 1, 2022.

**NOTE 1 TO PARAGRAPH (K)(2)(I):** For obtaining the tasks specified in paragraphs (k)(2)(i) through (iii) of this AD for Bombardier Global Express TLMC, Publication No. BD–700 TLMC, Revision 34, dated March 1, 2022, use Document Identification No. GL 700 TLMC.

(ii) Task 32–43–25–101, ''Operational Test of the Brake Shutoff Valve,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global Express TLMC, Publication No. BD–700 TLMC, Revision 34, dated March 1, 2022.

(iii) Task 52–11–00–106, ''Visual Check of the Passenger-Door Vent-Flap Mechanism,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global Express TLMC, Publication No. BD–700 TLMC, Revision 34, dated March 1, 2022.

(iv) Task 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global Express XRS TLMC, Publication No. BD–700 XRS TLMC, Revision 21, dated March 1, 2022.

**NOTE 2 TO PARAGRAPH (K)(2)(IV):** For obtaining the tasks specified in paragraphs (k)(2)(iv) through (vi) of this AD for Bombardier Global Express XRS TLMC, Publication No. BD–700 XRS TLMC, use Document Identification No. GL XRS TLMC.

(v) Task 32–43–25–101, ''Operational Test of the Brake Shutoff Valve,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global Express XRS TLMC, Publication No. BD–700 XRS TLMC, Revision 21, dated March 1, 2022.

(vi) Task 52–11–00–106, ''Visual Check of the Passenger-Door Vent-Flap Mechanism,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global Express XRS TLMC, Publication No. BD–700 XRS TLMC, Revision 21, dated March 1, 2022.

(vii) Task 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 5000 TLMC, Publication No. BD–700 TLMC, Revision 25, dated March 1, 2022.

**NOTE 3 TO PARAGRAPH (K)(2)(VII):** For obtaining the tasks specified in paragraphs (k)(2)(vii) through (ix) of this AD for Bombardier Global 5000 TLMC, Publication No. BD–700 TLMC, use Document Identification No. GL 5000 TLMC.

(viii) Task 32–43–25–101, ''Operational Test of the Brake Shutoff Valve,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 5000 TLMC, Publication No. BD–700 TLMC, Revision 25, dated March 1, 2022.

(ix) Task 52–11–00–106, ''Visual Check of the Passenger-Door Vent-Flap Mechanism,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 5000 TLMC, Publication No. BD–700 TLMC, Revision 25, dated March 1, 2022.

(x) Task 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 5000 Featuring Global Vision Flight Deck (GVFD) TLMC, Publication No. GL 5000 GVFD TLMC, Revision 15, dated March 1, 2022.

**NOTE 4 TO PARAGRAPH (K)(2)(X):** For obtaining the tasks specified in paragraphs (k)(2)(x) through (xii) of this AD for Bombardier Global 5000 Featuring GVFD TLMC, Publication No. GL 5000 GVFD TLMC, use Document Identification No. GL 5000 GVFD TLMC.

(xi) Task 32–43–25–101, ''Operational Test of the Brake Shutoff Valve,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 5000 Featuring GVFD TLMC, Publication No. GL 5000 GVFD TLMC, Revision 15, dated March 1, 2022.

(xii) Task 52–11–00–106, ''Visual Check of the Passenger-Door Vent-Flap Mechanism,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 5000 Featuring GVFD, Publication No. GL 5000 GVFD TLMC, Revision 15, dated March 1, 2022.

(xiii) Task 32–34–00–101, ''Functional Test of the Landing-Gear Emergency Extension,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, Revision 15, dated March 1, 2022.

**NOTE 5 TO PARAGRAPH (K)(2)(XIII):** For obtaining the tasks specified in paragraphs (xiii) through (xv) of this AD for Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, use Document Identification No. GL 6000 TLMC.

(xiv) Task 32–43–25–101, ''Operational Test of the Brake Shutoff Valve,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, Revision 15, dated March 1, 2022.

(xv) Task 52–11–00–106, ''Visual Check of the Passenger-Door Vent-Flap Mechanism,'' of Part 2, ''Airworthiness Limitations,'' of the Bombardier Global 6000 TLMC, Publication No. GL 6000 TLMC, Revision 15, dated March 1, 2022.

(3) For service information identified in this AD, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website bombardier.com.

(4) 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.

(5) 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 June 12, 2023.

**Ross Landes,**

*Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2023–14001 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0927; Project Identifier MCAI–2023–00013–T; Amendment 39–22461; AD 2023–12–03]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A350–941 and –1041 airplanes. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD 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 August 7, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of August 7, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0927; 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–2023–0927.

**FOR FURTHER INFORMATION CONTACT:** Dat Le, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7317; email *dat.v.le@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 Airbus SAS Model A350–941 and –1041 airplanes. The NPRM published in the **Federal Register** on April 14, 2023 (88 FR 22923). The NPRM was prompted by AD 2023–0004, dated January 6, 2023, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2023–0004) (also referred to as the MCAI). The MCAI states that new or more restrictive airworthiness limitations are necessary.

EASA AD 2023–0004 specifies that it requires tasks (limitations) already in Airbus A350 Airworthiness Limitations Section (ALS), Part 2, Revision 08, dated May 2, 2022, that is required by EASA AD 2022–0125, dated June 28, 2022 (which corresponds to FAA AD 2023–04–05, Amendment 39–22352 (88 FR 13668, March 6, 2023) (AD 2023–04–05)), and that incorporation of EASA AD 2023–0004 invalidates (terminates) prior instructions for those tasks. This AD therefore terminates the limitations for the tasks identified in the service information referenced in EASA AD 2023–0004 only, as required by paragraph (j) of AD 2023–04–05.

In the NPRM, the FAA proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in EASA AD 2023–0004. The FAA is issuing this AD to address reduced structural integrity of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0927.

## Discussion of Final Airworthiness Directive

### Comments

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

### 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, 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 2023–0004 describes new or more restrictive airworthiness limitations for airplane structures and safe life limits. 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 31 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD.

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. Therefore, the agency estimates the average total cost per operator 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 adding the following new airworthiness directive:

**2023–12–03 Airbus SAS:** Amendment 39–22461; Docket No. FAA–2023–0927; Project Identifier MCAI–2023–00013–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective August 7, 2023.

**(b) Affected ADs**

This AD affects AD 2023–04–05, Amendment 39–22352 (88 FR 13668, March 6, 2023) (AD 2023–04–05).

**(c) Applicability**

This AD applies to Airbus SAS Model A350–941 and –1041 airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before November 1, 2022.

**(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 structural integrity of the airplane.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0004, dated January 6, 2023 (EASA AD 2023–0004).

**(h) Exceptions to EASA AD 2023–0004**

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0004.

(2) Paragraph (3) of EASA AD 2023–0004 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 2023–0004 is on or before the applicable ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0004, 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) of EASA AD 2023–0004.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0004.

**(i) Provisions for Alternative Actions and Intervals**

After the existing 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 2023–0017.

**(j) Terminating Action for AD 2023–04–05**

Accomplishing the actions required by this AD terminates the corresponding requirements of AD 2023–04–05, for the tasks identified in the service information referenced in EASA AD 2023–0004 only.

**(k) 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 (l) 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 Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

**(l) Additional Information**

For more information about this AD, contact Dat Le, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7317; email *dat.v.le@faa.gov.*

**(m) 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) European Union Aviation Safety Agency (EASA) AD 2023–0004, dated January 6, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0004, 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 EASA AD on the EASA website at *ad.easa.europa.eu.*

(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 June 12, 2023.

**Ross Landes,**

*Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2023–14004 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0926; Project Identifier MCAI–2022–01583–A; Amendment 39–22462; AD 2023–12–04]**

**RIN 2120–AA64**

## Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Pilatus Aircraft Ltd. (Pilatus) Model PC–24 airplanes. This AD was prompted by a report that an incorrect wiring arrangement was detected around the weather radar system. This AD requires modifying the weather radar redundant wiring, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference (IBR). The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective August 7, 2023.

The Director of the Federal Register approved the incorporation by reference

of a certain publication listed in this AD as of August 7, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No.FAA–2023–0926; 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 service information that is incorporated by reference in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this service information on the EASA website at *ad.easa.europa.eu.*
- 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. The EASA service information is also available at *regulations.gov* under Docket No. FAA–2023–0926.

**FOR FURTHER INFORMATION CONTACT:**

Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@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 serial-numbered Pilatus Model PC–24 airplanes. The NPRM published in the **Federal Register** on April 14, 2023 (88 FR 22928). The NPRM was prompted by EASA AD 2022–0249, dated December 14, 2022 (EASA AD 2022–0249) (referred to after this as the MCAI). The MCAI states an occurrence was reported where an incorrect wiring arrangement was detected around the weather radar system on certain Pilatus Model PC–24 airplanes. In case of a lightning strike, the functionalities related to the Advanced Graphic Module (AGM) 1 and AGM2, the Dual Generic Input/Output (DGI0) 1 card in the Modular Avionics Unit (MAU) 1 module of the Honeywell Advanced Cockpit Environment (ACE) system, and the Attitude Heading Reference System (AHRS) 2 could be affected. The MCAI specifies modification of the weather radar redundant wiring.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0926.

In the NPRM, the FAA proposed to require modifying the weather radar redundant wiring. The FAA is issuing this AD to address an incorrect wiring arrangement around the weather radar system. The unsafe condition, if not addressed, could, in the case of a lightning strike, lead to the partial loss of flight and navigation data displayed to the pilot or pilots, possibly resulting in increased flight crew workload and a consequent reduction of safety margins.

## Discussion of Final Airworthiness Directive

### Comments

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

### Conclusion

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

### Related Service Information Under 1 CFR Part 51

EASA AD 2022–0249 requires modification of the weather radar redundant wiring.

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**.

### Costs of Compliance

The FAA estimates that this AD affects 12 airplanes of U.S. registry.

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

ESTIMATED COSTS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Modification | 16 work-hours × $85 per hour = $1,360 | $5,000 | $6,360 | $76,320 |

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, some 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:

**2023–12–04 Pilatus Aircraft Ltd.:** Amendment 39–22462; Docket No. FAA–2023–0926; Project Identifier MCAI–2022–01583–A.

**(a) Effective Date**

This airworthiness directive (AD) is effective August 7, 2023.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Pilatus Aircraft Ltd. Model PC–24 airplanes, serial numbers 231 through 252 inclusive and serial numbers 254 and 255, certificated in any category.

**(d) Subject**

Joint Aircraft System Component (JASC) Codes 3497, Navigation System Wiring; and 3442, Weather Radar System.

**(e) Unsafe Condition**

This AD was prompted by a report that an incorrect wiring arrangement was detected around the weather radar system. The FAA is issuing this AD to address an incorrect wiring arrangement around the weather radar system. The unsafe condition, if not addressed, could, in the case of a lightning strike, lead to the partial loss of flight and navigation data displayed to the pilot or pilots, possibly resulting in increased flight crew workload and a consequent reduction of safety margins.

**(f) Compliance**

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

**(g) Required Actions**

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2022–0249, dated December 14, 2022 (EASA AD 2022–0249).

**(h) Exceptions to EASA AD 2022–0249**

(1) Where EASA AD 2022–0249 requires compliance from its effective date, this AD requires using the effective date of this AD.

(2) Where the service information referenced in paragraph (1) of EASA AD 2022–0249 specifies removing and discarding parts, this AD requires removing those parts from service.

(3) This AD does not adopt the ''Remarks'' paragraph of EASA AD 2022–0249.

**(i) No Reporting Requirement**

Although the service information referenced in EASA AD 2022–0249 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

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

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in § 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 (k) 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.

**(k) Additional Information**

For more information about this AD, contact Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov.*

**(l) 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 the AD specifies otherwise.

(i) European Union Aviation Safety Agency AD 2022–0249, dated December 14, 2022.

(ii) [Reserved]

(3) For EASA AD 2022–0249, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

(4) 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.

(5) 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 June 12, 2023.

**Ross Landes,**

*Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2023–14010 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0928; Project Identifier MCAI–2023–00134–T; Amendment 39–22465; AD 2023–12–07]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called Model A300–600 series airplanes). This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This AD requires revising the existing maintenance or inspection program, 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 August 7, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of August 7, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0928; 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; phone +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this material on the EASA website: *ad.easa.europa.eu.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2023–0928.

**FOR FURTHER INFORMATION CONTACT:** Dan Rodina, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone 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 by adding an AD that would apply to all Airbus SAS Model A300–600 series airplanes. The NPRM published in the **Federal Register** on April 14, 2023 (88 FR 22925). The NPRM was prompted by AD 2023–0017, dated January 23, 2023, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2023–0017) (also referred to as the MCAI). The MCAI states that new or more restrictive airworthiness limitations have been developed.

In the NPRM, the FAA proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in EASA AD 2023–0017. The FAA is issuing this AD to address the risks associated with the effects of aging on airplane systems. The unsafe condition, if not addressed, 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. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0928.

## Discussion of Final Airworthiness Directive

### Comments

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

### 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, 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 2023–0017 specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits. 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 120 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

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. Therefore, the agency estimates the average total cost per operator 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 adding the following new airworthiness directive:

**2023–12–07 Airbus SAS:** Amendment 39–22465; Docket No. FAA–2023–0928; Project Identifier MCAI–2023–00134–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective August 7, 2023.

**(b) Affected ADs**

This AD affects AD 2018–18–21, Amendment 39–19400 (83 FR 47054, September 18, 2018) (AD 2018–18–21).

**(c) Applicability**

This AD applies to all Airbus SAS Model A300B4–601, A300B4–603, A300B4–620, A300B4–622, A300B4–605R, A300B4–622R, A300C4–605R Variant F, A300F4–605R and A300F4–622R 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 the risks associated with the effects of aging on airplane systems. The unsafe condition, if not addressed, 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.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0017, dated January 23, 2023 (EASA AD 2023–0017).

**(h) Exceptions to EASA AD 2023–0017**

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0017.

(2) Paragraph (3) of EASA AD 2023–0017 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 2023–0017 is on or before the applicable ''limitations'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0017, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraph (4) of EASA AD 2023–0017.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0017.

**(i) Provisions for Alternative Actions and Intervals**

After the existing 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 2023–0017.

**(j) Terminating Action for AD 2018–18–21**

For Model A300B4–601, A300B4–603, A300B4–620, A300B4–622, A300B4–605R, A300B4–622R, A300C4–605R Variant F, A300F4–605R and A300F4–622R airplanes only: Accomplishing the actions required by this AD terminates the corresponding requirements of AD 2018–18–21, for the tasks identified in the service information referenced in EASA AD 2023–0017 only.

**(k) 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 person identified in paragraph (l) 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 local flight standards district office/certificate holding district 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 Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

**(l) Additional Information**

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

**(m) 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) European Union Aviation Safety Agency (EASA) AD 2023–0017, dated January 23, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0017, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this EASA AD on the EASA website: *ad.easa.europa.eu.*

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

(5) You may view this material 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 June 13, 2023.

**Michael Linegang,**

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

[FR Doc. 2023–14005 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0667; Project Identifier MCAI–2022–00735–A; Amendment 39–22475; AD 2023–12–17]**

**RIN 2120–AA64**

## Airworthiness Directives; Pilatus Aircraft Ltd. Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is superseding Airworthiness Directive (AD) 2022–19–03 which applied to Pilatus Aircraft Ltd. (Pilatus) Model PC–12, PC–12/45, PC–12/47, and PC–12/47E airplanes. AD 2022–19–03 required incorporating new revisions to the airworthiness limitation section (ALS) of the existing airplane maintenance manual (AMM) or Instructions for Continued Airworthiness (ICA) to establish a 5-year life limit for certain main landing gear (MLG) actuator bottom attachment bolts and new life limits for the rudder bellcrank. Since the FAA issued AD 2022–19–03, the FAA determined that new or more restrictive tasks and limitations are necessary. This AD requires revising the ALS of the existing AMM or ICA for your airplane, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference (IBR). The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective August 7, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of August 7, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0667; 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 that is incorporated by reference in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +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, 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–2023–0667.

**FOR FURTHER INFORMATION CONTACT:** Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@faa.gov*.

**SUPPLEMENTARY INFORMATION:**

## Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2022–19–03, Amendment 39–22172 (87 FR 57809, September 22, 2022) (AD 2022–19–03). AD 2022–19–03 applied to all Pilatus Model PC–12, PC–12/45, PC–12/47, and PC–12/47E airplanes. AD 2022–19–03 required incorporating new revisions to the ALS of the existing airplane AMM or ICA to establish a 5-year life limit for certain MLG actuator bottom attachment bolts and new life limits for the rudder bellcrank. The FAA issued AD 2022–19–03 to prevent MLG collapse during all phases of airplane operations, including take-off and landing, and also to prevent rudder bellcrank failure, which could lead to loss of airplane control.

The NPRM published in the **Federal Register** on April 11, 2023 (88 FR 21543). The NPRM was prompted by EASA AD 2022–0103, dated June 9, 2022 (EASA AD 2022–0103) (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 new or more restrictive tasks and limitations have been developed. These new or more restrictive airworthiness limitations include repetitive inspections for cracks in the lower main spar connection of the horizontal stabilizer.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0667.

In the NPRM, the FAA proposed to require revising the ALS of the existing AMM or ICA for your airplane, as specified in EASA AD 2022–0103. The FAA is issuing this AD to address failure of certain parts, which could result in loss of airplane control. Additionally, the actions required to address the unsafe condition in AD 2022–19–03 are included in ''the applicable ALS,'' as defined in EASA AD 2022–0103.

## Discussion of Final Airworthiness Directive

### Comments

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

### Conclusion

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

## Related Service Information Under 1 CFR Part 51

EASA AD 2022–0103 requires certain actions and associated thresholds and intervals, including life limits and maintenance tasks. EASA AD 2022–0103 also requires doing corrective actions if any discrepancy (as defined in the applicable ALS) is found during accomplishment of any task required by paragraph (1) of EASA AD 2022–0103 and revising the approved aircraft maintenance program (AMP) by incorporating the limitations, tasks, and associated thresholds and intervals described in ''the applicable ALS'' as defined in EASA AD 2022–0103.

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**.

## Differences Between This AD and EASA AD 2022–0103

Paragraph (2) of EASA AD 2022–0103 requires corrective actions in accordance with the applicable Pilatus maintenance documentation or contacting Pilatus for approved instructions and accomplishing those instructions accordingly. Paragraph (3) of EASA AD 2022–0103 requires revising the approved AMP. Paragraph (4) of EASA AD 2022–0103 provides credit for performing actions in accordance with previous revisions of the Pilatus AMM. Paragraph (5) of EASA AD 2022–0103 explains that after revision of the approved AMP, it is not necessary to record accomplishment of individual actions for demonstration of AD compliance. This AD does not require compliance with paragraphs (2) through (5) of EASA AD 2022–0103.

## Costs of Compliance

The FAA estimates that this AD affects 1,030 airplanes of U.S. registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates that revising the ALS of the existing AMM or ICA for your airplane requires about 1 work-hour for an estimated cost on U.S. operators of $87,550 or $85 per airplane.

## 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 2022–19–03, Amendment 39–22172 (87 FR 57809, September 22, 2022); and

■ b. Adding the following new airworthiness directive:

**2023–12–17 Pilatus Aircraft Ltd.:** Amendment 39–22475; Docket No. FAA–2023–0667; Project Identifier MCAI–2022–00735–A.

**(a) Effective Date**

This airworthiness directive (AD) is effective August 7, 2023.

**(b) Affected ADs**

This AD replaces AD 2022–19–03, Amendment 39–22172 (87 FR 57809, September 22, 2022) (AD 2022–19–03).

**(c) Applicability**

This AD applies to Pilatus Aircraft Ltd. Model PC–12, PC–12/45, PC–12/47, and PC–12/47E airplanes, all serial numbers, certificated in any category.

**(d) Subject**

Joint Aircraft System Component (JASC) Code 5511, Horizontal Stabilizer, Spar/Rib.

**(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 states that failure to revise the airworthiness limitations section (ALS) of the existing aircraft maintenance manual (AMM) by introducing new and more restrictive instructions and maintenance tasks as specified in the component limitations section, which includes repetitive inspections for cracks in the lower main spar connection of the horizontal stabilizer, could result in an unsafe condition. The FAA is issuing this AD to address failure of certain parts, which could result in loss of airplane control.

**(f) Compliance**

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

**(g) Required Actions**

(1) Before further flight after the effective date of this AD, revise the ALS of the existing AMM or Instructions for Continued Airworthiness for your airplane by incorporating the requirements specified in paragraph (1) of European Union Aviation Safety Agency AD 2022–0103, dated June 9, 2022 (EASA AD 2022–0103).

(2) The actions required by paragraph (g)(1) of this AD may be performed by the owner/operator (pilot) holding at least a private pilot certificate and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR 43.9(a) and 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439.

**(h) Provisions for Alternative Requirements (Airworthiness Limitations)**

After the actions required by paragraph (g) of this AD have been done, no alternative requirements (airworthiness limitations) are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2022–0103.

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

(1) 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 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 (j) of this AD or email: *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.

(2) Global AMOC AIR–730–22–357, dated September 28, 2022, and Global AMOC AIR–730–23–054 R1, dated February 10, 2023, were approved as AMOCs for the requirements for AD 2022–19–03, and are approved as AMOCs for the requirements of paragraph (g) of this AD. Other AMOCs previously issued for the requirements of AD 2022–19–03 are not approved as an AMOC for the requirements of this AD.

**(j) Additional Information**

For more information about this AD, contact Doug Rudolph, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4059; email: *doug.rudolph@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 the AD specifies otherwise.

(i) European Union Aviation Safety Agency AD 2022–0103, dated June 9, 2022.

(ii) [Reserved]

(3) For EASA AD 2022–0103, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

(4) 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.

(5) 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 June 14, 2023.

**Michael Linegang,**

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

[FR Doc. 2023–14007 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0654; Project Identifier MCAI–2022–01505–T; Amendment 39–22467; AD 2023–12–09]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. This AD was prompted

by reports that, during instrument landing system (ILS) approaches, the flight control system reverted from primary flight control computer (PFCC) normal mode operating in autopilot to remote electronics unit (REU) direct mode, and then, after a period of time, to PFCC direct mode. This AD requires installation of a PFCC software update; and a records review or detailed inspection to identify pre-existing repairs or damage within certain limits to certain structures, and obtaining and following additional instructions, if necessary, as specified in a Transport Canada 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 August 7, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of August 7, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0654; 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 Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email: *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca;* website: *tc.canada.ca/en/aviation.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2023–0654.

**FOR FURTHER INFORMATION CONTACT:** Steven Dzierzynski, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone (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 Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. The NPRM published in the **Federal Register** on March 30, 2023 (88 FR 19019). The NPRM was prompted by AD CF–2022–65, dated November 23, 2022, issued by Transport Canada, which is the aviation authority for Canada (also referred to as the MCAI). The MCAI states that airplanes equipped with the CAT IIIB Autoland option, have had numerous occurrences during ILS approaches where the flight control system has reverted from PFCC normal mode operating in autopilot to REU direct mode, and then, after a period of time, to PFCC direct mode. During these occurrences, the caution message FLT CTRL DIRECT is posted on the engine indication and crew alerting system (EICAS). The MCAI states that it requires a PFCC software update, which includes control law updates that require review and disposition of previous repairs and damage assessments prior to conducting the software update. These pre-existing repairs and damage may exceed the Aircraft Structural Repair Publication (ASRP) permitted damage limits for affected structures and would affect the control laws.

In the NPRM, the FAA proposed to require installing updated PFCC software; this installation includes pre-requisites that must be met prior to the installation (installing certain database versions and software). In addition, the installation requires a records review or detailed inspection to identify pre-existing repairs and damages (that were within ASRP limits) to certain structures and obtaining and following additional instructions, as specified in Transport Canada AD CF–2022–65. The FAA is issuing this AD to address reversion to direct mode during ILS approaches, which, if not corrected, could impact flight control functions, which could prevent continued safe flight and landing. See the MCAI for additional background information.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0654.

**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. The FAA received an additional comment from one commenter, Delta Air Lines (Delta). The following presents the comment received on the NPRM and the FAA's response to each comment.

**Request for Clarification if Repair Review Is a Required for Compliance (RC) Action**

Delta requested to include an exception in paragraph (h) of the proposed AD to clarify that step 3.2 of the Accomplishment Instructions in Airbus Canada Limited Partnership A220 Service Bulletin (SB) BD500–270020, Issue No. 001, dated September 28, 2022, is not required for compliance (RC).

The FAA disagrees with adding an exception for Procedure section 3.2 of Airbus Canada Limited Partnership A220 SB BD500–270020, Issue No. 001, dated September 28, 2022. The note of step 1 of the Procedure section states ''The Procedure section of the Accomplishment Instructions is Required for Compliance (RC) and must be done to comply with the AD.'' The software of the PFCC is updated so that the new Control Laws (CLAWS) obey the compliance requirements for the Maximum Landing Weight (MLW) increase and to resolve inadvertent Direct Mode reversions in approach on CAT IIIB capable configuration. The unsafe condition is addressed by the software update which also includes the control laws updates. There is a statement in the Background section of the proposed AD that references the Transport Canada AD CF–2022–65 note, which mentions the PFCC software update also includes control laws updates. No changes have been made to this AD regarding this issue.

**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 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 this product. Except for minor editorial changes, 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**

Transport Canada AD CF–2022–65 specifies procedures for installing updated PFCC software; this installation includes pre-requisites that must be met prior to the installation (installing certain database versions and software). In addition, the installation requires a records review or detailed inspection to identify pre-existing repairs and damages (that were within ASRP limits) to certain structures and obtaining and following additional instructions. 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 72 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 |
|---|---|---|---|
| 4 work-hours × $85 per hour = $340 | $14 | $354 | $25,488 |

The FAA has received no definitive data on which to base the cost estimates for the on-condition actions specified in this AD.

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:

**2023–12–09 Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.):** Amendment 39–22467; Docket No. FAA–2023–0654; Project Identifier MCAI–2022–01505–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective August 7, 2023.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Airbus Canada Limited Partnership (Type Certificate previously held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Model BD–500–1A10 and BD–500–1A11 airplanes, certificated in any category, as identified in Transport Canada AD CF–2022–65, dated November 23, 2022 (Transport Canada AD CF–2022–65).

**(d) Subject**

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

**(e) Unsafe Condition**

This AD was prompted by reports that, during instrument landing system (ILS) approaches, the flight control system reverted from primary flight control computer (PFCC) normal mode operating in autopilot to remote electronics unit (REU) direct mode, and then, after a period of time, to PFCC direct mode. The FAA is issuing this AD to address reversion to direct mode during ILS approaches, which, if not corrected, could impact flight control functions and could prevent continued safe flight and landing.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Transport Canada AD CF–2022–65.

**(h) Exceptions to Transport Canada AD CF–2022–65**

(1) Where Transport Canada AD CF–2022–65 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where the service information referenced in Transport Canada AD CF–2022–65 specifies installing software updates on the PFCCs using a USB-type device, this AD also allows the use of a portable maintenance access terminal (PMAT)-type device.

**Note 1 to paragraph (h)(2):** When using a PMAT-type device, guidance for updating the software can be found in Airbus Canada Service Bulletin (SB) BD500–270020, Issue 001, dated September 28, 2022.

**(i) Additional AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to

approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (j)(1) 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 Transport Canada; or Airbus Canada Limited Partnership's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

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

**(j) Additional Information**

(1) For more information about this AD, contact Steven Dzierzynski, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone (516) 228–7300; email *9-avs-nyaco-cos@faa.gov.*

(2) For Airbus Canada service information identified in this AD that is not incorporated by reference, contact Airbus Canada Limited Partnership, 13100 Henri-Fabre Boulevard, Mirabel, Québec J7N 3C6, Canada; telephone 450–476–7676; email *a220_crc@abc.airbus*; website: *a220world.airbus.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

**(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) Transport Canada AD CF–2022–65, dated November 23, 2022.

(ii) [Reserved]

(3) For Transport Canada AD CF–2022–65, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email: *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca;* website: *tc.canada.ca/en/aviation.*

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

(5) You may view this material 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 June 13, 2023.

**Michael Linegang,**

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

[FR Doc. 2023–14006 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0662; Project Identifier MCAI–2022–00745–T; Amendment 39–22464; AD 2023–12–06]**

**RIN 2120–AA64**

## Airworthiness Directives; Bombardier, Inc., Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is superseding Airworthiness Directive (AD) 2020–07–13, which applied to certain Bombardier, Inc., Model BD–100–1A10 airplanes. AD 2020–07–13 required revising the existing airplane flight manual (AFM) to provide the flightcrew with new warnings for ''Autoflight'' and ''Engine Failure in Climb During ALTS CAP.'' This AD requires revising the existing AFM to provide the flightcrew with new warnings for ''Autoflight'' and ''Engine Failure in Climb During (V) ALTS CAP or (V) ALTV CAP.'' This AD was prompted by a revision to the procedures to ensure that all applicable altitude capture modes utilized and annunciated in the affected fleet are included and to more clearly denote these altitude capture modes. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective August 7, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 7, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0662; 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 Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website *bombardier.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2023–0662.

**FOR FURTHER INFORMATION CONTACT:** Steven Dzierzynski, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7367; 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 to supersede AD 2020–07–13, Amendment 39–19892 (85 FR 20394, April 13, 2020) (AD 2020–07–13). AD 2020–07–13 applied to certain Bombardier, Inc., Model BD–100–1A10 airplanes. AD 2020–07–13 required revising the existing AFM to provide the flightcrew with new warnings for ''Autoflight'' and ''Engine Failure in Climb During ALTS CAP.'' The FAA issued AD 2020–07–13 to address the occurrence of an engine failure during or before a climb while in ALTS CAP or (V) ALTS CAP mode, as it could cause the airspeed to drop significantly below the safe operating speed and may require prompt flightcrew intervention to maintain a safe operating speed.

The NPRM published in the **Federal Register** on April 10, 2023 (88 FR 21123). The NPRM was prompted by

AD CF–2019–12R1, dated June 9, 2022, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI). The MCAI states that during altitude capture flight, the flight guidance/autopilot does not account for engine failure while capturing an altitude. The MCAI states that Transport Canada AD CF–2019–12, dated April 3, 2019, referenced specific altitude capture modes but did not consider all possible available annunciated altitude capture modes used in the affected airplanes. Therefore, the MCAI mandates further updates to the Limitation and Emergency Procedures sections of the AFM to ensure that all applicable altitude capture modes utilized and annunciated in the affected fleet are included and more clearly denotes these altitude capture modes in these new procedures.

In the NPRM, the FAA proposed to require revising the existing AFM to provide the flightcrew with new warnings for ''Autoflight'' and ''Engine Failure in Climb During (V) ALTS CAP or (V) ALTV CAP.'' The FAA is issuing this AD to address the occurrence of an engine failure during or before a climb while in altitude capture flight. The unsafe condition, if not addressed, could cause the airspeed to drop significantly below the safe operating speed and may require prompt flightcrew intervention to maintain a safe operating speed.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0662.

**Discussion of Final Airworthiness Directive**

**Comments**

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

**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, 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 the following service information, which provides new warnings for the ''Autoflight'' procedure in Section 02–04, ''Systems Limitations,'' of the LIMITATIONS section; and ''Engine Failure in Climb During (V) ALTS CAP or (V) ALTV CAP,'' procedure in Section 03–32, ''Powerplant,'' of the EMERGENCY PROCEDURES section; of the applicable AFMs.

- Bombardier Challenger 300 Airplane Flight Manual (Imperial Version), Publication No. CSP 100–1, Revision 69, dated July 4, 2022. (For obtaining the procedures for Bombardier Challenger 300 AFM (Imperial Version), Publication No. CSP 100–1, use Document Identification No. CH 300 AFM–I.)
- Bombardier Challenger 350 Airplane Flight Manual, Publication No. CH 350 AFM, Revision 34, dated June 14, 2022. (For obtaining the procedures for Bombardier Challenger 350 AFM, Publication No. CH 350 AFM, use Document Identification No. CH 350 AFM.)

These documents are distinct since they apply to different airplane models in different configurations. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

**Costs of Compliance**

The FAA estimates that this AD will affect 244 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 |
|---|---|---|---|
| 1 work-hour × $85 per hour = $85 | $0 | $85 | $20,740 |

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

The FAA determined that this 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) 2020–07–13, Amendment 39–19892 (85 FR 20394, April 13, 2020); and
■ b. Adding the following new AD:

**2023–12–06 Bombardier, Inc.:** Amendment 39–22464; Docket No. FAA–2023–0662; Project Identifier MCAI–2022–00745–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective August 7, 2023.

**(b) Affected ADs**

This AD replaces AD 2020–07–13, Amendment 39–19892 (85 FR 20394, April 13, 2020) (AD 2020–07–13).

**(c) Applicability**

This AD applies to Bombardier, Inc., Model BD–100–1A10 airplanes, certificated in any category, serial numbers 20003 through 20500 inclusive, and 20501 through 20867 inclusive.

**(d) Subject**

Air Transport Association (ATA) of America Code 22, Auto flight.

**(e) Reason**

This AD was prompted by a report that during altitude capture flight, the flight guidance/autopilot does not account for engine failure while capturing an altitude. The FAA is issuing this AD to address the occurrence of an engine failure during or before a climb while in altitude capture flight. The unsafe condition, if not addressed, could cause the airspeed to drop significantly below the safe operating speed and may require prompt flightcrew intervention to maintain a safe operating speed.

**(f) Compliance**

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

**(g) Revision of Existing Airplane Flight Manual (AFM)**

Within 30 days after the effective date of this AD, revise the existing AFM to include the information specified in ''Autoflight'' procedure in Section 02–04, ''System Limitations,'' of the LIMITATIONS section, and ''Engine Failure in Climb During (V) ALTS CAP or (V) ALTV CAP,'' procedure in Section 03–32, ''Powerplant,'' of the EMERGENCY PROCEDURES section; of the Bombardier Challenger 300 Airplane Flight Manual (Imperial Version), Publication No. CSP 100–1, Revision 69, dated July 4, 2022 (for airplanes having serial numbers 20003 through 20500 inclusive); or the Bombardier Challenger 350 Airplane Flight Manual, Publication No. CH 350 AFM, Revision 34, dated June 14, 2022 (for airplanes having serial numbers 20501 through 20867 inclusive); as applicable.

**Note 1 to paragraph (g):** For obtaining the procedures for Bombardier Challenger 300 AFM (Imperial Version), Publication No. CSP 100–1, use Document Identification No. CH 300 AFM–I.

**Note 2 to paragraph (g):** For obtaining the procedures for Bombardier Challenger 350 AFM, Publication No. CH 350 AFM, use Document Identification No. CH 350 AFM.

**(h) Additional AD Provisions**

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to ATTN: Program Manager, Continuing Operational Safety, at the address identified in paragraph (i)(2) of this AD or email to: *9-avs-nyaco-cos@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 responsible Flight Standards Office.

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

**(i) Additional Information**

(1) Refer to Transport Canada AD CF–2019–12R1, dated June 9, 2022, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–0662.

(2) For more information about this AD, contact Steven Dzierzynski, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7367; email *9-avs-nyaco-cos@faa.gov.*

**(j) 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) Section 02–04, ''Systems Limitations,'' of the LIMITATIONS section, of the Bombardier Challenger 300 Airplane Flight Manual (Imperial Version), Publication No. CSP 100–1, Revision 69, dated July 4, 2022.

**Note 1 to paragraph (j)(2)(i) of this AD:** This note applies to paragraphs (j)(2)(i) and (ii). For obtaining the procedures for Bombardier Challenger 300 AFM (Imperial Version), Publication No. CSP 100–1, use Document Identification No. CH 300 AFM–I.

(ii) Section 03–32, ''Powerplant,'' of the EMERGENCY PROCEDURES section, of the Bombardier Challenger 300 Airplane Flight Manual (Imperial Version), Publication No. CSP 100–1, Revision 69, dated July 4, 2022.

(iii) Section 02–04, ''Systems Limitations,'' of the LIMITATIONS section, of the Bombardier Challenger 350 Airplane Flight Manual, Publication No. CH 350 AFM, Revision 34, dated June 14, 2022.

**Note 2 to paragraph (j)(2)(iii):** This note applies to paragraphs (j)(2)(iii) and (iv) of this AD. For obtaining the procedures for Bombardier Challenger 350 AFM, Publication No. CH 350 AFM, use Document Identification No. CH 350 AFM.

(iv) Section 03–32, ''Powerplant,'' of the EMERGENCY PROCEDURES section, of the Bombardier Challenger 350 Airplane Flight Manual, Publication No. CH 350 AFM, Revision 34, dated June 14, 2022.

(3) For service information identified in this AD, contact Bombardier Business Aircraft Customer Response Center, 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–2999; email *ac.yul@aero.bombardier.com;* website *bombardier.com.*

(4) 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.

(5) 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 June 13, 2023.

**Michael Linegang,**

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

[FR Doc. 2023–14003 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2023–0669; Project Identifier MCAI–2022–01238–T; Amendment 39–22459; AD 2023–12–01]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus SAS Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is superseding Airworthiness Directive (AD) 2006–10–13, which applied to all Airbus SAS Model A330–223, –321, –322, and –323 airplanes. AD 2006–10–13 required repetitive inspections of the firewall of the lower aft pylon fairing (LAPF), and corrective actions if necessary. AD 2006–10–13 also provided an optional terminating action for the repetitive inspections. This AD was prompted by

the design of an updated LAPF, the installation of which constitutes terminating action for the repetitive inspection required by AD 2006–10–13. This AD continues to require the actions specified in AD 2006–10–13, provides new optional terminating actions, and changes the applicability to exclude certain airplanes; 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 August 7, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of August 7, 2023.

**ADDRESSES:**

*AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0669; 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 the 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–2023–0669.

**FOR FURTHER INFORMATION CONTACT:** Tim Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3667; email *timothy.p.dowling@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2006–10–13, Amendment 39–14597 (71 FR 28250, May 16, 2006) (AD 2006–10–13). AD 2006–10–13 applied to all Airbus SAS Model A330–223, –321, –322, and –323 airplanes. AD 2006–10–13 required repetitive inspections of the firewall of the LAPF, and corrective actions if necessary. AD 2006–10–13 also provided an optional terminating action for the repetitive inspections. The FAA issued AD 2006–10–13 to address cracking of the LAPF firewall, which could reduce the effectiveness of the firewall and result in an uncontrolled engine fire.

The NPRM published in the **Federal Register** on April 11, 2023 (88 FR 21540). The NPRM was prompted by AD 2022–0190, dated September 14, 2022, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2022–0190) (also referred to as the MCAI). The MCAI states that since Direction Générale de l'Aviation Civile (DGAC) France AD F–2004–028 R2 was issued, Airbus designed an updated LAPF, the installation of which also constitutes terminating action for the repetitive inspections required by DGAC France AD F–2004–028 R2. EASA AD 2022–0190 retains the requirements of DGAC France AD F–2004–028 R2, and includes reference to an additional optional terminating action modification. EASA AD 2022–0190 also excludes airplanes on which the optional terminating action was embodied in production from its applicability.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–0669.

In the NPRM, the FAA proposed to continue to require the actions specified in AD 2006–10–13, provide new optional terminating actions, and change the applicability to exclude certain airplanes, as specified in EASA AD 2022–0190. The FAA is issuing this AD to address cracking of the LAPF firewall, which could reduce the effectiveness of the firewall and result in an uncontrolled engine fire.

## Discussion of Final Airworthiness Directive

### Comments

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

### 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, 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 2022–0190 specifies procedures for repetitively inspecting each LAPF firewall for cracks, and performing corrective actions, including stop-drilling the crack and applying sealants, and repairing the LAPF firewall. EASA AD 2022–0190 also specifies terminating actions for the repetitive inspections, including modifying and reidentifying the LAPF or replacing the LAPF with an LAPF having part number 72A100–713. 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 41 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

| Action | Labor cost | Parts cost | Cost per product | Cost on U.S. operators |
|---|---|---|---|---|
| Retained actions from AD 2006–10–13 | 7 work-hours × $85 per hour = $595 | $0 | $595 | $24,395 |

ESTIMATED COSTS FOR OPTIONAL ACTIONS

| Labor cost | Parts cost | Cost per product |
|---|---|---|
| 14 work-hours × $85 per hour = $1,190 | $120,000 | $121,190 |

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

| Labor cost | Parts cost | Cost per product |
|---|---|---|
| 7 work-hours × $85 per hour = $595 | $120,000 | $120,595 |

**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) 2006–10–13, Amendment 39–14597 (71 FR 28250, May 16, 2006); and
■ b. Adding the following new AD:

**2023–12–01 Airbus SAS:** Amendment 39–22459; Docket No. FAA–2023–0669; Project Identifier MCAI–2022–01238–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective August 7, 2023.

**(b) Affected ADs**

This AD replaces AD 2006–10–13, Amendment 39–14597 (71 FR 28250, May 16, 2006) (AD 2006–10–13).

**(c) Applicability**

This AD applies to Airbus SAS Model A330–223, A330–321, A330–322, and A330–323 airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2022–0190, dated September 14, 2022 (EASA AD 2022–0190).

**(d) Subject**

Air Transport Association (ATA) of America Code 54, Nacelles/pylons.

**(e) Unsafe Condition**

This AD was prompted by reports of cracking of the lower aft pylon fairing (LAPF) firewall, and by the development of an optional terminating replacement. The FAA is issuing this AD to address this cracking, which could reduce the effectiveness of the firewall and result in an uncontrolled engine fire.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2022–0190.

**(h) Exceptions to EASA AD 2022–0190**

(1) Where EASA AD 2022–0190 refers to ''28 February 2004 [the effective date of DGAC France AD F–2004–028 at original issue],'' this AD requires using June 20, 2006 (the effective date of AD 2006–10–13).

(2) For any airplane on which a crack has been found and a stop-drill of the crack and sealant application has not been done as specified in paragraph (4.1) of EASA AD 2022–0190 as of the effective date of this AD: Within 30 days after the effective date of this AD, accomplish the actions specified in paragraph (4.1) of EASA AD 2022–0190.

(3) Where paragraph (2) of EASA AD 2022–0190 specifies a crack length, replace the text ''up to 30.48 mm'' with ''less than or equal to 30.48 mm (1.2 inches).''

(4) This AD does not adopt the ''Remarks'' section of EASA AD 2022–0190.

**(i) No Reporting Requirement**

Although the service information referenced in EASA AD 2022–0190 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

**(j) 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 (k) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(i) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office. (ii) AMOCs approved previously for AD 2006–10–13 in FAA Letters ANM–116–17–235 and AIR–676–20–117 are approved as AMOCs for the corresponding provisions of EASA AD 2022–0190 that are required by paragraph (g) of this AD.

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

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

**(k) Additional Information**

For more information about this AD, contact Tim Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3667; email *timothy.p.dowling@faa.gov.*

**(l) Material Incorporated by Reference**

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2022–0190, dated September 14, 2022.

(ii) [Reserved]

(3) For EASA AD 2022–0190, 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 EASA AD on the EASA website at *ad.easa.europa.eu.*

(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 June 7, 2023.

**Ross Landes,**

*Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2023–14002 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2023–0501; Airspace Docket No. 23–AWP–3]**

**RIN 2120–AA66**

## Amendment of Very High Frequency (VHF) Omnidirectional Range (VOR) Federal Airways V–6, V–338, V–494, and United States Area Navigation (RNAV) Route T–331

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

**ACTION:** Final rule; correction.

**SUMMARY:** This action corrects a final rule published by the FAA in the **Federal Register** on May 15, 2023, that amends the Very High Frequency (VHF) Omnidirectional Range (VOR) Federal airways V–6, V–338, V–494, and United States Area Navigation (RNAV) route T–331 descriptions to reflect the name change from the Squaw Valley, CA, VOR/Distance Measuring Equipment (DME) navigational aid (NAVAID) to the Palisades, CA, VOR/DME. The description of V–6 in the final rule contained segments that were previously revoked as published by the FAA in the **Federal Register** on January 17, 2023. This action makes editorial corrections to the description of V–6.

**DATES:** Effective date 0901 UTC, August 10, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

**ADDRESSES:** A copy of the final rule, this final rule correction, and all background material may be viewed online at *www.regulations.gov* using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year.

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

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

**SUPPLEMENTARY INFORMATION:**

### History

The FAA published a final rule in the **Federal Register** for Docket No. FAA–2022–1113 (88 FR 2504; January 17, 2023), that amended VOR Federal airway V–6 in the vicinity of Litchfield, MI. The amendment revoked a segment of the airway between the intersection of the Chicago Heights, IL, VORTAC 358° and Gipper, MI, VORTAC 271° radials (NILES Fix), and the Gipper, MI, VORTAC.

The FAA published a final rule in the **Federal Register** for Docket No. FAA–2023–0501 (88 FR 30896; May 15, 2023), amending the VOR Federal airway V–6 description to reflect the name change from the Squaw Valley, CA, VOR/DME NAVAID to the Palisades, CA, VOR/DME. In this airspace action the segment of V–6 between the intersection of the Chicago Heights, IL, VORTAC 358° and Gipper, MI, VORTAC 271° radials (NILES Fix), and the Gipper, MI, VORTAC was included in the description in error.

This action corrects this error by removing the segment of V–6 between the intersection of the Chicago Heights, IL, VORTAC 358° and Gipper, MI, VORTAC 271° radials (NILES Fix), and the Gipper, MI, VORTAC from the airway description. No other portion of the airway is affected by this rule.

### Correction to Final Rule

■ Accordingly, pursuant to the authority delegated to me, in Docket No. FAA–2023–0501, as published in the **Federal Register** of May 15, 2023 (88 FR 30896), FR Doc. 2023–10280, on page 30897, in the second and third columns, the airway route description for V–6 is corrected to read as follows:

**V–6 [Corrected]**

From Oakland, CA; INT Oakland 039° and Sacramento, CA, 212° radials; Sacramento; Palisades, CA; Mustang, NV; Lovelock, NV; Battle Mountain, NV; INT Battle Mountain 062° and Wells, NV, 256° radials; Wells; 5

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

Issued in Washington, DC, on June 27, 2023.

**Brian Konie,**

*Acting Manager, Rules and Regulations Group.*

[FR Doc. 2023–13967 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### 15 CFR Part 713

**[Docket No. 230502–0117]**

**RIN 0694–AI54**

## Chemical Weapons Convention Regulations: Reducing the Concentration Level Above Which Mixtures Containing Schedule 2A Chemicals Are Subject to Declaration and Reporting Requirements

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Industry and Security (BIS) is publishing this final rule to amend the Chemical Weapons Convention Regulations (CWCR) to reduce the concentration threshold level above which mixtures containing a Schedule 2A chemical are subject to the declaration requirements that apply to Schedule 2A chemical production, processing and consumption under the Chemical Weapons Convention (CWC). This final rule also amends the CWCR to reduce the concentration threshold level above which mixtures containing a Schedule 2A chemical are subject to the declaration and reporting requirements that apply to exports and imports of Schedule 2A chemicals under the CWC. These regulatory amendments bring the CWCR into further alignment with guidelines adopted by the Organization for the Prohibition of Chemical Weapons (OPCW) Conference of the States Parties (CSP), which established a low concentration limit for Schedule 2A chemicals.

**DATES:** This rule is effective July 3, 2023.

**FOR FURTHER INFORMATION CONTACT:** For questions on the CWCR requirements that apply to Schedule 2 chemicals (which include Schedule 2A ''Toxic Chemicals'' and Schedule 2B ''Precursors''), contact Erica Sunyog, Treaty Compliance Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482–6237.

**SUPPLEMENTARY INFORMATION:**

### Background

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (also known as the Chemical Weapons Convention and, hereinafter, ''CWC'' or ''Convention''), which entered into force on April 29, 1997, is an international arms control treaty that aims to eliminate an entire category of weapons of mass destruction by prohibiting the development, production, acquisition, stockpiling, retention, transfer or use of chemical weapons by States Parties (*i.e.,* the countries that have ratified or acceded to the CWC). Under the CWC, States Parties have agreed to destroy any stockpiles of chemical weapons that they may hold, any chemical weapons production facilities that they own or possess, and any chemical weapons that they abandoned on the territory of other States Parties. The CWC established the OPCW to achieve the object and purpose of the Convention, to ensure the implementation of its provisions (including those pertaining to international verification of compliance), and to provide a forum for consultation and cooperation among the CWC States Parties. All CWC States Parties are members of the OPCW.

Under the CWC, States Parties have agreed to implement a comprehensive data declaration, notification, and inspection regime to provide transparency and to verify that relevant facilities are not engaged in activities prohibited under the CWC. Article VI of the CWC and the CWC's Verification Annex set out declaration, notification, and inspection requirements for three categories of scheduled chemicals (Schedule 1, Schedule 2, and Schedule 3 chemicals) and for unscheduled discrete organic chemicals (*i.e.,* carbon compounds other than oxides, sulfides, and metal carbonates that are not listed in Schedule 1, Schedule 2, or Schedule 3) when produced, processed, or consumed in excess of certain thresholds. The Verification Requirements for Schedule 2 (including Schedule 2A) chemicals are specified in Part VII of the Verification Annex (''Schedule 2 Regime'').

The CWC's Annex on Chemicals identifies the criteria for listing chemicals in Schedule 1, Schedule 2, or Schedule 3, and lists the specific chemicals included on each Schedule. There are three Schedule 2A chemicals listed in the Annex on Chemicals:

(1) Amiton: 0,0-Diethyl S-[2-(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts (78–53–5);

(2) PFIB: 1,1,3,3,3-Pentafluoro-2-(trifluoromethyl)-1-propene (382–21–8); and

(3) BZ: 3-Quinuclidinyl benzilate (6581–06–2).

As stated in the guidelines pertaining to Schedule 2 chemicals that are set forth in the CWC's Annex on Chemicals, the inclusion of these three chemicals on Schedule 2A reflects a determination by the CWC States Parties that these chemicals pose ''a significant risk to the object and purpose of the Convention'' due to their ''lethal or incapacitating toxicity'' and that they are ''not produced in large commercial quantities for purposes not prohibited'' under the CWC. Two of the three chemicals (Amiton and BZ) are defense articles subject to the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130), which include registration, recordkeeping, and export and reexport licensing requirements that are administered by the Department of State. The third chemical (PFIB) is a waste product from the production of fluoromonomers, which are unscheduled discrete organic chemicals under the CWC. PFIB (including mixtures with concentrations well under 10%) is specified on the Commerce Control List (CCL), supp. no. 1 to part 774 of the Export Administration Regulations (EAR) and thereby subject to export license requirements administered by BIS. According to export data collected by BIS, exports of PFIB are minimal.

The provisions of the CWC that affect commercial activities involving scheduled chemicals are implemented, pursuant to the Chemical Weapons Convention Implementation Act of 1998 (CWCIA) (22 U.S.C. 6701 *et seq.*) and Executive Order 13128 (64 FR 34703, June 28, 1999), by the CWCR (15 CFR parts 710–722) and the EAR (15 CFR 742.18 and part 745). BIS administers both the CWCR and the EAR. BIS maintains the list of Schedule 2A chemicals in the CWCR (supplement no. 1 to part 713) and the EAR (supplement no. 1 to part 745). BIS also administers

the declaration, reporting, notification, and verification requirements, including those for Schedule 2A chemicals, that are described in parts 713 and 716 of the CWCR.

The Regime for Schedule 2 Chemicals and Facilities Related to such Chemicals (CWC Verification Annex, Part VII), provides in paragraph 5 that declarations ''are generally not required for mixtures containing a low concentration of a Schedule 2 chemical'' and are only required in accordance with guidelines approved by the Conference of the States Parties to the Convention ''in cases where the ease of recovery from the mixture of the Schedule 2 chemical and its total weight are deemed to pose a risk to the object and purpose of [the] Convention.'' Prior to the approval of such guidelines, the CWCIA was enacted (in October 1998) and the CWCR were implemented (on December 30, 1999). The CWCIA prohibits the imposition of routine inspection or reporting requirements pertaining to mixtures containing a Schedule 2 chemical if the concentration of the Schedule 2 chemical in the mixture is less than 10 percent (see 22 U.S.C. Chapter 75, section 6742(a)(1)). Prior to the issuance of this rule, the CWCR required that the calculation of the quantity of any single Schedule 2 chemical that was produced, processed, or consumed also include the quantities produced, processed or consumed in mixtures when the concentration of the Schedule 2 chemical in the mixture was 30% or more by volume or by weight, whichever yielded the lesser percentage (15 CFR 713.2(a)(3)).

Nearly ten years following the enactment of the CWCIA, at the Fourteenth Session of the CSP (November 30–December 4, 2009), the States Parties adopted guidelines regarding low-concentration limits, detailed in document ''Decision C–14/DEC.4'' (''OPCW Guidelines''), for Schedule 2A chemicals. These guidelines provide that declarations are not required under Part VII of the Verification Annex for a chemical mixture containing a Schedule 2A chemical, if the concentration of the Schedule 2A chemical in the mixture is:

(1) 1% or less; or

(2) More than 1%, but less than or equal to 10%, provided that the annual amount of the Schedule 2A chemical produced, processed or consumed is less than the relevant verification threshold, which is ten times the relevant declaration threshold.

This final rule accordingly amends part 713 of the CWCR by reducing the concentration threshold level above which mixtures containing a Schedule 2A chemical are counted toward the declaration and reporting requirements described in the CWCR. This change makes the Schedule 2A mixture concentration threshold consistent with the OPCW Guidelines, subject to the constraint imposed by the 10% low concentration threshold limit allowed under the CWCIA. Specifically, this final rule amends the CWCR to replace the previous low concentration threshold for mixtures containing a Schedule 2A chemical (*i.e.,* a concentration of 30% or more, by volume or weight) with a low concentration threshold of 10% or more. This rule modifies only the declaration requirements under the CWCR for mixtures containing Schedule 2A chemicals; it does not modify the declaration requirements for any other chemicals or any requirements applicable to the three Schedule 2A chemicals under either the EAR or ITAR.

*Amendments to Section 713.2 of the CWCR—Annual Declaration Requirements for Plant Sites That Produce, Process or Consume Schedule 2 Chemicals in Excess of Specified Thresholds*

Section 713.2 of the CWCR requires submission of a declaration from a plant site if one or more plants at that site produced, processed or consumed a Schedule 2 chemical during any of the three previous calendar years, or anticipate doing so in the next calendar year, in excess of the declaration threshold (*i.e.,* the quantity specified for that Schedule 2 chemical in § 713.2(a)(1)(i)(A)(*1*) through (*3*) of the CWCR). Since the low concentration threshold for Schedule 2A chemicals now differs from the low concentration threshold for Schedule 2B chemicals, this rule revises the text of the current § 713.2(a)(3)(i) and adds paragraphs (a)(3)(i)(A), specific to Schedule 2A chemicals, and (a)(3)(i)(B), specific to Schedule 2B chemicals. Section 713.2(a)(3)(i)(A) reduces the low concentration threshold for the declaration requirements that apply to mixtures containing a Schedule 2A chemical from a concentration of 30% or more of the Schedule 2A chemical by volume or weight, whichever formula yields the lesser percentage, to a concentration of 10% or more of the Schedule 2A chemical by volume or weight, whichever yields the lesser percentage. To distinguish the low concentration threshold for Schedule 2B chemicals, which remains unchanged, from the new low concentration threshold for Schedule 2A chemicals, the low concentration threshold for the declaration requirements that apply to the production, processing or consumption of mixtures containing a Schedule 2B chemical is separately described in § 713.2(a)(3)(i)(B) of the CWCR and remains at a concentration of 30% or more by volume or weight, whichever formula yields the lesser percentage.

This rule also makes conforming changes to § 713.2(a)(3)(ii) and (iii) of the CWCR to reflect the change described above in the low concentration threshold for mixtures containing Schedule 2A chemicals. In addition, this rule adds Notes 1 through 4 to § 713.2(a)(3). Notes 1 and 2 provide examples of how to determine declaration and reporting requirements for mixtures containing a Schedule 2A chemical. Notes 3 and 4 contain updated versions of examples that were previously included in § 713.2(a)(3)(iii). These examples are included as Notes because their purpose is to clarify the application of the regulatory requirements described in § 713.2(a)(3).

*Amendments to Section 713.3 of the CWCR—Annual Declaration and Reporting Requirements for Exports and Imports of Schedule 2 Chemicals*

Section 713.3 of the CWCR requires the submission of declarations and/or reports of exports and imports of Schedule 2 chemicals from declared plant sites, undeclared plant sites, and trading companies, along with any other persons subject to the CWCR, if such entities or persons exported or imported a Schedule 2 chemical in a quantity above the applicable threshold level, including amounts in mixtures above the specified low concentration level. Since the low concentration threshold for Schedule 2A chemicals now differs from the low concentration threshold for Schedule 2B chemicals, this rule revises the text of the current § 713.3(b)(2) and adds paragraphs (b)(2)(i)(A), specific to Schedule 2A chemicals, and (b)(2)(i)(B), specific to Schedule 2B chemicals. Section 713.3(b)(2)(i)(A) reduces the low concentration threshold for the declaration and reporting requirements that apply to exports and imports of mixtures containing a Schedule 2A chemical from a concentration of 30% or more of the Schedule 2A chemical by volume or weight, whichever formula yields the lesser percentage, to a concentration of 10% or more of the Schedule 2A chemical by volume or weight, whichever formula yields the lesser percentage. To distinguish the low concentration threshold for Schedule 2B chemicals, which remains

unchanged, from the new low concentration threshold for Schedule 2A chemicals, the low concentration threshold for the declaration and reporting requirements that apply to exports and imports of mixtures containing a Schedule 2B chemical is separately described in § 713.3(b)(2)(i)(B) of the CWCR and remains at a concentration of 30% or more by volume or weight, whichever formula yields the lesser percentage.

This final rule revises Notes 1 and 2 to § 713.3(b)(2) and, consistent with the amendments described OPCW guidelines, adds § 713.3(b)(2)(ii) and (iii) to include, respectively, the information that was previously contained in these two notes. As revised, the notes provide examples of how to determine declaration and reporting requirements for exports and imports of mixtures containing a Schedule 2A chemical. New § 713.3(b)(2)(ii) clarifies how to count the amount of a Schedule 2 chemical in a mixture (*i.e.,* the quantity of each Schedule 2A or Schedule 2B chemical in a mixture must be counted, separately; however, the total weight of the mixture must not be counted). New § 713.3(b)(2)(iii) includes a general reference to the low concentration threshold levels that are now described in § 713.3(b)(2)(i). It also clarifies that the Schedule 2A and Schedule 2B low concentration thresholds set forth in § 713.3(b)(2)(i) apply only for declaration and reporting purposes under the CWCR and not for other purposes (*e.g.,* determining whether the export of a mixture requires an End-Use Certificate or a license per the relevant provisions in the EAR or the ITAR).

**Rulemaking Requirements**

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including: potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits and of reducing costs, harmonizing rules and promoting flexibility. This final rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. Although this rule amends the CWCR to reduce the low concentration threshold for mixtures containing Schedule 2A chemicals for purposes of the applicable declaration and reporting requirements and, in so doing, indirectly affects the burden imposed by certain Schedule 2A chemical requirements in the EAR, BIS believes that the overall increases in burdens associated with the following information collections will be minimal:

- OMB control number 0694–0091 (Chemical Weapons Convention Declaration and Report Handbook and Forms & Chemical Weapons Convention Regulations (CWCR))—this collection includes all Schedule 1, Schedule 2, Schedule 3, and unscheduled discrete organic chemical CWCR declarations, reports, notifications, and on-site inspections of chemical facilities and carries a total burden estimate of 15,815, of which an estimated 762 hours pertain to the Schedule 2 (*i.e.,* both Schedule 2A and Schedule 2B) declaration regime and 12,117 pertain to inspections across all (*i.e.,* Schedule 1, Schedule 2, Schedule 3, and unscheduled discrete organic chemical) facilities;
- OMB control number 0694–0117 (Chemical Weapons Convention Provisions of the Export Administration Regulations (EAR))—this collection includes Schedule 1 chemical advance notifications and annual reports, Schedule 3 chemical End-Use Certificates, and exports of ''technology'' to produce certain Schedule 2 and Schedule 3 chemicals and carries a total burden estimate of 53 hours.

BIS does not expect the burden hours associated with these collections to change. This rule changes the declaration requirements only for mixtures containing between 10 and 30 percent of three chemicals with extremely limited commercial applications. Two of the three chemicals at issue (*i.e.,* the chemical Amiton: 0,0 Diethyl S-[2-(diethylamino) ethyl] phosphorothiolate and corresponding alkylated or protonated salts and the chemical BZ: 3- Quinuclidinyl benzilate) are defense articles subject to the export licensing jurisdiction of the Department of State under the ITAR. Manufacturers, exporters, and temporary importers of these items are therefore required to register under the ITAR (22 CFR122.1) and are subject to recordkeeping obligations under the ITAR including maintenance of records concerning the manufacture, acquisition, and disposition of defense articles (22 CFR 122.5). This final rule does not impose a significant additional burden on companies that produce or export Amiton and BZ because the companies are already required to maintain sufficient records to comply with their recordkeeping obligations under ITAR. The third chemical (the chemical PFIB: 1,1,3,3,3-Pentafluoro-2(trifluoromethyl)- 1-propene) is a byproduct of fluoromonomer production. Producers of fluoromonomers are already subject to the CWC declaration and inspection requirements for unscheduled discrete organic chemicals, which include regular, thorough site inspections under the procedures set out in Part IX of the Verification Annex to the CWC and implemented in part 715 of the CWCR. Consequently, BIS anticipates that this rule will impose few, if any, new reporting obligations on any U.S. company. These changes to the burden hours are within the bounds of the existing estimates.

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

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

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) (APA), requiring notice of proposed rulemaking, the opportunity for public participation and a delay in effective date, are waived for good cause as unnecessary and contrary to the public interest (see 5 U.S.C. 553(b)(B)). A delay of this rulemaking to provide an opportunity for public comment is unnecessary because this rule implements, to the extent permitted by the CWCIA, a treaty obligation. Specifically, paragraph 5 of Part VII of the CWC Verification Annex provides for declarations to be provided in accordance with guidelines adopted by the CSP regarding low-concentration mixtures of Schedule 2 chemicals. CSP Decision C–14/DEC.4 adopted such guidelines, which provide a low concentration limit of 1% for Schedule 2A chemicals, or 10% provided that the annual amount produced of the Schedule 2A chemical does not exceed certain specified thresholds. The decision adopting the guidelines further called for the States Parties, in accordance with their domestic legal

processes, to implement the guidelines as soon as practicable.

Similarly, a delay of this rulemaking to provide notice and opportunity for public comment would be contrary to the public interest, as would a 30-day delay in effective date. In light of U.S. obligations under the CWC, this rule serves the public interest by implementing without further delay the OPCW guidelines under U.S. domestic law.

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by the APA or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

**List of Subjects**

*15 CFR Part 713*

Chemicals, Exports, Foreign trade, Imports, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, part 713 of the Chemical Weapons Convention Regulations (15 CFR parts 710–722) is amended as follows:

## PART 713—ACTIVITIES INVOLVING SCHEDULE 2 CHEMICALS

■ 1. The authority citation for 15 CFR part 713 continues to read as follows:

**Authority:** 22 U.S.C. 6701 *et seq.;* 50 U.S.C. 1601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950, as amended by E.O. 13094, 63 FR 40803, 3 CFR, 1998 Comp., p. 200; E.O. 13128, 64 FR 36703, 3 CFR 1999 Comp., p. 199.

■ 2. Amend § 713.2 by revising paragraph (a)(3) to read as follows:

**§ 713.2 Annual declaration requirements for plant sites that produce, process or consume Schedule 2 chemicals in excess of specified thresholds.**

(a) * * *

(3) *Mixtures containing a Schedule 2 chemical*—(i) *Mixtures that must be counted.* When determining the total quantity of a Schedule 2 chemical produced, processed or consumed at a plant on your plant site, you must count the quantity of each Schedule 2 chemical in a mixture, in the following circumstances:

(A) *Schedule 2A chemicals in mixtures.* The concentration of each Schedule 2A chemical in the mixture is 10% or more by volume or weight, whichever yields the lesser percentage;

(B) *Schedule 2B chemicals in mixtures.* The concentration of each Schedule 2B chemical in the mixture is 30% or more by volume or weight, whichever yields the lesser percentage.

(ii) *How to count the quantity of each Schedule 2 chemical in a mixture.* You must count, separately, the quantity of each Schedule 2A or Schedule 2B chemical in a mixture when determining the total quantity of a Schedule 2 chemical produced, processed or consumed at a plant on your plant site. Do not count the total weight of a mixture.

(iii) *Determining declaration requirements for production, processing and consumption.* If the total quantity of a Schedule 2 chemical produced, processed or consumed at a plant on your plant site, including mixtures that contain 10% or more concentration of a Schedule 2A chemical or 30% or more concentration of a Schedule 2B chemical, exceeds the applicable declaration threshold set forth in paragraphs (a)(1)(i)(A)(*1*) through (*3*) of this section, you have a declaration requirement and must separately declare each Schedule 2A or Schedule 2B chemical.

**Note 1 to § 713.2(a)(3)—Example:** If, during the past calendar year, a plant on your plant site produced, processed, or consumed a mixture containing 130 kilograms of PFIB with a concentration of 12%, the total amount of PFIB produced, processed, or consumed at that plant for CWCR purposes would be 130 kilograms, which exceeds the declaration threshold of 100 kilograms for that Schedule 2A chemical. Consequently, you must declare 130 kilograms of production, processing, or consumption of PFIB at that plant site during the past calendar year.

**Note 2 to § 713.2(a)(3)—Example:** If, during the past calendar year, a plant on your plant site produced, processed, or consumed a mixture containing 130 kilograms of PFIB with a concentration of 8%, the total amount of PFIB produced, processed, or consumed at that plant for CWCR purposes would be 0 kilograms, which would not trigger a declaration requirement. This outcome is based on the fact that the concentration of PFIB in the mixture is less than 10% and, for CWCR purposes would not have to be ''counted.''

**Note 3 to § 713.2(a)(3)—Example:** If, during the past calendar year, a plant on your plant site produced a mixture containing 300 kilograms of thiodiglycol with a concentration of 32% and also produced 800 kilograms of pure thiodiglycol, the total amount of thiodiglycol produced at that plant for CWCR purposes would be 1,100 kilograms, which exceeds the declaration threshold of 1 metric ton for that Schedule 2B chemical. Consequently, you must declare production of thiodiglycol at that plant site during the past calendar year.

**Note 4 to § 713.2(a)(3)—Example:** If, during the past calendar year, a plant on your plant site processed a mixture containing 300 kilograms of thiodiglycol with a concentration of 25% and also processed 800 kilograms of pure thiodiglycol, the total amount of thiodiglycol processed at that plant for CWCR purposes would be 800 kilograms and would not trigger a declaration requirement. This outcome is based on the fact that the concentration of thiodiglycol in the mixture is less than 30% and, therefore, would not have to be ''counted'' and added to the 800 kilograms of pure thiodiglycol processed at that plant during the past calendar year.

* * * * *

■ 3. Amend § 713.3 by revising paragraph (b)(2) to read as follows:

**§ 713.3 Annual declaration and reporting requirements for exports and imports of Schedule 2 chemicals.**

* * * * *

(b) * * *

(2) *Mixtures containing a Schedule 2 chemical*—(i) *Mixtures that must be counted.* The quantity of each Schedule 2 chemical contained in a mixture must be counted for the declaration or reporting of an export or import, in the following circumstances:

(A) *Schedule 2A chemicals in mixtures.* The concentration of each Schedule 2A chemical in the mixture is 10% or more by volume or weight, whichever yields the lesser percentage;

(B) *Schedule 2B chemicals in mixtures.* The concentration of each Schedule 2B chemical in the mixture is 30% or more by volume or weight, whichever yields the lesser percentage.

(ii) *How to count the quantity of each Schedule 2 chemical in a mixture.* You must count, separately, the quantity of each Schedule 2A or Schedule 2B chemical in a mixture when determining the total quantity of a Schedule 2 chemical that was exported from or imported to a declared plant site, or individually exported or imported, above the applicable threshold set forth in paragraphs (b)(1)(i) through (iii) of this section. Do not count the total weight of a mixture.

(iii) *Mixture concentration thresholds apply only for declaration and reporting purposes.* The concentration thresholds for Schedule 2A and Schedule 2B chemical mixtures set forth in paragraph (b)(2)(i) of this section apply only for the declaration and reporting purposes described in the CWCR. These thresholds do not apply for purposes of determining whether the export of your mixture to a non-State Party requires an End-Use Certificate. Nor do they apply for purposes of determining whether you need to obtain an export license from BIS (see § 742.2, § 742.18 and

§ 745.2 of the Export Administration Regulations (15 CFR parts 730 through 774)) or from the Department of State (see the International Traffic in Arms Regulations (22 CFR parts 120 through 130)).

**Note 1 to § 713.3(b)(2)—Example:** If, during the past calendar year, your plant site exported or imported a mixture containing 3 kilograms of Amiton with a concentration of 12%, the total amount of Amiton exported or imported for CWCR purposes is 3 kilograms, which exceeds the declaration threshold of 1 kilogram for that Schedule 2A chemical. Consequently, you must declare 3 kilograms of export or import at that plant site during the past calendar year.

**Note 2 to § 713.2(b)(2)—Example:** If, during the past calendar year, your plant site exported or imported a mixture containing 3 kilograms of Amiton with a concentration of 8%, the total amount of Amiton exported or imported for CWCR purposes would be 0 kilograms and would not trigger a declaration requirement. This outcome is based on the fact that the concentration of Amiton in the mixture is less than 10% and, therefore, would not have to be ''counted.''

* * * * *

**Matthew S. Borman,**

*Deputy Assistant Secretary for Export Administration.*

[FR Doc. 2023–13736 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket No. USCG–2023–0552]**

## Safety Zones in Reentry Sites; Jacksonville, Daytona, and Canaveral, Florida

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notification of enforcement of regulation.

**SUMMARY:** The Coast Guard is activating three safety zones for the Commercial Resupply Services (CRS–28) mission reentry, vehicle splashdown, and recovery operations. These operations will occur in the U.S. Exclusive Economic Zone (EEZ). Our regulation for safety zones in reentry sites within the Seventh Coast Guard District identifies the regulated areas for this event. No U.S.-flagged vessel may enter the safety zones unless authorized by the Captain of the Port Jacksonville or a designated representative. Foreign-flagged vessels are encouraged to remain outside the safety zones.

**DATES:** The regulations in 33 CFR 165.T07–0806 will be enforced for the safety zones identified in the **SUPPLEMENTARY INFORMATION** section below for the dates and times specified.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this notification of enforcement, call or email Lieutenant Griffin Terpstra, Sector Jacksonville, Waterways Division, U.S. Coast Guard; telephone 904–714–7616, email *Griffin.D.Terpstra@uscg.mil.*

**SUPPLEMENTARY INFORMATION:** With this document, the Coast Guard Captain of the Port (COTP) Jacksonville is activating a portion of the safety zone as listed in 33 CFR 165.T07–0806(a)(1), and the safety zones listed in (a)(2) and (a)(3) on June 30, 2023 through July 4, 2023, for the CRS–28 Commercial Crew mission reentry vehicle splashdown, and the associated recovery operations in the U.S. EEZ. These safety zones are located within the COTP Jacksonville Area of Responsibility (AOR) offshore of Jacksonville, Daytona, and Cape Canaveral, Florida. The Coast Guard is activating these safety zones in order to protect vessels and waterway users from the potential hazards created by reentry vehicle splashdowns and recovery operations. In accordance with the general regulations in 33 CFR part 165, subpart C, no U.S.-flagged vessel may enter the safety zones unless authorized by the COTP Jacksonville or a designated representative except as provided in § 165.T07–0806(d)(3). All foreign-flagged vessels are encouraged to remain outside the safety zones.

There are two other safety zones listed in § 165.T07–0806(a)(4) and (a)(5), which are located within the COTP St. Petersburg AOR, in addition to a portion of zone listed in (a)(1) that is located in the COTP Savannah AOR, that are being simultaneously activated through a separate notifications of enforcement of the regulation document issued under Docket Numbers USCG–2023–0551, and USCG–2023–0553.[1]

Twenty-four hours prior to the CRS–28 recovery operations, the COTP Jacksonville, the COTP Savannah, the COTP St. Petersburg, or designated representative will inform the public that whether any of the five safety zones described in § 165.T07–0806, paragraph (a), will remain activated (subject to enforcement). If one of the safety zones described in § 165.T07–0806, paragraph (a), remains activated it will be enforced for four hours prior to the CRS–28 splashdown and remain activated until announced by Broadcast Notice to Mariners on VHF–FM channel 16, and/or Marine Safety Information Bulletin (as appropriate) that the safety zone is no longer subject to enforcement. After the CRS–28 reentry vehicle splashdown, the COTP or a designated representative will grant general permission to come no closer than 3 nautical miles of any reentry vehicle or space support vessel engaged in the recovery operations, within the activated safety zone described in § 165.T07–0806, paragraph (a). Once the reentry vehicle, and any personnel involved in reentry service, are removed from the water and secured onboard a space support vessel, the COTP or designated representative will issue a Broadcast Notice to Mariners on VHF–FM channel 16 announcing the activated safety zone is no longer subject to enforcement. The recovery operations are expected to last approximately one hour.

The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

Dated: June 29, 2023.

**Janet Espino-Young,**

*Captain, U.S. Coast Guard, Captain of the Port Jacksonville.*

[FR Doc. 2023–14156 Filed 6–30–23; 8:45 am]

**BILLING CODE 9110–04–P**

[1] These notifications of enforcement of the regulation can be found at: *https://regulations.gov* by searching for docket number USCG–2023–0551, and USCG–2023–0553.

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket Number USCG–2023–0544]**

**RIN 1625–AA00**

## Safety Zone; Corpus Christi Bay, Corpus Christi, TX

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for certain navigable waters in the Corpus Christi Bay. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by a fireworks display launched from a barge in the Corpus Christi Bay in Corpus Christi, Texas. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Corpus Christi or a designated representative.

**DATES:** This rule is effective from 9 p.m. through 10 p.m. on July 4, 2023.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0544 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Lieutenant Commander Anthony Garofalo, Sector Corpus Christi Waterways Management Division, U.S. Coast Guard; telephone 361–939–5130, email *CCWaterways@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

## I. Table of Abbreviations

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

## II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. We must establish this safety zone immediately to protect personnel, vessels, and the marine environment from potential hazards created by the fireworks display and lack sufficient time to provide a reasonable comment period and then to consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with fireworks launched from a barge in the Corpus Christi Bay.

## III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port, Sector Corpus Christi (COTP) has determined that potential hazards associated with the fireworks display, occurring from 9 p.m. through 10 p.m. on July 4, 2023, will be a safety concern for anyone within the waters of the Corpus Christi Bay area within a 1000 foot radius from the following point; 27°47′34.39″ N, 97°23′6.77″ W. The purpose of this rule is to ensure the safety of vessels and persons on these navigable waters in the safety zone while the display of the fireworks takes place in the Corpus Christi Bay.

## IV. Discussion of the Rule

This rule establishes a temporary safety zone on the night of July 1st, 2023. The safety zone will encompass certain navigable waters of the Corpus Christi Bay and is defined by a 1000 foot radius around the launching platform. The regulated area encompasses a 1000 foot radius from the following point; 27°47′34.39″ N, 97°23′6.77″ W. The fireworks display will take place in the waters of the Corpus Christi Bay. No vessel or person is permitted to enter the temporary safety zone during the effective period without obtaining permission from the COTP or a designated representative, who may be contacted on Channel 16 VHF–FM (156.8 MHz) or by telephone at 361–939–0450. The Coast Guard will issue Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety Marine Information Broadcasts, as appropriate.

## V. Regulatory Analyses

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

### *A. Regulatory Planning and Review*

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

This regulatory action determination is based on the size, location, and duration of the safety zone. The temporary safety zone will be enforced for the short period of one hour, on the night of July 4, 2023. The zone is limited to a 1000 foot radius from the launching position of in the navigable waters of the Corpus Christi Bay. The rule does not completely restrict the traffic within a waterway and allows mariners to request permission to enter the zone.

### *B. Impact on Small Entities*

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

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

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

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

### *C. Collection of Information*

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

*D. Federalism and Indian Tribal Governments*

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

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

*E. Unfunded Mandates Reform Act*

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

*F. Environment*

We have analyzed this rule under Department of Homeland Security Directive 023–01, and Environmental Planning, COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f) and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishment of a temporary safety zone for navigable waters of the Corpus Christi Bay in a zone defined by a 1000 foot radius from the following coordinate: 27°47′34.39″ N, 97°23′6.77″ W. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by fireworks display in the waters of the Corpus Christi Bay. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

*G. Protest Activities*

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

**List of Subjects in 33 CFR Part 165**

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

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

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

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

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

■ 2. Add § 165.T08–0544 to read as follows:

**§ 165.T08–0544 Safety Zone; Corpus Christi Bay, Corpus Christi, TX.**

(a) *Location.* The following area is a safety zone: all navigable waters of the Corpus Christi Bay encompassed by a 1000 foot radius from the following point; 27°47′34.39″ N, 97°23′6.77″ W.

(b) *Enforcement period.* This section is subject to enforcement from 9:00 p.m. through 10:00 p.m. on July 4, 2023.

(c) *Regulations.* (1) According to the general regulations in § 165.23 of this part, entry into this temporary safety zone is prohibited unless authorized by the Captain of the Port Sector Corpus Christi (COTP) or a designated representative. They may be contacted on Channel 16 VHF–FM (156.8 MHz) or by telephone at 361–939–0450.

(2) If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

(d) *Information broadcasts.* The COTP or a designated representative will inform the public of the enforcement times and date for this safety zone through Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety Marine Information Broadcasts as appropriate.

Dated: June 27, 2023.

**J.B. Gunning,**

*Captain, U.S. Coast Guard, Captain of the Port Sector Corpus Christi.*

[FR Doc. 2023–14079 Filed 6–30–23; 8:45 am]

**BILLING CODE 9110–04–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R09–OAR–2022–0427; FRL–10165–02–R9]**

## Air Plan Approval and Limited Approval-Limited Disapproval; California; Antelope Valley Air Quality Management District; Stationary Source Permits; New Source Review

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is finalizing an approval and a limited approval and limited disapproval of revisions to the Antelope Valley Air Quality Management District (AVAQMD or ''District'') portion of the California State Implementation Plan (SIP). These revisions concern the District's New Source Review (NSR) permitting program for new and modified sources of air pollution under part D of title I of the Clean Air Act (CAA or ''Act''). This action updates the District's portion of the California SIP with nine revised rules. Under the authority of the CAA, this action simultaneously approves local rules that regulate emission sources and directs the District to correct rule deficiencies.

**DATES:** This rule is effective August 2, 2023.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R09–OAR–2022–0427. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form.

Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Shaheerah Kelly, Rules Office (AIR–3–2), U.S. Environmental Protection Agency, Region IX, (415) 947–4156, *kelly.shaheerah@epa.gov.*

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

**Table of Contents**



## I. Proposed Action

On January 30, 2023 (88 FR 5826), the EPA proposed approval of three rules and a limited approval and limited disapproval of six rules that were submitted for incorporation into the California SIP. Table 1 shows the rules in the California SIP that will be removed or superseded by this action.

TABLE 1—SIP RULES TO BE REMOVED OR SUPERSEDED

| Rule | Rule title | Amendment or adoption date | Submittal date | EPA action date | FR citation |
|---|---|---|---|---|---|
| **Regulation II (Permits)** | | | | | |
| Rule 206 | Posting of Permit to Operate | 2/21/1976 | 4/21/1976 | 11/9/1978 | 43 FR 52237. |
| Rule 219 | Equipment Not Requiring a Written Permit Pursuant to Regulation II. | 9/4/1981 | 10/23/1981 | 7/6/1982 | 47 FR 29231. |
| **Regulation XIII (New Source Review)** | | | | | |
| Rule 1301 | General | 12/7/1995 | 8/28/1996 | 12/4/1996 | 61 FR 64291. |
| Rule 1302 | Definitions | 12/7/1995 | 8/28/1996 | 12/4/1996 | 61 FR 64291. |
| Rule 1303 | Requirements | 5/10/1996 | 8/28/1996 | 12/4/1996 | 61 FR 64291. |
| Rule 1304 | Exemptions | 6/14/1996 | 8/28/1996 | 12/4/1996 | 61 FR 64291. |
| Rule 1306 | Emission Calculations | 6/14/1996 | 8/28/1996 | 12/4/1996 | 61 FR 64291. |
| Rule 1309 | Emission Reduction Credits | 12/7/1995 | 8/28/1996 | 12/4/1996 | 61 FR 64291. |
| Rule 1309.1 | Priority Reserve | 12/7/1995 | 8/28/1996 | 12/4/1996 | 61 FR 64291. |
| Rule 1310 | Analysis and Reporting | 12/7/1995 | 8/28/1996 | 12/4/1996 | 61 FR 64291. |
| Rule 1311 | Power Plants | 2/25/1980 | 4/3/1980 | 1/21/1981 | 46 FR 5965. |
| Rule 1313 | Permits to Operate | 12/7/1995 | 8/28/1996 | 12/4/1996 | 61 FR 64291. |

Table 2 shows the rules that the State submitted for inclusion in the California SIP. The submitted rules listed in Table 2 would replace the current EPA-approved SIP rules that are listed in Table 1. The rule subsections contained in 1302(C)(5) and 1302(C)(7)(c) are not submitted for inclusion in the California SIP because they are requirements for regulating toxic air contaminants (TAC) and hazardous air pollutants (HAP) under District Rule 1401, ''New Source Review for Toxic Air Contaminants.'' [1]

TABLE 2—SUBMITTED RULES

| Rule | Rule title | Adoption or amendment date | Submittal date [a] |
|---|---|---|---|
| **Regulation II (Permits)** | | | |
| Rule 219 | Equipment not Requiring a Permit | 6/15/2021 | 8/3/2021 |
| **Regulation XIII (New Source Review)** | | | |
| Rule 1300 | New Source Review General | 7/20/2021 | 8/3/2021 |
| Rule 1301 | New Source Review Definitions | 7/20/2021 | 8/3/2021 |
| Rule 1302 (except 1302(C)(5) and 1302(C)(7)(c)). | New Source Review Procedure | 7/20/2021 | 8/3/2021 |
| Rule 1303 | New Source Review Requirements | 7/20/2021 | 8/3/2021 |
| Rule 1304 | New Source Review Emissions Calculations | 7/20/2021 | 8/3/2021 |
| Rule 1305 | New Source Review Emissions Offsets | 7/20/2021 | 8/3/2021 |
| Rule 1306 | New Source Review for Electric Energy Generating Facilities | 7/20/2021 | 8/3/2021 |
| Rule 1309 | Emission Reduction Credit Banking | 7/20/2021 | 8/3/2021 |

[a] The submittal for Rules 219, 1300, 1301, 1302, 1303, 1304, 1305, 1306, and 1309 was transmitted to the EPA via a letter from CARB dated August 3, 2021.

[1] Subsections 1302(C)(5)(d) and 1302(C)(7)(c)(iii) of Rule 1302 specifically state that subsections 1302(C)(5) and 1302(C)(7)(c) are not submitted to the EPA and are not intended to be included as part of the California SIP.

Table 3 shows the previous versions of Rule 219 and other rules under Regulation XIII codified in 40 CFR 52.220 prior to July 1, 1997, that will be superseded by the submitted versions of Rule 219 as amended on June 15, 2021, and Rules 1300 through 1306 and 1309 as amended on July 20, 2021, upon the EPA's approval of these rules into the California SIP. The District was officially formed on July 1, 1997, as the Antelope Valley APCD (AVAPCD), the agency with jurisdiction over the Los Angeles County portion of the Mojave Desert Air Basin; the AVAPCD was changed to the AVAQMD on January 1, 2002. Prior to that time, the jurisdiction of the Antelope Valley area was, at different points in time, part of the Los Angeles County Air Pollution Control District (APCD), the Southern California APCD, and the South Coast AQMD.

TABLE 3—CODIFIED RULES IN 40 CFR 52.220 PRIOR TO JULY 1, 1997

| Rule | Submittal agency | Submittal date | EPA approval date (FR citation) |
|---|---|---|---|
| **Regulation II (Permits)** | | | |
| Rule 11 (Exemptions) | Los Angeles County APCD | 6/30/1972 | 9/22/1972 (37 FR 19812). |
| Rule 219 | Southern California APCD | 4/21/1976 | 11/9/1978 (43 FR 52237). |
| Rule 219 | Southern California APCD | 8/2/1976 | 11/9/1978 (43 FR 52237). |
| Rule 219 | Los Angeles County APCD | 6/6/1977 | 11/9/1978 (43 FR 52237). |
| Rule 219 | South Coast AQMD | 10/23/1981 | 7/6/1982 (47 FR 29231). |
| **Regulation XIII (New Source Review)** | | | |
| Rules 1301, 1303, 1304, 1305, 1306, 1307, 1310, 1311, and 1313. | South Coast AQMD | 4/3/1980 | 1/21/1981 (46 FR 5965). |
| Rules 1302 and 1308 | South Coast AQMD | 8/15/1980 | 1/21/1981 (46 FR 5965). |
| Rules 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1310, 1311, and 1313. | Los Angeles County APCD | 9/5/1980 | 6/9/1982 (47 FR 25013). |
| Rules 1301, 1302, 1309, 1309.1, 1310, and 1313, adopted on 12/7/1995; Rule 1303 adopted on 5/10/1996; and Rules 1304 and 1306 adopted on 6/14/1996. | South Coast AQMD | 8/28/1996 | 12/4/1996 (61 FR 64291). |

In our proposal, we proposed approval of Rules 219, 1300, and 1306 as authorized under section 110(k)(3) of the Act. As authorized in sections 110(k)(3) and 301(a) of the Act,[2] we proposed a limited approval and limited disapproval of Rules 1301, 1302, 1303, 1304, 1305, and 1309 because although they fulfill most of the relevant CAA requirements and strengthen the SIP, they also contain the following deficiencies, summarized below, that do not fully satisfy the relevant requirements for preconstruction review and permitting under section 110 and part D of the Act:

1. Rule 1304(C)(2)(d) allows Simultaneous Emission Reductions (SERs), which are emission reductions that are proposed to occur in conjunction with emission increases from a proposed project, to be calculated using a potential-to-emit (PTE)-to-PTE calculation method rather than an actuals-to-PTE calculation method for determining (1) applicability of NNSR or quantity of offsets required for a new Major Facility or a Major Modification, and (2) the amount of offsets required at a Major Facility or Modified Facility. These SERs are inconsistent with 40 CFR 51.165(a)(1)(vi)(E)(*1*) and 40 CFR 51.165(a)(3)(ii)(J), and, when used as offsets, may not be real reductions in actual emissions as required by 40 CFR 51.165(a)(3)(i) and CAA section 173(c)(1). These deficiencies make portions of Rules 1301, 1302, 1303, 1304, and 1305 not fully approvable.

2. Rule 1304(E)(2), which defines the calculation method for determining Historical Actual Emissions (HAE), contains a typographical error making the provision deficient.

3. Rules 1302(D)(6)(a)(iii), 1304(C)(4)(c), 1309(D)(3)(c), and 1309(E)(6) allow the use of contracts, but neither the District's NSR rules submitted for approval nor any of the District's other SIP-approved NSR rules define the term ''contract'' or provide requirements for how a contract is an enforceable mechanism that may be used in the same way as an ATC or PTO.

4. Rule 1305(C)(6) allows interprecursor trading (IPT) between ozone precursors on a case-by-case basis, which is no longer permissible.

5. The District's rules do not contain the de minimis plan requirements contained in CAA section 182(c)(6) that apply to areas classified as Severe nonattainment.[3]

Our proposal also discussed that this action would result in a more stringent SIP and is consistent with the additional substantive requirements of CAA sections 110(l) and 193, while not relaxing any existing provision contained in the SIP; and will not interfere with any applicable attainment and reasonable further progress requirements; or any other applicable CAA requirement. We also proposed that our action would not relax any pre-November 15, 1990 requirement in the SIP, and therefore changes to the SIP resulting from this proposed action would ensure greater or equivalent emission reductions of ozone and its precursors in the District.

Finally, our proposed action included our proposed determination to approve, under 40 CFR 51.307, the District's visibility provisions for sources subject to the District's nonattainment new source review (NNSR) program. Accordingly, we also proposed to revise 40 CFR 52.281(d) to remove the visibility Federal Implementation Plan

[2] If a portion of a plan revision meets all the applicable CAA requirements, CAA sections 110(k)(3) and 301(a) authorize the EPA to approve the plan revision in part and disapprove the plan revision in part.

[3] CAA Section 182(d), which was added by the Clean Air Act Amendments of 1990, details plan submission requirements for Severe nonattainment areas and includes all the provisions under section 182(c) for Serious nonattainment areas.

(FIP) at 40 CFR 52.28 as it pertains to California to clarify that the FIP does not apply to the District.

The EPA's proposal and technical support document (TSD), which can be found in the docket for this action, contain more a detailed discussion of the rule deficiencies as well as a complete analysis of the District's submitted rules that form the basis for our proposed action.

## II. Public Comments and EPA Responses

The public comment period on the proposal opened on January 30, 2023, the date of its publication in the **Federal Register**, and closed on March 1, 2023. During this period, the EPA received comment letters submitted by the AVAQMD, City of Lancaster, City of Palmdale, U.S. Department of Defense, Northrop Grumman Corporation, and Lockheed Martin Aeronautics Company. These comments are included in the docket for this action and are accessible at *www.regulations.gov.* In this section, we provide a summary of and response to each of these comments.

### *A. Comments From AVAQMD*

*Comment #1:* The District states that portions of the EPA's proposed action are inopportune. The District states that, despite the EPA's extensive involvement in the rule development process for both the District and the Mojave Desert Air Quality Management District (''MDAQMD''), it took over a year from the time of official submission for the EPA to formulate and publish the proposed action. The District states that during this period there was no substantive communication from the EPA regarding potential additional deficiencies that had not been identified during the development phase. The District states that the only communications received from the EPA regarding the District NSR program after the adoption of the rule amendments were requests for copies of the SIP approved versions of various SIP rules and accompanying information, most of which the District had previously provided to the EPA in the rule development process. The District states that the EPA could have communicated trivial deficiencies to the District prior to publishing the proposed action, which would have allowed the District to provide commitments to amend its rules and that such a process would have allowed issues to be narrowed to those that truly require interpretation or judicial review.

*Response to Comment #1:* The EPA does not read this comment as asserting that our proposed action on the submitted rules was legally or technically deficient; rather, we understand the comment to express dissatisfaction with the EPA's communication after CARB's submittal of the revised rules on August 3, 2021.

The EPA values its relationships with state, local, and tribal air agencies and strives to maintain open and transparent communications with them. Prior to our receipt of the District's submittal, the EPA, the District, and CARB committed significant resources to meeting on a bi-weekly basis, from approximately March 2020 to June 2021, for detailed discussions of the NSR program deficiencies we identified in a letter to the District dated December 19, 2019, which applied to both the District and to the MDAQMD.[4] After the conclusion of this process and following CARB's submission of the District's revised rules, the EPA identified a few additional issues not identified in our December 19, 2019 letter. EPA staff are available to continue to work with the District to address questions and concerns with revisions necessary to correct the deficiencies, with the goal of full approval of revisions to the District's rules and a fully approved NSR program.

In addition, we understand the District's reference to ''commitments'' to suggest that the EPA could have proposed a conditional approval under CAA section 110(k)(4) rather than proposing a limited approval and limited disapproval. As authorized under CAA sections 110(k)(3) and 301(a), we are taking action to finalize a limited approval and limited disapproval of the submitted rules that contain the deficient provisions we identified in our proposed action.

*Comments #2 and #2a:* The District states that the EPA's proposed rulemaking does not fully identify its existing NSR program. The District states that Table 1 in the proposed action and Table 2–2 in the accompanying Technical Support Document (TSD) are incomplete because they fail to mention SIP-approved Rules 201, ''Permit to Construct,'' 202, ''Temporary Permit to Operate,'' 203, ''Permit to Operate,'' and 204, ''Permit Conditions.'' The District points out that Rules 201, 202, 203, and 204 are currently in the SIP, and that they should have been listed in the proposed action because they are important for understanding portions of the District's NSR program. The District then requests the EPA to officially acknowledge that Rules 201, 202, 203, and 204 are part of District's NSR Program. The District also asserts that Table 2–2 in the TSD is inaccurate.

*Response to Comments #2 and #2a:* The purpose of Table 1—Current SIP Rules in our proposed action is to present the current SIP-approved versions of the submitted rules that we were proposing to act upon, not to present all the NSR rules in the SIP. To the extent the title for Table 1 created confusion, we apologize. We note that TSD Table 2–2: District's NSR Rules in the Current California SIP includes the four rules identified in the District's comment regarding Table 1 (Rules 201, 202, 203, and 204). The EPA responds below to the District's specific comments regarding TSD Table 2–2 in its responses to District Comments 2b, 2c, and 2d.

*Comment #2b:* The District states that Rules 208, 218, 218.1, 221, and 226 should not be listed in the TSD because they are not part of the District's NSR program and requests that the EPA revise TSD Table 2–2 to remove those rules that are not directly related to NSR.

*Comment #2c:* The District states that Rules 213, 213.1, and 213.2 should not be listed in the TSD because they are not applicable to the current NSR program. The District states that it would appreciate a clarification by the EPA, either in Table 2–2 of the TSD or elsewhere, that Rules 213, 213.1, and 213.2 are not a part of its NSR program because their terms were superseded by the version of Rule 1301 that the EPA approved into the SIP in 1983.

*Response to Comments #2b and #2c:* EPA's proposed action concerns only the rules identified in Table 2—Submitted Rules and Table 3—Rescinded Rules.[5] TSD Table 2–2 was provided primarily for context and background. We note that the District does not assert that the clarifications in its comment letter relate to the submitted rules or to the rules identified for rescission. We do not believe that the District's clarifications relate to the EPA's evaluation of California's requested SIP revisions. Nevertheless, we appreciate the additional

[4] Letter from Lisa Beckham to Brad Poiriez, which the District identifies in footnote 18 of its comment letter. In March 2020, the EPA began holding bi-weekly meetings with the CARB and MDAQMD staff to discuss and resolve issues identified in the letter. In March 2021, we began to focus our efforts on the same issues contained in the AVAQMD rules, which were nearly identical to the MDAQMD's. We continued to meet until June 1, 2021.

[5] The information in Tables 2 and 3 of the **Federal Register** notice for our proposed action is repeated in TSD Table 3–1: AVAQMD's Submitted Rules and TSD Table 3–2: AVAQMD's Rules Requested to be Rescinded.

information in the District's letter, which is included in the docket.

*Comment #2d:* The District states that the TSD does not sufficiently discuss the SIP history and thus perpetuates inaccuracies and inconsistencies. The District states that Table 2–2 in the TSD contains inaccuracies regarding the SIP history of a variety of the listed rules, especially those found in Regulation II. The District then provides an historical overview of air quality regulation in its jurisdiction. The District states that any South Coast Air Quality Management District (SCAQMD) rule actions submitted and approved as of October 15, 1982, became SIP rules for the areas outside of the South Coast Air Basin (the ''non-SCAB portions'') of Los Angeles County on November 18, 1983. The District states that there are four rules in Table 2–2 of the TSD that fall into this category (although it lists six: Rules 202, 206, 207, 213, 213.1, and 213.2). The District states that these rules were approved into the California SIP for SCAQMD in 1978, and that the amended regulations at 40 CFR 52.220(c) do not specify SCAQMD. The District also provides a history of the AVAQMD and amendments and rescissions of rules. The District then requests that the EPA acknowledge the SIP history detailed in Comment 2d and update the TSD for AVAQMD NSR with that information.

*Response to Comment #2d:* Section 2 of the EPA's TSD provides information regarding the formation of the AVAPCD, its current boundaries, air quality and current SIP-approved rules. We provided this information for context and background as relevant to our review, approval, and rescission of the identified rules in our rulemaking action. We appreciate the additional information in the District's letter, which provides an historical overview of its predecessor agencies and SIP-approved rules and is included in the docket.

Although we have noted that TSD Table 2–2 is provided for context and background, and that our action concerns only the rules identified in Tables 2 and 3 of the **Federal Register** notice for our proposed action, we would like to address the District's comment relating to Table 2–2 and Rules 202, 206, 207, 213, 213.1, and 213.2 and its comment that 40 CFR 52.220(c) does not specify SCAQMD. To the extent that the District is asserting that these rules are not part of the District's portion of the SIP and should not be reflected in Table 2–2 of the TSD, the EPA disagrees. The EPA's proposed action incorporating these rules into the SIP states that the rules, which had been adopted by the Southern California Air Pollution Control District (SoCalAPCD), applied to the (at the time) newly created SCAQMD.[6] As the EPA explained in that proposed action, California split the SoCalAPCD into four districts after it submitted the SoCalAPCD rules for SIP inclusion: SCAQMD, Los Angeles County Air Pollution Control District (APCD), Riverside County APCD, and San Bernardino APCD.[7] EPA approved the submittals for Rules 202, 206, 207, 213, 213.1, and 213.2 at 43 FR 52237 (November 9, 1978), although that approval did not apply within Antelope Valley because the desert portion of Los Angeles County had already been split from SCAQMD and the approval of SoCalAPCD rules was to apply only within the new SCAQMD portion of the former SoCalAPCD.[8] However, the SCAQMD portion of the SIP (with certain exceptions) was extended to AVAQMD in 1982 when SCAQMD's jurisdiction was extended to include the Southeast Desert portion of Los Angeles County.[9] Regarding Rule 202, EPA approved two submittals in the rulemaking at 43 FR 52237: Rule 202(a) and (b), adopted on January 9, 1976, and submitted to the EPA on April 21, 1976; and Rule 202(c), which was adopted as an amendment on May 7, 1976, and submitted to the EPA on August 2, 1976. Thus, Rules 202, 206, 207, 213, 213.1, and 213.2 applied to the SCAQMD following EPA approval at 43 FR 52237, and the rules were extended to apply in AVAQMD when the SCAQMD's jurisdiction expanded in 1982. Except for Rule 206, which this rulemaking removes, the rules remain in the District's portion of the California SIP.

*Comment #3:* The District states that the TSD does not completely identify provisions of 40 CFR 52.220(c) that need to be changed. The District states that Section 3.1 of the TSD attempts to identify specific codifications contained in 40 CFR 52.220(c) that need to be changed to properly reflect the condition of the District SIP rules in relation to NSR. The District states that while the EPA identified a number of potential changes to 40 CFR 52.220(c) in TSD Table 3–3, the proposed changes are not complete or comprehensive to update the SIP. The District references a list of CFR citations in Table C of its comment letter, which is titled, ''CFR Citations Which May Require Clarification.'' The District states that the citations presented in Table C may or may not require additional clarifications to appropriately identify the applicable SIP for the referenced rules. The District then requests that the EPA identify all provisions in 40 CFR 52.220(c) and elsewhere that need clarification and list them in an update to the TSD and in the final rulemaking action.

*Response to Comment #3:* The EPA disagrees with the District's characterization of Section 3.1 of the TSD that ''USEPA attempts to identify specific codifications contained in 40 CFR 52.220(c) which need to be changed to properly reflect the condition of the AVAQMD SIP rules in relation to NSR.'' In fact, Section 3.1 of the TSD explains our proposal to act on CARB's specific requests to revise the California SIP in submittals dated October 30, 2001, April 22, 2020, and August 3, 2021. The EPA did not independently identify parts of the SIP that needed to be updated; rather, we proposed to take action according to CARB's requests.[10]

We acknowledge the District's request for the EPA to review Table C of its comment letter (titled, ''CFR Citations Which May Require Clarification'') and independently ''identify all provisions in 40 CFR 52.220(c) and elsewhere which need clarification.'' This request appears to be a request to revise the CFR and, hence, the SIP. A public comment to a proposed rulemaking is not the correct mechanism for requesting a revision to the SIP; such a request must meet the criteria for SIP submittals, including public notice and submittal

[6] 43 FR 52237 (November 9, 1978). The notice explains that the rules that CARB submitted for the SoCalAPCD SIP apply to the SCAQMD: ''On April 21, August 2, and November 19, 1976 the State of California submitted to the Regional Administrator, Region IX, revisions of the Southern California Air Pollution Control District . . . regulations. On February 1, 1977 the State split the Southern California Air Pollution Control District into the South Coast Air Quality Management District in the western region and three separate APCDs formed out of the remaining parts of Los Angeles, Riverside, and San Bernardino counties in the eastern desert areas . . . The State of California resubmitted rules for these eastern areas on June 6, 1977, merely to reflect this split . . . South Coast Air Quality Management District and Los Angeles, Riverside, and San Bernardino Air Pollution Control Districts (Southeast Desert Portions) regulation II . . . will provide [the requirements to obtain a permit].''

[7] Id.

[8] 43 FR 25684, 25685 (June 14, 1978).

[9] 48 FR 52451 (November 18, 1983). The Southeast Desert portion of Los Angeles County was added to the SCAQMD on July 9, 1982. On October 15, 1982, the SCAQMD adopted the existing rules and regulations of the SCAQMD for the Southeast Desert Air Basin portion of Los Angeles County, with the exception of Rules 1102, 1102.1, 461, and Regulation III, and rescinded the existing rules and regulations of the Los Angeles County APCD, with the exception of Regulation III.

[10] CARB is the governor's designee for submitting official revisions to the California SIP.

from CARB to the EPA.[11] We are available, however, to work with the District outside of this rulemaking to address these concerns.

*Comment #4:* The District states that the EPA's proposed rulemaking identifies deficiencies that are present in the current SIP-approved rules and does not explain why these previously approved provisions are no longer approvable. The District states that it would appreciate a more detailed explanation of the underlying provisions of the CAA that have changed to make the previously approved SIP provisions, which were adequate for SIP approval in 1996, not approvable now. The District states that it is not aware of any amendments to the CAA since 1990, therefore it requests an updated, specific analysis with appropriate citations, documentation, and rationale for the changes to EPA's interpretations that render previously approved NSR program provisions not approvable. The District states that it would appreciate a more detailed analysis—not mere citations of current regulations—regarding the specific changes in the EPA regulations and policy that now render previously approved provisions deficient. The District states that the TSD associated with the EPA's proposed action does not provide a sufficient explanation of the EPA's interpretation of the CAA requirements.

*Response to Comment #4:* We disagree with the District's comment that our proposed action does not provide sufficient explanation or analysis of the deficiencies identified. The EPA provided its rationale as to why the submitted revisions to the SIP-approved rules, while deficient, represent an overall strengthening of the SIP.[12] The EPA's citations in our proposed rulemaking and the TSD to specific provisions in the Act and its implementing regulations in 40 CFR part 51 are the basis for the EPA's disapproval of certain specified provisions in the District's revised NSR rules.

As the District notes, the EPA last approved the District's Regulation XIII into the SIP in 1996. In 2002, the EPA revised its NSR regulations at 40 CFR 51.165.[13] These revisions included the addition of 40 CFR 51.165(a)(3)(ii)(J). As we discussed in our proposed action and accompanying TSD, the District's submitted rules are inconsistent with the requirements in 40 CFR 51.165(a)(3)(ii)(J) and are therefore deficient.[14] In particular, our proposed action explains that 40 CFR 51.165(a)(3)(ii)(J) requires offsets for each major modification at a major source in an amount equal to the difference between pre-modification actual emissions and post-modification PTE.[15] Our responses to Comments 6 and 6a provide additional explanation of this issue. The EPA's interpretation of this provision is reasonable and consistent with our actions regarding other submittals of NSR rules for SIP approval.[16]

*Comment #5:* The District states that neither the proposed rulemaking nor the TSD specifically discusses the interrelationship between the main portion of the District's NSR rules in Regulation XIII and Rule 219. The District states that while this is not generally identified as a deficiency, historically the EPA has asserted that Rule 219 somehow provides an ''exemption'' from NSR requirements. The District describes its permitting program as emissions unit-based, and distinguishes it from the federal regulatory scheme, which the District describes as facility-based. The District states that the ''net result'' is that while a specific emissions unit may be exempt from permitting requirements, it ''will still undergo the NSR process.'' The District cites Rules 1301 and 1304 to support its position that its NSR program requires emissions changes to be determined both on an emissions unit by emissions unit basis and in regard to the facility as a whole, and it cites to Rule 219(B)(5) to support its position that Rule 219 requires emissions from exempt equipment to be included in NSR calculations. The District also states that while Rule 219 only exempts certain emissions units from obtaining ''paper'' permits, it does not exempt emissions units or an entire facility containing such units from other requirements in the District's Rulebook.

The District states that ''USEPA has expressed concerns in the past'' that a facility could escape NSR review if it were composed entirely of exempt equipment and explains that there are several backstops that prevent facilities that consist solely of equipment that is potentially exempt under Rule 219 from escaping review, such as actions undertaken by enforcement personnel and local land use agencies pursuant to state law. The District requests that the notation regarding the nature and effect of Rule 219 as part of its NSR program be corrected or clarified in the EPA's TSD.

*Response to Comment #5:* The EPA proposed to fully approve into the SIP the revised version of Rule 219 as amended on June 15, 2021, because we have determined that it satisfies all relevant CAA requirements. We do not interpret the District's comment as an assertion that our proposed action to fully approve Rule 219 is incorrect. Section 8 and Attachment 6 of the TSD contain the EPA's evaluation of Rule 219 with respect to CAA 110(l), and Attachment 1 of the TSD contains EPA's evaluation with respect to the requirements under 40 CFR 51.160–164.[17] In Section 8 of the TSD, we wrote that the submitted version of Rule 219 ''will result in a more stringent SIP and will not interfere with any applicable attainment, reasonable further progress goals, or any other applicable CAA requirement. Therefore, we can approve the submitted rules into the AVAQMD portion of the California SIP as proposed in this action under section 110(l) of the Act.'' [18] The information the District provided in its comment letter does not change our proposal to fully approve Rule 219.

The District's comment alludes to concerns that the EPA has expressed ''in the past.'' Although the EPA may have expressed concerns with a previous version of Rule 219, our review of the

[11] See, *e.g.,* 40 CFR part 51, App. V.

[12] 88 FR 5826, 5829; TSD Sections 5–8.

[13] 67 FR 80185 (December 31, 2002).

[14] In our 2002 rulemaking, we added the requirement in 40 CFR 51.165(a)(2)(ii), which states that deviations from federal definitions and requirements are generally approvable only if a state specifically demonstrates that the submitted provisions are more stringent, or at least as stringent, in all respects as the corresponding federal provisions and definitions. To date, the District has not made such a demonstration.

[15] 88 FR 5826, 5831.

[16] See, *e.g.,* 81 FR 50339 (August 1, 2016), in which we finalized a limited approval/limited disapproval action on the Bay Area Air Quality Management District's NSR program. The Bay Area Air Quality Management District subsequently revised and resubmitted its rules, which the EPA approved in the rulemaking titled: ''Revisions to California State Implementation Plan; Bay Area Air Quality Management District; Stationary Sources; New Source Review,'' 83 FR 8822 (March 1, 2018). See also ''Revision of Air Quality Implementation Plan; California; Sacramento Metropolitan Air Quality Management District; Stationary Source Permits,'' 78 FR 53270 (August 29, 2013).

[17] Specifically, as we indicated in Attachment 1 of the TSD, Rule 219 is consistent with 40 CFR 51.160(e), which allows states to exclude some sources from NSR requirements (*i.e.,* LAER and offsets), as well as public notice, by not requiring those sources to obtain a permit. There is a distinction between sources subject to NSR requirements and sources that are simply part of the District's NSR program. Even emissions from equipment that is exempt from permitting requirements must be included when making a major source determination. Rules 201 and 203 require that essentially all sources must obtain an authority to construct and a permit to operate, but Rule 219 specifies which sources do not need to obtain a permit, and therefore do not need to undergo NSR review, even if their emissions are included in determining if a source is major.

[18] 88 FR 5826; TSD, p. 39.

submitted version of Rule 219 did not identify any remaining concerns and found that the rule is approvable.[19] Therefore, we do not find it necessary to address the merits of the ''backstops'' involving District enforcement and state laws that the District asserts would mitigate such a problem.

*Comment #6:* The District states that the EPA partially mischaracterizes Rule 1304(C)(2)(d) as a ''potential to emit to new potential to emit after modification'' calculation. According to the District, this provision is more correctly characterized as ''current fully offset allowable emissions'' to ''potential new emissions.'' The District also asserts that such fully offset allowable emissions are reflected as ''fully Federally enforceable emissions limitations'' on the permits for each piece of affected equipment and for the facility as a whole. The District states that the EPA is objecting to the use of SERs, which are created as part of an NSR action at a Major Facility to, in effect, ''self-fund'' the necessary offsetting emissions reductions by reducing emissions elsewhere in the Major Facility.

*Comment #6a:* The District states that the provisions of Rule 1304(C)(2)(d) are a clarified restatement of provisions that are currently SIP approved and have been in use since at least 1995. It then provides a historical overview of how the current language in the submitted Rule 1304(C)(2)(d) is derived from the rule provisions that the EPA approved in 1996, and that the only way to obtain a ''Federally enforceable permit condition'' would be via a prior NSR permitting action.

The District explains that its primary purpose for the 2021 NSR amendments was to address EPA's concerns, and that the amendments further clarified that SERs created from currently existing fully offset Permit Units at an existing Major Facility can only be used for changes within the same facility and cannot be banked. The District states that the ''procedural flow'' found in Rule 1302 and a specific limitation of Rule 1303(A)(4) ensures that such SERs would not be used to determine either BACT applicability, Major Facility status, or Major Modification status, therefore limiting the use of SERs and ensuring that there is no net increase in the amount of total emissions allowable from a particular facility that utilizes these provisions. The District states that its rules contrast with the potential use of the ''De Minimis'' provisions, which would result in an increase of allowable emissions of 25 tons per year (tpy) over a rolling five-year period.

The District states that it assumes the EPA approved rule language is similar to that which the EPA now finds deficient pursuant to CAA section 116, and that it is unclear why the current submission cannot be approved considering the current SIP-approved language uses broader, more inclusive language with fewer safeguards. The District therefore requests that the EPA provide a detailed analysis of why the current submission cannot be approved as equivalent to or more stringent than the CAA requirements. In addition, the District requests guidance on exactly what type and nature of evidence the EPA considers necessary for approval.

*Response to Comments #6 and #6a:* The EPA does not agree with the District's statements in Comments 6 and 6a. Preliminarily, the EPA notes that Rule 1303(B) imposes offset obligations for new or modified facilities that emit or have the potential to emit above specified thresholds ''as calculated pursuant to Rule 1304.'' [20] Rule 1304, ''New Source Review Emission Calculations,'' sets forth ''the procedures and formulas to calculate increases and decreases in emissions'' to determine applicability of offset obligations and to calculate SERs, which are ''reductions generated within the same facility.'' [21] Rule 1304(B)(1) specifies ''General emission change calculations,'' and Rule 1304(B)(2) specifies ''Net Emissions Increase Calculations.'' Notably, Rule 1304(B)(2)(c) provides that the net emissions increase calculation must subtract SERs ''as calculated and verified pursuant to Section C below.'' Rule 1304(C) specifies the calculation of SERs. The EPA proposed to disapprove Rule 1304(C)(2)(d). This provision applies to modification projects at existing major sources that involve emissions units that ''have been previously offset in a documented prior permitting action.'' Thus, Rule 1304(C)(2)(d) relates to the calculation of a net emissions increase to establish offset obligations.

The EPA's proposed action explains that Rule 1304(C)(2)(d) is deficient because, for certain projects, it allows the amount of required offsets to be calculated using a pre-project baseline using potential emissions (generally, the emissions allowed by a permit),[22] whereas the CAA requires a pre-project baseline based on actual emissions.[23] As the EPA explained, CAA section 173(c)(1) requires the SIP to contain provisions to ensure that emission increases from new or modified major stationary sources are offset by real reductions in actual emissions. In addition, 40 CFR 51.165(a)(3)(ii)(J) requires that, for major modifications, the total quantity of increased emissions that must be offset shall be determined by summing the difference between the allowable emissions after the modification and the actual emissions before the modification for each emissions unit.

Rule 1304(C)(2)(d) is not consistent with statutory and regulatory requirements that the pre-project baseline utilize actual emissions to calculate offset obligations. Instead, for emissions from units that have been ''previously offset in a documented prior permitting action,'' Rule 1304(C)(2)(d) allows the pre-project baseline to use the unit's potential to emit (the unit's allowable emissions) as reflected in a permit:

> [Historic Actual Emissions] for a specific Emission Unit(s) may be equal to the Potential to Emit for that Emission Unit(s), [if] the particular Emissions Unit have [sic] been previously offset in a documented prior permitting action so long as: (i) The PTE for the specific Emissions Unit is specified in a Federally Enforceable Emissions Limitation; and (ii) The resulting Emissions Change from a calculation using this provision is a decrease or not an increase in emissions from the Emissions Unit(s) and (iii) Any excess SERs generated from a calculation using this provision are not eligible for banking pursuant to the provision [sic] of District Regulation XIV.

[19] As we discussed in section 8 of the TSD and in TSD Attachment 6, we found that the District's revisions to Rule 219 ensured consistency with CAA requirements, forming the basis for our proposal to fully approve the revised rule. The EPA expressed the concerns stated in docket item D.20, ''EPA Email Comments to MDAQMD re MDAQMD Rule 219,'' (dated 3/28/2019), in reference to the previous, locally adopted version of MDAQMD Rule 219, which also applied to AVAQMD Rule 219. The District took adequate action when it revised the rule in 2021, which is the version EPA proposed to fully approve.

[20] Rule 1303(B)(1). See also, EPA TSD, p. 18. Rule 1303(A) specifies control obligations, *i.e.,* Best Available Control Technology.

[21] Rule 1304(A). In addition, District Rule 1304 sets forth ''procedures and formulas'' to calculate BACT obligations. See, District Rule 1304(A)(1)(a)(i). See also, EPA TSD, pp. 18–19.

[22] Rule 1304(C)(2)(d)(i) states that the PTE for an emissions unit is specified in a federally enforceable emissions limitation. Therefore, in the context of this rulemaking action regarding the District's NSR program, the terms ''allowable'' and ''potential'' seem generally interchangeable.

[23] We note that District's comment includes the following incorrect statement, ''In short, USEPA is objecting to the use of Simultaneous Emissions Reductions (SERs) which are created as part and parcel of an NSR action at a Major Facility to in effect 'self-fund' the necessary offsetting emissions reductions by reducing emissions elsewhere in the Major Facility.'' The deficiency identified by the EPA is the District's calculation methodology to determine the quantity of offsets required, which inappropriately allows for the use of reductions that occurred in the past and are not necessarily ''simultaneous.''

The District states that the EPA partially mischaracterizes Rule 1304(C)(2)(d) as allowing the use of the potential-to-potential test because the provision is more correctly characterized as ''current fully offset allowable emissions'' to ''potential new emissions.'' It is true that Rule 1304(C)(2)(d) allows the use of a pre-project baseline based on currently fully offset allowable emissions, because it is clear that the rule equates allowable emissions and potential to emit. However, the District's statements regarding the use of allowable emissions or potential emissions as the pre-project baseline are not relevant to the point presented in our proposed action that Rule 1304 is not consistent with federal requirements because it does not require the use of *actual* emissions as the pre-project baseline, rather than allowable emissions.[24]

Allowable emissions are generally set higher than anticipated actual emissions to allow for normal fluctuations in emissions to occur without violating the permit conditions. The use of allowable emissions as the pre-project baseline means that the difference between pre-project and post-project emissions will be smaller than a calculation applying the EPA's requirement to use actual emissions as the pre-project baseline. Therefore, the District's rule, when using this provision, is likely to under-calculate the quantity of offsets required.

The fact that under the District's rule only units that are already fully offset can use the allowable-to-potential offset quantification method does not remedy this deficiency, as fully offset units are still likely to have allowable emission limits above their actual emissions. Furthermore, the District's assertion that the allowable-to-potential methodology is only available to generate ''self-funded'' reductions for use as offsets also fails to remedy this problem, since federal requirements require actual emissions to be used as the baseline for offsets calculations in all instances, including those in which a facility internally generates its own emissions reductions to satisfy its offset obligations.

Similarly, the District's statement that its rule does not allow an increase in allowable emissions is irrelevant. CAA 173(c)(1) and 40 CFR 51.165(a)(3)(ii)(J) require that the quantity of offsets must be based on allowable increases above actual emissions.

Regarding the District's statement that ''USEPA is objecting to the use of Simultaneous Emissions Reductions (SERs) which are created as part and parcel of an NSR action at a Major Facility to in effect 'self-fund' the necessary offsetting emissions reductions by reducing emissions elsewhere in the Major Facility,'' the EPA disagrees. This statement is inaccurate because the EPA did not categorically reject the District's use of SERs; rather, we identified the District's SERs calculation methodology as inconsistent with federal requirements.[25] As has been noted, the EPA identified as a deficiency Rule 1304(C)(2)(d), which provides that the pre-project baseline can be equal to allowable (*i.e.,* potential to emit, or potential emissions) if the emissions unit has been ''previously offset in a documented prior permitting action.'' Thus, the deficiency that the EPA identified is the District's use of SERs as a means to deviate from the federal requirement to use actual emissions for the pre-project baseline. Instead, Rule 1304(C)(2)(d) uses a pre-project baseline using allowable (*i.e.,* potential) emissions for units with previously offset emissions. Moreover, the EPA's regulations at 40 CFR 51.165(a)(3)(ii)(J) plainly apply to each proposed major modification.

The District also states that SERs created from currently existing fully offset permit units at an existing major facility can only be used for changes at the same facility and cannot be banked. The fact that SERs cannot be bought and sold between facilities does not address the deficiency identified by the EPA that Rule 1304(C)(2)(d) allows the calculation of required offsets to use a baseline of allowable (*i.e.,* potential) emissions, not the federally required baseline of actual emissions.[26]

The District provides no support for its assumption that the EPA approved similarly deficient provisions to submitted Rule 1304(C)(2)(d) into the SIP in 1996 under CAA section 116. The EPA's 1996 rulemaking approved the rules to which the District refers on the basis of CAA section 110, not section 116.[27] The District's point that the EPA approved rules with similar language over a quarter century ago does not address the EPA's analysis and finding in our current rulemaking that Rule 1302(C)(2)(d) is inconsistent with CAA 173(c)(1), the definition of ''net emissions increase'' in 40 CFR 51.165(a)(1)(vi)(E)(*1*) and with the calculation methodology in 40 CFR 51.165(a)(3)(ii)(J). For the EPA to approve a provision that deviates from federal requirements, the District must demonstrate how the provision is more stringent than or at least as stringent as the corresponding federal requirements.[28] The District, to date, has not provided such a demonstration; we address this point further in our response to the District's Comment 6b. We respond to the District's comment on the use of SERs for BACT or general applicability purposes in our response to District Comment 6c.[29]

*Comment #6b:* The District argues that the EPA's statement that SERs [as defined in Rule 1302] used as offsets may not be based on real or actual emission reductions as required by CAA section 173(c)(1) does not consider that the actual reduction in emissions have already occurred as part of a previously offset action and that the use of SERs derived from such action ensures the allowable emissions from a particular facility would not increase without additional offsets being required. The District states that that the EPA also ignores the overall structure of its NSR program, which is specifically designed to obtain BACT on more equipment and offsets in more situations than is required under the CAA.

The District argues that the EPA's interpretation of the offset requirement is an issue of fundamental fairness in implementation because a facility would in effect be required to offset the exact same amount of allowable emissions each time it needed to upgrade, replace, or otherwise modify its equipment processes. The District provides a hypothetical example to demonstrate that a facility that had previously offset emissions would never have the ability to use those actual reductions that it previously obtained and purchased under the EPA's interpretation of offsets requirements. The District also states that the facility would have to provide extra offsetting emissions reductions to regain its previously allowed and permitted emissions.

[24] See, *e.g.,* 40 CFR 51.165(a)(3)(ii)(J) (requiring offsets for each major modification at a major source in an amount equal to the difference between pre-modification *actual* emissions, not allowable (*i.e.,* potential) emissions).

[25] 88 FR 5826, 5830. We identified several District rules as not fully approvable because they do not assure compliance with federal regulations for calculation of required offsets, stemming from cross-references to Rule 1304(C)(2)(d). See, *e.g.,* 1305(C)(2), 1303(B)(1), 1302(C)(3); and various definitions in Rule 1301.

[26] Arguably, the District allows facilities to ''bank'' emission reductions for their own internal future use, even if the District prohibits use of banked emission reductions between facilities.

[27] 61 FR 64291 (December 4, 1996).

[28] 40 CFR 51.165(a)(2)(ii).

[29] Likewise, we respond to the District's assertion regarding the De Minimis rule at CAA section 182(c)(6) in our response to the District's Comments 9b and 10.

The District then states that regardless of whether past emissions reductions are technically ''paper reductions,'' the District and its predecessor agencies have been using the formulation in the SIP approved NSR rules in one form or another since at least 1995, although more likely since the early 1980s. The District states that over that period of time the number of NAAQS exceedances has declined and so has the amount of Major Facility and overall stationary source emissions, despite significant increases in both economic activity and District population. The District argues that such a decrease would not have occurred if the NSR program was based on paper reductions.

The District requests that the EPA discuss why it considers the taking of previously obtained and purchased allowable emissions limits without additional compensation to be allowable under the CAA and a discussion as to whether such an effective taking is Constitutional. The District states that it would appreciate additional discussion on why the EPA considers actual decreases in the emissions inventory to be inadequate to show that the District's NSR program is not based upon ''paper reductions.''

*Response to Comment #6b:* The EPA disagrees with the District's comment. The District first argues that actual emissions reductions occur ''as part of the previously offset action and that the use of SERs derived from such action ensures that the allowable emissions from a particular facility would not increase without additional offsets being required.'' As we explained in our response to District Comments 6 and 6a, the EPA's regulations at 40 CFR 51.165(a)(3)(ii)(J) apply to each proposed major modification. The fact that certain past emissions increases were offset does not justify not requiring offsets for emissions increases from the new project. In addition, the District's comment appears to assert that offsets used for a previous permitting action are available for offsetting increases in actual emissions associated with future modifications. The Clean Air Act [30] and EPA's NSR regulations do not allow facilities to use the same emissions reductions more than once; after a facility relies upon specific emissions reductions for an NNSR permit action, the reductions are no longer surplus and cannot be used again in a future NNSR permit action.[31] Also, the District's use of allowable emissions as the metric for whether there has been an emissions increase is inconsistent with federal requirements. Typically, allowable emissions limits are set higher than anticipated actual emissions to allow for normal variations in a facility's actual emissions without violating the emissions limit in the permit. While a proposed project may not result in a change to a facility's allowable emissions limit, it may increase actual emissions. An increase in actual emissions must be offset, as required under CAA section 173(c)(1).

The District asserts that ''the overall structure of the AVAQMD NSR program . . . is specifically designed to obtain BACT on more equipment as well as offsets in more situations than is required by the [federal] CAA.'' The District, however, provides no demonstration to support this claim, nor does it provide any basis on which the EPA could find that its NSR program ensures equivalency with federal offset requirements.[32] Similarly, the references in the District's comment letter to its Staff Report are not sufficient to demonstrate that its NSR program offsets emission increases in a manner that is at least as stringent as federal requirements. For example, Table 4 of the Staff Report compares BACT and offset requirements, but the Table does not demonstrate how implementation of the District's NSR program is imposing an equivalent quantity of offsets.[33] In addition, the last row of Table 4 states that offsets are required for significant modifications at existing major facilities, but it does not address the difference between the District's program and the federal regulations in calculating the necessary quantity of offsets for such projects.

The District provides a hypothetical example referencing a scenario in its NSR Final Staff Report to explain the difference in the quantities of offsets required under its program compared to the federal program. The District's example, however, does not include key components of the federal program—for example, whether the project constitutes a major modification under 40 CFR 51.165(a)(1)(v)(A). Under the federal requirements, after determining that a project is a major modification, the facility would need to provide offsets for the difference between the pre-modification actual emissions and the post-modification potential emissions, as those terms are defined in 40 CFR 51.165. Because the District's hypothetical example only discusses quantities of allowable emissions, it is not possible to determine the quantity of emissions offsets the facility would need to provide. As noted above, however, the District's example reveals the inconsistencies of its approach and federal NSR requirements: (i) offsets of past emissions increases do not satisfy the offset obligations for increases in actual emissions for a new project; and (ii) reductions used to offset emissions increases in the past cannot be re-used to offset increases in actual emissions in future permitting actions.

A real-world example that illustrates how the District's rules are less stringent than federal requirements involves a permit application submitted to the MDAQMD to upgrade three existing natural gas-fired combustion turbines at a power plant. Although this example occurred in the MDAQMD, the implicated MDAQMD rules are identical to the District's and therefore this example is helpful to explain how the District's rules could result in a less stringent outcome than federal law requires.[34] MDAQMD's analysis of the project presents the facility's actual emissions of $NO_X$ in the five-year period from 2016 to 2020 as ranging from 83.6 tpy to 103.9 tpy.[35] MDAQMD's analysis also presents the ''pre-modification PTE'' of $NO_X$ as 205 tpy. MDAQMD's analysis states that the ''post-modification PTE'' of $NO_X$ is 204.5 tpy.[36] Per the EPA's requirements, the required quantity of offsets for this project would be approximately 131 tpy (204.5 tpy minus the highest actual emissions rate of 103.9 tpy, multiplied by the offset ratio of 1.3 for Severe nonattainment areas, as required under CAA section 182(d)(2)). MDAQMD, however, only compared pre- and post-project allowable (*i.e.,* potential) emissions; therefore, it determined that no offsets were required for the project because its analysis indicated that the project would result in a 0.55 tpy decrease in emissions.[37] As the

[30] CAA 173(a)(1)(A) and 173(c).

[31] 40 CFR 51.165(a)(3)(ii)(G).

[32] See 40 CFR 51.165(a)(1), 51.165(a)(2)(ii).

[33] AVAQMD Staff Report pp. 40–42.

[34] It is also the EPA's understanding that there is an overlap in the administration and management of AVAQMD and MDAQMD, which increases the likelihood that the Districts would share the same interpretation of identical rule text.

[35] MDAQMD, ''Preliminary Determination/Decision—Statement of Basis for Minor Modification to and Renewal of FOP Number: 104701849 For: High Desert Power Project, LLC.'' December 21, 2022, p. A–52 (PDF p. 72), Table 9.

[36] MDAQMD, ''Preliminary Determination/Decision—Statement of Basis for Minor Modification to and Renewal of FOP Number: 104701849 For: High Desert Power Project, LLC.'' December 21, 2022, p. A–54 (PDF p. 74), Table 14.

[37] See also, Letter dated June 16, 2022, from Jon Boyer, Director, Environmental, Health, and Safety, Middle River Power, to Lisa Beckham, EPA Region IX, Subject: ''Prevention of Significant Deterioration (PSD) Applicability Analysis for Turbine Upgrades at the High Desert Power Project (Revised),'' (''HDPP PSD Analysis''). The same modification was analyzed under the federal PSD program,

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AVAQMD regulations also provide for comparing only pre- and post-project allowable (*i.e.,* potential) emissions, they also would lead to a similar result—that no offsets would be required.

The District also asserts that the EPA previously approved the provision we are now finding to be deficient and that, since 1995, when this provision came into active use, the number and extent of NAAQS exceedances has declined. The District also asserts that the decline in emissions could not have occurred if its NSR program was not achieving reductions at least equivalent to those that would occur if the District followed the requirements of the CAA. We do not agree with this comment. NSR programs primarily regulate construction and modification of stationary sources, and improvements in air quality can and do result from regulation of existing stationary sources (*e.g.,* RACT, RACM and BACM requirements) as well as from regulation of mobile sources such as passenger vehicles and trucks, and non-road engines such as diesel engines used in agriculture and construction. The EPA also notes that because the District is currently classified as Severe nonattainment for the 2008 and 2015 ozone NAAQS, the CAA requires the District to implement rules consistent with the federal nonattainment NSR requirements at CAA section 173 and 40 CFR 51.165.

*Comment #6c:* The District states that the EPA's identification of Rules 1301(MM), 1301(UU), 1301(RR), 1301(TT), and 1304(B)(2) reflects a misunderstanding of the overall structure of the District's NSR regulation. The District states that the EPA assumes that the District's use of previously offset SERs could potentially allow a new or modified facility to escape being categorized as a ''Major Facility'' or a ''Major Modification.''

The District states that the EPA ignores the existence of Rule 1302, which ''very clearly sets out a flow for analysis in which one step occurs after another in sequence as indicated in the Final NSR Staff Report.'' The District explains that the first step in the sequence is to determine the ''Emissions Change'' under Rule 1302(C)(1) on both an emissions unit and facility wide basis using Rule 1304(B)(1), noting no SERs are used in that calculation. The District states that the next steps involve the determination of whether a particular change is indeed a ''Modification.'' The District states that the EPA also conveniently ignores the provisions of Rule 1303(A)(4), which excludes the use of SERs in determining emissions increases for the purpose of applying BACT.

The District admits that Rule 1304(C)(2)(d) could be interpreted incorrectly ''without the procedural sequence that Rule 1302 sets forth.'' The District asserts that these provisions at issue have been in active use since 1996 with demonstrable results in overall air quality. The District states that, despite its assertion of the adequacy of the submitted provisions, it would appreciate guidance from the EPA regarding methods to clarify that SERs derived from previously fully offset activities can be used only to reduce the amount of offsets required and not for any other purpose.

*Response to Comment #6c:* The EPA disagrees with the District's assertions that the EPA's proposed disapproval of Rule 1301's definitions for ''Major Modification,'' ''Modification (Modified),'' ''Net Emissions Increase,'' and ''Significant'' is incorrect. We note that Rule 1301 defines the terms ''Major Modification'' and ''Modification (Modified)'' using the term ''Net Emissions Increase,'' and, as explained in our proposed action, Rule 1301(UU) defines the term ''Net Emissions Increase'' as an emission increase calculated per Rule 1304(B)(2) that exceeds zero.[38] Rule 1304(B)(2) prescribes the calculation methodologies for net emissions increases, and provides that net emissions increases must subtract SERs ''as calculated and verified pursuant to Section C below.'' [39] As noted in our proposed action and in our response to Comments 6 and 6a, Rule 1304(C)(2)(d) allows permit applicants to calculate a net emissions increase using allowable (*i.e.,* potential) emissions as the pre-project baseline, rather than actual emissions, as required by the EPA's regulations.[40] As we have explained in our response to Comments 6 and 6a, the District's approach is less stringent than federal requirements because actual emissions are almost always lower than allowable (*i.e.,* potential) emissions. Therefore, an evaluation of a net emissions increase (which is essentially a comparison of pre-project and post-project emissions) that uses actual emissions (as required by the EPA's regulations) will show a higher net emissions increase than a calculation that uses allowable (*i.e.,* potential) emissions as the pre-project baseline.

We further note that Rule 1303, ''New Source Review Requirements,'' sets forth Best Available Control Technology (BACT) requirements [41] at subsection (A), and subsections (A)(2) and (A)(3) impose BACT requirements through the use of the term ''Modification (Modified),'' defined at Rule 1301(RR).[42] As we explained in our proposed action, Rule 1301(RR) defines ''Modified'' in terms of whether a project will ''result in a Net Emission Increase [sic].'' [43] As a result, a project that does not result in a ''Net Emission Increase'' will not meet the criteria for ''Modified.'' Therefore, projects can potentially avoid the applicability of the BACT requirement because Rule 1303 uses the term ''Modified'' and, indirectly, the term ''Net Emission Increase,'' to impose this requirement.

Similarly, Rule 1303(B)(2) imposes offset requirements using the term ''Major Modification,'' which is defined at Rule 1301(MM). Rule 1301(MM) defines ''Major Modification'' using the term ''Net Emissions Increase.'' [44] As a result, a project that does not result in a ''Net Emissions Increase'' will not meet the criteria for a ''Major Modification'' and therefore can potentially avoid the applicability of offset requirements because Rule 1303 uses the term ''Major Modification'' and, indirectly, the term ''Net Emissions Increase,'' to impose this obligation.

The District states, ''the existence of Rule 1302 . . . very clearly sets out a flow for analysis in which one step occurs after another in sequence . . . first you determine 'Emissions Change' under 1302(C)(1) on both an emissions unit and facility wide basis using 1304(B)(1) . . . No SERs are used in this calculation.'' The EPA does not agree with these statements. Rule 1302(C)(1) does not specifically reference Rule 1304(B)(1)—it references, more generally, Rules 1304 and 1700.[45] This

which uses baseline actual emissions to projected actual emissions methodology for determining applicability of the federal NNSR program. The submitted PSD analysis shows that the project will result in an increase in actual emissions. For $NO_2$, projected actual emissions would be 35.25 tpy greater than baseline actual emissions. HDPP PSD Analysis, Table 7, p. 8.

[38] 88 FR 5826, 5830.

[39] Rule 1304(B)(2)(c).

[40] 40 CFR 51.165(a)(2).

[41] The District's definition of Best Available Control Technology in Rule 1301(K) is consistent with the federal definition of ''lowest achievable emission rate'' in CAA section 171(3) and 40 CFR 51.165(a)(1)(xiii).

[42] Rule 1303(A)(2) and (A)(3) use the term ''Modified Permit Unit,'' Rule 1301 separately defines the terms ''Modification (Modified)'' at subsection (RR) and ''Permit Unit'' at subsection (DDD).

[43] 88 FR 5826, 5830.

[44] Rule 1301(MM) refers to a ''Significant Net Emissions Increase''; Rule 1301 separately defines ''Significant'' at 1301(TTT) and ''Net Emissions Increase'' at 1301(UU).

[45] Rule 1302(C)(1)(a) states: ''The APCO shall analyze the application to determine the specific pollutants, amount, and change (if any) in

point is significant because Rule 1302(C)(1)'s general cross-reference to Rule 1304 encompasses not just Rule 1304(B)(1), which might be helpful, but also the deficient provisions of Rule 1304(C)(2)(d), which, as explained above, calculate SERs using a pre-project baseline of allowable (*i.e.,* potential) emissions, which results in improper calculations of net emissions increases.

The District, in its comment letter, ''admits that the provisions as expressed in 1304(C)(2)(d) could, in the abstract and absent the procedural sequence set forth in 1302, potentially be interpreted incorrectly.'' The EPA does not agree that Rule 1302 contains a ''procedural sequence.'' We also do not find any such sequence in Rule 1304. Rule 1304 identifies several different types of emissions calculations but does not specify an analytical framework for their use.

The District's comment also repeatedly refers to its Staff Report. In general, references to non-regulatory sources can be helpful to explain regulatory text; however, the District's reliance on its Staff Report in this instance is not sufficient to correct the fact that the rules fail to ensure proper analysis and implementation of federal requirements.

Therefore, Rule 1302's broad cross reference to Rule 1304 is insufficient to establish a sequence or an ''analysis flow'' such as that asserted by the District. The ambiguity in the District's rules means that they do not ensure a proper analysis of emissions changes, such as, for example, correctly evaluating whether a project will result in an ''Emissions Change'' before evaluating whether it will result in a ''Net Emissions Increase.'' Such sequence is essential to correctly identifying whether a project would result in a net emissions increase under 40 CFR 51.165(a)(1)(vi), which the District currently uses as a basis for determining whether a project is a ''Major Modification.''

In reviewing SIP submissions, the EPA must ensure that the plain language of the rule under review is clear and unambiguous. In a September 23, 1987 memorandum, the ''Potter memo,'' the EPA stated its criteria regarding the enforceability of SIPs and SIP revisions.[46] The Potter memo states that SIP rules must be clear in terms of their applicability, and that ''[v]ague, poorly defined rules must become a thing of the past.'' [47] It also states that ''SIP revisions should be written clearly, with explicit language to implement their intent. The plain language of all rules . . . should be complete, clear, and consistent with the intended purpose of the rules.'' [48] The EPA can only approve rule language that is clear on its face, and the sequence the District uses for determining emissions changes and net emissions increases is not sufficiently clear. The clarification in the Staff Report cannot supplant vague rule language. The District makes the statement that it has been using the provisions at issue ''since at least 1996 with corresponding demonstrable results in improving air quality.'' Even if air quality improved during this period, the rules must be clarified to ensure they are interpreted properly. It is speculative to assume that any air quality improvements occurred as a result of the way the rules are currently written.

Additionally, the District's comment letter states that ''USEPA also conveniently ignores the provisions of 1303(A)(4) which excludes the use of SERs in determining emissions increases for purpose [sic] of applying BACT.'' Rule 1303(A)(4) includes an appropriately specific cross-reference to Rule 1304(B)(1), regarding ''General Emissions Change Calculations.'' Rule 1304(B)(1) provides for proper calculation of a project's emissions changes. However, the BACT requirement is also implemented by Rule 1303(A)(2) and (A)(3), which, as described above, use the term ''Modified,'' which is problematically defined by Rule 1301(RR), specifically because of its cross-reference to the term ''Net Emissions Increase,'' which is in turn deficient because of its cross reference to Rule 1304's calculation methodologies, including Rule 1304(C)(2)(d). As we described in our response to the District's Comment 6b, MDAQMD found that a project in its jurisdiction did not trigger BACT because there was no net emissions increase and therefore the facility was not ''Modified'' as defined in Rule 1301(RR). It appears that the MDAQMD used the identical SERs-related provisions of MDAQMD Rule 1304(C)(2)(d) to calculate ''Net Emission Increase'' to conclude that the project was not ''Modified'' and as a result it did not require BACT.[49] We note that such a conclusion appears inconsistent with MDAQMD Rule 1303(A)(4), but apparently resulted from the ambiguities in Rules 1301, 1302, 1303, and 1304 described above. Even though the project occurred in the MDAQMD jurisdiction, the identical rule provisions mean that it is a useful example to explain the rule deficiencies in AVAQMD. Under both AVAQMD's rules and MDAQMD's, it is difficult to envision a scenario in which a ''fully offset'' emissions unit, using the District's terminology, would ever need to install BACT or obtain offsets as long as the facility does not increase its allowable emissions. Therefore, we confirm the determinations in our proposed action that the definitions of ''Net Emissions Increase'' in Rule 1301(UU) and all related provisions in Rule 1301(MM), 1301(RR), and 1301(TTT), as well as 1304(B)(2), are deficient.

*Comment #6d:* With regard to the EPA's finding that ''SERs used to determine quantity of offsets required are not based on actual emissions as required in 40 CFR 51.165(a)(3)(ii)(J),'' the District repeats that its NSR regulation is designed to ensure that the emissions reductions achieved from each modified emissions unit, and thus from any facility containing such emissions units, are greater than those required by the CAA by requiring BACT and offsets in more cases and on a greater number of emissions units than the CAA requires. The District states that its NSR program is also designed to meet the California Clean Air Act requirement mandating that stationary source control programs developed by a district with moderate or greater ozone pollution achieve ''no net increase in emissions of nonattainment pollutants or their precursors from new or modified stationary sources which emit or have the potential to emit 25 tons per year or more of nonattainment pollutants or their precursors,'' which ensure that emissions at a particular

emissions pursuant to the provisions of District Rules 1304 and 1700.''

[46] Memorandum dated September 23, 1987, from J. Craig Potter, Assistant Administrator for Air and Radiation, to EPA Regional Administrators and Regional Counsels, Regions I–X, ''Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency.''

[47] Id. at 3.

[48] Id. at 4.

[49] The District's analysis of the application for this project states: ''The permitting action is classified as an NSR Modification as defined in Rule 1301(NN). As there are no net emissions increases associated with $NO_X$, VOC, or PM10, the emissions unit and the facility are not Modified as defined in Rule 1301 with respect to those pollutants and current BACT is not triggered.'' (Emphasis in original.) MDAQMD, ''Preliminary Determination/Decision—Statement of Basis for Minor Modification to and Renewal of FOP Number: 104701849 For: High Desert Power Project, LLC.'' December 21, 2022, p. 8. We note that the District makes two logically inconsistent statements in its analysis of the project: first, that the project is an NSR Modification under Rule 1301(NN), and second, that the project is not Modified as defined in Rule 1301(NN).

facility remain the same or decrease over time. The District states that this is in direct contrast to the EPA's ''De Minimis'' provisions, which could result in up to a 25 tpy increase in pollutants from each Major Facility over every rolling five-year period. The District states that it has provided clear and convincing evidence in its Staff Report and elsewhere that its NSR program requires BACT and offsets in a number of situations where the CAA would not require them, resulting in a more stringent set of requirements overall. The District then requests specific, detailed guidance regarding what type and nature of additional evidence, if any, the EPA would consider appropriate to show equivalent stringency to the CAA requirements.

*Response to Comment #6d:* The EPA disagrees with the District's comment. First, as we explained in our response to the District's Comment 6b, the District provides no demonstration to support its claim that its program is more stringent than required by the federal NSR regulations, nor does it provide any basis on which the EPA could find that its NSR program ensures equivalency with federal offset requirements. Similarly, the references in the District's comment letter to its Staff Report are not sufficient to demonstrate that its NSR program offsets emissions increases in a manner that is at least equivalent to federal requirements. As to the District's assertion that its NSR rules are designed to meet the California Clean Air Act ''no net increase'' requirement: even if the District's program satisfies the California Clean Air Act, it must also satisfy federal air pollution control requirements under the federal CAA and its implementing regulations; satisfaction of state law requirements does not justify noncompliance with federal requirements. We provide additional explanation on the California ''no net increase'' requirement and federal offsetting requirements in our response to District comments 9b and 10. Also, as we described in our response to the District's Comment 6b, MDAQMD's determination that the project did not require offsets despite a projected actual emissions increase of 35 tpy $NO_X$ under the PSD program, supports our finding that the District's program, which implements the same offsetting rules as MDAQMD, is less stringent than the federal requirements. We respond to the District's assertion regarding the De Minimis provisions at CAA section 182(c)(6) in our response to the District's Comment 9b.

*Comment #7:* Regarding the District's use of the word ''proceed'' in the definition of ''Historic Actual Emissions,'' which the EPA identified as a deficiency, the District agrees that the deficiency is probably an overlooked typographical error, but that it has been in the rule for several iterations, dating back to 1996. The District states that it could have provided to the EPA a commitment to correct this deficiency prior to the publication of the EPA's action if the EPA had provided prior notification of the issue. The District states that it would appreciate specific guidance from the EPA regarding whether a commitment to modify the deficient provision would be appropriate at this time.

*Response to Comment #7:* The District does not appear to disagree with the EPA's proposed determination that this issue is a deficiency; rather, the District appears to take issue with the manner in which the EPA provided notification of it. The EPA appreciates the coordination and cooperation demonstrated over the period of joint work by our agencies to improve the District's NSR rules. We remain available to discuss revisions necessary to address the deficiencies with the goal to full approval of revisions to the District's rules and a fully approved NSR program. The District may address this deficiency, along with all other identified deficiencies, in its next revised SIP submittal of its NSR program rules.

*Comment #8:* The District comments that the EPA failed to sufficiently communicate a deficiency identified in our proposed action, specifically, that Rules 1302 and 1304 allow for the interchangeable use of the terms ''contract'' and ''permit.'' The District states that, had the EPA communicated this deficiency, the District could have provided assurances to the EPA to remove the deficiency. The District states that it can and will be able to provide a commitment to modify the deficient provisions in a subsequent local action, but it requests specific guidance from the EPA on whether it is appropriate to provide the EPA a commitment to modify at this time.

*Response to Comment #8:* We do not interpret the District's comment to assert a legal or technical basis that our proposed action to disapprove this rule is incorrect. The District states that the term ''contract'' was most likely inadvertently retained and that it can commit to modify the specific provisions to address the issue. We appreciate the District's willingness to address this deficiency. It is not necessary for the District to provide additional commitments. Following this final action, the EPA remains available to discuss necessary revisions, with the goal of full approval of revisions to the District's rules and a fully approved NSR program.

*Comment #9a (''Interprecursor Trading''):* This comment concerns the use of interprecursor trading, which is provided for in Rule 1305(C)(6). The District first states that the EPA is concerned that a court decision and subsequent change to 40 CFR 51.165(a)(11) make interprecursor trading impermissible. The District notes that it revised Regulation XIII (including Rule 1305) after the court decision but before the EPA revised 40 CFR 51.165(a)(11). The District states that it is unclear whether the revision to 40 CFR 51.165(a)(11) has been challenged and observes that the EPA could have chosen to revise the provision differently. The District states that the EPA did not provide any indication in the TSD on the current status of this particular regulatory provision other than a citation. The District references a footnote as providing sufficient warning and requiring compliance with the applicable provisions to ensure that interprecursor trading among ozone precursors does not occur in a subsequent NSR action. The District states that prompt communication on the EPA's part would have obliviated [sic] the need for this comment as the District could have committed to clarifying the deficient provision in a subsequent rulemaking. The District then requests specific guidance from the EPA regarding whether the provision of a commitment of modify the deficient provision would be appropriate at this time.

*Response to Comment #9a (''Interprecursor Trading''):* To the extent the District's comment might be read as asserting that the EPA's proposed limited approval/limited disapproval of Rule 1305 is incorrect, the EPA does not agree. As the District acknowledges in its comment, on January 29, 2021, the D.C. Circuit Court of Appeals issued a decision in *Sierra Club* v. *USEPA,* that vacated an EPA regulation that allowed the use of reductions of an ozone precursor to offset increases in a different ozone precursor, *i.e.,* ''interprecursor trading.'' [50] On July 19, 2021, the EPA removed the ozone interprecursor trading provisions in 40 CFR 51.165(a)(11).[51]

Rule 1305(C)(6) allows for the use of interprecursor trading. This fact is not

[50] See, *Sierra Club* v. *EPA,* 21 F.4th 815, 819–823 (D.C. Cir. 2021).

[51] 86 FR 37918 (July 19, 2021).

changed by a footnote in the rule that acknowledges the January 2021 court decision without clearly prohibiting the use of interprecursor trading to satisfy offset obligations.[52] To the extent the District is suggesting that the timing of the EPA's revisions to 40 CFR 51.165(a)(11) or the possibility of subsequent legal challenges to those revisions somehow affects the EPA's conclusion that Rule 1305(C)(6) is not consistent with federal law, we disagree. Therefore, the EPA's proposed limited approval/limited disapproval of Rule 1305 is appropriate. Following this final action, the EPA remains available to discuss necessary revisions, with the goal of full approval of revisions to the District's rules and a fully approved NSR program.

*Comment #9b (''De Minimis Rule''):* The District summarizes the EPA's proposed action as asserting that CAA section 182(c)(6) ''mandates the inclusion of a so called 'De Minimis' provision'' and also as appearing to assert that CAA 182(c)(6) overrides the District's ability to implement rules that are more stringent than the requirements of the CAA pursuant to CAA section 116. The District states that the SIP-approved version of its NSR program does not contain a ''De Minimis'' provision primarily due to the requirement in the California Health and Safety Code section 40918(a) of ''no net increase in emissions of nonattainment pollutants and their precursors.'' The District asserts that the EPA did not bring up this issue during the rule development period. The District states that the inclusion of the ''de minimis'' provision, as required under CAA section 182, would allow major facilities to increase their actual emissions without providing offsets, increasing $NO_X$ and VOC emissions by as much as 100 tons per year, as it results in ''a complete exemption from Offsets and BACT requirements.'' It then asserts that incorporating the De Minimis provision would weaken its NSR program, which would violate CAA section 110(l), California Health and Safety Code section 40918(a)(1), and the Protect California Air Act of 2003, which it states, ''prohibits local air districts from amending or revising its New Source Review rules to be less stringent than those in effect on 12/30/2002.'' The District also states that, despite its assertion of the adequacy of the current submissions, it requests specific guidance regarding the type and nature of evidence the EPA would consider appropriate to show greater stringency of the District's NSR program than that provided by the ''de minimis'' provision.

*Response to Comment #9b (''De Minimis Rule''):* The EPA does not agree with the comment. CAA section 182(c)(6) (''the De Minimis Rule'') specifies a mandatory requirement for state NSR programs in nonattainment areas classified as Serious and above. It requires such areas to evaluate whether a particular physical change or change in the method of operation is a major modification by considering net emissions increases from that change and all other net emissions increases during the preceding five calendar years. If the total of all such emission increases is greater than 25 tons, the particular change is subject to the area's SIP-approved NNSR program.[53]

The District does not dispute the EPA's determination that the District's NSR program does not include provisions specified in CAA section 182(c)(6).[54] Instead, the District asserts that the inclusion of language to satisfy the De Minimis Rule provision would result in emissions increases at major facilities, possibly totaling as much as 100 tons each of $NO_X$ and VOC over a five-year period without requiring offsets. This assertion, however, reflects the District's misinterpretation of CAA 182(c)(6). CAA section 182(c)(6) requires NNSR programs in nonattainment areas to require facilities to aggregate project emissions over a rolling five-year period to ensure adequate regulatory review of NSR requirements such as those for control technologies and offsets. Contrary to the District's assertions, CAA section 182(c)(6) does not allow facilities to increase actual emissions by 25 tons without offsetting them.

Furthermore, the District does not explain how the De Minimis Rule conflicts with either the ''no net increase'' requirement in California Health and Safety Code section 40918(a) or the Protect California Air Act of 2003. The District's comment does not change the EPA's understanding that the De Minimis Rule operates independently of these requirements, and therefore the District's implementation of it would not weaken the District's current NNSR program. As the District's rules are currently written, BACT requirements apply when an emission unit has an emission increase or PTE of greater than 4.56 tpy (25 lb/day) (Rule 1303(A)(1) and (2)), or when the emission increase or PTE of all emission units exceed 25 tpy (Rule 1303(A)(3)). For example, a new facility with five emission units, each with a PTE of 4 tpy, would not be subject to BACT requirements under state or federal NSR requirements. However, if during the next 5 years, the source proposed to add three additional emission units, each with a PTE of 4 tpy, BACT would still not be triggered under the current rule, since the state 4.56 tpy emission unit and the federal 25 tpy project thresholds have not been exceeded. However, under the ''De Minimis'' requirements, the new project would be considered a major modification, with an aggregated emission increase of 32 tpy, and therefore, trigger both BACT and offset requirements for the current project. This is because the aggregated emissions from the two projects occuring within a 5-year time frame exceed the 25 tpy De Minimis Rule threshold. The District's rules fail to ensure that such a scenario is not treated as de minimis, as CAA section 182(c)(6) requires. The federal De Minimis Rule prevents a series of smaller projects, with emissions equivalent to the major modification threshold, from avoiding the major modification requirements of BACT and offsets. California law does not ensure conformity with the De Minimis Rule; therefore, the District's NSR program must include provisions to ensure compliance with it. The District's assertion that the De Minimis rule would result in a complete exemption from offsets and BACT requirements is not correct—implementation of the requirements of the De Minimis Rule would ensure that more projects are subject to NNSR requirements, and, in turn, procure offsets and install BACT, consistent with federal law.

The District asserts that its submitted rules would be more stringent than implementing the De Minimis Rule and other aspects of EPA's NNSR requirements and seeks guidance from the EPA on how to make this demonstration. In general, to make a demonstration that a program is at least as stringent as federal NNSR program

[52] The footnote attached to Rule 1305 states: ''Use of this section subject to the ruling in *Sierra Club* v. *USEAP* [sic] 985 F.3d 1055 (D.C. Cir, 2021) and subsequent guidance by USEPA.''

[53] The CAA section 182(c)(6) ''De Minimis Rule'' provides: ''The new source review provisions under this part shall ensure that increased emissions of volatile organic compounds resulting from any physical change in, or change in the method of operation of, a stationary source located in the area shall *not* be considered de minimis for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.''

[54] The District also concedes that it revised Rule 1303 to remove a provision that previously provided such assurance.

requirements, the District would need to demonstrate that the requirements of its rule would trigger LAER and offsets requirements in all cases that would trigger these same requirements pursuant to the provisions of CAA section 182(c)(6). The EPA does not believe such a demonstration is possible, given the variety of project scenarios, which, depending on the facts (timing and emission rates from individual and groups of emissions units), would show that each set of rules is more and less stringent than the other in some cases. As we discussed in our response to District Comments 6–6d, the District's rules are flawed in that they allow for improper calculation of net emissions increases, which affects the implementation of NSR requirements. Our responses to Comments 6–6d also describe the MDAQMD's analysis of a permit application for a project involving a power plant and its determination that the project was not a modification because it would result in an emissions decrease, even though the project would increase actual emissions. The same situation could occur in the District because the District rules implicated by the permit application are identical to the MDAQMD's. We do not agree that the District's approach of not considering this project or other similar projects to be a modification constitutes a more stringent program.

As to the District's statement regarding the EPA not raising this issue earlier, the EPA appreciates the coordination and cooperation demonstrated over the period of joint work by our agencies to improve the rules. We remain available to discuss revisions necessary to address the deficiencies with the goal of full approval of revisions to the District's rules and a fully approved NSR program.

*Comment #10:* The District states that the De Minimis Rule ''would have a profound negative effect on air quality'' because not only would facilities be able to increase allowable emissions by up to 25 tons per rolling 5-year period, but the rule would also cause other detrimental practices such as ''emissions spiking'' and delayed equipment upgrades.

*Response to Comment #10:* The District's hypothetical assertions that CAA 182(c)(6) would encourage ''emissions spiking'' to artificially increase actual emissions prior to making a modification are unsupported. As a practical matter, a source operating for two years above its actual needed operations to get as close as possible to its allowable emissions would likely incur significant costs in the process to unnecessarily operate the equipment. We do not see this scenario as providing a realistic incentive; in fact, implementation of CAA section 182(c)(6) would create no greater incentive for a source to increase its actual emissions prior to making a change that may require the source to undergo NNSR than the limited incentive that exists under the District's current rules. Similarly, the District's hypothetical assertion that the De Minimis Rule would discourage facilities from upgrading equipment is outside the scope of our proposed action, which is to ensure the District's NSR rules comply with federal NNSR program requirements regarding the calculation of emission reductions and the quantity of offsets required for significant emission increases.[55]

The District also requests that the EPA ''provide clear and convincing evidence that the implementation of USEPA's suggested corrections would indeed produce a benefit to air quality in the region.'' The objective of the EPA review of the District's submitted rules is to ensure conformity with federal requirements. Our proposed action describes the statutory and regulatory requirements that the District's NSR rules must satisfy for EPA approval.[56] Where the District disagrees with the EPA's finding of deficiency, it has not provided a quantitative or legal demonstration that its rule provisions are more stringent, or at least as stringent, as the federal requirements.

*Comment #11:* The District states that the EPA's proposed limited disapproval of all rules that cite Rule 1304(C)(2) is overbroad. The District states that the EPA has indicated that it is proposing to disapprove Rules 1301, 1302, 1303, 1304, and 1305 primarily due to the cross-references in these rules to provisions in Rule 1304(C)(2). The District states that such an action would disapprove the use of any internal offsetting for any facility—not just Major Facilities—regardless of the calculation used to determine SERs. The District states that such a disapproval might result in an increase of Emission Reductions Credits being banked and then immediately used, under District Regulation XIV, ''Emission Reduction Credit Banking,'' but asserts that it is more probable that it would result in an immediate cessation of all modifications to existing facilities within the District. Therefore, the District states this action is overbroad, as simply disapproving the use of the provisions in Rule 1304(C)(2)(d) would be enough to alleviate the EPA's stated concerns and allow the remainder of the NSR program to be approved in a manner and to the extent that it could be included to satisfy the 70 ppb ozone NAAQS requirements. The District requests that the EPA provide further justification on why a more limited disapproval of the provisions contained in Rule 1304(C)(2)(d) would be insufficient to address the EPA's major alleged deficiencies, as set forth in the EPA's proposed action.

*Response to Comment #11:* As we stated in our proposed action, the deficiencies pertaining to offsets in the District's NSR program make portions of Rules 1301, 1302, 1303, 1304, and 1305 not fully approvable because the District's NSR program is not consistent with CAA section 182(c)(6). Our basis for that finding is also explained in our responses to Comments 9 and 10 above. In addition, the EPA's TSD provides additional information regarding the deficiencies in these rules, largely as a result of cross references to Rule 1304(C)(2)(d), which allows SERs to be calculated using a baseline of allowable emissions, not actual emissions. This deficiency affects the calculation of net emissions increases in Rule 1304(B)(2). Therefore, the use of the term ''net emissions increase'' or cross-references to Rule 1304 affect the approvability of Rules 1301, 1302, 1303, and 1305. Please see Table 4 of our TSD for additional information.

The EPA's action to finalize a limited approval and limited disapproval of Rules 1301, 1302, 1303, 1304, and 1305 into the SIP means that the rules, as currently submitted, will be incorporated into the SIP, but they must be revised and resubmitted to the EPA to avoid sanctions and FIP consequences. As we stated in our proposed action, we proposed limited approval and limited disapproval of these rules because although they fulfill most of the relevant CAA requirements and strengthen the SIP, they also contain certain deficiencies. Our final action incorporates into the SIP the submitted rules listed in Table 2 for which we are fully approving or finalizing a limited approval/limited disapproval, including those provisions we identified as deficient.

*Comment #12:* The District states that the issues with its NSR program are substantially similar to those the EPA raised in the NPRM for the MDAQMD's

[55] We also note that the District's current NSR program fails to adequately address increases in actual emissions that might result from delayed equipment upgrades because the rules allowing net emissions increases to be evaluated using a baseline of pre-project allowable emissions rather than actual emissions. See EPA responses to Comments 6–6d above.

[56] See 88 FR 5826, 5829–30; TSD p. 21–25.

NSR program.[57] The District requests that the EPA not finalize this action until the MDAQMD's issues are resolved, because any resolution of the issues for the MDAQMD would presumably be similarly applied to the District's program. The District states that if such a delay is not possible, it requests that the EPA not object to the consolidation of a challenge to this action in any future potential litigation involving the MDAQMD's issues.

*Response to Comment #12:* The EPA believes it will be efficient to work with AVAQMD and MDAQMD simultaneously to resolve the identified deficiencies for both NSR programs. The District's comment regarding future potential litigation is outside the scope of this rulemaking and no response is required.

*B. Comments From the Cities of Lancaster and Palmdale*

The Cities of Lancaster and Palmdale state that they ''adopt[ ] and join[ ] in the comment letter submitted by the Antelope Valley Air Quality Management District (AVAQMD)'' and that they ''would like to reiterate [the District's] comments in their entirety.'' The EPA's responses to the District's comments are provided in section II.A. of this document.

*C. Comments From Northrop Grumman Corporation (''Northrop Grumman''), Lockheed Martin Aeronautics Company—Palmdale (''Lockheed Martin Aero''), and the United States Department of Defense (''DoD'')*

*Northrop Grumman and Lockheed Martin Aero Comment #1:* Both commenters state that the proposed rulemaking identifies alleged deficiencies that are currently approved into the SIP without explanation for why previously approved provisions are now inappropriate. The commenters state that the CAA has not been amended since 1990 and that they have not identified any federal regulatory changes or EPA guidance that provide a basis for determining that the current rules are deficient. The commenters state that they would appreciate an analysis and rationale for the changes to the EPA's interpretations that render the previously approved NSR program provisions now unacceptable.

*Response to Northrop Grumman and Lockheed Martin Aero Comment #1:* As the EPA stated in our response to the District's Comment #4, the EPA's proposed action and TSD provide citations to the specific provisions in the Act and its implementing regulations that are the basis for the EPA's disapproval of certain specified provisions in the District's revised NSR rules. 40 CFR 51.165(a)(3)(ii)(J) requires offsets for each major modification at a major source in an amount equal to the difference between pre-modification actual emissions and post-modification PTE.[58] The EPA interprets the language in the regulation referring to ''the modification'' to mean each major modification that is undertaken at a major source, with emphasis on the word ''each.'' The EPA's interpretation of this provision is consistent with our approval of other NSR SIP rules in the past.[59] Since approving rules from the District's Regulation XIII into the SIP in 1996, the EPA has revised the implementing regulations at 40 CFR 51.165 to clarify the Act's requirements several times. The 2002 revisions to 40 CFR 51.165 added 40 CFR 51.165(a)(3)(ii)(J).[60] As we discussed in this document and in our proposed action and accompanying TSD, the District's submitted rules do not adequately address the requirements in 40 CFR 51.165(a)(3)(ii)(J).[61]

*Northrop Grumman and Lockheed Martin Aero Comment #2, and DoD Comment:* Northrop Grumman and Lockheed Martin Aero state that the EPA would require the use of HAE or actual emissions even where a particular Emissions Unit has already been offset in a past NSR permitting action. The commenters take issue with the argument that taking credit for these previously offset sources does not represent ''real reductions.'' The commenters state that their facility emission limits, as well as individual permit limits, were created as a result of facility shutdowns (the Ford Motor Company plant in Pico Rivera and the Lockheed Martin Burbank facility). Both commenters state that at the time of the Ford and Lockheed shutdowns, their facilities were under the jurisdiction of SCAQMD, therefore ERCs were calculated pursuant to SCAQMD Rule 1306(e)(2), based on ''actual emissions that occurred each year during the two-year period immediately preceding the date of permit application, or other appropriate period determined by the Executive Officer or designee to be representative of the source's cyclical operation, and consistent with federal requirements,'' and included all adjustments or discounts required as well as payment of any remaining NSR balances. Both commenters assert that these were not ''paper reductions'' but were instead real emissions reductions, and to now determine those reductions as ''paper'' reductions is without merit.

Similarly, the DoD believes that emissions that are previously offset through an approved New Source Review regulation represent actual emission reductions as required by CAA section 173(c)(1), and as such, can be used for calculating emission reductions pursuant to 1304(C)(2)(d). Fully offset emissions are not ''paper reductions''; they represent actual reduction in emissions, banked and used following approved regulatory procedures. DoD argues that the removal of this provision would create a discriminatory situation in which a facility that has previously provided offsets for emission sources or processes is not differentiated from one that has received a permit without providing offsets. DoD requests that the EPA reconsider this change so that facilities have the incentive and flexibility to modify and replace older emission sources to improve the air quality and achieve military mission requirements.

[57] 87 FR 72434 (November 25, 2022).

[58] See, *e.g.,* EPA, ''Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations,'' 67 FR 80185 (December 31, 2002), p. I–6–11 (''With regard to the amount of emissions increase that must be offset, consistent with our proposal, the new rules provide once a physical or operational change is determined to be a major modification (based on the 'actual-to-projected-actual' applicability test) the current definition of 'actual emissions' would continue to be used for other NSR purposes, including ambient impact analyses. Based on this position, the new rules for nonattainment NSR provide that the total tonnage of increased emissions, in tons per year, resulting from a major modification must be determined by summing the difference between the allowable emissions after the modification and the 'actual emissions' (as defined by the current rules) before the modification for each emissions unit affected by the modification. [§ See 51.165(a)(3)(ii)(J)]''). See also 81 FR 50339, 50340 (August 1, 2016) (''40 CFR 51.165(a)(3)(ii)(J) directs SIPs to include rules to ensure that the total tonnage of increased emissions, in tons per year, resulting from a major modification that must be offset in accordance with section 173 of the Act shall be determined by summing the difference between the allowable emissions after the modification and the actual emissions before the modification. This provision requires providing offsets for each major modification at a major source in an amount equal to the difference between pre-modification actual emissions and post-modification PTE.'')

[59] See, *e.g.,* ''Revisions to California State Implementation Plan; Bay Area Air Quality Management District; Stationary Sources; New Source Review;'' 83 FR 8822 (March 1, 2018); see also ''Revision of Air Quality Implementation Plan; California; Sacramento Metropolitan Air Quality Management District; Stationary Source Permits;'' 78 FR 53270 (August 29, 2013).

[60] 67 FR 80185 (December 31, 2002).

[61] In our 2002 rulemaking, we also added the requirement in 40 CFR 51.165(a)(2)(ii) that deviations from federal definitions and requirements are generally approvable only if a state specifically demonstrates that the submitted provisions are more stringent, or at least as stringent, in all respects as the corresponding federal provisions and definitions. To date, the District has not made such a demonstration.

*Response to Northrop Grumman and Lockheed Martin Aero Comment #2 and DoD Comment:* The EPA disagrees with the comments, although we have no argument with the commenters as to whether the reductions were real at the time the offsets were originally used to permit the emissions units. Instead, the intent of our statement was to clarify that because such emissions reductions were previously used as offsets to create the permitted allowable emissions, they are not real reductions for a current project. 40 CFR 51.165(a)(3)(i)(A) establishes the federal requirements for SIP rules concerning offsets. This provision states that the baseline for determining credit for emissions reductions shall be the actual emissions of the source from which the credits are obtained, where the attainment plan is based on the actual emissions of sources within the nonattainment area. The District's attainment plan is based on actual emissions from permitted sources, thus triggering the requirements of this provision.[62] Thus, an emission unit's actual emissions must be used as the baseline for calculating emission reductions from an existing emission unit, regardless of whether it was previously offset or not. Allowing credit for a reduction in previously offset PTE is not creditable, because that portion of the reduction has already been credited in the attainment plan demonstration. Furthermore, 40 CFR 51.165(a)(3)(ii)(G) explicitly prohibits facilities from using the same emissions reductions more than once. If a facility relies upon emissions reductions for a prior NNSR permit action, those emissions reductions are not eligible for use again in a future NNSR permit action.

The commenters assert that reductions previously used to offset a project may be used to offset emissions increases occurring in the present day. These assertions are problematic—reductions used for offsets must be ''surplus'' to reductions that were already required by federal law (*e.g.,* by other SIP-approved regulations such as CAA section 182(b)(2) Reasonably Available Control Technology (RACT) requirements and NSR permits). Because the offsets provided for the existing equipment were already ''relied'' upon to issue an NSR permit, they cannot be used again to issue another NSR permit. The commenters reference ERCs awarded to them by SCAQMD; since AVAQMD was formed in 1997, reductions that were credited by SCAQMD must have occurred at least 20 years in the past.[63] We note here that in our proposed action, we did not identify the prohibition of reliance on previously-used offsets as a deficiency in the District's rules, but the issue relates to the same deficient provision that we identified: Rule 1304(C)(2)(d). We determined that it is appropriate to include an explanation of the requirements stated in 40 CFR 51.165(a)(3)(i)(A) and 40 CFR 51.165(a)(3)(ii)(G) to fully respond to the commenters.

The requirements stated in 40 CFR 51.165(a)(3)(i)(A) and 40 CFR 51.165(a)(3)(ii)(G) are consistent with the statutory provisions stated in CAA section 173(c)(1), which the DoD asserts is satisfied when previously offset emissions are treated as actual emission reductions for a current project, a statement with which we disagree. The CAA and its implementing regulations require a pre-construction analysis of each project at a major source to determine whether the project will result in a significant emissions increase and a significant net emissions increase, and if so, the quantity of reductions necessary to offset the significant emissions increase. CAA section 173(c)(1) requires NSR SIPs to offset the ''total tonnage of increased emissions of the air pollutant from the new or modified source by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant,'' and that ''[s]uch emission reductions shall be, by the time a new or modified source commences operation, in effect and enforceable . . . .'' As we explained above, because the District's attainment plan is based on actual emissions from permitted sources, an emission unit's actual emissions must be used as the baseline for calculating emission reductions from an existing emission unit, regardless of whether it was previously offset or not.

In terms of calculating offset quantities, 40 CFR 51.165(a)(3)(ii)(J) is plainly stated as a discrete requirement applicable to each proposed major modification. This provision requires offsets for each major modification at a major source in an amount equal to the difference between pre-modification actual emissions and post-modification potential to emit, which is generally equivalent to allowable emissions. The EPA interprets the language in the regulation referring to ''the modification'' to mean *each* major modification that a facility undertakes at a major source. The EPA's interpretation of this provision is consistent with our approval of other NSR SIP rules.[64] [65]

*Northrop Grumman and Lockheed Martin Aero Comment 3:* Northrop Grumman and Lockheed Martin Aero state that the AVAQMD's NSR rules assure that increased emissions are offset by enforceable reductions in actual emissions. The commenters state that the CAA and its implementing regulations require that emission increases from new and modified sources in nonattainment areas are offset by emissions reductions that:

(1) Are ''in effect and *enforceable*'' (CAA section 173(c)) (emphasis in original comment);

(2) are ''creditable to the extent that the *old level* of actual emissions . . . exceeds the new level of actual emissions'' (40 CFR 51.165(a)(1)(vi)(E)(*1*)) (emphasis in original comment); and

(3) amount to the sum of ''the difference between allowable emissions after the modification . . . and the *actual emissions before the modification*'' (40 CFR(a)(3)(ii)(J)) (emphasis in original comment).

The commenters state that despite the EPA's reservations about the District's use of a PTE baseline for calculating SERs for previously offset sources, the District's rules do just as the CAA requires. The commenters argue that the

[62] AVAQMD, ''Federal 70 ppb Ozone Attainment Plan (Western Mojave Desert Nonattainment Area),'' for adoption on January 17, 2023, p. 24 (''The stationary source inventory is composed of point sources and area-wide sources . . . The inventory reflects *actual* emissions from industrial point sources reported to the Districts by the facility operators through calendar year 2018.'' (emphasis added)). See also, AVAQMD, ''Federal 75 ppb Ozone Attainment Plan (Western Mojave Desert Nonattainment Area),'' March 21, 2017, p. 7 (''This document includes a comprehensive, accurate and current inventory of actual emissions . . . .'').

[63] We note that the shutdowns of the facilities referenced in the comments appear to have occurred in the 1980's or early 1990s. See, *e.g.,* EPA, ''Reuse and the Benefit to Community: San Fernando Valley (Area 1) Superfund Site: Burbank,'' October 2018, p. 1 (''The closure of the Lockheed Martin facility in 1991 presented a redevelopment opportunity, while the groundwater cleanup presented a challenge in a water-scarce region.''), available at: *https://semspub.epa.gov/work/HQ/100002333.pdf;* see also, The New York Times, ''Northrop to Buy Vacant Ford Plant,'' February 5, 1982 (''Ford discontinued assembly operations at the plant in January, 1980.''), available at: *https://www.nytimes.com/1982/02/05/business/northrop-to-buy-vacant-ford-plant.html.*

[64] See, *e.g.,* ''Revisions to California State Implementation Plan; Bay Area Air Quality Management District; Stationary Sources; New Source Review,'' 83 FR 8822 (March 1, 2018); see also ''Revision of Air Quality Implementation Plan; California; Sacramento Metropolitan Air Quality Management District; Stationary Source Permits,'' 78 FR 53270 (August 29, 2013).

[65] In response to the DoD's assertion that the federal requirements ''would create a discriminatory situation,'' we maintain that the permit application process should be sufficient to enable the District to determine the quantity and status of offset credits and reductions; diligent implementation of the federal requirements will avoid confusion and unfair outcomes. Removal of the use of a PTE-to-PTE test would align the District's NNSR program with the same federal NNSR program that is applicable in all other areas. We do not see this as discriminatory.

District's SER calculations are in fact what turn temporary and unenforceable reductions into actual, permanent, and enforceable reductions, which may be properly credited as offsets or against emission increases when measuring a net emissions increase.

*Response to Northrop Grumman and Lockheed Martin Aero Comment #3:* The EPA disagrees with the comments. As the commenters state, 40 CFR 51.165(a)(1)(vi)(E)(*1*) specifies that emission reductions are creditable as offsets to the extent that the *old level of actual emissions* . . . exceeds the new level of actual emissions.'' This provision clearly indicates that the baseline for calculating an emissions reduction is the current actual level of emissions, not the allowable emissions, as suggested by the commentor. As we explained in our proposed action, the District's program is deficient because it allows sources to calculate the quantity of emissions reductions by using potential to emit as the baseline for the calculations rather than the federally required baseline of actual emissions. Using a PTE-to-PTE test to calculate the quantity of creditable emissions reductions does not satisfy the requirements stated in CAA section 173(c)(1) or 40 CFR 51.165(a)(1)(vi)(E)(*1*) because it does not consider the actual emissions change resulting from a project.[66]

In addition, as the EPA explained in our proposed action, 40 CFR 51.165(a)(3)(ii)(J) directs SIPs to include rules to ensure that the total tonnage of increased emissions, in tons per year, resulting from a major modification that must be offset in accordance with CAA section 173 shall be determined by summing the difference between the allowable emissions after the modification and the actual emissions before the modification.[67] This provision requires providing offsets for each major modification at a major source in an amount equal to the difference between pre-modification actual emissions and post-modification PTE.[68]

Contrary to the commenters' assertions, the District's use of a PTE-to-PTE test in lieu of the required actual to potential test renders that portion of the District's NSR program deficient. Therefore, the District's rules do not satisfy the federal requirements that the commenters cite.

*Northrop Grumman and Lockheed Martin Aero Comment #4:* Northrop Grumman and Lockheed Martin Aero state that EPA's suggested corrections could limit the ability to modernize, which would be detrimental to air quality. The commenters state that there are no available ERCs in the District, and that interdistrict ERC requirements under the California Health and Safety Code along with the EPA's revised regulations that make interprecursor trading between ozone precursors impermissible mean that it is unlikely for the company to locate sufficient offsets for its projects.

Northrop Grumman states that it recently installed a large new paint hangar equipped with technology to meet the Regulation XIII BACT requirement and is in the process of designing another that will also be equipped with technology to meet BACT. Northrop Grumman argues that eliminating the use of potential to emit as HAE for previously offset sources would make this modernization impossible due to the lack of VOC offsets in this or any upwind district. Lockheed Martin Aero describes plans to update its own facility. Lockheed Martin Aero also argues that eliminating the use of potential to emit as HAE for previously offset sources would make this modernization impossible due to the complete lack of VOC offsets in this or any upwind district.

*Response to Northrop Grumman and Lockheed Martin Aero Comment #4:* These comments do not provide any information regarding the legality or appropriateness of the EPA's proposed rulemaking action. Instead, they raise concerns about the impacts regarding the outcome of our action, in that the required rule revisions may require such projects to obtain additional offsets, which they state are not available. This concern is outside the scope of our proposed action, which is to ensure the District's NSR rules comply with federal NNSR program requirements regarding the calculation of emission reductions and the quantity of offsets required for significant emission increases.

The EPA will continue to work with the District to resolve the deficiencies in its NSR rules and stakeholders will have the ability to provide input on revisions to the rules through public participation opportunities at the local and federal level.

*Northrop Grumman and Lockheed Martin Aero Comment #5:* Northrop Grumman Lockheed Martin Aero state that the results of this SIP disapproval could limit modernization and growth at a crucial time for the companies. The commenters assert that the District has provided more than appropriate evidence in its staff report and supporting analyses that its entire NSR program is fully compliant with and is overall more stringent than the CAA. The commenters claim that the EPA's proposed disapproval is not only unnecessary to protect air quality but could also result in significant unintended consequences.

The commenters state that they are major aerospace defense contractors and employers in the AVAQMD. Northrop Grumman explains that it has plans to add productive capacity and 1,100 jobs at its Palmdale facility this year, and that the EPA's proposed disapproval could limit the ability to achieve that growth, which could also have much broader ramifications, including the ability to meet its contractual obligations to the United States Department of Defense that are important to national security. Lockheed Martin Aero states that it has plans to add productive capacity and jobs at the Palmdale facility, and that limiting that growth could have much broader ramifications including the ability to meet its contractual obligations to the United States Department of Defense that are important to national security.

The commenters conclude with the statement that they do not believe there is evidence that EPA's disapproval will produce benefits to air quality in the region, and instead encourage the EPA to approve the rules as submitted and to focus its efforts on mobile and other underregulated sources in the District that are within its purview.

*Response to Northrop Grumman and Lockheed Martin Aero Comment #5:* The EPA appreciates the commenters' concerns regarding business operations and employment considerations. The EPA is responsible for ensuring the rules submitted for inclusion in the SIP comply with all applicable CAA requirements prior to approval. Our action is intended to ensure that federal NNSR requirements are met and will be implemented consistently. The EPA will continue to work with the District to resolve the deficiencies in its rules and stakeholders will have the ability to provide input on revisions to the rules through public participation opportunities at the local and federal level. The EPA looks forward to working collaboratively with the District to address the deficiencies in its rules and thereby assisting the District in addressing air pollution in its jurisdiction.

[66] See note 22 above regarding Rule 1304(C)(2)(d)(i), which states that the PTE for an emissions unit is specified in a federally enforceable emissions limitation and the generally interchangeable nature of the terms ''allowable'' and ''potential'' in the context of this rulemaking regarding the District's NSR rules.

[67] 81 FR 50339, 50340 (August 1, 2016).

[68] Id.

## III. EPA Action

None of the submitted comments change our assessment of the submitted rules as described in our proposed action. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is approving the submitted versions of Rules 219, 1300, and 1306. Likewise, as authorized under sections 110(k)(3) and 301(a) of the Act, the EPA is finalizing a limited approval of the submitted versions of Rules 1301, 1302, 1303, 1304, 1305, and 1309. This action incorporates submitted Rules 219, 1300, 1301, 1302, 1303, 1304, 1305, 1306, and 1309 into the California SIP, including those provisions identified as deficient. As authorized under section 110(k)(3) and 301(a), the EPA is simultaneously finalizing a limited disapproval of Rules 1301, 1302, 1303, 1304, 1305, and 1309.

As a result of our limited approval and limited disapproval of Rules 1301, 1302, 1303, 1304, 1305, and 1309, the EPA must promulgate a federal implementation plan (FIP) under section 110(c) for the District within 24 months unless we approve subsequent SIP revisions that correct the deficiencies identified in this action. In addition, the offset sanction in CAA section 179(b)(2) will be imposed 18 months after the effective date of this action, and the highway funding sanction in CAA section 179(b)(1) six months after the offset sanction is imposed. Sanctions will not be imposed if the EPA approves a subsequent SIP submission that corrects the identified deficiencies before the applicable deadlines.

In this action we are also finalizing an approval of the District's visibility provisions for major sources subject to review under the NNSR program under 40 CFR 51.307. Therefore, we are revising 40 CFR 52.281(d) to remove the FIP for visibility protections as it applied to the District.

## IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, the EPA is incorporating by reference the rules listed in Table 2 of this preamble which implement the District's New Source Review (NSR) permitting program for new and modified sources of air pollution under part D of title I of the CAA. The EPA has made, and will continue to make, these materials available through *https://www.regulations.gov* and in hard copy at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

## V. Statutory and Executive Order Reviews

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

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

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

### *B. Paperwork Reduction Act (PRA)*

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

### *C. Regulatory Flexibility Act (RFA)*

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

### *D. Unfunded Mandates Reform Act (UMRA)*

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

### *E. Executive Order 13132: Federalism*

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

### *F. Executive Order 13175: Coordination With Indian Tribal Governments*

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

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

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

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

### *I. National Technology Transfer and Advancement Act (NTTAA)*

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

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of

environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to review state choices, and approve those choices if they meet the minimum criteria of the Act. Accordingly, this final action is finalizing the approval and the limited approval and limited disapproval of a state submittal as meeting federal requirements and does not impose additional requirements beyond those imposed by state law.

The State did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

*L. Petitions for Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 1, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon oxides, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: June 22, 2023.

**Martha Guzman Aceves,**

*Regional Administrator, Region IX.*

For the reasons stated in the preamble, the Environmental Protection Agency amends part 52, chapter I, title 40 of the Code of Federal Regulations as follows:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

### Subpart F—California

■ 2. Section 52.220 is amended by:
■ a. Adding paragraphs (b)(25), (c)(6)(xvii)(E), (c)(31)(vi)(I), and (c)(39)(iii)(H);
■ b. Revising paragraph (c)(68)(ii); and
■ c. Adding paragraphs (c)(68)(v) through (vii), (c)(70)(i)(F) and (G), (c)(87)(v)(B), (c)(103)(xviii)(D), (c)(155)(iv)(D), (c)(240)(i)(A)(*6*) and (*7*), and (c)(602).

The additions and revision read as follows:

**§ 52.220 Identification of plan—in part.**

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(b) * * *

(25) Los Angeles County Air Pollution Control District.

(i) Previously approved on May 31, 1972, in paragraph (b) of this section and deleted with replacement in paragraph (c)(6): Rule 11.

(ii) [Reserved]

(c) * * *

(6) * * *

(xvii) * * *

(E) Previously approved on September 22, 1972, in paragraph (c)(6) of this section and deleted with replacement in paragraph (c)(39)(iii)(B) of this section for implementation in the Antelope Valley Air Quality Management District: Rule 11.

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(31) * * *

(vi) * * *

(I) Previously approved on November 9, 1978, in paragraph (c)(31)(vi)(C) of this section and now deleted without replacement for implementation in the Antelope Valley Air Quality Management District: Rule 206.

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(39) * * *

(iii) * * *

(H) Previously approved on November 9, 1978, in paragraph (c)(39)(iii)(B) of this section and deleted without replacement: Rules 206 and 219.

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(68) * * *

(ii) Previously approved on January 21, 1981, and deleted without replacement for implementation in the South Coast Air Quality Management District: Rule 1311.

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(v) Previously approved on January 21, 1981, in paragraph (c)(68)(i) of this section and deleted with replacement in paragraph (c)(240)(i)(A) of this section: Rules 1301, 1303, 1304, 1306, 1310 and 1313.

(vi) Previously approved on January 21, 1981, in paragraph (c)(68)(i) of this section and deleted without replacement: Rule 1307.

(vii) Previously approved on January 21, 1981, in paragraph (c)(68)(i) of this section and now deleted without replacement for implementation in the Antelope Valley Air Quality Management District: Rule 1311.

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(70) * * *

(i) * * *

(F) Previously approved on January 21, 1981, in paragraph (c)(70)(i)(A) of this section and deleted with replacement in paragraph (c)(240)(i)(A) of this section: Rule 1302.

(G) Previously approved on January 21, 1981, in paragraph (c)(70)(i)(A) of this section and deleted without replacement: Rule 1308.

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(87) * * *

(v) * * *

(B) Previously approved on June 9, 1982, in paragraph (c)(87)(v)(A) of this section and deleted without replacement: Rules 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1310, 1311, and 1313.

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(103) * * *

(xviii) * * *

(D) Previously approved on July 6, 1982, in paragraph (c)(103)(xviii)(A) of this section and now deleted with replacement in paragraph (c)(602)(i)(A)(*1*) of this section for implementation in the Antelope Valley Air Quality Management District: Rule 219.

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(155) * * *

(iv) * * *

(D) Previously approved on January 29, 1985, in paragraph (c)(155)(iv)(B) of this section and deleted without replacement: Rule 1305.

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(240) * * *

(i) * * *

(A) * * *

(6) Previously approved on December 4, 1996, in paragraph (c)(240)(i)(A)(*1*) of this section and now deleted with replacement in paragraphs (c)(602)(i)(A)(*2*) through (c)(602)(i)(a)(*9*) of this section for implementation in the Antelope Valley Air Quality Management District: Rules 1301, 1302, and 1309, adopted on December 7, 1995, Rule 1303, adopted on May 10, 1996, and Rules 1304 and 1306, adopted on June 14, 1996.

(7) Previously approved on December 4, 1996, in paragraph (c)(240)(i)(A)(*1*) of this section and now deleted without replacement for implementation in the Antelope Valley Air Quality Management District: Rules 1309.1, 1310 and 1313, adopted on December 7, 1995.

* * * * *

(602) The following regulations were submitted on August 3, 2021, by the Governor's designee as an attachment to a letter dated August 3, 2021.

(i) *Incorporation by reference.* (A) Antelope Valley Air Quality Management District.

(*1*) Rule 219, ''Equipment Not Requiring a Permit,'' amended on June 15, 2021.

*(2)* Rule 1300, ''New Source Review General,'' amended on July 20, 2021.

*(3)* Rule 1301, ''New Source Review Definitions,'' amended on July 20, 2021.

*(4)* Rule 1302 ''New Source Review Procedure,'' (except 1302(C)(5) and 1302(C)(7)(c)), amended on July 20, 2021.

*(5)* Rule 1303, ''New Source Review Requirements,'' amended on July 20, 2021.

*(6)* Rule 1304, ''New Source Review Emissions Calculations,'' amended on July 20, 2021.

*(7)* Rule 1305, ''New Source Review Emissions Offsets,'' amended on July 20, 2021.

*(8)* Rule 1306, ''New Source Review for Electric Energy Generating Facilities,'' amended on July 20, 2021.

*(9)* Rule 1309, ''Emission Reduction Credit Banking,'' amended on July 20, 2021.

(B) [Reserved]

(ii) [Reserved]

* * * * *

■ 3. Section 52.281 is amended by adding paragraph (d)(10) to read as follows:

**§ 52.281 Visibility protection.**

* * * * *

(d) * * *

(10) Antelope Valley Air Quality Management District.

* * * * *

[FR Doc. 2023–13763 Filed 6–30–23; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R07–OAR–2023–0201; FRL–10839–02–R7]**

## Air Plan Partial Approval and Partial Disapproval; Missouri; Revision to Sulfur Dioxide Control Requirements for Lake Road Generating Facility

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is taking final action to partially approve and partially disapprove revisions to the State Implementation Plan (SIP) submitted by the State of Missouri on February 17, 2022. In its submission, the Missouri Department of Natural Resources (MoDNR) requested that revisions to a 2016 Administrative Order on Consent (AOC) for controlling sulfur dioxide ($SO_2$) emissions at the Lake Road power plant (hereinafter referred to as ''2016 AOC'') be approved in the SIP. This final action amends the SIP to establish more stringent fuel oil sulfur content limits, remove $SO_2$ emission limits that are no longer needed due to the strengthened fuel oil sulfur requirements, and streamline reporting requirements. The approved SIP changes meet the requirements of the Clean Air Act (CAA). This final action also disapproves a new provision in the AOC that would potentially allow Lake Road to exceed the fuel oil sulfur content limits on a temporary basis.

**DATES:** This final rule is effective on August 2, 2023.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R07–OAR–2023–0201. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *www.regulations.gov* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional information.

**FOR FURTHER INFORMATION CONTACT:** Allie Donohue, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7986; email address: *donohue.allie@epa.gov*.

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

### Table of Contents



### I. What is being addressed in this document?

The EPA is partially approving and partially disapproving a SIP revision submitted by the State of Missouri on February 17, 2022. In its submission, MoDNR requested that AOC No. APCP–2015–118 between MoDNR and Evergy (formerly Kansas City Power & Light) submitted in 2016, and amended in 2018 (Amendment #1), be replaced with Amendment #2 to the AOC in the SIP. The EPA is approving these SIP revisions, with the exception of Amendment #2 paragraph 12.A. The approved revisions meet the requirements of the Clean Air Act. The EPA is disapproving Amendment #2 paragraph 12.A. because this provision potentially allows Lake Road to burn fuel oil with a sulfur content greater than the sulfur content limit of 15 parts per million (ppm) on a temporary basis. Paragraph 12.A. is severable from Amendment #2 because it is a new paragraph that was not previously included in the 2016 AOC or Amendment #1, and it is not approved in the SIP. The EPA proposed to partially approve and partially disapprove this submission on April 26, 2023 (88 FR 25309). The EPA's analysis of the State's requested SIP revisions can be found in section II of the proposed rule and in more detail in the technical support document (TSD) included in this docket.

## II. Have the requirements for approval of a SIP revision been met?

With respect to the portions of the submittal which EPA is approving, the State submission met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice on this SIP revision from November 1, 2021, to December 9, 2021 and received no comments. In addition, as explained above and in more detail in the TSD which is part of this docket, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

As explained in section II of the proposed rule and further in the TSD, the EPA is disapproving Amendment #2 paragraph 12.A.

The EPA received no comments on the proposed rule during the public comment period which opened April 26, 2023, the date of its publication in the **Federal Register**, and closed on May 26, 2023.

## III. What action is the EPA taking?

The EPA is taking final action to amend the Missouri SIP by partially approving and partially disapproving the State's submittal. Under section 179(a) of the CAA, final disapproval of a submittal that addresses a requirement of part D, title I of the CAA (CAA sections 171–193) or is required in response to a finding of substantial inadequacy as described in CAA section 110(k)(5) (SIP Call) starts a sanctions clock. The Missouri SIP submission that we are partially disapproving was not submitted to meet either of these requirements. Therefore, this partial disapproval will not trigger mandatory sanctions under CAA section 179. In addition, CAA section 110(c)(1) provides that the EPA must promulgate a Federal Implementation Plan (FIP) within two years after either finding that a State has failed to make a required submission or disapproving a SIP submission in whole or in part, unless the EPA approves a SIP revision correcting the deficiencies within that two-year period. With respect to our partial disapproval of Missouri's SIP submission, however, we conclude that any FIP obligation resulting from this partial disapproval is satisfied by our determination that there is no deficiency in the SIP to correct. Specifically, we are approving all revisions with the exception of Amendment #2 paragraph 12.A.

## IV. Incorporation by Reference

In this document, 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 Missouri Amendment #2 to Administrative Order on Consent, State effective October 18, 2021, between MoDNR and Evergy related to controlling $SO_2$ emissions at the Lake Road power plant discussed in section I of this preamble and as set forth below in the amendments to 40 CFR part 52. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 7 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Also, in this document, as described in the amendments to 40 CFR part 52 set forth below, the EPA is removing provisions of the EPA-Approved Missouri Administrative Order on Consent and Amendment #1 (State effective September 27, 2018) from the Missouri State Implementation Plan, which is incorporated by reference in accordance with the requirements of 1 CFR part 51. As described in the amendments to 40 CFR part 52 set forth below, EPA is also removing an outdated reference to the St. Joseph Light and Power $So_2$ consent agreement (State effective May 21, 2001).

## V. Environmental Justice Considerations

The EPA reviewed demographic data, which provides an assessment of individual demographic groups of the populations living within a 2-mile radius of the Lake Road facility Census 2010 Summary Report available on its environmental justice (EJ) screening and mapping tool (''EJSCREEN''). The EPA then compared the data to the State average for each of the demographic groups using 2010 State census data from the United States Census Bureau. The results of this analysis are being provided for informational and transparency purposes. The results of the demographic analysis indicate that, for populations within the 2-mile radius of the Lake Road facility, the percent of people of color (persons who reported their race as a category other than White alone (not Hispanic or Latino)) is less than the national average (16 percent versus 21 percent). Within people of color, the percent of the population that is Black or African American alone is lower than the State average (3 percent versus 12 percent) and the percent of the population that is American Indian/Alaska Native is similar to the State average (1 percent versus 1 percent). The percent of the population that is two or more races is similar to the State average (3 percent versus 3 percent). The percent of people with low income within the 2-mile radius of the Lake Road facility is higher than the State average (41 percent versus 31 percent).

## VI. 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 Clean Air Act 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 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 14094 (88 FR 21879, April 11, 2023);
- 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 subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a State program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- 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.

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).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA performed an environmental justice analysis, as is described above in the section titled, ''Environmental Justice Considerations.'' The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

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 September 1, 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 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: June 26, 2023.

**Meghan A. McCollister,**

*Regional Administrator, Region 7.*

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as set forth below:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

### Subpart AA—Missouri

■ 2. In § 52.1320, in the table in paragraph (d):

■ a. Remove and reserve entries ''(17)'', ''(32)'', and ''(33)''; and

■ b. Add entry ''(38)'' in numerical order.

The addition reads as follows:

**§ 52.1320 Identification of plan.**

* * * * *

(d) * * *

EPA-APPROVED MISSOURI SOURCE-SPECIFIC PERMITS AND ORDERS

| Name of source | Order/permit No. | State effective date | EPA approval date | Explanation |
|---|---|---|---|---|
| * | * | * | * | * |
| (38) Kansas City Power and Light—Lake Road Facility. | Amendment #2 to Administrative Order on Consent No. APCP–2015–118. | 10/18/2021. | 7/3/2023, [insert **Federal Register** citation]. | EPA is approving Amendment #2 to AOC No. APCP–2015–118, except for paragraph 12.A. |

* * * * *

[FR Doc. 2023–13979 Filed 6–30–23; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**[Docket No. FWS–HQ–ES–2021–0033; FF09E41000 234 FXES111609C0000]**

**RIN 1018–BF98**

## Endangered and Threatened Wildlife and Plants; Designation of Experimental Populations

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish Wildlife Service (Service), revise the regulations concerning experimental populations of endangered species and threatened species under the Endangered Species Act. We remove language generally restricting the introduction of experimental populations to only the species' ''historical range'' to allow for the introduction of populations into habitat outside of their historical range for conservation purposes. To provide for the conservation of certain species, we have concluded that it may be increasingly necessary and appropriate to establish experimental populations outside of their historical range if the

species' habitat has undergone, is undergoing, or is anticipated to undergo irreversible decline and is no longer capable of supporting the species due to threats such as climate change or invasive species. We added language that the Secretary will also consider any adverse effects that may result to the ecosystem from the experimental population being established. We also made minor changes to clarify the existing regulations; these minor changes do not alter the substance or scope of the regulations.

**DATES:** This final rule is effective August 2, 2023.

**ADDRESSES:** Public comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available on the internet at *https://www.regulations.gov* in Docket No. FWS–HQ–ES–2021–0033.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Maclin, Chief, Division of Restoration and Recovery, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2646. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

**SUPPLEMENTARY INFORMATION:**

## Background

The purposes of the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*) are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the ESA states that it is the policy of Congress that Federal agencies shall seek to conserve threatened and endangered species and use their authorities to further the purposes of the ESA (16 U.S.C. 1531(c)(1)). The ESA's implementing regulations are found in title 50 of the Code of Federal Regulations (CFR).

The 1982 amendments to the ESA added section 10(j) to facilitate reintroductions of listed species by allowing the Service to designate ''experimental populations.'' The regulations to carry out section 10(j) provide that the Service may designate as an experimental population a population of an endangered species or a threatened species that will be released into suitable natural habitat outside the species' current natural range (but within its probable historical range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed) (50 CFR 17.81). At the time the Service adopted these regulations, we did not anticipate the impact of climate change on species and their habitats. We have since learned that climate change is causing, or is anticipated to cause, many species' suitable habitat to shift outside of their historical range.

The 2021 National Fish, Wildlife, and Plants Climate Adaptation Network's Climate Adaptation Strategy report summarizes impacts to species' behavior, morphology, and physiology, as well as shifts in ranges and demographic and population-level impacts from climate change (NFWPCAN, 2021, pp. 15–20). In chapter 7 of the Fourth National Climate Assessment (Lipton et. al., 2018, p. 269), one of the key messages states, ''Climate change continues to impact species and populations in significant and observable ways. Terrestrial, freshwater, and marine organisms are responding to climate change by altering individual characteristics, the timing of biological events, and their geographic ranges. Local and global extinctions may occur when climate change outpaces the capacity of species to adapt.'' A recent paper looked at Big Pine Key, Florida, as a case study in examining how to incorporate current scientific knowledge about regional climate projections in Service analyses. The authors examined the anticipated future effects of sea-level rise on existing habitat from saltwater intrusion of the freshwater lens below Big Pine Key. They stated that, beyond 3 ft (0.9 m) of sea-level rise, few adaptation options are available for the Florida Key deer beyond relocations outside of the Florida Keys (Miller and Harwell, 2022, p. 14553). Thus, it is clear that climate change is presently affecting—and will continue to affect—species and their habitats, and that tools such as the establishment of experimental populations outside of their historical range will become increasingly important for the conservation and recovery of ESA-listed species.

In addition to climate change, other threats such as invasive species may also reduce the ability of habitat to support experimental populations within the species' historical range. For example, both the Guam rail and Guam kingfisher (sihek) no longer have any habitat within their historical range that is suitable for reintroduction or establishment of an experimental population. The primary cause of the rail's and sihek's extinction in the wild was predation by the introduced brown tree snake (54 FR 43966, October 30, 1989; USFWS 2008, p. 21). Applying the current section 10(j) regulations, the Service's Director determined that each was an extreme case and found that the primary habitat of the species within its historical range had been unsuitably and irreversibly altered or destroyed. For the rail, we finalized the establishment of an experimental population on the island of Rota, and for the sihek we recently published a final rule to establish an experimental population on Palmyra Atoll; both locations are outside the historical range for these species (54 FR 43966, October 30, 1989; 88 FR 19880, April 4, 2023).

Therefore, we have determined that it may be necessary and appropriate to establish experimental populations outside of a species' historical range to provide for its conservation and adaptation to the habitat-related impacts of climate change and other threats. On June 7, 2022, we proposed to revise the section 10(j) regulations at 50 CFR part 17, subpart H (87 FR 34625), and in this final rule we discuss the comments we received during the comment period and our consideration of the issues raised.

## This Rulemaking Action

The regulatory changes in this final rule more clearly establish the authority of the Service to introduce experimental populations of listed species into areas of habitat outside of their historical ranges. Removing this restriction—that the Service may only consider designating an experimental population outside a species' historical range if the species' primary habitat has been unsuitably and irreversibly altered or destroyed—will allow the Service to act before populations are severely depleted, lose important elements of genetic diversity, or become habituated to captivity and may help to prevent species extinctions. Being able to act before situations are so dire that there is no remaining suitable habitat within the historical range will improve the likelihood of species recovery while reducing the need for costly and extreme measures.

When introducing experimental populations outside of historical range, we must avoid adversely affecting the ecosystem into which the population is being introduced. Our practice is to follow the International Union for Conservation of Nature (IUCN) Guidelines for Reintroductions and

Other Conservation Translocations, which recommends conducting ecological risk assessments where appropriate. As part of this final rule, we added language stating that we will consider any possible adverse effects to the ecosystem that may result from the establishment of the experimental population. Other regulatory revisions included in this final rule do not change the process for designating an experimental population.

In this rule, we finalize the proposed revisions at 87 FR 34625 (June 7, 2022) to the regulations at 50 CFR part 17, subpart H. The primary revision was to delete the reference to a species' ''historical range.'' This change allows for experimental populations to be introduced into habitat outside of the historical range of the species under appropriate circumstances. Those circumstances could include instances where little to no habitat remains within the historical range of a species or where formerly suitable habitat within the historical range has undergone, is undergoing, or is anticipated to undergo irreversible decline or change, such that it no longer contains the resources necessary for survival and recovery, thereby leading to the need to establish the species in habitat in areas outside the historical range. Circumstances could also include instances where, based on the best available scientific information, we anticipate that the historical range will no longer contain habitat capable of supporting the recovery of the species. This rule will be applied to future designations and will not require the reevaluation of any prior designation of an experimental population.

**Changes From the Proposed Rule**

Based on comments we received on the proposed rule (87 FR 34625, June 7, 2022), and to provide clarifications, we include the changes described below to the proposed regulations. Other than these revisions, we are finalizing the rule as proposed:

1. In the regulation at 50 CFR 17.81(a), we removed the proposed reference to ''one or more life history stages.'' We determined that this language was confusing and did not communicate our intent that, in order to designate an experimental population outside the historical range, we must determine that there is habitat capable of supporting that experimental population. In considering this change we also decided it would be appropriate to change ''that is necessary to support'' to ''that is capable of supporting.''

2. In § 17.81(a), we also revised ''that has been or will be released'' to ''that will be released'' as the proposed language implied that we can retroactively designate already introduced populations, which we cannot do.

3. To § 17.81(b), we revised proposed § 17.81(b)(4) for clarity by adding ''experimental'' before ''population'' in the first part of the sentence. We also added a new subparagraph (b)(5) to ensure that, when establishing an experimental population outside of the species' historical range, we consider whether establishing such a population will adversely affect the ecosystem in the area where the experimental population would be established.

4. We revised proposed § 17.81(c)(3) to address the possibility that removal of the experimental population may be necessary by adding the word ''remove'' to the sentence. In the past, we have recognized that removal may be needed, and this addition explicitly recognizes that possibility.

5. We clarified and revised proposed § 17.81(d) by changing the word ''acts'' to ''actions.''

**Summary of Comments and Responses**

In our proposed rule to revise the regulations for establishing experimental populations published on June 7, 2022 (87 FR 34625), we requested public comments. By the close of the public comment period on August 8, 2022, we received just under 570 public comments on our proposed rule. We received comments from a range of sources including individual members of the public, States, Tribes, industry organizations, legal foundations and firms, and environmental organizations. Just under half of the comments received (253) were nearly identical statements from individuals indicating their general support for the proposed changes to the regulations but not containing substantive content. In addition, more than 50 identical comments generally indicated they did not support the proposed changes, and several stated general concern over impacts to private agricultural lands. The remaining comments were unique and raised substantive issues.

We reviewed and considered all public comments prior to developing this final rule. Summaries of substantive comments and our responses are provided below. We combined similar comments where appropriate. We did not, however, consider or respond to comments that are not relevant to or are beyond the scope of this particular rulemaking action.

*Comment 1:* Several commenters stated that the proposed rule conflicts with the 2018 United States Supreme Court decision in *Weyerhaeuser Co.* v. *United States Fish and Wildlife Service,* 139 S. Ct. 361, 372 (2018). These commenters asserted that the court ruled that areas that are not habitat cannot be designated as critical habitat, even though at one time the area in question served as habitat for the species. They further stated that if habitat cannot be designated as critical habitat under the ESA, neither can land be designated as critical habitat if it was never part of the historical range of the species and never served as habitat for the species.

*Response:* Nothing in these 10(j) regulation revisions changes the processes or regulations for designating critical habitat. Establishment of an experimental population does not designate critical habitat or require that any areas be designated as critical habitat. In accordance with these revised 10(j) regulations, critical habitat for experimental populations may be designated only for those experimental populations that we determine to be essential to the conservation of the species. We cannot designate critical habitat for nonessential experimental populations. In addition, we would not establish an experimental population in areas of habitat that would not support that population. For some species, areas that were not part of the species' historical range are now capable of supporting a population because of climate change, and those areas can now serve as habitat for that species. Consistent with *Weyerhaeuser,* we will designate as critical habitat only areas that are habitat for the given listed species, and we will make that determination based on the best available science for the particular species, the statutory definition of ''critical habitat,'' our implementing regulations, and existing case law (87 FR 37757 at 37759, June 24, 2022).

*Comment 2:* A few commenters stated that we should retain the following sentence that we proposed to delete from § 17.81(f): ''In those situations where a portion or all of an essential experimental population overlaps with a natural population of the species during certain periods of the year, no critical habitat shall be designated for the area of overlap unless implemented as a revision to critical habitat of the natural population for reasons unrelated to the overlap itself.'' One commenter asserted that this sentence contains an important clarification. Another commenter also asserted that retaining this sentence provides assurance to private landowners that the expanded areas for potential release will not be

used to expand designation of critical habitat.

*Response:* We have retained the proposed deletion in this final rule. We will not designate critical habitat for nonessential experimental populations. In designating critical habitat for essential experimental populations, we will follow section 4 of the ESA and the regulations and policies for critical habitat designations.

*Comment 3:* A few commenters stated that the recent repeal of the 2020 final rule that established the definition of ''habitat'' for designating critical habitat under the ESA is a concern. The commenters asserted that the lack of a regulatory definition for habitat adds to the uncertainty and subjectivity that will result when the Service designates experimental populations.

*Response:* When we are analyzing whether and where to establish an experimental population, we look at whether the habitat is suitable to support that population and if the establishment of the population will be successful. This analysis is species-specific and is based on the best available scientific information. However, the evaluation of whether habitat in the experimental population area is suitable to support the species is distinct from a critical habitat designation, which is accomplished through a separate rulemaking process. Again, we cannot designate critical habitat for nonessential experimental populations.

*Comment 4:* A commenter recommended the Service revise the proposed rule to clarify that impacts to nonessential experimental populations that have been introduced outside the species' historical range will not trigger consultation obligations under section 7 of the ESA. The commenter asserted that while such a provision would not meaningfully alter the trajectory of the species, it could make a critical difference in the Biden-Harris Administration's goal of expediently delivering clean energy on a large scale.

*Response:* Section 10(j) of the ESA already provides for reduced or streamlined section 7 procedures for experimental populations. For nonessential experimental populations, except for those occurring on National Park Service (NPS) lands or the National Wildlife Refuge System (NWRS), the less formal conferencing process applies rather than the standard consultation process requirements. Conferencing is an important tool to ensure that impacts do not jeopardize the continued existence of the species because the need to conference is based on an analysis of the combined populations of the listed species, whether or not any are designated as a nonessential experimental population.

*Comment 5:* A commenter expressed concern over the proposed revision requiring section 7 consultation to occur on experimental populations outside of historical habitat. The commenter stated that this proposed requirement would be onerous, lacks regulatory certainty for the regulated community, and stated is not clear how existing projects and land uses would be impacted should they now be required to undergo section 7 consultation where they previously did not because of being in non-occupied areas.

*Response:* It is true that if we designated an experimental population outside of historical range, the section 7 consultation requirements would apply. For nonessential experimental populations, we would treat the population as a species proposed for listing (except within NWRS or NPS land, where such populations are treated as threatened species) and follow the more informal conferencing process, and for essential experimental populations we would follow the standard consultation process. Conferencing is required only when a proposed action is likely to jeopardize the continued existence of a species proposed for listing or destroy or adversely modify proposed critical habitat. We do not anticipate that there would be many circumstances where we would determine that a project affecting a nonessential experimental population is likely to jeopardize the listed species. Existing projects and land uses may not necessarily be affected if there is no further Federal nexus to those projects or land uses; when considering whether to establish an experimental population, whether within or outside historical range, we will coordinate closely with any affected entities.

*Comment 6:* One commenter stated that where the Service elects to promulgate an ESA section 10(j) rule prohibiting take of experimental populations, the Service should establish a blanket exception for incidental take of nonessential experimental populations introduced outside the species' historical range. The commenter further asserted that otherwise, ESA section 10(j) rules prohibiting take outside of historical ranges would introduce unnecessary uncertainty for the construction and/or operation of renewable energy and transmission and distribution projects. Another commenter suggested that the Service should recognize that the ''blanket 4(d) rule'' does not apply to experimental populations and should further create a blanket exception to the take prohibition for nonessential experimental populations located outside the species' historical range.

*Response:* All experimental populations are treated as if they were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the ESA. This provision allows the Service to devise those prohibitions and exceptions necessary to provide for the conservation of the species rather than provide the full prohibitions that would apply for an endangered species. If we reinstate the blanket 4(d) rule, we will not consider using it for an experimental population in the future, and we are not establishing a blanket exception for incidental take that would apply to all 10(j) populations because we conclude that each situation is unique and requires careful consideration of what prohibitions may be necessary to apply to the experimental population; creating a blanket exception to the take prohibition for a nonessential designation would not provide the flexibility that is needed to further the conservation of the species. When we establish an experimental population, we propose a species-specific rule that outlines any prohibitions that will apply to that species' experimental population. Throughout this process we work with any entities that may be affected by the establishment of the experimental population to address any concerns about how the population may affect any ongoing or future renewable energy projects.

*Comment 7:* One commenter suggested that the Service should explicitly recognize the value of mitigation in areas outside a species' historical range. The commenter stated that, should the Service finalize the proposed rule, there will be regulatory confirmation that the agency believes areas outside a species' historical range can serve valuable conservation purposes (*e.g.,* as different areas become able to support a life stage due to the effects of climate change or other factors). Where the Service has introduced an experimental population outside the species' historical range, the commenter asserted that the agency should also allow the proponents of projects having impacts to the species within the historical range to provide compensatory mitigation in areas outside the historical range in which the Service has introduced the experimental population.

*Response:* Fulfilling the Service's mission and recovering species requires all available conservation tools,

potentially including compensatory mitigation in an area with an introduced experimental population. Any such decision will be species- and situation-specific, and we will make the decision in the context of recovery and landscape-level planning and will follow our current regulations and policies for section 10(j) and compensatory mitigation.

*Comment 8:* A commenter stated that we are revising the current 10(j) regulations to interpret the statute as making it discretionary rather than mandatory to use the best available science to determine whether the release will further the conservation of the species. The commenter further stated that FWS should explicitly state that it is changing the language to reflect a changed interpretation or policy instead of doing it tacitly and without acknowledging it.

*Response:* We have not proposed or finalized any revisions to the 10(j) regulations that change the requirement to use the best scientific and commercial data available when considering whether to establish an experimental population. See 50 CFR 17.81(b). Regardless of whether an experimental population is within or outside the historical range of the species, the Service must still find, based on the best scientific and commercial data available, that the experimental population will further the conservation of the species.

*Comment 9:* Several commenters stated that the criteria we used to justify the proposed rule are vague, nonspecific, and undefined. They suggested that the proposed rule does not state to what degree a species' habitat needs to suffer such damage before this new authority could be invoked. The commenters asserted that this criterion also fails to meet the standard of objective science-based decision-making that the Service is required by the ESA to meet. Another commenter requested that we reemphasize the importance of conserving nonexperimental populations in place wherever possible. This commenter stated that only non-development-related pressures (*e.g.,* threats that are impossible to abate through protection of originally designated critical habitat, like climate change) should be considered as appropriate reasons to establish experimental populations of rare plants outside of their historical range.

*Response:* Conserving nonexperimental populations is important to the recovery of species; however, for some species, establishing experimental populations may be necessary to advance their recovery. Defining what specific type of threats are ''appropriate circumstances'' is not necessary or advisable because they will vary by species, their habitat needs, habitat availability, and threats to the species and any definition may fail to acknowledge all circumstances under which establishing an experimental population is appropriate. However, in the preamble of this final rule we further explained, in general terms, when we might establish an experimental population outside of its historical range. Additionally, the regulations at 50 CFR 17.81(b) and (c) do outline required elements that we must consider or provide in any specific experimental population regulation. Regardless of whether an experimental population designation is within or outside of a species' historical range, it must be based on the best available science and further the conservation of the species.

*Comment 10:* One commenter indicated that clarity is needed to ensure that an experimental population designation can be applied even when releases have already been conducted, regardless of the date of such releases. Another commenter stated that the regulation change should not be limited to new introductions and that the Service should reevaluate and update prior designations to comply with this change. The commenters stated that not doing a reevaluation would penalize existing experimental populations that could benefit significantly by being introduced or allowed to expand outside their ''historical range'' as it was defined when they were listed.

*Response:* We cannot designate a population as experimental if that population was already released and not as an experimental population; we stated in the proposed rule, and further clarified in this final rule, that these regulations would not apply retroactively. However, it is possible that we may consider establishing additional experimental populations for species that already have an experimental population and could at that time consider whether to establish one or more populations outside of the species' historical range. Requirements for periodic review of the effects of experimental populations on the recovery of the species (§ 17.81(c)(4)), as well as the requirement to review the status of a species under section 4(c)(2) of the Act (5-year status reviews) provide mechanisms to evaluate and adjust our recovery programs for individual species.

*Comment 11:* A commenter stated that, rather than designating experimental populations, the Service should find landscapes where a listed species is thriving and prohibit changes to the management and maintain the current uses of that land until the species recovers. The commenter further stated that the Service should seek to copy and apply that management to similar lands within the species' natural range where the species has been extirpated.

*Response:* Conserving populations within their current range is important to the recovery of listed species, and establishing experimental populations is one of the tools we use to help achieve that goal. However, in some circumstances, such as when climate change or invasive species have altered the habitat within the current range so that it is no longer capable of supporting the species, establishing experimental populations outside of a species' historical range is also an important recovery tool.

*Comment 12:* One commenter recommended that the Service, in collaboration with the National Marine Fisheries Service (NMFS), quickly, expeditiously, and with stakeholder involvement develop comprehensive guidance as to translocation decision-making. The commenter stated that, where potential translocations of listed species may promote conservation, that guidance should help decision-makers at the Services answer translocation questions.

*Response:* While overarching guidance on translocations is important, at this time we will not be developing such guidance with NMFS. We have, however, recommended that our field and regional offices follow the IUCN reintroduction guidelines, which serves this purpose.

*Comment 13:* One commenter suggested that we reference the IUCN reintroduction guidelines in regulation and specifically mentioned our internal memo recommending the use of the guidelines.

*Response:* While the IUCN guidelines are important in guiding introductions and we have communicated that information to our staff in our regions and field offices, we do not find it is necessary to reference them in these regulations. Because the best available science and guidance may change over time, it is unwise to reference a specific set of guidelines in our regulations. Instead, our regulations at § 17.81(b) include the direction to ''use the best scientific and commercial data available.''

*Comment 14:* A commenter urged us to add terminology to 50 CFR part 17 or the preamble to this rulemaking that

reflects the importance of and need for connectivity between current and reintroduced populations, and between historical and newly suitable habitats.

*Response:* While connectivity between populations is very important, the 1982 amendments to the ESA and our regulations for experimental populations require that the experimental population must be geographically separate from other populations of that species. Where populations will not be geographically separate, or where the goal is to promote connectivity of populations, tools such as safe harbor agreements or recovery permits, rather than designation of experimental populations under section 10(j) of the Act, may be more appropriate.

*Comment 15:* Several commenters note that the Service has recognized that invasive species can pose a threat to species within their historical range. The commenters also stated that establishing experimental populations of endangered species outside of the species' historical range also, like invasive species, has the potential to disrupt the ecosystem in the introduced range such that it impacts native and/or threatened or endangered species. They further asserted that establishing a population outside of its historical range could have myriad unforeseeable and unintended consequences to other native wildlife species and native plant communities.

*Response:* Invasive species do pose threats to many species, and we would need to carefully consider whether an experimental population established outside of its historical range could itself become an invasive species. While we think this scenario is unlikely, as ESA-listed species do not typically have characteristics of invasive species, we have revised the regulations by adding a new subparagraph in § 17.81(b) to indicate that, when we are considering establishing an experimental population outside of historical range, we will analyze any adverse effects on the ecosystem into which the experimental population is being introduced.

*Comment 16:* A few commenters stated that, while narrow, there is an avenue in the current regulations for designating experimental populations outside their historical range. The commenters explained that such designations are necessarily limited and can occur only in ''the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed.'' They further explained that this ''extreme case'' standard ensures a species is limited to its historical range unless and until there is a robust scientific evaluation of the species' primary habitat. The commenters asserted that, considering the profound and sometimes irreversible effect introduction can have on existing species, existing habitat, and human development, to name only a few, it is imperative that such evaluations occur in advance of any designation.

*Response:* Deleting the reference to ''historical range'' and removing the requirement that the species' primary habitat be destroyed is necessary to make the process of establishing experimental populations outside a species' historical range more flexible. With climate change and other threats, such as invasive species, increasingly becoming an issue for some species, it is likely that habitats will become unsuitable and such situations are no longer ''extreme cases.'' These revisions will allow greater flexibility to act before primary habitats are destroyed and allow for more efficient and effective recovery efforts. For listed species whose recovery is threatened by factors such as these, we view experimental population establishment outside of their historical ranges as a potential tool for their management and conservation.

*Comment 17:* Commenters stated that giving the Service the ability to designate non-historical habitat for experimental endangered species populations will be misused by the agency and other nongovernmental organizations to unduly burden the energy and agricultural industries and force operators out of business.

*Response:* The process for designating an experimental population is rigorous, and we must go through a public notice and comment rulemaking process before deciding to establish an experimental population, whether within or outside historical range. During the process, we coordinate with State agencies, Tribal governments, local governments, industry groups, private landowners, and other entities that may be affected by the establishment of an experimental population.

*Comment 18:* One commenter stated that the reference to ''affected private landowner,'' while already in the existing regulations, is unclear and should be further defined. The commenter asserted that private forest owners are looking for certainty and consistency in the application of rules and policies under the ESA, and the proposed rule should be explicit about with whom the Service will engage before drafting rules and when introducing populations into habitat outside of their historical range for conservation purposes. Further, the commenter urged the Service to provide a definitive and transparent framework for engagement and outreach to the affected private landowners.

*Response:* Determining with which entities we will collaborate will be important when we are contemplating proposing to establish an experimental population—whether within or outside historical range. With whom we engage will vary depending on the species and potential location of the experimental population. However, because we cannot anticipate in advance all potential stakeholders, the term ''affected private landowners'' is intentionally broad. Defining the term further could unintentionally exclude groups of landowners. Therefore, we are not further defining ''affected private landowner.''

*Comment 19:* Commenters suggested that the Service should establish experimental populations in areas where States and private partners are willing to develop innovative programs to make the reintroduced species an asset to neighboring landowners, rather than a liability. The commenters asserted that this could be done through, for instance, a pay-for-presence program that financially rewards landowners for the documented presence of the introduced species on their land.

*Response:* We support the goal of having a reintroduced experimental population be an asset to landowners, but we do not currently have the authorization or funding to establish a pay-for-presence program.

*Comment 20:* One commenter recommended that, instead of expanding the scope of section 10(j) experimental populations, the Service should evaluate use of non-ESA frameworks under State wildlife management authority when contemplating potential introductions of ESA-protected species outside historical range. The commenter stated that the Service could develop more flexible management programs in cooperation with States, land management agencies, and private landowners that could avoid ESA regulatory burdens and associated risks and costs of litigation. The commenter further asserted that most importantly, such agreements would enhance local collaboration and control and increase the likelihood of social acceptance and, ultimately, long-term success of conservation translocations.

*Response:* We do work collaboratively with States and other agencies when considering whether to establish an experimental population and can craft species-specific rules that include only the take prohibitions necessary for the

conservation of the species. When establishing an experimental population, we must follow the ESA and our regulations. Introduction of species under the authorities of section 10(j) allow for regulatory flexibilities by the establishment of a section 4(d) rule. A species introduced without a section 10(j) rule is subject to all the regulatory authorities of the ESA. In addition, we can collaboratively reintroduce populations of ESA-listed species without using the experimental population tool and could also use our Safe Harbor Agreement tool as a mechanism for reintroducing listed species.

*Comment 21:* One commenter indicated that it was of critical importance to assure the full coordination and cooperation between the Service and any affected States as an integral part of the experimental population establishment process, along with recognition that an affected State must agree to the proposed action.

*Response:* While we have not revised our regulations to include a requirement that the affected State(s) must agree to the proposed establishment of an experimental population, our full coordination with State agencies and all other affected entities when going through the process to establish an experimental population is extremely important and is reflected in our regulations (see § 17.81(e)).

*Comment 22:* One commenter stated that that the Service should work with Tribes to seek and incorporate Indigenous Traditional Ecological Knowledge (ITEK) into decisions relating to experimental populations as doing so will help produce better decisions.

*Response:* We have added Tribes into the regulations as an entity with whom we must coordinate (see § 17.81(e)). Our intent is to fully coordinate with any Tribes that may be affected by the establishment of an experimental population. We will also work with Tribes to gather ITEK when going through the experimental population establishment process.

*Comment 23:* A number of commenters stated that, given the increasing threats to many species within their historical ranges, recovery of those species may be increasingly dependent on the introduction of experimental populations. They stated that it is increasingly necessary for the Service to use the ''essential'' designation. The commenters further asserted that more generous use of the ''essential'' designation would allow the Service to designate critical habitat for experimental populations, which would be an important tool in addressing the increasing threats to habitat recognized in the proposed rule.

*Response:* Establishing experimental populations is one tool to help recover listed species. Our determination as to whether an experimental population is essential to the continued existence of the species is made on a species-by-species basis, considering the status of that species and the best available scientific and commercial information. We cannot predict in advance whether we will make essential determinations more frequently in the future.

*Comment 24:* One commenter suggested that we revise § 17.81(c)(2), the requirement to determine whether an ''experimental population is, or is not, essential to the continued existence of the species in the wild,'' by adding ''or in captivity, if the species is solely held in captivity.''

*Response:* We did not include the proposed revision in this final rule because this concept is outside the scope of our proposal and the public did not have an opportunity to comment on it.

*Comment 25:* Several commenters supported the proposed revisions and noted that climate change poses new and growing threats to a myriad of species. The commenters asserted that many species, including threatened and endangered species with already limited habitat availability, must either adapt to rapidly shifting temperature and precipitation regimes or migrate at a pace commensurate with climatic changes to avoid extinction. They stated that species with low vagility or dispersal capability may not be able to keep up with such shifts and may be driven to extinction via this migration lag.

*Response:* Climate change poses threats to numerous species, the impacts of which we did not anticipate at the time we adopted these regulations in 1984. One reason we are revising our regulations is that we have since learned that the impact of climate change is causing, or is anticipated to cause, many species' suitable habitat to shift outside of their historical range. In these instances, having a tool that allows us to establish an experimental population outside of a species' historical range will help us better recover listed species.

*Comment 26:* One commenter stated that every regulation, every tool, and every policy the Service creates should be evaluated through the lens of section 2(c) of the ESA and the definition of ''conservation.'' The commenter explained that if the action does not use ''all methods and procedures which are necessary'' to recover species, it should be revised, as the Service proposes to do here.

*Response:* Establishing experimental populations is one tool we can implement to support the recovery of listed species. We are revising our 10(j) regulations to reflect our determination that, in order to provide for the conservation of certain species, it may be increasingly necessary and appropriate to establish experimental populations outside of their historical range if the species' habitat has undergone, is undergoing, or is anticipated to undergo irreversible decline and is no longer capable of supporting the species due to threats such as climate change or invasive species. The commenter's views about how section 2(c) and the definition of ''conservation'' should be broadly applied throughout our ESA program are beyond the scope of this rule.

*Comment 27:* A few commenters stated that the Service's proposed change is not only within its authority but is necessary to fulfill the purposes of the ESA and specifically section 10(j). They stated that threats including climate change, invasive species, and human stressors like development are increasingly degrading many species' ability to survive—let alone recover—within their historical ranges. In addition, a number of commenters supported the proposed regulatory revisions and stated that it is clear that the ESA did not foresee or address the potential ESA implementation problems that climate change would present. The commenters asserted that adapting the regulations to accommodate shifts in habitat due to climate change potentially has merit if the process is sufficiently rigorous to avoid unanticipated secondary effects.

*Response:* As stated in the preamble, in 1984, when our regulations pertaining to section 10(j) of the ESA were first written, climate change and invasive species were not recognized as the significant threats they are today. As an agency, we need to adapt our regulations and policies to address changing threats to species.

*Comment 28:* Several commenters stated that the Service should prioritize habitats near or adjacent to species' historical ranges where at all possible. They asserted that, when this is not possible, great effort should be taken to identify habitats that are clearly analogous to those in species' historical ranges for reintroduction efforts.

*Response:* We will prioritize habitats near or adjacent to species' historical ranges where possible, but we must ensure that the experimental population

is geographically separate from other populations of the species. Furthermore, we will prioritize areas within the historical range if those areas are still capable of supporting the species and an experimental population. If climate change or other threats have made, or are likely to make, areas within historical range incapable of supporting the species and an experimental population, we will then consider areas outside of the species' historical range.

*Comment 29:* Some commenters stated that the idea of ''historical range'' is no longer relevant in a modern conservation context. They asserted that the historical range of a species may no longer be meaningful because the historical climate and historical habitat in the historical range may no longer exist.

*Response:* Climate change and other threats are changing the habitats of many species and species' ranges continually change over time due to many factors, such that there may be no single reference point for a species' historical range. However, historical range still provides important context to understand a species' biological needs, ecological roles, and the factors that affect it. We will still use the concept of historical range within the context of designating experimental populations to determine when it may be appropriate to assess the potential for adverse effects of introducing a species outside its historical range to the receiving ecosystems.

*Comment 30:* Commenters stated that the Service did not address the longstanding policy considerations and interpretations of the ESA statutory provisions that underpinned the 1984 rulemaking. The commenters indicated that we did not acknowledge our prior determination in 1984 that the purposes and policies of the ESA prohibit the transplantation of listed species beyond their historical ranges and must reconcile this interpretation with the revisions we proposed.

*Response:* We acknowledge that our prior 1984 determination generally prohibits the transplantation of listed species beyond their historical range. However, when the 1984 regulations were developed, we were not aware of the potential impacts of climate change that could render habitat within a species' historical range unsuitable for the species. Also, when we developed the 1984 regulations, we reserved the ability in extreme situations for transplantations outside the historical range at § 17.81(a) (see above Response to Comment 16). Through this rule change we are adjusting our regulatory authority to allow us to adequately respond to these potential scenarios in circumstances where it may not be possible to recover a species within its historical range because of loss or alteration of some or all its suitable habitat. As noted above, this final rule is consistent with our statutory authority because the only applicable requirement for an experimental population is to be ''wholly separate geographically from nonexperimental populations of the same species.''

*Comment 31:* Several commenters believed the Service's analysis under the Regulatory Flexibility Act (RFA) and consideration of responsibilities under Executive Order (E.O.) 13132 is incorrect. The commenters also disagreed with our finding for E.O. 12630 that the proposed rule would not have significant takings implications and that a takings implication assessment is not warranted. They urged us to conduct such an assessment before finalizing the rule.

*Response:* Regarding E.O. 13132, the Service is the only entity that is directly affected by this rule as we are the only entity that would apply these regulations to designate experimental populations. This rule will further the goals of conservation and recovery of endangered species and threatened species. While serving to advance these legitimate government interests, this rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Regarding E.O. 12630, no external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. Moreover, the rule change does not directly affect private property. It will not result in either a physical or regulatory taking because it will not present a barrier to all reasonable and expected beneficial uses of private property.

Finally, we note that designation of any experimental population would require a public notice-and-comment rulemaking process that would undergo individual review and analysis under the RFA and these Executive orders.

*Comment 32:* A few commenters stated that the Service attempts to avoid its obligations under the Unfunded Mandates Reform Act (UMRA) by failing to include local government in the development of its regulations and by failing to examine the impact of the proposed regulations on the operations of local government.

*Response:* The requirement to undertake an analysis under the UMRA applies only to regulations containing ''Federal mandates'' that meet the threshold levels under the Act. (2 U.S.C. 1532–1535.) The UMRA defines ''Federal mandate'' as a regulation that would impose either an enforceable duty upon State, local, or Tribal governments (Federal intergovernmental mandate) or an enforceable duty upon the private sector (Federal private sector mandate). (2 U.S.C. 658(5)–(7).) The regulatory changes in this final rule would not impose an enforceable duty on State, local, or Tribal governments, or the private sector. The only direct impact of this rule change is upon the Service because this rulemaking action pertains to the general requirements that apply when the Service exercises its authority to establish experimental populations. When the Service proposes to establish a specific experimental population, whether within or outside of historical range, we will undertake an analysis under the UMRA.

*Comment 33:* Some commenters asserted the need to conduct National Environmental Policy Act (NEPA) analysis on the regulation revision and that this rulemaking action should not be categorically excluded. They stated the Service is seeking to fast-track this revision by claiming a categorical exclusion under NEPA and disagreed with our finding. In particular, several commenters stated that the rule does not consider the economic and environmental harm of experimental populations that currently impact public land managers and the agriculture industry in Arizona.

*Response:* We have complied with NEPA by determining that the rule is covered by a categorical exclusion found at 43 CFR 46.210(i). We explained this determination in an Environmental Action Statement that is posted in the docket for this rule. This rule change sets out the overarching process and considerations that the Service undertakes when it designates an experimental population, and this rulemaking action has no significant impacts on the human environment. When the Service proposes to establish an experimental population, the proposed action will be subject to the NEPA process at that time.

*Comment 34:* One commenter recommended a more significant investment in environmental review when considering introduction of a species beyond its historical range. The commenter asserted that such processes should go beyond the use of the typical environmental assessment (EA) and include the compilation of an

environmental impact statement (EIS) to explore and solicit input on all possible alternative actions with stakeholders. The commenter further asserted that if introduction beyond a species' historical range is targeted as the preferred action, emphasis must be placed on understanding and planning for the potential cumulative and indirect impacts of such an action.

*Response:* When we propose to establish an experimental population beyond a species' historical range, we will undertake a thorough analysis under NEPA and decide whether to use a categorical exclusion, an EA, or an EIS.

**Required Determinations**

*Regulatory Planning and Review—Executive Orders 12866 and 13563*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed ''to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.''

*Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or that person's designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that this rule would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking revises and clarify requirements for the Service regarding factors for establishing experimental populations under the ESA. The changes to these regulations do not expand the reach of species protections.

The Service is the only entity that is directly affected by this rule because we are the only entity that would apply these regulations to designate experimental populations. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. The future designation of any experimental population would require a public notice and comment rulemaking process that would include a review under the Regulatory Flexibility Act.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the Regulatory Flexibility Act section above, this rule would not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A small government agency plan is not required. As explained above, small governments will not be affected because the rule will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate on State, local, or Tribal governments or the private sector of $100 million or greater in any year; that is, this rule is not a ''significant regulatory action''' under the Unfunded Mandates Reform Act. This rule does not impose any obligations on State, local, or Tribal governments.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, this rule does not have significant takings implications. This rule does not pertain to ''taking'' of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule substantially advances a legitimate government interest (conservation and recovery of endangered species and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

*Federalism (E.O. 13132)*

In accordance with Executive Order 13132, we have considered whether this rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to designation of experimental populations under the ESA and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

This rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This rule clarifies factors for designation of experimental populations under the ESA.

*Government-to-Government Relationship With Tribes*

In accordance with Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' and the Department of the Interior's manual at 512 DM 2, we have considered possible effects of this rule on federally recognized Indian Tribes. We will continue to collaborate and coordinate with Tribes on issues related to federally listed species and their habitats. See Joint Secretary's Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' June 5, 1997). As discussed earlier in this document, we have revised the regulations to add a requirement for

consultation with affected Tribal governments in developing and implementing experimental population rules. Any regulation promulgated pursuant to this section will, to the maximum extent practicable, represent an agreement between the Service, the affected State and Federal agencies, Tribal governments, local government agencies, and persons holding any interest in land or water that may be affected by the establishment of an experimental population.

*Paperwork Reduction Act of 1995 (PRA)*

This regulation revision does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the PRA (44 U.S.C. 3501 *et seq.*). OMB has previously approved the information collection requirements associated with reporting requirements associated with experimental populations and assigned the following OMB Control Number: 1018–0095, ''Endangered and Threatened Wildlife, Experimental Populations, 50 CFR 17.84'' (expires 9/30/2023). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

We analyzed this regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8).

We find that the categorical exclusion found at 43 CFR 46.210(i) applies to these regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case. When the Service proposes to establish an experimental population for a particular species, the proposed action will be subject to the NEPA process at that time.

*Energy Supply, Distribution, or Use (E.O. 13211)*

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

**References Cited**

A complete list of all references cited in this rule is available upon request from the Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**) or online at *https://www.regulations.gov* in Docket No. FWS–HQ–ES–2021–0033.

**Authority**

We issue this rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

**Regulation Promulgation**

For the reasons described above, we hereby amend subpart H, of part 17, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.80 by revising paragraph (a) to read as follows:

**§ 17.80 Definitions.**

(a) The term *experimental population* means an introduced and/or designated population (including any offspring arising solely therefrom) that has been so designated in accordance with the procedures of this subpart but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species. Where part of an experimental population overlaps with nonexperimental populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will be recognized only outside the areas of overlap. Thus, such a population will be treated as experimental only when the times of geographic separation are reasonably predictable, *e.g.,* fixed migration patterns, natural or manmade barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.

* * * * *

■ 3. Amend § 17.81 by:
■ a. Revising paragraph (a), paragraph (b) introductory text, and paragraphs (b)(3) and (b)(4);
■ b. Removing the undesignated paragraph following paragraph (b)(4);
■ c. Adding paragraph (b)(5);
■ d. Revising paragraph (c)(3);
■ e. Redesignating paragraphs (d), (e), and (f) as paragraphs (e), (f), and (g);
■ f. Adding a new paragraph (d); and
■ g. Revising the newly designated paragraphs (e), (f), and (g).

The revisions and additions read as follows:

**§ 17.81 Listing.**

(a) The Secretary may designate as an experimental population a population of endangered or threatened species that will be released into habitat that is capable of supporting the experimental population outside the species' current range, subject to the further conditions specified in this section, provided that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

(b) Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Secretary must find by regulation that such release will further the conservation of the species. In making such a finding, the Secretary will use the best scientific and commercial data available to consider:

* * * * *

(3) The relative effects that establishment of an experimental population will have on the recovery of the species;

(4) The extent to which the introduced experimental population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area; and

(5) When an experimental population is being established outside of its historical range, any possible adverse effects to the ecosystem that may result

from the experimental population being established.

* * * * *

(c) * * *

(3) Management restrictions, protective measures, or other special management concerns of that population, as appropriate, which may include but are not limited to, measures to isolate, remove, and/or contain the experimental population designated in the regulation from nonexperimental populations; and

* * * * *

(d) The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate under the standards set out in sections 10(d) and 10(j) of the Act, to allow actions necessary for the establishment and maintenance of an experimental population.

(e) The Service will consult with appropriate State fish and wildlife agencies, affected Tribal governments, local governmental agencies, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section will, to the maximum extent practicable, represent an agreement between the Service, the affected State and Federal agencies, Tribal governments, local government agencies, and persons holding any interest in land or water that may be affected by the establishment of an experimental population.

(f) Any population of an endangered species or a threatened species determined by the Secretary to be an experimental population in accordance with this subpart will be identified by a species-specific rule in §§ 17.84 and 17.85 as appropriate and separately listed in § 17.11(h) (wildlife) or § 17.12(h) (plants) as appropriate.

(g) The Secretary may designate critical habitat as defined in section (3)(5)(A) of the Act for an essential experimental population as determined pursuant to paragraph (c)(2) of this section. Any designation of critical habitat for an essential experimental population will be made in accordance with section 4 of the Act. No designation of critical habitat will be made for nonessential experimental populations.

■ 4. Revise § 17.82 to read as follows:

**§ 17.82 Prohibitions.**

Any population determined by the Secretary to be an experimental population will be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act with respect to such population. The species-specific rules (protective regulations) adopted for an experimental population under § 17.81 will contain applicable prohibitions, as appropriate, and exceptions for that population.

■ 5. Amend § 17.83 by revising paragraph (b) and adding paragraph (c) to read as follows:

**§ 17.83 Interagency cooperation.**

* * * * *

(b) For a listed species, any experimental population that, pursuant to § 17.81(c)(2), has been determined to be essential to the survival of the species or that occurs within the National Park System or the National Wildlife Refuge System, as now or hereafter constituted, will be treated for purposes of section 7 of the Act as a threatened species.

(c) For purposes of section 7 of the Act, any consultation or conference on a proposed Federal action will treat any experimental and nonexperimental populations as a single listed species for the purposes of conducting the analyses and making agency determinations pursuant to section 7(a) of the Act.

■ 6. Amend § 17.84 by:

■ a. Revising the section heading; and

■ b. In paragraphs (l)(1), (l)(16), and (x)(8) remove the word ''special'' wherever it appears.

The revision reads as follows:

**§ 17.84 Species-specific rules—vertebrates.**

* * * * *

■ 7. Amend § 17.85 by revising the section heading and paragraph (a)(2)(i) to read as follows:

**§ 17.85 Species-specific rules—invertebrates.**

(a) * * *

(2) * * *

(i) Except as expressly allowed in the rule in this paragraph (a), all the prohibitions of § 17.31(a) and (b) apply to the mollusks identified in the rule in this paragraph (a).

* * * * *

**§ 17.86 [Removed and Reserved]**

■ 8. Remove and reserve § 17.86

**Shannon A. Estenoz,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2023–13672 Filed 6–30–23; 8:45 am]

**BILLING CODE 4333–15–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 660

**[Docket No. 230626–0156]**

**RIN 0648–BM14**

## Fisheries Off West Coast States; Pelagic Species Fisheries; Amendment 20 to the Coastal Pelagic Species Fishery Management Plan

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

**ACTION:** Final rule.

**SUMMARY:** This final rule announces approval of and implements Amendment 20 to the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). Amendment 20 removes management category terminology from use in the FMP, but does not revise the manner in which the CPS stocks are managed. The Pacific Fishery Management Council (Council) recommended Amendment 20 for clarity and consistency with other Council FMPs. This final rule removes the definition for ''Actively Managed Species'' and a reference to ''monitored stocks'' from Federal regulations. Because this action does not change the manner in which CPS stocks are managed, this action is administrative in nature.

**DATES:** This rule is effective August 2, 2023.

**FOR FURTHER INFORMATION CONTACT:** Taylor Debevec at (562) 980–4066 or *taylor.debevec@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

This final rule concurrently announces approval of and implements Amendment 20 to the CPS FMP. The CPS FMP has used the Management Categories of ''Active'' (or Actively) and ''Monitored'' to effectively and efficiently direct available agency and Council resources, in recognition that not all stocks require as intensive management as others, *e.g.,* frequency of assessments and changes to harvest levels. However, the Council initiated an effort to address a perceived lack of clarity regarding the meaning and use of management category terms in the CPS FMP and to promote consistency with other Council FMPs. In April 2022, the Council took final action to recommend Amendment 20 to the CPS FMP to NMFS to remove management category

terms from the FMP and incorporate additional modifications in place of those terms to ensure the flow and readability of the FMP. The intent of Amendment 20 is to improve clarity regarding the management approaches for stocks in the CPS FMP and to describe how each stock is managed in a stock-specific manner, rather than through use of a categorical assignment. Amendment 20 does not change the management approaches for stocks in the CPS FMP.

We published a notice of availability (NOA) for Amendment 20 on March 23, 2023 (88 FR 17515), with a comment period ending on May 8, 2023. We published a proposed rule to implement the Amendment 20 on April 6, 2023 (88 FR 20456), with a comment period ending on May 22, 2023. We considered all public comments received on the NOA and proposed rule. See Comments and Responses section for more information. Now, on behalf of the Secretary of Commerce, we are announcing the approval of Amendment 20 and issuing this final rule implementing Amendment 20, consistent with the review and approval process outlined in section 304(a) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq*. Specifically, this final rule implements the following regulatory revisions, which are unchanged from the proposed rule: removal of the definition of ''Actively Managed Species'' from 50 CFR 660.502; and removal of the term ''monitored stocks'' from 50 CFR 660.511(k). The NOA and proposed rule for this action included additional background and details, which are not repeated here. For additional information on this action, please refer to the NOA (88 FR 17515 March 23, 2023) and proposed rule (88 FR 20456 April 6, 2023).

**Comments and Responses**

NMFS received two public comments—one was from an anonymous submitter and the other was a joint comment from Oceana and Earthjustice. The anonymous submitter supported the action. Oceana and Earthjustice raised other unrelated topics that they believe are issues with the FMP, having to do with the management of the central subpopulation of northern anchovy. Because the Oceana/Earthjustice comment was outside the scope of this action, we have not provided a response. After considering the public comments, NMFS made no changes from the proposed rule.

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act, the Assistant Administrator, NMFS, has determined that this final rule is consistent with the CPS FMP, other provisions of the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable law.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities for the purposes of the Regulatory Flexibility Act. The factual basis for the certification was published in the proposed rule (88 FR 20456, April 6, 2023) and is not repeated here. As a result, a final regulatory flexibility analysis was not required and none was prepared.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act. There are no relevant Federal rules that may duplicate, overlap, or conflict with the final action.

**List of Subjects in 50 CFR Part 660**

Fisheries, Fishing, Indians-lands, Recreation and recreation areas, Reporting and record keeping requirements, Treaties.

Dated: June 27, 2023.

**Samuel D. Rauch, III,**

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

For the reasons set out in the preamble, NMFS amends 50 CFR part 660 as follows:

## PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

**§ 660.502 [Amended]**

■ 2. In § 660.502, remove the definition ''Actively managed species''.

■ 3. In § 660.511, revise paragraph (k) to read as follows:

**§ 660.511 Catch restrictions.**

* * * * *

(k) The following annual catch limit applies to fishing for Northern Anchovy (Central Subpopulation): 25,000 mt.

[FR Doc. 2023–14009 Filed 6–30–23; 8:45 am]

BILLING CODE 3510–22–P

# Proposed Rules

Federal Register
Vol. 88, No. 126
Monday, July 3, 2023

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

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 35

**[Docket No. NRC–2018–0297]**

**RIN 3150–AK80**

## Rubidium-82 Generators, Emerging Technologies, and Other Medical Use of Byproduct Material

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Regulatory basis; notice of public meeting.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) is conducting rulemaking to add requirements for calibration and dosage measurement for certain generator systems and establish performance-based requirements for existing and future emerging medical technologies. The NRC is also considering additional changes to its medical use regulations to accommodate developments in the medical field related to new radiopharmaceuticals and emerging medical technologies. The rulemaking will affect medical licensees who use these technologies and evaluate the current training and experience requirements for emerging medical technologies. The NRC is requesting comments from the public on the regulatory basis for this rulemaking. The NRC plans to hold one or more public meetings during the comment period to promote full understanding of the contemplated action and facilitate public comment.

**DATES:** Submit comments by October 31, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received before this date.

**ADDRESSES:** You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2018–0297. 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.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff. For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Celimar Valentin-Rodriguez, telephone: 301–415–7124, email: *Celimar.Valentin-Rodriguez@nrc.gov;* and Maryann Ayoade, telephone: 301–415–0862, email: *Maryann.Ayoade@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

**SUPPLEMENTARY INFORMATION:**

### I. Obtaining Information and Submitting Comments

*A. Obtaining Information*

Please refer to Docket ID NRC–2018–0297 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–2018–0297.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–80–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time, Monday through Friday, except Federal holidays.

*B. Submitting Comments*

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2018–0297 in your comment submission.

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

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

### II. Discussion

The NRC is requesting comment on a regulatory basis to support a rulemaking that would amend part 35 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Medical use of byproduct material,'' to add requirements for calibration and dosage measurement for strontium-82/rubidium-82 generators (hereafter referred to as Rb-82 generators) and establish performance-based requirements for existing and future emerging medical technologies (EMTs). The NRC is also considering additional changes to its medical use regulations to accommodate developments in the medical field related to new radiopharmaceuticals

and EMTs. Additionally, the NRC is evaluating the current training and experience requirements required for authorized users (AUs) of EMTs to fulfill their radiation safety-related duties and supervisory roles.

A regulatory basis is a precursor to a proposed rule and describes the NRC's planned approach for revising the regulations. This regulatory basis (1) includes a discussion of the background of the regulatory issues, (2) explains the proposed areas of change to the regulations and how those changes could resolve the issues, (3) provides the technical and policy information used to support the regulatory basis, and (4) identifies different alternatives to address the regulatory issues and evaluates the cost and benefits of rulemaking and the alternatives. The regulatory basis also explains the limitations on the scope and quality of the regulatory basis, such as known uncertainties in the data or methods of analysis, and the mitigation measures that address these limitations.

## III. Specific Requests for Comment

The NRC considers a regulatory basis to be a pre-rulemaking document. If the NRC decides to pursue rulemaking, the NRC will publish a proposed rule that will seek public comment. Currently, the NRC is seeking advice and recommendations from the public on the regulatory basis.

The regulatory basis, titled ''Rubidium-82 Generators, Emerging Technologies, and Other Medical Use of Byproduct Material—Regulatory Basis,'' can be obtained at ADAMS Accession No. ML23122A356. The regulatory basis evaluates the existing regulatory framework for Rb-82 generators, including the use of enforcement discretion when licensees who use Rb-82 generators cannot meet existing requirements for calibration, and dosage determination and what type of regulatory changes would need to be considered to permit such action. In addition, the regulatory basis evaluates what regulatory changes are needed to establish risk-informed, performance-based requirements for existing and future emerging medical technologies.

The NRC will consider any comments received on the regulatory basis in the development of the proposed rule and will respond to the comments in the proposed rule. The regulatory basis describes all of the regulatory changes being considered, and the NRC is requesting comment regarding some of these potential changes. Please indicate the topic and item number with your response or comment:

*Request for Comment Regarding Averted Costs to Licensees*

Section 8 of the regulatory basis document discusses potential rulemaking costs and other impacts to the NRC (section 8.3), Agreement States (section 8.4), and licensees (section 8.5). The analyses are based on the NRC's preliminary assessment and estimates, and the NRC will conduct a more detailed cost and impact evaluation in the draft regulatory analysis that will accompany the proposed rule. To assist the NRC in conducting this detailed analysis, please provide comments on whether licensees would realize averted costs from a more streamlined licensing of existing and future EMTs. Explain why or why not.

*Request for Comment on Topics in Appendix A of the Regulatory Basis*

The specific areas for comment that follow are from appendix A of the regulatory basis, and the numbering scheme matches the numbering in appendix A.

Generator Systems (See Regulatory Basis Section A.1)

The NRC is considering regulatory changes to address calibration and dose determination requirements for rubidium-82 generators. In addition, the NRC is also considering regulatory changes to address generators currently licensed under 10 CFR part 35, subpart K and novel generator systems.

*Question A.1.1:* Please provide comments on the need for radiation safety officers to have specific training for all generator systems licensed under 10 CFR part 35, subpart D, ''Unsealed Byproduct Material—Written Directive Not Required.'' If general awareness on radionuclide generators, including their functions and risks, is sufficient, explain why.

The NRC is considering amending the requirement in § 35.63, ''Determination of dosages of unsealed byproduct material for medical use,'' to clarify that, for the incremental administration of rubidium-82, dose measurements do not have to be complete before administration when the dose is measured continuously during the infusion of Rb-82 from a generator to the patient.

*Question A.1.2:* Please provide comments on whether and how the NRC should allow the completion of dosage measurement after the beginning of an incremental administration for radionuclides other than Rb-82. How would such an allowance be bounded? What considerations should go into the expansion of this flexibility?

*Question A.1.3:* The NRC has found that AUs authorized under § 35.290, ''Training for imaging and localization studies,'' have sufficient understanding of radionuclide generators, and the NRC is considering revising § 35.27, Supervision,'' to require device-specific training requirements for supervised individuals. Please provide comments with a rationale on whether § 35.290 AUs should also be required to have device-specific training for all radionuclide generators for which they supervise the use.

Intravascular Brachytherapy Systems (See Regulatory Basis Section A.2)

The NRC is considering revisions to 10 CFR part 35, subpart F, ''Manual Brachytherapy,'' to incorporate regulatory requirements for intravascular brachytherapy (IVB).

*Question A.2.1:* The NRC is considering adding a new section under subpart F to address the specific training and experience (T&E) requirements to be an AU for IVB and other uses under § 35.401 (liquid brachytherapy, diffusion brachytherapy, and eye applicators). Please provide comments on the sufficiency of the T&E for AUs as outlined in the current EMT licensing guidance documents for IVB, liquid brachytherapy, and eye applicators. Specifically, the NRC is seeking comments on the knowledge topics encompassing the safety-related characteristics of these EMTs required for AUs to fulfill their radiation safety-related duties and supervision roles; the methods on how knowledge topics should be acquired; and consideration for continuing education, vendor training for new medical uses, and training on NRC regulatory requirements.

Liquid Brachytherapy Sources and Devices (See Regulatory Basis Section A.3)

The NRC is considering changes to 10 CFR part 35, subpart F, ''Manual Brachytherapy'' and other pertinent sections to incorporate regulatory requirements for liquid brachytherapy.

*Question A.3.1:* The NRC has found that the hazards of liquid brachytherapy are similar to those of microsources and microspheres. Please provide comments with a rationale on whether the current definition of manual brachytherapy in § 35.2, ''Definitions,'' should be revised to include liquid brachytherapy and exclude microsources or if liquid brachytherapy should be included in the newly proposed subpart I for microsources.

*Question A.3.2:* The NRC is proposing to add a new § 35.71, ''Contamination

control,'' that would require licensees to develop, implement, and maintain procedures addressing contamination control and spill response for the uses authorized on the license. The NRC is seeking input on whether this requirement is needed or if the requirements in 10 CFR part 20, ''Standards for Protection against Radiation,'' are sufficient for contamination control. Please provide comments on this proposed requirement and indicate if it should apply to all medical licensees or to a certain subset and why.

*Question A.3.3:* The NRC is considering amending § 35.2 to define the term ''source leakage'' as it relates to liquid brachytherapy. For example, a possible leakage rate could be any leakage from a liquid brachytherapy source that results in a dose exceeding 0.5 Sievert (50 rem) dose equivalent to any individual organ other than the treatment site. Please comment on whether this limit is appropriate and explain why or why not. What types of limits for liquid brachytherapy device leakage should the NRC consider (*e.g.,* activity-based, dose-based, external to the patient)?

Gamma Stereotactic Radiosurgery and Photon Emitting Teletherapy Units (See Regulatory Basis Section A.6)

Since the NRC established requirements for gamma stereotactic radiosurgery units in 2002, the design and engineering elements have evolved and the components and operation of newer GSR units are significantly different from the units that the NRC currently regulates under 10 CFR part 35, subpart H, ''Photon Emitting Remote Afterloader Units, Teletherapy Units, and Gamma Stereotactic Radiosurgery Units.''

*Question A.6.1:* Please provide comments on the need for model-specific training for radiation safety officers for certain 10 CFR part 35, subpart H devices. If model-specific training is needed, how should the NRC determine which devices would require such training?

*Question A.6.2:* Current NRC requirements in 10 CFR part 35, subpart H, are focused on components critical to patient and facility safety for the use of these devices. The proposed changes to subpart H focus on elements and objectives rather than specific components. Examples of elements include source output, source collimation, source position, source attenuation, patient safety, and facility safety. Please provide comments on other elements that should be considered.

*Question A.6.3:* Please provide comments on what types of objective tests the NRC should require for full calibration measures for 10 CFR part 35, subpart H devices. What functional elements should be considered for safety?

*Question A.6.4:* Please provide comments on what types of objective tests the NRC should require for periodic spot-checks for 10 CFR part 35, subpart H devices. Additionally, what functional elements should be considered critical to safety?

Microsource Manual Brachytherapy (See Regulatory Basis Section A.7)

The use of microspheres for permanent implant manual brachytherapy has grown significantly over the past 20 years, and the NRC has accrued valuable operating experience. To incorporate the use of new and existing microspheres and microparticles for manual brachytherapy, the NRC is considering creating a new subpart within 10 CFR part 35 in the currently ''reserved'' subpart I of 10 CFR part 35.

*Question A.7.1:* The NRC is considering defining a ''microsource'' in § 35.2 as microparticles and microspheres. What types of radiation (such as alpha, beta, gamma) should fit into the definition of ''microsource''? Please include comments and a rationale for whether (1) microspheres should be limited to specific types of radiation or certain energies; (2) microsources should be limited to sealed sources with a Sealed Source and Device (SS&D) registry; (3) unsealed microsources should be required to have a SS&D registry; and (4) any additional changes are needed in the current regulations for microsource brachytherapy that would increase flexibility for future microsource brachytherapy.

*Question A.7.2:* The NRC is considering defining ''physiological equilibrium'' in § 35.2 to include stasis or other states of equilibrium. Please provide comments on what should be included in a definition of physiological equilibrium or identify other considerations for physiological stop points.

*Question A.7.3:* As the complexity of the medical use of byproduct material increases, use of teams in medical care is becoming more common. Please provide comments on the fundamental elements of a successful team-approach program.

Section 35.40, ''Written directives,'' would be amended to clarify that requirements for manual brachytherapy uses under 10 CFR part 35, subpart F, are in § 35.40(b)(6). The NRC is considering listing the subpart I requirements for written directives for microsource manual brachytherapy uses under a new item in § 35.40(b).

*Question A.7.4:* For microsource manual brachytherapy, please provide comments and a rationale for whether the before-implant written directive should specify the dose or activity.

*Question A.7.5:* For microsource manual brachytherapy, please provide comments and a rationale for whether the after-implant written directive should specify the activity administered or the dose delivered to the treatment site.

*Question A.7.6:* As required by § 35.41 for determining whether a medical event has occurred (as defined in § 35.3045), please comment on whether and why the NRC should require calculating and documenting the activity administered or the activity or dose specifically delivered to the treatment site. By what deadline (*e.g.,* number of hours or days) should this determination be made?

*Question A.7.7:* For microsource manual brachytherapy, please comment on whether the NRC should require post-treatment imaging to confirm that the treatment was delivered in accordance with the written directive. Why or why not? What other mechanisms are available to confirm that the treatment was delivered in accordance with the written directive?

*Question A.7.8:* Please identify any tasks that would require an authorized medical physicist for the use of microsphere manual brachytherapy and identify whether and how the NRC should revise the training and experience requirements for authorized medical physicists in § 35.51, ''Training for an authorized medical physicist.''

*Question A.7.9:* Please comment on what types of use should be permitted for microsource manual brachytherapy, including whether the use should be limited to that approved in the sealed source and device registry. Please comment on why unsealed microsources without a unique delivery system should or should not be allowed.

*Question A.7.10:* Please comment on why any new requirements for microsource manual brachytherapy should or should not be limited to permanent implants.

*Question A.7.11:* The NRC is considering establishing minimum safety procedures for microsources and requiring instructions to assure adequate protection of public health and safety. These changes are based on current EMT licensing guidance for yttrium-90 (Y–90) microspheres and

expected new uses of microsources. Please identify and comment on other items that should be included in a new requirement for safety procedures and instructions for microsource manual brachytherapy.

*Question A.7.12:* The NRC is considering establishing minimum safety precautions (controls) to assure adequate protection of public health and safety. These considerations are based on current EMT licensing guidance for Y–90 microspheres and expected new uses of microsources. Please identify and comment on other items that should be included in a new requirement for safety precautions (controls) for microsource manual brachytherapy.

*Question A.7.13:* The NRC is seeking input on the need for continued conditional approval for AUs of Y–90 microspheres. The current licensing guidance for Y–90 microspheres states that an AU should successfully complete training in the operation of the delivery system, safety procedures, and clinical use for the specific type of Y–90 microsphere for which authorization is sought. The guidance specifies that clinical use training to support unsupervised use should include at least three hands-on patient cases for each type of Y–90 microsphere requested, conducted in the physical presence of an AU who is authorized for the type of Y–90 microsphere for which the individual is seeking authorization. The guidance allows conditional approval of an AU before completing these three hands-on patient cases if a proposed AU cannot complete patient cases before authorization. This conditional approval was originally added to the guidance because there were limited Y–90 microsphere licensees and AUs to train future AUs. As the use of Y–90 microspheres has increased significantly, please comment on the continued need for conditional approval for Y–90 microsphere AUs. Indicate why the NRC should or should not continue to allow this pathway for all microspheres and microsources AUs.

*Question A.7.14:* The NRC is seeking input on the 80 hours of classroom and laboratory training for interventional radiologists pursuing AU status for Y–90 microsphere and other microsource uses. The NRC in the current EMT licensing guidance for Y–90 microspheres includes a pathway for interventional radiologists to become AUs for Y–90 microspheres use. This pathway requires the interventional radiologist to demonstrate that they have 80 hours of classroom and laboratory training in specific topics and specific work experience important to radiation safety, in addition to demonstrating they have sufficient clinical interventional radiology and diagnostic radiology experience. Please comment on why 80 hours is or is not an appropriate amount of time to ensure these topics are adequately covered. Who should supervise the work experience to ensure the future AUs have adequate radiation safety knowledge and why?

*Question A.7.15:* The NRC is seeking input on classroom and laboratory training topics for physicians seeking AU status for all microspheres or other types of microsources. The NRC, in the current EMT licensing guidance for Y–90 microspheres, provides a pathway for interventional radiologists and physicians that meet the training and experience requirements in §§ 35.390 and 35.490 to become AUs for Y–90 microspheres use. This pathway does not require any classroom and laboratory training or specific work experience for these physicians besides demonstration of successfully completed training in the operation of the delivery system, safety procedures, and clinical use (including hands-on patient cases) for the type of Y–90 microsphere for which authorization is sought. Please identify and comment on any additional classroom and laboratory training topics or specific work experience that should be required for these physicians to become AUs for all microspheres or other types of microsources in subpart I. What additional training and work experience should be considered, if any, and why?

*Question A.7.16:* The NRC is seeking input on the pathways for physicians to become AUs for use of microspheres and other types of microsources. The NRC in the current EMT licensing guidance for Y–90 microspheres provides pathways for interventional radiologists and physicians that meet the training and experience requirements in §§ 35.390 and 35.490 to become AUs for Y–90 microsphere use. Please comment on whether and why the NRC should or should not provide additional pathways for other types of physicians to become AUs for use of microspheres or other types of microsources.

*Question A.7.17:* In most circumstances, are AUs the individuals administering Y–90 microspheres? Is it appropriate for other individuals to administer microsources under the supervision of an AU? Why or why not?

Other Part 35 Changes: Novel Radionuclide Generators (See Regulatory Basis Section A.8)

*Question A.8.1:* Industry is evaluating various novel radionuclide generators. Some novel radionuclide generators may be utilized to compound therapeutic dosages of unsealed byproduct material. The NRC is considering a requirement for licensees to perform breakthrough testing on novel radionuclide generators and report instances when breakthrough exceeds a defined limit. Since breakthrough limits for some novel radionuclide generators have not been established by the United States Pharmacopeia, please explain why it would or would not be sufficient for licensees to develop, implement, and maintain procedures for breakthrough testing and reporting for novel radionuclide generators.

Other Part 35 Changes: Training and Experience (See Regulatory Basis Section A.8)

*Question A.8.2:* Please comment on the type of T&E that should be required for AUs utilizing novel radionuclide generators and the type of T&E for authorized nuclear pharmacists utilizing novel radionuclide generators.

*Question A.8.3:* Please comment on why the current structure for authorized medical physicist involvement in 10 CFR part 35, subpart F, ''Manual Brachytherapy,'' is or is not sufficient. If not sufficient, what specific tasks or skills should be performed by an authorized medical physicist for manual brachytherapy?

*Question A.8.4:* Due to the increased number and complexity of EMTs, please comment on why the NRC should or should not require continuing education for AUs. If continuing education should be required, what should it entail, at what frequency should it be acquired, and how should knowledge topics be acquired?

*Question A.8.5:* Please comment on the need for AUs for § 35.200 to have device-specific training on radionuclide generators. If device-specific training is needed, what topics should the training include? Please explain why the training should or should not be specific to the radionuclide generators for which the AUs are supervising the use.

*Question A.8.6:* Please comment and provide a rationale for whether physicians authorized for full use under § 35.300 need additional T&E to fulfill their radiation safety-related duties and supervision roles because of expected emerging therapeutic radiopharmaceuticals. Please comment on why additional training is or is not needed on regulatory requirements for emerging therapeutic radiopharmaceuticals. If needed, what topics should the T&E include? What specific training should these AUs be

required to have (*e.g.,* vendor training on clinical use and safety procedures) prior to first-time use, if any? Why should they be required or not required to have continuing education?

*Question A.8.7:* Please comment on why the current AU T&E requirements for use of sealed sources and medical devices for diagnosis in § 35.590 (*i.e.,* 8 hours of classroom and laboratory training in basic radionuclide handling techniques specifically applicable to the use of the device authorized under § 35.500, as well as device-specific training in the use of the device) are or are not appropriate for emerging sealed sources and medical devices containing sealed sources. If AUs for § 35.500 need additional training and work experience on emerging sealed sources and medical devices containing sealed sources for diagnosis, what topics should be covered?

Other Part 35 Changes: Security and Controls

*Question A.8.8:* Please comment on any specific changes that are needed to secure consoles, keys, and passwords for remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units because of changes in technology.

*Question A.8.9:* Please comment on the types of doors or entry controls that would be acceptable to maintain security of licensed material while not interfering with patient care. For example, why should a physical door be required, or why other entry controls such as lasers acceptable?

## IV. Cumulative Effects of Regulation

The NRC is following its Cumulative Effects of Regulation (CER) process by engaging with external stakeholders throughout this regulatory basis and related regulatory activities. Opportunity for public comment is provided to the public at this regulatory basis stage.

1. In light of any current or projected CER challenges, how should NRC provide sufficient time to implement the new proposed requirements, including changes to programs and procedures?

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

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

4. What are the unintended consequences, and how should they be addressed?

5. Please comment on the NRC's cost and benefit estimates in the regulatory basis.

## V. Public Meetings

During the public comment period, the NRC will hold one or more public meetings to facilitate discussion of the proposed rulemaking described in the regulatory basis document, including the questions in Appendix A of the document and provided in Section III of this document.

The NRC will publish a notice of the location, time, and agenda of the meetings in the docket on *Regulations.gov*, and on the NRC's public meeting website at least 10 calendar days before the meeting. Stakeholders should monitor the NRC's public meeting website for information about the public meeting at: *https://www.nrc.gov/public-involve/public-meetings/index.cfm.*

## VI. 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. or **Federal Register citation** |
|---|---|
| Final Rule—''Criteria for the Release of Individuals Administered Radioactive Material,'' January 29, 1997 | 62 FR 4120. |
| Final Rule—''Requirements for Expanded Definition of Byproduct Material,'' October 1, 2007 | 72 FR 55864. |
| Licensing Guidance for the Intraocular Use of NeoVista, Inc.Epi-Rad$_{90}$™ (Strontium-90) Ophthalmic System, April 2009 | ML091140370. |
| Enforcement Guidance Memorandum (EGM) 13–003, ''Enforcement Guidance Memorandum—Interim Guidance for Dispositioning Violations Involving 10 CFR 35.60 and 10 CFR 35.63 for the Calibration of Instrumentation to Measure the Activity of Rubidium-82 and the Determination of Rubidium-82 Patient Dosages,'' April 18, 2013. | ML13101A318. |
| ViewRay™ System for Radiation Therapy Licensing Guidance, July 24, 2013 | ML13179A287. |
| Low Activity Radioactive Seeds Used for Localization of Non-Palpable Lesions and Lymph Nodes Licensing Guidance, Revision 1, October 07, 2016. | ML16197A568. |
| Memorandum from M. Dapas to D. Dorman, C. Pederson, K. Kennedy; ''Revision of Technical Basis for Granting Specific Exemption from Decommissioning Funding Plan Requirement for Germanium-68/Gallium-68 Generators,'' July 13, 2017. | ML17075A487. |
| SECY–18–0015, ''Staff Evaluation of the U.S. Nuclear Regulatory Commission's Program for Regulating Patient Release After Radioisotope Therapy,'' January 29, 2018. | ML17279B139 (package). |
| Management Directive 5.9, ''Adequacy and Compatibility of Program Elements for Agreement State Programs,'' April 26, 2018 | ML18081A070. |
| Leksell Gamma Knife® Perfexion™ and Leksell Gamma Knife® Icon™ Licensing Guidance, Revision 1, January 10, 2019 | ML18333A365. |
| Germanium-68/Gallium-68 Pharmaceutical Grade Generators Licensing Guidance, July 2019 | ML19106A367. |
| NUREG-1556, Volume 9, Revision 3, ''Consolidated Guidance About Materials Licenses: Program-Specific Guidance About Medical Use Licenses, Final Report,'' September 2019. | ML19256C219. |
| SECY–00–0118, Final Rules—10 CFR part 35, ''Medical Use of Byproduct Material'' and 10 CFR part 20, ''Standards for Protection Against Radiation,'' May 31, 2000. | ML003698513. |
| Xcision® GammaPod™ Licensing Guidance, January 22, 2020 | ML19304B370. |
| NRC Enforcement Policy, January 15, 2020 | ML19352E921. |
| State and Tribal Communication STC–20–049, ''Responses to the Organization of Agreement States (OAS) Requests Regarding Clarification of Compatibility Categories for Medical Licensing Guidance Documents; and Use of Safety Evaluation Reports (SERs) as a Legally Binding Requirement,'' June 30, 2020. | ML20178A610. |
| SECY–21–0013, ''Rulemaking Plan to Establish Requirements for Rubidium-82 Generators and Emerging Medical Technologies,'' February 9, 2021. | ML20261H562. |
| Yttrium-90 Microsphere Brachytherapy Sources and Devices TheraSphere® and SIR-Spheres® Licensing Guidance, Revision 10.2, April 20, 2021. | ML21089A364. |
| NorthStar Medical Radioisotopes, LLC, RadioGenix® Molybdenum-99/Technetium-99m Generator System; Licensing Guidance for Medical Use Licensees, Medical Use Permittees, and Commercial Nuclear Pharmacies, December 17, 2021. | ML21350A064. |

| Document | ADAMS accession No. or **Federal Register citation** |
|---|---|
| Staff Requirements Memorandum, SRM–SECY–21–0013, ''Rulemaking Plan to Establish Requirements for rubidium-82 Generators and Emerging Medical Technologies,'' January 13, 2022. | ML22013A266. |
| Staff Requirements Memorandum, SRM–SECY–20–0005, ''Rulemaking Plan for Training and Experience Requirements for Unsealed Byproduct Material (10 CFR part 35),'' January 27, 2022. | ML22027A519. |
| Alpha Tau Alpha DaRT™ Manual Brachytherapy Licensing Guidance, March 10, 2022 | ML22018A225. |
| Appendix, Consolidated Technical Analysis (chart with list of 10 CFR part 35 regulations and conditions applicable to use of Alpha DaRT™). | ML22018A223. |
| Letter to All Agreement States, Connecticut, and Indiana; ''Results of Annual Count of Radioactive Material Licenses in the National Materials Program'' (STC–22–034), May 19, 2022. | ML22139A026. |
| NRC Strategic Plan, NUREG–1614, Vol. 8, ''Strategic Plan, Fiscal Years 2022–2026'' | ML22067A170. |
| Regulatory Basis, ''Rubidium-82 Generators, Emerging Technologies, and Other Medical Use of Byproduct Material,'' June 2023. | ML23122A356. |

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–2018–0297. 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–2018–0297); (2) click the ''Subscribe'' link; and (3) enter an email address and click on the ''Subscribe'' link.

## VI. 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 31883). The NRC requests comment on this document with respect to the clarity and effectiveness of the language used.

Dated: June 27, 2023.

For the Nuclear Regulatory Commission.

**John M. Moses,**

*Deputy Director, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2023–14018 Filed 6–30–23; 8:45 am]

**BILLING CODE 7590–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2023–1441 Airspace Docket No. 22–AAL–25]**

**RIN 2120–AA66**

## Revocation of Colored Federal Airway Blue 12 (B–12) in the Vicinity of Kodiak Island, AK

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to revoke Colored Federal airway Blue 12 (B–12) in the vicinity of Kodiak Island, AK due to the previous establishment of Area Navigation (RNAV) route T–385 in support of a large and comprehensive T-route modernization project for the state of Alaska.

**DATES:** Comments must be received on or before August 17, 2023.

**ADDRESSES:** Send comments identified by FAA Docket No. FAA–2023–1441 and Airspace Docket No. 22–AAL–25 using any of the following methods:

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

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

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

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

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

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

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

**SUPPLEMENTARY INFORMATION:**

### Authority for This Rulemaking

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

air traffic within the National Airspace System (NAS).

**Comments Invited**

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

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

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

**Availability of Rulemaking Documents**

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

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Western Service Center, Federal Aviation Administration, 2200 South 216th St., Des Moines, WA 98198.

**Incorporation by Reference**

Colored Federal airways are published in paragraph 6009 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

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

**Background**

In 2003, Congress enacted the Vision 100-Century of Aviation Reauthorization Act (Pub. L. 108–176), which established a joint planning and development office in the FAA to manage the work related to the Next Generation Air Transportation System (NextGen). Today, NextGen is an ongoing FAA-led modernization of the nation's air transportation system to make flying safer, more efficient, and more predictable.

In support of NextGen, this proposal is part of an ongoing, large and comprehensive T-route modernization project in the state of Alaska. The project mission statement states: ''To modernize Alaska's Air Traffic Service route structure using satellite-based navigation development of new T-routes and optimization of existing T-routes will enhance safety, increase efficiency and access, and will provide en route continuity that is not subject to the restrictions associated with ground-based airway navigation.'' As part of this project, the FAA evaluated the existing Colored Airway structure for: (a) direct replacement (*i.e.,* overlay) with a T-route that offers a similar or lower Minimum En route Altitude (MEA) or Global Navigation Satellite System Minimum En route Altitude (GNSS MEA); (b) the replacement of the colored airway with a T-route in an optimized but similar geographic area, while retaining similar or lower MEA; or (c) removal with no route structure (T-route) restored in that area because the value was determined to be insignificant.

The aviation industry/users have indicated a desire for the FAA to transition the Alaskan en route navigation structure away from dependency on Non-Directional Beacons (NDB) and move to develop and improve the RNAV route structure. Colored Federal Airway B–12 is a direct route between the Woody Island and Iliamna NDBs in Alaska. This direct route is over hazardous terrain in the area of Fourpeaked Mountain and Mount Douglas. The terrain in this area rises from sea level to more than 6,000 feet in a very short distance, creating hazardous conditions to pilots. Due to the high terrain, B–12 has a minimum enroute altitude (MEA) of 10,000 feet.

The FAA published RNAV route T–385 on August 29, 2022, in Docket No. 19–AAL–54 (87 FR 52674) as a replacement for B–12. T–385 avoids the mountainous terrain and offers a significantly lower MEA. Although not a direct route, T–385 reflects the needs of the aviation community, provides safer routing and has become the primary routing between the Woody Island and Iliamna NDBs.

**The Proposal**

The FAA is proposing an amendment to 14 CFR part 71 to revoke Colored Federal airway B–12 in the vicinity of Kodiak Island, AK in support of a large and comprehensive T-route modernization project for the state of Alaska.

Colored Federal airway B–12 currently extends between the Woody Island, AK NDB and the Iliamna, AK, NDB. The FAA proposes to revoke B–12 in its entirety.

**Regulatory Notices and Analyses**

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

**Environmental Review**

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and

Procedures'' prior to any FAA final regulatory action.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

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

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

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

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

**§ 71.1 [Amended]**

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

*Paragraph 6009(d) Colored Federal Airways.*

* * * * *

**B–12 [Remove].**

* * * * *

Issued in Washington, DC, on June 27, 2023.

**Brian Konie,**

*Acting Manager, Airspace Rules and Regulations.*

[FR Doc. 2023–13989 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

**[Docket No. FWS–R2–ES–2022–0162; FF09E21000 FXES1111090FEDR 234]**

**RIN 1018–BG22**

## Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to list the dunes sagebrush lizard (*Sceloporus arenicolus*), a species found only in southeastern New Mexico and west Texas, as an endangered species under the Endangered Species Act of 1973, as amended (Act). This determination also serves as our 12-month finding on a petition to list the dunes sagebrush lizard. After a review of the best available scientific and commercial information, we find that listing the species is warranted. If we finalize this rule as proposed, it will add this species to the List of Endangered and Threatened Wildlife and extend the Act's protections to the species. We find the designation of critical habitat to be prudent but not determinable at this time.

**DATES:** We will accept comments received or postmarked on or before September 1, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by August 17, 2023.

*Public informational meeting and public hearing:* We will hold a public informational session from 5 to 6 p.m., mountain standard time, followed by a public hearing from 6 to 8 p.m., mountain standard time, on July 31, 2023.

**ADDRESSES:** You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–R2–ES–2022–0162, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R2–ES–2022–0162, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

*Availability of supporting materials:* Supporting materials, such as the species status assessment report, are available at *https://www.regulations.gov* at Docket No. FWS–R2–ES–2022–0162.

*Public informational meeting and public hearing:* The public informational meeting and the public hearing will be held virtually using the Zoom platform. See *Public Hearing,* below, for more information.

**FOR FURTHER INFORMATION CONTACT:** Shawn Sartorius, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113; telephone 505–346–2525. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

**SUPPLEMENTARY INFORMATION:**

### Executive Summary

*Why we need to publish a rule.* Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the dunes sagebrush lizard meets the Act's definition of an endangered species; therefore, we are proposing to list it as such. Listing a species as an endangered or threatened species can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process.

*What this document does.* We propose to list the dunes sagebrush lizard as an endangered species under the Act. As explained in this document, we find that the designation of critical habitat for the dunes sagebrush lizard is not determinable at this time.

*The basis for our action.* Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the dunes sagebrush lizard is endangered due to

the following threats: (1) Habitat loss, fragmentation, and degradation from development by the oil and gas and frac sand (high-purity quartz sand that is suspended in fluid and injected into wells to blast and hold open cracks in the shale rock layer during the fracking process) mining industries; and (2) climate change and climate conditions, both resulting in hotter, more arid conditions with an increased frequency and greater intensity of drought throughout the species' geographic range.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. As explained later in this proposed rule, we find that the designation of critical habitat for the dunes sagebrush lizard is not determinable at this time.

**Information Requested**

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule.

We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns and the locations of any additional populations of this species;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status of this species.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*) directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final determination may differ from this proposal. Based on the new information we receive (and any comments on that new information), we may conclude that the species is threatened instead of endangered, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species.

*Public Hearing*

We have scheduled a public informational meeting and public hearing on this proposed rule to list the dunes sagebrush lizard as an endangered species. We will hold the public informational meeting and public hearing on the date and at the times listed above under *Public informational meeting and public hearing* in **DATES**.

We are holding the public informational meeting and public hearing via the Zoom online video platform and via teleconference so that participants can attend remotely. For security purposes, registration is required. To listen and view the meeting and hearing via Zoom, listen to the meeting and hearing by telephone, or provide oral public comments at the public hearing by Zoom or telephone, you must register. For information on how to register, or if you encounter problems joining Zoom the day of the meeting, visit *https://www.fws.gov/office/new-mexico-ecological-services.* Registrants will receive the Zoom link and the telephone number for the public informational meeting and public hearing. If applicable, interested members of the public not familiar with the Zoom platform should view the Zoom video tutorials (*https://support.zoom.us/hc/en-us/articles/206618765-Zoom-video-tutorials*) prior to the public informational meeting and public hearing.

The public hearing will provide interested parties an opportunity to present verbal testimony (formal, oral comments) regarding this proposed rule. The public informational meeting will be an opportunity for dialogue with the Service. The public hearing is a forum for accepting formal verbal testimony. In the event there is a large attendance, the time allotted for oral statements may be limited. Therefore, anyone wishing to make an oral statement at the public hearing for the record is encouraged to provide a prepared written copy of their statement to us through the Federal eRulemaking Portal, or U.S. mail (see **ADDRESSES**, above). There are no limits on the length of written comments submitted to us. Anyone wishing to make an oral statement at the public hearings must register before the hearing (*https://www.fws.gov/about/region/southwest*). The use of a virtual public hearing is consistent with our regulations at 50 CFR 424.16(c)(3).

**Previous Federal Actions**

On December 30, 1982, we published our candidate notice of review (CNOR) classifying the sand dune lizard (*i.e.,* dunes sagebrush lizard) as a Category 2 candidate species (47 FR 58454). Much of the previous literature concerning *Sceloporus arenicolus* refers to it by the common name of sand dune lizard (*e.g.,* Degenhardt et al. 1996, p. 159); however, the currently accepted common name is dunes sagebrush lizard (Crother 2017, p. 52). Category 2 status included those taxa for which information in the Service's possession indicated that a proposed rule was

possibly appropriate, but for which sufficient data on biological vulnerability and threats were not available to support a proposed rule.

On September 18, 1985, we published our CNOR reclassifying the dunes sagebrush lizard as a Category 3C candidate species (50 FR 37958). Category 3C status included taxa that were considered more abundant or widespread than previously thought or not subject to identifiable threats. Species in this category were not included in our subsequent notices of review, unless their status had changed. Therefore, in our subsequent November 21, 1991, CNOR (56 FR 58804), the dunes sagebrush lizard was not listed as a candidate species.

On November 15, 1994, our CNOR once again included the dune sagebrush lizard as a Category 2 candidate species (59 FR 58982), indicating that its conservation status had changed. On February 28, 1996, we published a CNOR that announced changes to the way we identify candidates for listing under the Act (61 FR 7596). In that document, we provided notice of our intent to discontinue maintaining a list of Category 2 species, and we dropped all former Category 2 species from the candidate list. This was done to reduce confusion about the conservation status of those species, and to clarify that we no longer regarded them as candidate species. As a result, the dunes sagebrush lizard did not appear as a candidate in our 1996 (61 FR 7596; February 28, 1996), 1997 (62 FR 49398; September 19, 1997), or 1999 (64 FR 57534; October 25, 1999) CNOR.

In our 2001 CNOR, the dunes sagebrush lizard was placed on our candidate list with listing priority number (LPN) of 2 (66 FR 54808; October 30, 2001). Service policy (48 FR 43098; September 21, 1983) requires the assignment of an LPN to all candidate species that are warranted for listing. This listing priority system was developed to ensure that the Service has a rational system for allocating limited resources in a way that ensures that the species in greatest need of protection are the first to receive such protection. The LPN is based on the magnitude and immediacy of threats and the species' taxonomic uniqueness with a value range from 1 to 12. A listing priority number of 2 for the dunes sagebrush lizard means that the magnitude and the immediacy of the threats to the species were considered high.

On June 6, 2002, we received a petition from the Center for Biological Diversity to list the dunes sagebrush lizard. On June 21, 2004, the United States District Court for the District of Oregon (*Center for Biological Diversity* v. *Norton,* Civ. No. 03–1111–AA) found that our resubmitted petition findings for three species, including the dunes sagebrush lizard, which we published as part of the CNOR on May 4, 2004 (69 FR 24876), were not sufficient to satisfy the petition process. The court indicated that we did not specify what listing actions for higher priority species precluded publishing a proposed rule for these three species, and that we did not adequately explain the reasons why actions for the identified species were deemed higher in priority, or why such actions resulted in the preclusion of listing actions for these three species. The court ordered that we publish updated findings for these species within 180 days of the order.

On December 27, 2004, we published a 12-month finding that listing of the dunes sagebrush lizard was warranted, but precluded by higher priorities (69 FR 77167). In that finding, the species remained on the candidate list, with an LPN of 2. On December 14, 2010, we proposed to list the dunes sagebrush lizard as endangered (75 FR 77801). Following two public comment periods (see 75 FR 77801, December 14, 2010, and 76 FR 19304, April 7, 2011), we announced a 6-month extension on the final determination for the proposed listing of the dunes sagebrush lizard and reopened the comment period on the proposed rule to list the species (76 FR 75858; December 5, 2011). We took this action because there was substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the proposed listing rule. On February 24, 2012, we again reopened the comment period on the proposed listing (77 FR 11061). The February 24, 2012, publication also announced the availability of, and requested comments on the likelihood of implementation and effectiveness of the conservation measures in, a signed conservation agreement for the dunes sagebrush lizard in Texas. Following these comment periods, on June 19, 2012, we published a document (77 FR 36871) withdrawing the proposed rule to list the dunes sagebrush lizard as endangered based on our conclusion that the threats to the species identified in the proposed rule were no longer as significant as believed at the time of the proposed rule. We based this conclusion on our analysis of current and future threats as well as an analysis of the potential benefits of conservation efforts in New Mexico and Texas.

On June 1, 2018, we received a petition from the Center for Biological Diversity and Defenders of Wildlife, requesting that the dunes sagebrush lizard be listed as endangered or threatened and critical habitat be designated for this species under the Act. On July 16, 2020, we published a 90-day finding determining that the petition presented substantial scientific or commercial information indicating that listing the species may be warranted (85 FR 43203). On May 19, 2022, we received a complaint from the Center for Biological Diversity alleging that we failed to issue a timely 12-month finding. In order to settle the complaint, we agreed to publish a 12-month finding by June 29, 2023. This document serves as the 12-month finding for the 2018 petition.

**Peer Review**

A species status assessment (SSA) team prepared a SSA report for the dunes sagebrush lizard. The SSA team was composed of Service biologists, in consultation with other species experts from State wildlife agencies, consulting firms, and academia. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the dunes sagebrush lizard SSA report. We sent the SSA report to seven independent peer reviewers and received five responses. Results of this structured peer review process can be found at *https://www.regulations.gov* under Docket No. FWS–R2–ES–2022–0162. In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this proposed rule.

**Summary of Peer Review Comments**

As discussed above in Peer Review, we received comments from five peer reviewers on the draft SSA report. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the information contained in the SSA report. The peer reviewers generally concurred with our methods and conclusions presented within the draft SSA report. They provided some additional information, clarifications in terminology, further discussions and interpretations of the available scientific literature, and feedback on stressors. We

incorporated the majority of the substantive comments within the SSA report (USFWS 2023, version 1.2), and thus this proposed rule. We outlined the substantive comments that we did not incorporate, or fully incorporate, within the SSA report below.

*(1) Comment:* We received several comments from a reviewer on the use of shinnery oak (*Quercus havardii*) shrublands, which are areas of flat terrain interspersed among shinnery oak sand dune formations, by the dunes sagebrush lizard. The reviewer believed our assertion in the SSA report that dunes sagebrush lizards use shinnery oak shrublands for dispersal was incorrect. Instead, the reviewer believed that the dunes sagebrush lizard does not use shinnery oak shrublands for dispersal and only perform long-distance movements through shinnery oak dune formations.

*Our response:* We revised the wording of the SSA report to reflect the importance of the sand dune formations, particularly sand dune blowouts, to all aspects of dunes sagebrush lizard life history. However, there are records of dunes sagebrush lizards collected in shinnery oak shrublands, which we clarified in the SSA report. In response to this comment, we emphasized that the importance of the shinnery oak shrublands to the dunes sagebrush lizard is largely due to it providing a stabilizing force that maintains the structure of the sand dune formations.

*(2) Comment:* A reviewer commented that the SSA report presented an inaccurate impression on the extent of gene flow between the areas designated as analysis units for the SSA. The reviewer stated that there was no evidence of gene flow between these areas and they should be treated as independent units that do not exchange individuals.

*Our response:* For the SSA, we subdivided the dunes sagebrush lizard's range into analysis units to base our assessment of resiliency. These units were delineated based on genetic, demographic, and habitat data that indicated breakpoints where dunes sagebrush lizard movement was restricted on the landscape. We agree that contemporary gene flow and movement of individual dunes sagebrush lizards is limited to nonexistent between the areas we designated as analysis units. We revised our wording in the SSA report to reflect that dispersal events between these areas are infrequent and unlikely to contribute to the demographic or genetic resiliency of a population. These analysis units are based largely on the results of Chan et al. (2020, entire), who identified distinct genetic groupings across the dunes sagebrush lizard's range. However, Chan et al. (2020, p. 7) also found evidence of genetic intermixing between several of these groups, although admixed individuals composed a small portion of the samples that were typically restricted to contact zones between the distinct genetic groups. For this reason, we cannot unequivocally claim that dispersal and gene flow between our analysis units is nonexistent.

*(3) Comment:* A reviewer disagreed with our characterization of the shinnery oak duneland ecosystem as a dynamic environment in which sand dune formations shift over time. They stated that sand dunes were stable over decades and any appreciable shifts occur over the scale of centuries and millennia, which contrasted with our depiction of these ecosystems as dynamic with suitable habitat shifting regularly over time and space. The reviewer noted that several locations where dunes sagebrush lizards have been studied for over 30 years have remained stable over that time.

*Our response:* In reviewing the literature and personal accounts of experts, there is substantial evidence that sand dune fields in this area have shifted spatially since they were first described. However, we acknowledge that does not mean all sand dunes shift on similar spatial or temporal scales. In revising the SSA report, we referenced the results of Dzialak et al. (2013, entire), who documented shifts in the geographic extent of the Mescalero and Monahans Sandhills over 25 years using satellite and aerial imagery. They found that over that period some areas remained stable but loss and emergence of shinnery oak soil-associations were also common (Dzialak et al. 2013, p. 1381). Overall, the Mescalero and Monahans Sandhills experienced a net decline in geographic extent of 10.3 percent over the study period. Several areas within the range of the dunes sagebrush lizard, most notably in the northern extent of the range in the Mescalero Sandhills, were estimated to have had an elevated probability of loss in shinnery oak soil-associations (Dzialak et al. 2013, p. 1382). Therefore, we maintain our characterization of this landscape as one that is spatially dynamic, but we also revised our wording to clarify that some areas may remain stable over longer timeframes.

*(4) Comment:* A reviewer commented that trends in the frac sand mining industry are dependent on market demands and noted the inherent challenge in projecting mine expansion over time. The reviewer noted that since the industry is relatively new in this area (the first sand mine was established in 2017), growth rates may be biased by rapid expansion as mines were first established and before the market corrected to a more stable trend. The reviewer also suggested that the industry may shift to locally derived frac sand as the oil industry considers alternative methods of development.

*Our response:* We acknowledge that it is difficult to make projections for such a young industry for which there is little available information on the patterns and practices of sand mines collectively. However, our projections of future sand mine expansion were based on observed growth of known sand mines using aerial imagery (USFWS 2023, pp. 108–109, 112–114). We used imagery that covered a 4-year period, which included the initial startup phase of mine establishment as well as ebbs in the market, during the COVID pandemic. We observed minimal growth at several mines after their initial establishment, whereas others expanded eightfold from 2018 to 2022 (USFWS 2023, p. 109). By developing two scenarios that represent plausible upper and lower limits of sand mine growth, we capture inherent uncertainty in the future development of the industry. Thus, we are confident that our future scenarios incorporate plausible growth rates for sand mines based upon the best available data. We also note that our projected annual growth rates are within the range estimated in independent assessments by industry experts (USFWS 2023, pp. 195–196).

## I. Proposed Listing Determination

### Background

A thorough review of the taxonomy, life history, and ecology of the dunes sagebrush lizard is presented in the SSA report (version 1.2; USFWS 2023, pp. 16–42).

The dunes sagebrush lizard is a species of spiny lizard endemic to the shinnery oak dunelands and shrublands of the Mescalero and Monahans Sandhills in southeastern New Mexico and western Texas. Most dunes sagebrush lizard adults live for 2 to 4 years and reproduce in the spring and summer (Degenhardt and Jones 1972, p. 216; Cole 1975, p. 292; Snell et al. 1997, p. 9; Fitzgerald and Painter 2009, p. 200; Hibbitts and Hibbitts 2015, p. 156). Males are territorial and compete to attract and mate with females (Fitzgerald and Painter 2009, p. 200). Females establish nests underground in shinnery oak duneland vegetation, where they lay an average of five eggs per clutch and lay either one or two

clutches in a year (Hibbitts and Hibbitts 2015, p. 156, Hill and Fitzgerald 2007, p. 30; Ryberg et al. 2012, p. 583). Hatchlings emerge approximately 30 days after eggs are laid (Ryberg et al. 2012, p. 583; Fitzgerald and Painter 2009, p. 200). Eggs and young dunes sagebrush lizards are susceptible to natural mortality from environmental stress and predation.

This species is a habitat specialist that depends on shinnery oak duneland habitat to provide appropriate substrate for nests, cover for young, and food resources as juvenile lizards mature into adults (Fitzgerald et al. 1997, p. 4; Hibbitts et al. 2013, p. 104; Hardy et al. 2018, p. 10). The Mescalero and Monahans Sandhills ecosystems are composed of ancient sand dune fields formed and maintained by wind, shifting sand, and partially stabilized by shinnery oak (Ryberg et al. 2015, pp. 888, 893; Walkup et al. 2017, p. 2). These ecosystems are characterized by a patchy arrangement of narrow, almost linear sand dunes embedded in a matrix of shinnery oak shrubland flats (Fitzgerald and Painter 2009, p. 199; Ryberg et al. 2015, p. 890). Within the sand dunes themselves, dunes sagebrush lizards rely on open dune blowouts, which typically form on the leeward side of established vegetation (Walkup et al. 2021, pp. 13–14). Dune blowouts are bowl-shaped depressions in the sand dunes that form when disturbance removes stabilizing vegetation.

The landscape created by the shinnery oak duneland ecosystem is a spatially dynamic system in which the location and presence of sand dunes is not static and shifts over time (Dzialak et al. 2013, entire). Spatial variation within habitat patches can drive regional population dynamics by shaping movement, behavior, and habitat selection (Ryberg et al. 2015, p. 888). Dunes sagebrush lizards form small, localized populations called neighborhoods that are interconnected through dispersal (Ryberg et al. 2013, entire). Long-term population stability is maintained through interconnected neighborhoods experiencing localized colonization and extirpation (Fitzgerald et al. 1997, p. 28; Fitzgerald et al. 2005, p. 1).

**Regulatory and Analytical Framework**

*Regulatory Framework*

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors, such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

*Analytical Framework*

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess the viability of the dunes sagebrush lizard, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R2–ES–2022–0162 on *https://www.regulations.gov.*

**Summary of Biological Status and Threats**

In this discussion, we review the biological condition of the dunes sagebrush lizard and its resources, and the threats that influence the species' current and future condition, to assess the species' overall viability and the risks to that viability.

*Species Viability*

The key requirement for long-term viability of the dunes sagebrush lizard is large, intact, shinnery oak duneland ecosystems that facilitate completion of their life history and maintain healthy populations (Texas A&M University [TAMU] 2016, p. 3). Shinnery oak duneland habitat provides the primary features necessary to support neighborhoods of dunes sagebrush lizard, particularly sand dune blowouts that are essential for reproduction and other aspects of the species' life history (Fitzgerald et al. 1997, p. 4; Hibbitts et al. 2013, p. 104; Hardy et al. 2018, p. 10; Walkup et al. 2021, pp. 13–14). The shinnery oak duneland and shrubland habitat that surrounds these blowouts is important to facilitate dispersal and maintain the structure of the sand dune formations (Machenberg 1984, p. 23; Kocurek and Havholm 1993, pp. 401–402; Gucker 2006, p. 14; Dhillion and Mills 2009, p. 264).

Since the Mescalero and Monahans Sandhills are dynamic ecosystems, habitat patches for dunes sagebrush lizard can shift over time (Fitzgerald et al. 1997, p. 28; Dzialak et al. 2013, pp. 1371–1372, 1379–1383; Hardy et al. 2018, p. 27). Long-term resiliency of the dunes sagebrush lizard is maintained through interconnected neighborhoods experiencing localized colonization and extirpation (Ryberg et al. 2013, p. 1). A dunes sagebrush lizard population, even within a contiguous patch of habitat, is itself composed of aggregations of localized neighborhoods that interact with each other. That means dunes sagebrush lizards may not occur in all areas of suitable habitat due to natural extinction-colonization dynamics (Fitzgerald et al. 1997, p. 28; Painter et al. 1999, p. 51; Fitzgerald et al. 2005, p. 1), and the current state of occupancy may not necessarily reflect the future state at a site (Walkup et al. 2018, p. 503). Thus, it is important to include the consideration of currently unoccupied but potentially suitable habitat patches within the species' range, especially since dispersal rates and their mechanisms are not well understood (Painter et al. 1999, p. 36; Hardy et al. 2018, p. 20).

Scaling up to the species' range, the dunes sagebrush lizard is subdivided into three primary evolutionary lineages that are spatially discrete and have evolved in isolation since their initial founding (Chan et al. 2009, p. 136; Chan et al. 2020, pp. 6–7). Two are found in Mescalero Sandhills, with one occurring in the northern portion of the sandhills (Northern Mescalero) and the second in the southern portion (Southern Mescalero). The third is exclusive to the Monahans Sandhills of west Texas. Despite a narrow contact zone between the Northern and Southern Mescalero lineages (Chan et al. 2020, p. 7), there is no evidence of intermixing or gene flow between these lineages. These three lineages cover different portions of the species' range and, therefore, are subject to different environmental conditions. For example, a latitudinal gradient in precipitation and temperature exists from north to south within the Mescalero and Monahans Sandhills. In general, moving 1° latitude from north to south across the dunes sagebrush lizard's range results in a mean annual maximum temperature increase of 1.1 degrees Celsius (°C) (2 degrees Fahrenheit (°F)) and a total annual precipitation decrease of 5 centimeters (cm) (2 inches (in)) (Leavitt 2019, pp. 7–8; USFWS 2023, pp. 45–47). Potential evapotranspiration also increases from north to south (Holliday 2001, p. 101). The combination of isolation and environmental variation has likely facilitated adaptive differences between these lineages.

These lineages are further subdivided into at least 10 different genetic groups, delineated primarily by mitochondrial DNA haplotypes and corroborated by nuclear microsatellite data (Chan et al. 2014, p. 9; Chan et al. 2020, entire). These groups correspond to notable breaks and pinch points in the dune formations and reflect historical differentiation based on limited connectivity between contiguous habitat patches (Chan et al. 2020, p. 2). Within these groups there appears to be varying levels of connectivity and gene flow, with evidence of isolation by distance and resistance in several areas in New Mexico (Chan et al. 2014, pp. 33–41; Chan et al. 2017, pp. 9–22). Despite evidence of some gene flow between these groups based on nuclear microsatellite data (Chan et al. 2020, p. 7), they appear to function as independent units with intermixing restricted to narrow contact zones. Thus, there is limited potential for natural recolonization should one or more of these groups become extirpated.

*Threats*

We identified risk factors that have influenced the dunes sagebrush lizard and its habitats in the past and may continue to do so into the future. These included habitat destruction, modification, and fragmentation (Factor A), predation (Factor C), human-caused mortality (Factor E), invasive species (Factors A and E), pollution (Factors A and E), groundwater depletion (Factor A), and extreme weather and climate change (Factors A and E) (USFWS 2023, pp. 53–85). However, in this proposed rule, we will discuss only those factors in detail that could meaningfully impact the status of the species. Risk factors such as predation, pollution, invasive species, groundwater depletion, and human-caused mortality have more localized effects on the dunes sagebrush lizard but on their own are unlikely to significantly affect overall species viability. The primary risk factors affecting the current and future status of the dunes sagebrush lizard are habitat destruction, modification, and fragmentation associated with oil and natural gas production and frac sand mining. Climate change is also likely to lead to more extreme weather events, particularly drought, that will further impact the dunes sagebrush lizard and its habitat. For a detailed description of the threats analysis, please refer to the SSA report (USFWS 2023, pp. 53–85).

Habitat Destruction, Modification, and Fragmentation

Due to its reliance on a very specific and restricted habitat type, the dunes sagebrush lizard is highly susceptible to habitat loss and fragmentation (Walkup et al. 2017, p. 2). At the individual level, the removal of shinnery oak vegetation and destruction of sand dunes has multiple negative effects on the dunes sagebrush lizard. The species is dependent on this habitat type for all aspects of its life history, including breeding, feeding, and sheltering (Young et al. 2018, p. 906). Shinnery oak vegetation provides sheltering habitat for thermoregulation and refuge from potential predators (Machenberg 1984, pp. 16, 20–21; Degenhardt et al. 1996, p. 160; Snell et al. 1997, pp. 1–2, 6–11; Fitzgerald et al. 1997, p. 26; Peterson and Boyd 1998, p. 21; Painter et al. 1999, pp. 1, 27; Sartorius et al. 2002, pp. 1972–1975; Painter 2004, pp. 3–4; Dhillion and Mills 2009, p. 264; Leavitt and Acre 2014, p. 700; Hibbitts and Hibbitts 2015, p. 157). It also provides habitat for the prey (*e.g.,* insects and other terrestrial invertebrates) consumed by the dunes sagebrush lizard (Degenhardt et al. 1996, p. 160; Degenhardt and Jones 1972, p. 217; Fitzgerald and Painter 2009, p. 199; Leavitt and Acre 2014, p. 700). Dunes sagebrush lizards move exclusively through shinnery oak vegetation to disperse between the sand dune blowouts that support nesting and reproduction (Fitzgerald et al. 1997, p. 24). Since the dunes sagebrush lizard breeds exclusively in sand dune blowouts, loss of sand dunes eliminates breeding habitat for the species.

At the population level, habitat destruction and fragmentation can affect the dunes sagebrush lizard's viability in multiple ways. Loss of habitat can lead to the reduction or even loss of populations and those populations that do remain are likely smaller and more isolated, elevating their vulnerability to stochastic events (Henle 2004, p. 239; Devictoret al. 2008, p. 511; Hibbitts et al. 2013, p. 111; Leavitt and Fitzgerald 2013, p. 6; Walkup et al. 2017, p. 2). Fragmentation may also result in degradation of dune-blowout landforms beyond the immediate footprint of developed areas (Leavitt and Fitzgerald 2013, p. 9; Walkup et al. 2017, p. 11). Fragmented sites are often of lower quality, possessing fewer, more dispersed large dune blowouts as well as more large patches of flat open sand and barren ground (Leavitt and Fitzgerald 2013, pp. 9–10), which are less likely to support robust populations.

As populations and habitat patches disappear across the landscape, there are fewer ''stepping-stones'' to connect remaining populations through dispersal and colonization (Young et al. 2018, p. 910). Dunes sagebrush lizards are not known to disperse across large expanses of unsuitable habitat. Thus, a given population may have little chance of receiving immigrating individuals across areas where suitable habitat has been removed (Fitzgerald et al. 1997, p. 27). Movements of individual dunes sagebrush lizards between populations are hindered or precluded by fragmentation and do not occur at rates sufficient to sustain demographics necessary to prevent localized extirpations (Leavitt and Fitzgerald 2013, p. 11; Ryberg et al. 2013, p. 4; Walkup et al. 2017, p. 12; Young et al. 2018, p. 910). Over time, fragmentation isolates populations and results in a progressive decline in population abundance until, ultimately, the species becomes extirpated (Leavitt and Fitzgerald 2013, p. 12). Loss of habitat may be irreversible: once shinnery oak dunelands are disturbed, these landforms tend to shift to alternative stable states that are not prone to self-regeneration through ecological succession (Ryberg et al. 2015, p. 896; Johnson et al. 2016, p. 34).

*Oil and natural gas production*—The dunes sagebrush lizard's range overlaps with the Permian Basin, a geologic province that hosts multiple basins each with multiple stratigraphic units from which hydrocarbons, water, or minerals are extracted. Oil and gas development involves activities, such as surface exploration, exploratory drilling, oil field development, and facility construction, including access roads, well pads, and operation and maintenance. These activities can all result in direct habitat loss by disturbance and removal of shinnery oak duneland. Indirect habitat loss occurs from fragmentation of larger habitat into smaller parcels of suitable habitat. As habitat becomes fragmented, the overall stability of the shinnery oak sand dune formations decreases, promoting wind erosion and deflation of the dunes (Carrick and Kruger 2007, pp. 771–772; Breckle et al. 2008, pp. 442, 453–454; Mossa and James 2013, pp. 75, 88, 92; Engel et al. 2018, pp. 1–13; Forstner et al. 2018, pp. 3–21). Fragmentation can also result in edge effects in which the habitat directly adjacent to the converted areas is of lower quality. For example, habitat fragmentation can increase air temperatures and solar radiation, along with reducing the availability of microhabitats that can serve a thermal refugia for the dunes sagebrush lizard (Jacobson 2016, pp. 3–4, 10).

Several studies have demonstrated a negative relationship between oil well pad density and the number of dunes sagebrush lizards present at a site (Sias and Snell 1998, p. 1; Leavitt and Fitzgerald 2013, p. 9; Ryberg et al. 2015, p. 893; Johnson et al. 2016, p. 41; Walkup et al. 2017, p. 9). A regression analysis that predicted a 25 percent reduction in the abundance of dunes sagebrush lizards at well densities of 13.64 wells pads per square mile (wells/mi$^2$), and a 50 percent reduction at a well density of 29.82 well pads/mi$^2$ (Sias and Snell 1998, p. 23). Based on that study, the proposed recommendation became that well densities in New Mexico be limited to 13 well pads/mi$^2$ (Painter et al. 1999, p. 3). Further research found that areas with 13 well pads/mi$^2$ or greater are found to have considerably lower abundance of dunes sagebrush lizards than unfragmented sites (Leavitt and Fitzgerald 2013, p. 9). Further, high well and road density at the landscape scale result in smaller, fewer, and more dispersed sand dune blowouts that are less suited to dunes sagebrush lizard persistence (Leavitt and Fitzgerald 2013,

p. 9). Marked declines in dunes sagebrush lizard occurrence in New Mexico have also been observed at well densities of 5 and 8 well pads/mi², with no lizards found at well densities above 23 well pads/mi² (Johnson et al. 2016, p. 41). These results supported the recommendation that 13 well pads/mi² should be considered ''degraded'' habitat as a standard in the scientific literature. This effect extends to population persistence, as research has found that dunes sagebrush lizard populations have a relatively high susceptibility to local extinction in landscapes with 13 or more well pads/mi² (Walkup et al. 2017, p. 10). The network-like development of well pads and their connecting roads both isolate populations and disrupt the underlying geomorphologic processes required to maintain the shinnery oak dune formations.

In many areas of oil and gas development, caliche roads are constructed in a grid-like network (Young et al. 2018, p. 6). Roads fragment habitat and impede dunes sagebrush lizard movement, reducing access to habitat, mating opportunities, and prey, and decreasing population size and the likelihood of population persistence. Both field experiments and radio tracking studies have revealed that dunes sagebrush lizards will avoid crossing caliche roads (Hibbitts et al. 2017, p. 197; Young et al. 2018, p. 910). Roads may also create fugitive dust that can impact shinnery oak growth and alter the grain-size distribution in blowouts. The dunes sagebrush lizard appears to be more abundant in areas where sand particles are larger (Fitzgerald et al. 1997, p. 25; Snell et al. 1997, p. 9). Soils with fine-grained particles (less than 250 micrometers (μm)) may interfere with breathing physically (*e.g.,* inhaling sand) and prevent gas exchange necessary for lizards to breathe while buried (Fitzgerald et al.1997, p. 25; Snell et al. 1997, p. 9; Ryberg and Fitzgerald 2015, p. 118). Fine-grained sand may also be too compact for the dunes sagebrush lizard to bury itself, may be inadequate for nest excavation and egg incubation (Ryberg et al. 2012, p. 584), and may have properties that prevent adequate exchange of gasses and water between eggs and the substrate surrounding subterranean nest chambers (Snell et al. 1997, p. 9). Thus, covering blowouts in dust may make an area unsuitable habitat for the dunes sagebrush lizard.

*Frac sand mining*—Frac sand is a naturally occurring sand used as a proppant (*i.e.,* a solid material used to keep fissures beneath the Earth's surface open) during hydraulic fracturing of oil and gas wells to maximize production of unconventional reservoirs (Mossa and James 2013, pp. 76–79; Benson and Wilson 2015, pp. 1–50; Engel et al. 2018, pp. 1–13; Forstner 2018, pp. 1–19; Mace 2019, entire). Sand mining involves the use of heavy equipment and open-pit methods to mechanically remove vegetation and fine sediments from near-surface deposits of sand (*e.g.,* sand dunes and sand sheets) (Breckle et al. 2008, pp. 453–454; Benson and Wilson 2015, pp. 7–8, 49; Mossa and James 2013, pp. 76–80; Forstner et al. 2018, pp. 2–17; Mace 2019, pp. 42–61). Construction of sand mine facilities, which include processing plants and related infrastructure, in dunes sagebrush lizard habitat removes shinnery oak and grades and compacts shinnery oak dunelands. The sand mine facilities replace the shinnery oak dunelands with paved surfaces, buildings, open pit mines, spoil areas, processing pools, and other structures (Boyd and Bidwell 2002, p. 332; Ryberg et al. 2015, pp. 888–890, 895–896; Forstner et al. 2018, pp. 1–5). Sand mining operations in dunes sagebrush lizard habitat can remove entire shinnery oak duneland landforms, or portions thereof; alter dune topography; and produce large, deep, unnatural pits in the land surface (Breckle et al. 2008, pp. 453–454; Mossa and James 2013, pp. 77–79, 85; Engel et al. 2018, pp. 1–13; Pye 2009, pp. 361–362; Forstner et al. 2018, pp. 2–21). The effects of sand mining can extend beyond the footprint of the actual mine itself. Removal of a portion (or portions) of a sand dune promotes the loss and degradation of the entire landform (*i.e.,* the remaining unmined segments) by undermining its stability and promoting wind erosion and deflation (Carrick and Kruger 2007, pp. 771–772; Breckle et al. 2008, pp. 442, 453–454; Mossa and James 2013, pp. 75, 88, 92; Engel et al. 2018, pp. 1–13; Forstner et al. 2018, pp. 3–21).

Frac sand mining is a recent occurrence in this region: the first sand mine was developed in early 2017, and by the end of 2018, 17 facilities had registered with the Texas Commission on Environmental Quality for operations in the region (Mace 2019, pp. 1, 42–43, 78). Sand mines have only been developed in the Texas portion of the dunes sagebrush lizard's range, specifically the Monahans Sandhills. Currently, most mines are in Winkler and Ward Counties; these two counties contain 11 and 2, respectively, of the 17 existing facilities (Mace 2019, pp. 43–44, 56; USFWS 2023, pp. 108–109). Sand mining is expected to continue in these counties given the current location and density of mines in the counties, the average rates of surface mining, and the anticipated plans and growth of the oil and gas industry in the area (Mace 2019, pp. 42–54; Benson and Wilson 2015, pp. 1–8, 54–57; Latham and Watkins 2020, pp. 12–13).

Extreme Weather and Climate Change

The dunes sagebrush lizard occurs in a semiarid climate that experiences extreme heat and droughts, but the species is adapted to contend with such environmental variability. In the 1920s and 1930s, northern shinnery oak ecosystems averaged 1 to 2 years of drought every 10 years, and southern portions of those ecosystems averaged 2 to 3 years of drought every 10 years (Peterson and Boyd 1998, p. 14). In the past 20 years, moderate to exceptional drought has occurred every 1 to 2 years, in the southern and northern shinnery oak ecosystems (U.S. Drought Monitor 2022, unpaginated). Climate change is likely to increase the frequency and severity of drought in this region since, on average, surface air temperatures across Texas are predicted to increase by 3 °C (5.4 °F) by 2099 (Jiang and Yang 2012, p. 238). In the southwest United States, temperature increases are predicted to be concentrated in the summer months, and in Texas, the number of days exceeding 35 °C (95 °F) may double by 2050 (Kinniburgh et al. 2015, p. 8). According to climate change predictions, west Texas will experience greater variability in seasonal precipitation patterns with the greatest net loss experienced in winter (Jiang and Yang 2012, p. 238).

The impacts of extreme heat and drought on individual dunes sagebrush lizards is relatively unknown. Drought could impact food resources, which would then impact lizard productivity. The marbled whiptail (*Aspidoscelis marmoratus*), another lizard species found in the Monahans Sandhills, showed a decline in density during a period of drought (Fitzgerald et al. 2011, p. 30). If drought restricts available food resources, it could negatively affect dunes sagebrush lizard recruitment and survival.

The relationship between these weather events and dunes sagebrush lizard habitat (*i.e.,* shinnery oak) has been better characterized. While shinnery oak is highly adapted for arid conditions, prolonged periods of drought inhibit growth and reproduction. For example, during drought, shinnery oak can lose its leaves or not even leaf-out (Peterson and Boyd 1998, p. 9). Additionally, recent droughts have delayed typical spring leaf-out for shinnery oak, with leaf-out

instead occurring with the seasonal summer monsoons (Johnson et al. 2016, p. 78). The timing of the spring leaf-out is important, as it provides shelter for adult dunes sagebrush lizards as they become active in the spring and provides food resources for invertebrates that are consumed by dunes sagebrush lizard. Furthermore, continued alterations to the landscape are likely to exacerbate the impacts of climate change on dunes sagebrush lizard. For example, habitat fragmentation can already increase air temperatures and solar radiation, along with reducing the availability of microhabitats that can serve as a thermal refugia (Jacobson 2016, pp. 3–4, 10). Habitat fragmentation also restricts natural patterns of dispersal and colonization that could buffer against extreme weather impacts.

*Current Condition*

We assessed the current condition of the dunes sagebrush lizard using a geospatial analysis to estimate the current quantity and quality of available habitat (USFWS 2023, pp. 86–109). Our approach was rooted in the findings by numerous studies that the dunes sagebrush lizard experiences reductions in abundance and density as habitat is lost or becomes disturbed (Leavitt and Fitzgerald 2013, p. 11; Ryberg et al. 2013, p. 4; Walkup et al. 2017, p. 12; Young et al. 2018, p. 910). The results of our geospatial analysis indicate that across our analysis area there is approximately 210,506 hectares (ha) (520,161 acres (ac)) classified as shinnery oak duneland, which is the primary habitat type required by the species for breeding, feeding, and sheltering. Of this shinnery oak duneland habitat, about 50 percent is minimally disturbed by human development, whereas 35 percent has been degraded to the point it is likely unable to support populations of dunes sagebrush lizard. The remaining 15 percent has moderate levels of disturbance, where we project there have been reductions in dunes sagebrush lizard viability.

Since the dunes sagebrush lizard exhibits divisions between population areas and restricted gene flow across its range (Chan et al. 2020, entire), we identified 11 analysis units to assess resiliency. These units correspond to sections of the overall range of the dunes sagebrush lizard that are demographically and genetically independent from each other and logical breakpoints for analysis based on habitat distribution and potential barriers to movement (*i.e.,* highways). Levels of habitat degradation and disturbance were not equal across the 11 analysis units; therefore, we developed a system to rank the viability of dunes sagebrush lizard populations within these units based on habitat metrics. Each analysis unit was classified as either being in high, moderate, or low condition. Those in high condition possess enough undisturbed habitat that we project they will support robust, interconnected populations of the dunes sagebrush lizard. Moderate condition defines units that have experienced habitat loss and disturbance to such an extent that abundance and the potential for natural patterns of dispersal and colonization are expected to be reduced. Units in low condition have experienced such extensive habitat loss that they are expected to experience substantial population losses (USFWS 2023, pp. 92–94).

Of the 11 analysis units, we found two have an overall condition score of high, five that are moderate condition, and four that are low condition (Table 1). All analysis units in the Northern Mescalero Sandhills are in either high (two units) or moderate (three units) condition. In contrast, both analysis units in the Southern Mescalero Sandhills are in low condition. Two analysis units in the Monahans Sandhills are in low condition and two are moderate condition. Although two analysis units are in high condition according to our analysis (North Mescalero 2 and 4), there are physically disconnected from any other sand dune formations and contain the least amount of shinnery oak duneland habitat. Thus, despite being relatively undisturbed, they are isolated and small making them at increasing risk of extirpation.

TABLE 1—RESULTS FROM THE ANALYSIS OF CURRENT STATUS OF HABITAT ACROSS THE 11 ANALYSIS UNITS DEFINED FOR THE DUNES SAGEBRUSH LIZARD ASSESSMENT THE OVERALL CURRENT CONDITION OF THOSE UNIT

| Representation unit | Analysis unit | Proportion of total area minimally disturbed | Proportion of duneland minimally disturbed | Proportion of duneland degraded | Current condition |
|---|---|---|---|---|---|
| N Mescalero | N Mescalero 1 | 0.74 | 0.80 | 0.14 | Moderate. |
| | N Mescalero 2 | 0.76 | 0.93 | 0.01 | High. |
| | N Mescalero 3 | 0.62 | 0.65 | 0.31 | Moderate. |
| | N Mescalero 4 | 0.61 | 0.58 | 0.03 | High. |
| | N Mescalero 5 | 0.70 | 0.71 | 0.28 | Moderate. |
| S Mescalero | S Mescalero 1 | 0.17 | 0.17 | 0.51 | Low. |
| | S Mescalero 2 | 0.40 | 0.28 | 0.59 | Low. |
| Monahans | Monahans 1 | 0.36 | 0.40 | 0.56 | Low. |
| | Monahans 2 | 0.62 | 0.73 | 0.13 | Moderate. |
| | Monahans 3 | 0.66 | 0.65 | 0.16 | Moderate. |
| | Monahans 4 | 0.26 | 0.37 | 0.51 | Low. |

Using the total size of each analysis unit, we projected the proportion of the total dunes sagebrush lizard range that fell into these different condition categories. Only 6 percent of the species' range is considered to be in high condition, 47 percent is considered to be in moderate condition, and 47 percent is considered to be in low condition. For a more thorough discussion of the current status of the dunes sagebrush lizard, see the SSA report (USFWS 2023, pp. 86–109).

*Future Scenarios*

To assess the viability of the dunes sagebrush lizard into the future, we developed several scenarios to forecast the condition of the species under different projections of threats. We used our existing assessment of current habitat as the starting point for our future scenarios. We then incorporated projections of factors likely to impact dunes sagebrush lizard viability into the future. Although there are several factors that may influence the condition

of the species in the future, we focused on oil and gas development and sand mining as the threats most likely to impact the dunes sagebrush lizard's habitat and long-term viability.

Since dunes sagebrush lizard density and abundance have a negative relationship with oil well pad density, projecting the number and placement of future wells on the landscape is important for assessing the future condition of the species. Pierre et al. (2020, entire) created a spatially explicit model to project future landscape alteration associated with oil and gas development in the Permian Basin. Projections in the model followed three scenarios, which they labelled as ''Low'', ''Medium'', and ''High'', that differed based on numbers of wells developed on each pad. The inputs to the model are based on past, current, and anticipated future production practices that take into account evolving new technology that enables multiple wells to be developed on a single pad, ultimately requiring a smaller footprint per well. All three scenarios were projected to 2050. The models also prevented oil well pads from being established in certain locations, including areas set aside for conservation, such as State parks and Bureau of Land Management lands closed to oil drilling. Because of these features, Pierre et al. (2020, entire) represents a scientifically rigorous projection of future oil and gas development throughout the range of the dunes sagebrush lizard.

The sand mining industry is relatively young in west Texas, with the first mines appearing in 2017. Thus, there are not ample published data on past industry trends that could be used to project future growth. This raises uncertainty about projecting the growth of existing sand mines and the potential for new mines to be developed. For our future scenarios in the SSA report (USFWS 2023, pp. 111–114), we chose to model future sand mine expansion using our own empirical estimates of sand mine growth rates. We did this by using the latest aerial imagery to estimate growth of individual sand mines within the dunes sagebrush lizard's range from 2017 to 2022, depending on the availability of imagery. We identified 18 sand mines within our analysis area and assessed their growth rates over the 5-year period using aerial imagery. The median growth rate was 22 ha (54 ac) per mine per year, with the 25th percentile being 16 ha (39 ac) per mine per year and the 75th percentile being 30 ha (74 ac) per mine per year. To capture the ebbs and flows of the market, we created three estimates of sand mine growth rates—a high, medium, and low scenario (USFWS 2023, p. 112–114)—and integrated them into the future scenarios developed by Pierre et al. (2020, entire). For the medium sand mine growth rate scenario, we selected the median growth rate calculated using the aerial imagery. With the high scenario, we selected the 75th percentile of sand mines growth rates, and for the low scenario, we used the 25th percentile of sand mine growth rates. We then used geospatial analyses to project sand mine growth to 2050, which matches the timeframe of the Pierre et al. (2020, entire) scenarios (USFWS 2023, pp. 188–194).

We paired the projections of oil well density and sand mine expansion to capture the extent of potential future impacts to the dunes sagebrush lizard, not to generate a holistic, integrated economic scenario. In other words, we did not assume that the economic forces that would result in an outcome for one industry would necessarily result in a similar trend for the other. Instead, our scenarios were meant to capture the plausible range of landscape impacts caused by both industries under an upper and lower plausible limit. The likely future lies somewhere between these boundary scenarios, and it is important to interpret them as bounds of plausible future impacts to dunes sagebrush lizard habitat and the species' future viability.

There are several conservation agreements that have been put in place to minimize the impact of industrial activity on the dunes sagebrush lizard and its habitat (see *Conservation Efforts and Regulatory Mechanisms,* below). For projecting future conditions, we considered the nature of the agreements and accounted for them in our projections of future habitat. The protection of public lands in New Mexico was accounted for in the oil projections: Pierre et al. (2020, p. 349, table S3) excluded certain areas from future oil well placement, including protected areas, conservation easements in New Mexico, and Bureau of Land Management lands closed to future oil drilling. In Texas, since most landownership is private and there are fewer protected areas officially closed to future development, there were fewer restrictions on future oil development in the Pierre et al. (2020) model. Furthermore, unlike the conservation agreements in New Mexico, which require avoidance of dunes sagebrush lizard habitat, the agreements in Texas authorize impacts to habitat. The Texas agreements are voluntary agreements where areas set aside to preserve dunes sagebrush lizard habitat by Participants are not under permanent or long-term protection. Further, they do not provide any property-specific commitments to avoid habitat, only commitments to mitigate for habitat impacts that result from covered activities, for the duration of these agreements. Also, since these are private lands, we would not know the location of the habitat being avoided. Thus, based on performance of these plans to date, we do not expect these agreements to have a measurable effect in protecting the dunes sagebrush lizard or its habitat in Texas into the future. Therefore, we did not include potential future conservation efforts resulting from these plans in our scenarios projecting the species' future status. We did not adjust our future projections of oil well density or sand mining to account for these agreements.

We also did not include any future habitat restoration in the future projections. This is because loss of shinnery oak duneland habitat is irreversible. Trials to restore and recreate shinnery oak dunelands have not been successful (Ryberg et al. 2015, p. 896; Johnson et al. 2016, p. 34). Thus, restoration of dunes sagebrush lizard habitat has been limited and not conducted on a meaningful scale.

In all three scenarios, the quality and quantity of dunes sagebrush lizard habitat was projected to decrease (see figure, below). As with current condition, we ranked the resiliency of the 11 analysis units based on projected habitat conditions under all three scenarios. Across all three scenarios, only 2 percent of the dunes sagebrush lizard's range is projected to have high resiliency in 2050. The low scenario results in similar resiliency scores as estimated for current conditions. In contrast, in the medium scenario, 72 percent of the dunes sagebrush lizard's range is projected to have low resiliency. This increases to 77 percent under the high scenario. With the low scenario, 51 percent of the dunes sagebrush lizard's range is projected to be in moderate resiliency; this drops to 26 and 21 percent for the medium and high scenarios, respectively. Under the medium and high scenarios, all the analysis units in the Southern Mescalero and Monahans analysis units are projected to have low resiliency.

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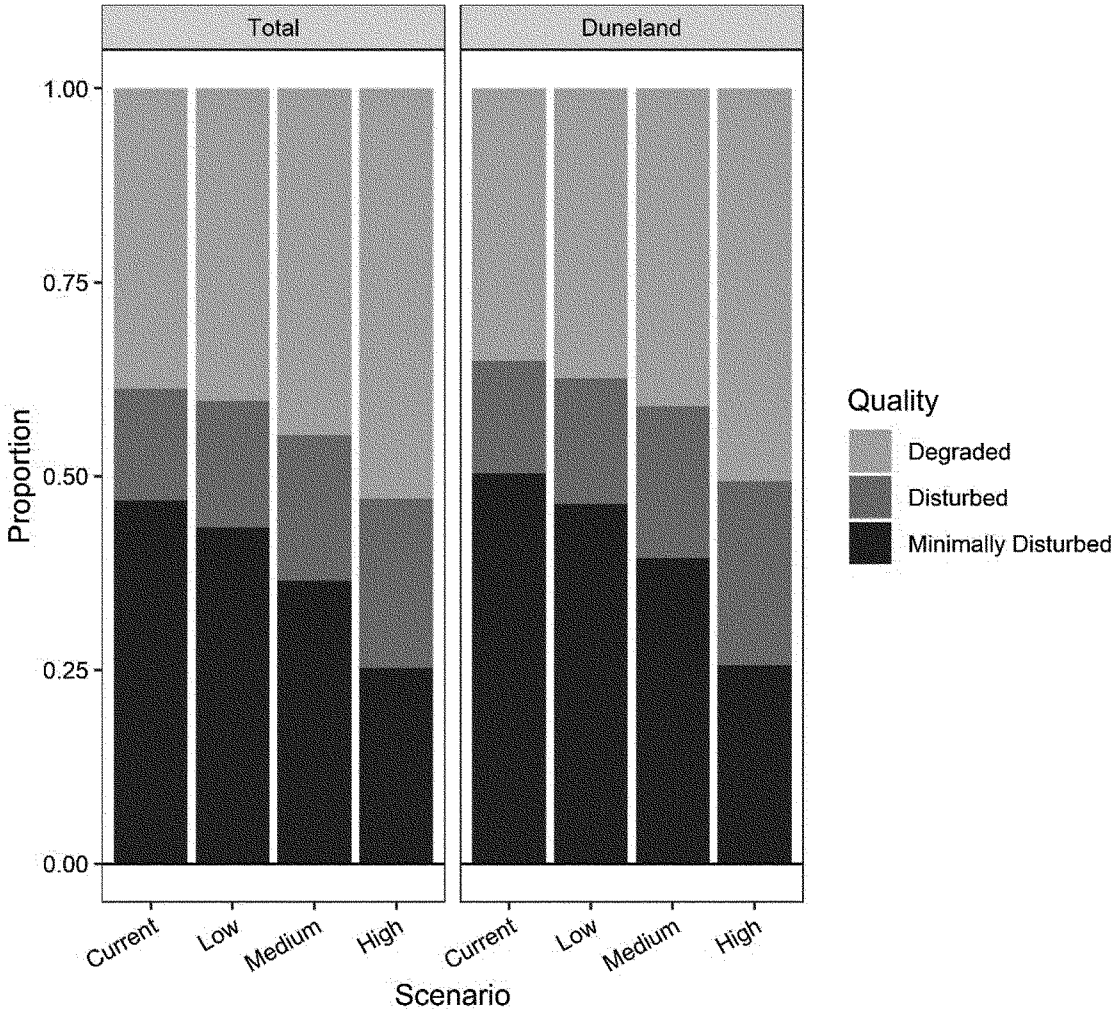


**Figure: Comparison of the proportion of total dunes sagebrush lizard habitat (left panel) and shinnery-oak duneland habitat (right panel) currently and projected by 2050 under the three future scenarios.** Quality refers to the categories of human disturbance defined in the SSA report. More details on the projections of the future status of the dunes sagebrush lizard can be found in the SSA report (USFWS 2023, pp. 110–129).

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*Cumulative Effects*

We note that by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. To assess the current and future condition of the species, we undertake an iterative analysis that encompasses and incorporates the threats individually and then accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of these factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

*Conservation Efforts and Regulatory Mechanisms*

Because we are considering the best available information and because the discussion above primarily addresses the viability of the dunes sagebrush lizard in relation to the threats and factors affecting its viability, here we will discuss regulatory mechanisms and conservation actions that potentially have influenced or will influence the current and future viability of the species.

New Mexico

The dunes sagebrush lizard is listed as an endangered species within the State of New Mexico by the New Mexico Department of Game and Fish and is considered a sensitive species by the Bureau of Land Management. In 2008, the Bureau of Land Management developed a Special Status Species Resource Management Plan Amendment

(hereafter Amendment) (BLM 2008, entire) to guide management of lands within dunes sagebrush lizard habitat in New Mexico. The plan addressed concerns and threats of oil and gas development and shinnery oak removal due to herbicide spraying by outlining protective measures and basic guidelines for development in the vicinity of dunes sagebrush lizard habitat. The plan provides for specific conservation requirements, lease stipulations, and the removal of 42,934 ha (106,091 ac) of dunes sagebrush lizard habitat from future oil and gas leasing (BLM 2008, entire). Since the Amendment was approved in 2008, the Bureau of Land Management has closed approximately 120,000 ha (300,000 ac) to future oil and gas leasing and closed approximately 345,000 ha (850,000 ac) to wind and solar development (Bureau of Land Management [BLM] 2008, p. 3). From 2008 to 2020, they have reclaimed 1,416 ha (3,500 ac) of abandoned well pads and associated roads. Additionally, the Bureau of Land Management continues to implement control efforts for invasive mesquite.

Following approval of the Amendment, a team including the Service, Bureau of Land Management, the Center of Excellence, and participating cooperators drafted both a candidate conservation agreement (CCA) and candidate conservation agreement with assurances (CCAA) (Center of Excellence [CEHMM] 2008, entire) for the dunes sagebrush lizard and lesser prairie-chicken (*Tympanuchus pallidicinctus*) in New Mexico. The CCA addresses the conservation needs of the dunes sagebrush lizard and lesser prairie-chicken on Bureau of Land Management lands in New Mexico by attempting habitat restoration and enhancement activities, conducting activities like removing unused well pads, and minimizing habitat degradation. The CCAA was developed to facilitate conservation actions for the two species on private and State lands.

The CCA and CCAA are umbrella agreements under which individual entities participate. In New Mexico, an estimated 35 percent of the occupied range of the dunes sagebrush lizard is on privately owned and State-managed lands. There are no local or State regulatory mechanisms pertaining to the conservation of dunes sagebrush habitat on private or State lands in New Mexico, nor is there New Mexico State Land Office policy in place to protect sensitive species. The only mechanism for the preservation of dunes sagebrush lizard habitat on lands administered by the New Mexico State Land Office is by having those lands enrolled in the CCAA.

Since the CCA and CCAA were finalized in December 2008, 40 oil and gas companies and 37 ranchers have enrolled a total of 218,144 ha (539,046 ac) of shinnery oak duneland habitat and 258,018 ha (637,577 ac) of the surrounding supportive matrix habitat. The total area of habitat enrolled by industry, private landowners, New Mexico Department of Game and Fish, and New Mexico State Land Office currently covers around 85 percent of the range of the dunes sagebrush lizard within New Mexico. By enrolling lands in these agreements, participants agree to avoid disturbing shinnery oak duneland habitat, forgo spraying of herbicides on shinnery oak, and relocate projects to avoid dunes sagebrush lizard habitat (CEHMM 2016, pp. 1–2).

Texas

In Texas, the dunes sagebrush lizard is listed as a ''species of greatest conservation need'' by the Texas Parks and Wildlife Department. This designation does not afford the species any legal protection, but it guides nongame conservation efforts, including regional efforts to conserve these species. Additionally, there are no local or other State mechanisms regulating impacts or pertaining to the conservation of dunes sagebrush lizard habitat on private lands. Nearly all dunes sagebrush lizard habitat in Texas is privately owned. Monahans State Park is the only public land on which the dunes sagebrush lizard is known to exist in Texas.

*Texas Conservation Plan*—In 2011, the Texas Comptroller of Public Accounts (Comptroller) led a group of stakeholders to develop the Texas Conservation Plan (TCP) for the dunes sagebrush lizard, which finalized a CCAA in 2012. The TCP authorizes impacts to dunes sagebrush lizard habitat (*i.e.,* incidental take of lizards) resulting from oil and gas development, agriculture, and ranching activities (*i.e.,* covered activities) and established a conservation program focused on avoiding these activities in dunes sagebrush lizard habitat. If avoidance of habitat cannot be accomplished, participants enrolled in the TCP must implement conservation measures that minimize and mitigate for habitat impacts via restoration or enhancement of dunes sagebrush lizard habitat (Texas Comptroller of Public Accounts [CPA] 2012, entire).

Approximately 1,847 ha (4,564 ac) of dunes sagebrush lizard habitat was negatively impacted by the TCP between 2012 and 2018. However, after 6 years of implementation, the Comptroller sought to revise the TCP to address issues preventing the plan from achieving its conservation and protection goals (Gulley 2017a, entire; Gulley 2017b, entire; Koch 2018, entire; Hegar 2018a, entire; Hegar 2018b, entire; Gulley 2018a, entire; Gulley 2018b, entire; Hegar 2018d, entire; CPA 2019, entire). In 2018, the Comptroller submitted these proposed revisions to the Service in the form of a new CCAA to replace the existing TCP and subsequently ended their administration of the permit (Ashley 2018a, entire; Ashley 2018b, entire; Hegar 2018a, entire; Hegar 2018b, entire; Hegar 2018c, entire). The Service did not approve the proposed new CCAA submitted by the Comptroller. Rather, in 2020, the Service revised and transferred the permit for the TCP to a new permit holder, the American Conservation Foundation (Falen 2019, entire; Fleming 2020a, entire; Fleming 2020b, entire). Of the 29 Participants enrolled in the 2012 TCP, only 8 expressed interest in maintaining enrollment under the revised 2020 TCP. Subsequently, the area enrolled in the TCP decreased significantly, from 120,193 ha (297,004 ac) in 2012, to 28,489 ha (70,397 ac) in 2020 (approximately 76 percent decrease). The Service remains in discussions with the American Conservation Foundation and remaining Participants to consider and implement changes to the TCP.

*2020 CCAA*—In 2020, a separate applicant, led primarily by mining companies, applied for a separate CCAA that covers oil and gas, sand mining, linear infrastructure (such as utilities and pipelines), wind, solar, local governments, and agriculture and ranching (Canyon Environmental, LLC 2020, entire). The Service approved this CCAA in 2021. Using habitat as a surrogate for quantifying the amount of incidental take, the total amount of take authorized during the permit term (23 years) is 14,140 ha (34,940 ac). Because it was not possible to determine how much dunes sagebrush lizard habitat would be disturbed or destroyed by Participants versus non-Participants, this estimate, which was formulated based on a variety of factors (Canyon Environmental, LLC 2020, pp. 45–49), is the expected total impacts to habitat in Texas over the permit term, including from the TCP.

The 2020 CCAA describes the goal and objectives of the CCAA conservation strategy. The one overarching goal is to contribute, directly or indirectly, to the conservation of the dunes sagebrush lizard by reducing or eliminating threats

on enrolled properties. This goal is then followed by a list of objectives that emphasize, in part, conserving dunes sagebrush lizard habitat, restoring and reclaiming impacted areas, reducing habitat fragmentation, and addressing surface impacts from the development of stratified mineral estates. Each industry has various avoidance and minimization measures that they are encouraged to implement. Each industry also has various fees based on dunes sagebrush lizard habitat type to be impacted. These fees are expected to support administration of the 2020 CCAA, as well as conservation actions and research.

The permit was issued on January 20, 2021, and the permit administrator is currently coordinating implementation with the Service and actively seeking participants to sign up under the 2020 CCAA. To date, no certificates of inclusion have been issued, and thus no conservation actions have been implemented as part of this CCAA.

**Determination of Dunes Sagebrush Lizard's Status**

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We also take into consideration any efforts by States or other authorities to protect the species and promote its viability.

*Status Throughout All of Its Range*

Among the threats we evaluated in our SSA report (USFWS 2023, entire), the most consequential to the long-term persistence of the dunes sagebrush lizard are habitat loss, modification, and fragmentation due to the industrial extraction of oil, gas, and frac sand (Factor A). Because these activities have so thoroughly degraded habitat across large portions (47 percent) of shinnery oak duneland habitat, much of it is no longer capable of supporting populations of the dunes sagebrush lizard. Even though these degraded areas may continue to support the dunes sagebrush lizard in small, isolated patches, the species in these areas has limited recruitment, has higher mortality, and is disconnected from other populations. In highly degraded areas, remnant populations may persist over the next several decades, but as they become extirpated there is little potential for recolonization due to habitat fragmentation. Therefore, the dunes sagebrush lizard is functionally extinct across 47 percent of its range. This includes the entire Southern Mescalero Sandhills portion of the range, which reduces the species' adaptive capacity and, therefore, reduces its representation.

Based on our habitat assessment, only two analysis units (6 percent) are currently in high enough condition to support robust, interconnected populations. Even this, however, may be an over-estimate of long-term resiliency, since these two analysis units are at the extreme northern portion of the species' range in New Mexico and are physically disconnected from other dune fields and each other. Additionally, although minimally disturbed, these two units contain the least amount of shinnery oak duneland habitat; thus, the populations within these units are small, isolated, and vulnerable to stochastic and catastrophic events.

Another large component of the species' range (47 percent) is currently in moderate condition, meaning it contains sufficient amounts of minimally disturbed habitat to support populations of the dunes sagebrush lizard at this time. However, within these areas, interconnectedness is reduced, increasing the potential for local extirpations. Dunes sagebrush lizard populations where the habitat is in moderate condition are not secure in those units, as the populations are already highly fragmented and are expected to continue to be impacted by human activity. Even if there was no further expansion of the oil and gas or sand mining industries, the existing footprint of these operations will continue to negatively affect the dunes sagebrush lizard into the future. For example, the existing road network will continue to restrict movement and facilitate direct mortality of dunes sagebrush lizards from traffic, and industrial development will continue to have edge effects on surrounding habitat and weaken the structure of the sand dune formations. The pervasiveness of industrial development makes dunes sagebrush lizards vulnerable to other threats that were not explicitly quantified in our assessment, such as extreme drought, groundwater extraction, oil spills, and mesquite encroachment. Because shinnery-oak duneland habitat cannot currently be restored (Ryberg et al. 2015, p. 896; Johnson et al. 2016, p. 34), and limited existing infrastructure will likely be removed from this landscape, there is little possibility for conditions in these moderate condition units to improve (USFWS 2023, pp. 105–107). Therefore, we conclude that habitat in these units will continue to deteriorate due to fragmentation, which will continue to isolate populations and result in a progressive decline in population abundance. Ultimately, the species will become extirpated in the areas currently classified as moderate condition, even without any expansion of current threats.

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we conclude that the risk factors acting on the dunes sagebrush lizard and its habitat, either singly or in combination, are of sufficient imminence, intensity, and magnitude to indicate that the species is in danger of extinction throughout all of its range. Due to current stressors, the species has experienced reductions in resiliency across its range, making it vulnerable to stochastic events. Although it still occupies much of its range, many populations are small, isolated, and vulnerable to extirpation, which will gradually erode redundancy and increase the risks posed by catastrophic events, such as drought. An entire lineage covering an ecologically separate portion of the range (Southern Mescalero) is functional extinct, which would reduce adaptive capacity and the ability of the species to respond to environmental change. A second lineage occupying a geographically disjunct portion of the range (Monahans) is on a similar trajectory. Thus, after assessing the best available information, we determine that the dunes sagebrush lizard is in danger of extinction throughout all of its range. Threats are so pervasive and severe across the species range that they heighten the risk of extinction for the dunes sagebrush lizard in the near future even with extrapolation of these threats into the future, meaning a threatened determination under the Act would not reflect the current risk to the species.

*Status Throughout a Significant Portion of Its Range*

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the dunes sagebrush lizard is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the dunes sagebrush lizard warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), which vacated the provision of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014) providing that if the Services determine that a species is threatened throughout all of its range, the Services will not analyze whether the species is endangered in a significant portion of its range.

*Determination of Status*

Our review of the best available scientific and commercial information indicates that the dunes sagebrush lizard meets the Act's definition of an endangered species. Therefore, we propose to list the dunes sagebrush lizard as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

**Available Conservation Measures**

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) may be established to develop and implement recovery plans. The recovery planning process involves the identification of actions that are necessary to halt and reverse the species' decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (*https://www.fws.gov/program/endangered-species*), or from our New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of New Mexico and Texas would be eligible for Federal funds to implement management actions that promote the protection or recovery of the dunes sagebrush lizard. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance.*

Although the dunes sagebrush lizard is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with the Service.

Examples of actions that may be subject to the section 7 processes are land management or other landscape-altering activities on Federal lands or mineral rights administered by the Bureau of Land Management as well as actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under

section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, Federal Emergency Management Agency, or Natural Resources Conservation Service). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation. Examples of Federal agency actions that may require consultation for the dunes sagebrush lizard could include updates or amendments to the Bureau of Land Management Resource Management Plan; oil and gas lease sales of Federal lands or minerals; habitat management, such as mesquite treatments and prescribed burns, on Bureau of Land Management lands; and new roads funded by the Federal Highway Administration. Given the difference in triggers for conferencing and consultation, Federal agencies should coordinate with the local Service Field Office (see **FOR FURTHER INFORMATION CONTACT**) with any specific questions.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any species listed as an endangered species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing.

At this time, however, we are unable to identify specific activities that would not be considered to result in a violation of section 9 of the Act because the dunes sagebrush lizard and its habitat occurs in a highly active and developing region of New Mexico and Texas and it is likely that site-specific conservation measures may be needed for activities that may directly or indirectly affect the species.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act if they are not authorized in accordance with applicable law; this list is not comprehensive:

(1) Destruction, alteration, or removal of shinnery oak duneland and shrubland vegetation.

(2) Degradation, removal, or fragmentation of shinnery oak duneland and shrubland formations and ecosystems.

(3) Disruption of water tables in dunes sagebrush lizard habitat.

(4) Introduction of nonnative species that compete with or prey upon the dunes sagebrush lizard.

(5) Unauthorized release of biological control agents that attack any life stage of the dunes sagebrush lizard or that degrade or alter its habitat.

(6) Herbicide or pesticide applications in shinnery oak duneland and shrubland vegetation and ecosystems.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

## II. Critical Habitat

### Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the

proposed activity would likely result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

**Prudency Determination**

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

As discussed earlier in this document, there is currently no imminent threat of collection or vandalism identified under Factor B for this species, and identification and mapping of critical habitat is not expected to initiate any such threat. In our SSA report and proposed listing determination for the dunes sagebrush lizard, we determined that the present or threatened destruction, modification, or curtailment of habitat or range is a threat to the dunes sagebrush lizard and that threat in some way can be addressed by the Act's section 7(a)(2) consultation measures. The species occurs wholly in the jurisdiction of the United States, and we are able to identify areas that meet the definition of critical habitat. Therefore, because none of the circumstances enumerated in our regulations at 50 CFR 424.12(a)(1) have been met and because the Secretary has not identified other circumstances for which this designation of critical habitat would be not prudent, we have determined that the designation of critical habitat is prudent for the dunes sagebrush lizard.

**Critical Habitat Determinability**

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the dunes sagebrush lizard is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking; or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of ''critical habitat.''

When critical habitat is not determinable, the Act allows the Service

an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. Careful assessments of the economic and environmental impacts that may occur due to a critical habitat designation are not yet complete, and we are in the process of working with the States and other partners in acquiring the complex information needed to perform those assessments. The information sufficient to perform a required analysis of the impacts of the designation is lacking. Therefore, we conclude that the designation of critical habitat for the dunes sagebrush lizard is not determinable at this time. The Act allows the Service an additional year to publish a critical habitat designation that is not determinable at the time of listing (16 U.S.C. 1533(b)(6)(C)(ii)).

**Required Determinations**

*Clarity of the Rule*

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. No designated Tribal lands occur within the range of the dunes sagebrush lizard, but several Tribes may have interests in this area and could be affected by the proposed rule. We contacted the Mescalero Apache, Pueblo of Tesuque, Ysleta del Sur Pueblo, Kiowa Tribe of Oklahoma, Apache Tribe of Oklahoma, and Comanche Nation of Oklahoma regarding the SSA process by mail and invited them to provide information and comments to inform the SSA. Our interactions with these Tribes are part of our government-to-government consultation with Tribes regarding the dunes sagebrush lizard and the Act. We will continue to work with Tribal entities during the rulemaking process.

**References Cited**

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

**Authors**

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the New Mexico Ecological Services Field Office.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h) by adding an entry for ''Lizard, dunes sagebrush'' to the List of Endangered and Threatened Wildlife in alphabetical order under REPTILES to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

* * * * *

(h) * * *

| Common name | Scientific name | Where listed | Status | Listing citations and applicable rules |
|---|---|---|---|---|
| * * * * * | | | | * * |
| REPTILES | | | | |
| * * * * * | | | | * * |
| Lizard, dunes sagebrush | *Sceloporus arenicolus* | Wherever found | E | [**Federal Register** citation when published as a final rule]. |
| * * * * * | | | | * * |

**Martha Williams,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. 2023–13859 Filed 6–30–23; 8:45 am]

**BILLING CODE 4333–15–P**

# Notices

Federal Register

Vol. 88, No. 126

Monday, July 3, 2023

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

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Adoption of Recommendations

**AGENCY:** Administrative Conference of the United States.

**ACTION:** Notice.

**SUMMARY:** The Assembly of the Administrative Conference of the United States adopted four recommendations at its hybrid (virtual and in-person) Seventy-ninth Plenary Session: Proactive Disclosure of Agency Legal Materials, Virtual Public Engagement in Agency Rulemaking, Using Algorithmic Tools in Retrospective Review of Agency Rules, and Online Processes in Agency Adjudication.

**FOR FURTHER INFORMATION CONTACT:** For Recommendations 2023–1, 2023–2, and 2023–3, Kazia Nowacki; and for Recommendation 2023–4, Matthew A. Gluth. For each of these recommendations the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; Telephone 202–480–2080.

**SUPPLEMENTARY INFORMATION:** The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see *www.acus.gov.*

The Assembly of the Conference met during its Seventy-ninth Plenary Session on June 15, 2023, to consider four proposed recommendations and conduct other business. All four recommendations were adopted.

Recommendation 2023–1, *Proactive Disclosure of Agency Legal Materials.* This recommendation identifies statutory reforms that, if enacted by Congress, would provide clear standards as to what legal materials agencies must publish and where they must publish them (whether in the **Federal Register**, on their websites, or elsewhere). The amendments also account for technological developments and correct certain statutory ambiguities and drafting errors. The objective of these amendments is to ensure that agencies provide ready public access to important legal materials in the most efficient way possible.

Recommendation 2023–2, *Virtual Public Engagement in Agency Rulemaking.* This recommendation identifies best practices to promote enhanced transparency, accessibility, and accountability when agencies use virtual tools to host public engagement meetings during the rulemaking process. It encourages agencies to offer virtual options when it would be beneficial to do so and offers best practices for structuring virtual public engagements in a way that meets public expectations and promotes valuable input for the agency.

Recommendation 2023–3, *Using Algorithmic Tools in Retrospective Review of Agency Rules.* This recommendation identifies best practices for agencies to consider when designing or using artificially intelligent or other algorithmic tools to identify rules that are outmoded or redundant, contain typographical errors or inaccurate cross-references, or might benefit from resolving issues with intersecting or overlapping rules or standards. It also discusses how agencies can design these tools in a way that promotes transparency, public participation, and accountability.

Recommendation 2023–4, *Online Processes in Agency Adjudication.* This recommendation identifies best practices for developing online processes by which private parties, representatives, and other participants in agency adjudications can file forms, evidence, and briefs; view case materials and status information; receive notices and orders; and perform other common adjudicative tasks.

The Conference based its recommendations on research reports and prior history that are posted at: *https://www.acus.gov/event/79th-plenary-session.*

The Appendix below sets forth the full texts of each recommendation. The Conference will transmit the recommendations to affected agencies, Congress, and the Judicial Conference of the United States, as appropriate.

*Authority:* 5 U.S.C. 595.

Dated: June 28, 2023.

**Shawne C. McGibbon,**

*General Counsel.*

## Appendix—Recommendations of the Administrative Conference of the United States

### Administrative Conference Recommendation 2023–1

### Proactive Disclosure of Agency Legal Materials

*Adopted June 15, 2023*

Agencies produce many kinds of legal materials—that is, documents that establish, interpret, apply, explain, or address the enforcement of legal rights and obligations, along with constraints imposed, implemented, or enforced by or upon an agency.[1] Agency legal materials come in many forms, ranging from generally applicable rules to orders issued in the adjudication of individual cases. Many statutes govern the public disclosure of these materials, including the Freedom of Information Act (FOIA),[2] the **Federal Register** Act,[3] and the E-Government Act of 2002.[4] Together, these statutes require agencies to proactively disclose certain materials, either by publishing them in the **Federal Register** or posting them on their websites. Other materials must be made available upon request. Some materials, based on their nature or content, are exempt from disclosure.

Since its establishment, the Administrative Conference has adopted dozens of recommendations encouraging agencies to proactively disclose important legal materials, even beyond what the law currently requires, and to make them publicly available in a readily accessible fashion.[5] The Conference has identified best

[1] Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, Disclosure of Agency Legal Materials 5 (May 30, 2023) (report to the Admin. Conf. of the U.S.).

[2] 5 U.S.C. 552.

[3] 41 U.S.C. ch. 15.

[4] Public Law 107–347, 116 Stat. 2899 (2002).

[5] Recommendations adopted in recent years include: Admin. Conf. of the U.S., Recommendation 2022–6, *Public Availability of Settlement Agreements in Agency Enforcement Proceedings,* 88

practices that, in some cases, Congress could implement through legislative action.

Considering the principal statutes governing the disclosure of agency legal materials, the Conference has also identified problems—inconsistencies and uncertainties, for example—that Congress should remedy through statutory reforms. Developed at different times and for different purposes, these statutes contain overlapping requirements that are sometimes difficult to harmonize. Some statutes are quite old—the **Federal Register** Act, for example, dates from 1935—and technological developments and organizational changes have rendered certain provisions outdated. Some statutory provisions are vague, which has led to litigation over their meaning and to differing agency practices.[6]

To ensure that agencies provide ready public access to important legal materials in the most efficient manner, this Recommendation identifies several statutory reforms that, if enacted by Congress, would provide clear standards as to what legal materials agencies must publish in the **Federal Register**, post on their websites, or otherwise proactively disclose. The Conference recognizes that these statutory reforms would impose additional initial and ongoing costs on agencies. At the same time, proactive disclosure of agency legal materials may save staff time or money through a reduction in the volume of FOIA requests or printing costs, or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests. In assigning responsibilities for overseeing the development and implementation of the proactive disclosure plans and for overseeing the agency's compliance with all legal requirements for the proactive disclosure of agency legal materials, agencies may wish to consider existing officials and the potential for overlapping or shared responsibilities.[7]

This Recommendation should not be considered as an exhaustive catalog of useful reforms. For example, it does not address whether the exemptions from FOIA's general disclosure requirements[8] should be amended or recommend actions that may be at odds with FOIA. The statutory reforms proposed in this Recommendation therefore would not require agencies to proactively disclose matters exempted or excluded from FOIA's general disclosure requirements, including ''inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.'' Congress should also consider timeframes for implementation of the proactive disclosure recommendations, whether for newly created or preexisting agency legal materials.

Nothing in this Recommendation should be interpreted to constitute the Conference's interpretation of the statutes governing the disclosure of agency legal materials. Any recommendation that a statutory provision be amended to ''provide'' something does not necessarily mean that the law does not already require it. Nor should this Recommendation be read as superseding the Conference's many previous recommendations on the disclosure of agency legal materials. In the absence of congressional action, the Conference encourages agencies to adopt the best practices identified in this Recommendation and its many previous recommendations.

**Recommendation**

**Proactive Disclosure of Agency Legal Materials**

1. Congress should amend 5 U.S.C. 552(a)(2) to provide, subject to Paragraph 2 of this Recommendation and the exemptions and exclusions in 5 U.S.C. 552(b) and (c), that each agency make available on its website:

a. Final opinions and orders issued in adjudications that are governed by 5 U.S.C. 554 and 556–557 or otherwise issued after a legally required opportunity for an evidentiary hearing. Each agency should proactively disclose any such opinion or order regardless of whether the agency designates the opinion or order as precedential, published, or other similar designation;

b. Written documents that communicate to a member of the public the agency's decision not to enforce a legal requirement against an individual or entity. Such documents may include decisions to grant an individual or entity a waiver or exemption, and advisory opinions that apply generally applicable legal requirements to specific facts or explain how the agency will exercise its discretion in particular cases;

c. Written legally binding opinions and memoranda issued by or under the authority of its chief legal officers;

d. Settlement agreements to which the agency is a party;

e. Memoranda of understanding, memoranda of agreement, and other similar inter-agency or inter-governmental agreements that affect a member of the public;

f. Any operative agency delegations of legal authority;

g. Any operative orders of succession for agency positions whose occupants must be appointed by the President with the advice and consent of the Senate; and

h. Any statutory or agency designations of first assistant positions to positions whose occupants must be appointed by the President with the advice and consent of the Senate.

2. Congress should provide in 5 U.S.C. 552 that an agency may promulgate regulations providing that it will not proactively disclose some records described in Paragraph 1 of this Recommendation, and subject to the exemptions and exclusions in 5 U.S.C. 552(b) and (c), because individual records in the relevant category do not vary considerably in terms of their factual contexts or the legal issues they raise, or that proactive disclosure of such documents would be misleading. Any such rule should explain which records the agency will not proactively disclose and what other information (*e.g.,* aggregate data, representative samples), if any, the agency will proactively disclose instead to adequately inform the public about agency activities.

3. Congress should provide a mechanism for ensuring that agencies:

a. Develop and post disclosure plans—internal management plans and procedures for making legal materials available online on their websites; and

b. Designate an officer or officers responsible for overseeing the development and implementation of the proactive disclosure plans described in Paragraph 3(a), and for overseeing the agency's compliance with all legal requirements for the proactive disclosure of agency legal materials.

4. Because various provisions of the E-Government Act, Public Law 107–347, governing proactive disclosure are duplicative, contain drafting errors, or are outdated, Congress should amend the statute to:

a. Delete 206(b);

b. Delete ''and (b)'' in 207(f)(1)(A)(ii); and

c. Eliminate references to the Interagency Committee on Government Information, which no longer exists. Congress should instead require that the Office of Management and Budget, after consultation with other relevant inter-agency bodies, periodically update its guidance on federal agency public websites to ensure that agencies present legal materials, required to be disclosed proactively, on their websites in a clear, logical, and readily accessible fashion.

5. Congress should provide that each agency should post each of its legislative rules, or a link to those rules, on its website, and should, to the extent feasible, include links to related agency legal materials, such as preambles and other guidance documents explaining the rule or significant adjudicative opinions interpreting or applying it.

**Enforcement of Proactive Disclosure Requirements**

6. Congress should provide that a person may use the process described in 5 U.S.C. 552(a)(3) to request that an agency proactively disclose certain records when the requestor alleges the agency is legally required to proactively disclose the records but has not done so.

7. Congress should provide in 5 U.S.C. 552(a)(4) that when a district court finds that an agency has not proactively disclosed records when legally required to do so, the reviewing court may order the agency to make them available to the general public in the manner required by the proactive disclosure provisions of 5 U.S.C. 552(a). Congress should also provide that a requester must exhaust administrative remedies required by 5 U.S.C. 552 before filing a

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FR 2312 (Jan. 13, 2023); Admin. Conf. of the U.S., Recommendation 2021–7, *Public Availability of Inoperative Agency Guidance Documents,* 87 FR 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020–5, *Publication of Policies Governing Agency Adjudicators,* 86 FR 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019–3, *Public Availability of Agency Guidance Documents,* 84 FR 38931 (Aug. 8, 2019); Recommendation 2018–5, *Public Availability of Adjudication Rules,* 84 FR 2142 (Feb. 6, 2019); and Recommendation 2017–1, *Adjudication Materials on Agency Websites,* 82 FR 31039 (July 5, 2017).

[6] *See generally* Bell et al., *supra* note 1.

[7] For example, 5 U.S.C. 552(j) requires agencies to designate a Chief FOIA Officer.

[8] 5 U.S.C. 552(b).

complaint in district court to compel an agency to proactively disclose records.

**Preparation of Proposed Legislation**

8. The Conference's Office of the Chair should prepare and submit to Congress proposed statutory changes consistent with this Recommendation.

**Administrative Conference Recommendation 2023–2**

**Virtual Public Engagement in Agency Rulemaking**

*Adopted June 15, 2023*

The law often requires agencies to give interested persons an opportunity to participate in rulemakings.[1] Presidential directives, including Executive Order 14,094, *Modernizing Regulatory Review,* also instruct agencies to proactively engage a range of interested or affected persons, including underserved communities and program beneficiaries.[2] And as a matter of best practice, the Administrative Conference has encouraged agencies to consider additional opportunities for public engagement.[3]

Interested persons are often able to learn about participation opportunities through notice in the **Federal Register** and participate in the rulemaking by submitting written data, views, and arguments, typically after the agency has issued a notice of proposed rulemaking (NPRM).

Agencies may also provide opportunities for oral presentation, whether before or after an NPRM has been issued. This opportunity can take the form of a public hearing, meeting, or listening session—what this Recommendation refers to as a ''public rulemaking engagement.'' Agencies may provide a public rulemaking engagement because a statute, presidential directive, or agency rule or policy requires one or because such engagement would improve agency decision making and promote public participation in regulatory policymaking.[4] The Conference has encouraged agencies to hold public rulemaking engagements when it would be beneficial to do so and to explore more effective options for notice, to ensure interested persons are aware of and understand regulatory developments that affect them. Agencies also directly engage with people and organizations that are interested in and affected by their rules, and the Conference has encouraged them to do so consistent with rules governing the integrity of the rulemaking process.[5]

When agencies engage with the public, they must ensure that they meet all legal accessibility requirements.[6] Effective public engagement also requires that agencies identify and address barriers to participation, including geographical constraints, resource limitations, and language barriers. For example, to ensure that all people affected by a rulemaking are aware of the rulemaking and opportunities to participate, the Conference has recommended that agencies conduct outreach that targets members of the public with relevant views who do not typically participate in rulemaking or may otherwise not be represented.[7]

In recent years, and especially during the COVID–19 pandemic, agencies increasingly have used widely available, internet-based videoconferencing software to engage with the public.[8] By reducing some barriers that people—especially members of historically underserved communities—encounter, virtual public engagement can help broaden participation in agency rulemakings.[9] At the same time, virtual engagements may present barriers to access for some people, such as low-income individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals in rural areas who lack access to broadband internet, individuals whose disabilities prevent effective engagement in virtual proceedings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency. Some individuals may also have difficulty, feel uncomfortable, or lack experience using a personal device or internet-based videoconferencing software to participate in an administrative proceeding.[10]

This Recommendation encourages agencies to offer virtual options when they determine it would be beneficial to hold a public rulemaking engagement or directly engage with specific people and organizations. It also offers best practices for planning, improving notice of, and managing public rulemaking engagements, as well as ensuring that members of the public can easily access materials related to virtual public rulemaking engagements (*e.g.,* agendas, recordings, transcripts) and underlying rulemakings (*e.g.,* draft rules, docket materials).

This Recommendation builds on many previous recommendations of the Conference regarding public participation in agency rulemaking, including Recommendation 2018–7, *Public Engagement in Rulemaking,* which, among other things, encourages agencies to develop comprehensive plans for public engagement in rulemaking, and Recommendation 2014–4, ''*Ex Parte*'' *Communications in Informal Rulemaking,* which offers best practices for engaging with members of the public while safeguarding the integrity of agency rulemaking.

**Recommendation**

**Virtual Public Engagement Planning**

1. Agencies that engage in rulemaking should, when feasible and appropriate, utilize internet-based videoconferencing software as a means of broadening engagement with interested persons in a cost-effective way, including through outreach that targets members of the public with relevant views who do not typically participate in rulemaking or may otherwise not be represented. As part of its overall policy for public engagement in rulemaking (described in Recommendation 2018–7, *Public Engagement in Rulemaking*), each agency should explain how it intends to use internet-based videoconferencing to engage with the public.

2. Each agency should ensure that its policies regarding informal communications between agency personnel and individual members of the public related to a rulemaking (described in Recommendation 2014–4, ''*Ex Parte*'' *Communications in Informal Rulemaking*) cover communications that take place virtually.

3. Each agency should prepare and post to a publicly available website guidance on the conduct of virtual public rulemaking engagements—that is, a meeting, hearing, listening session, or other live event that is rulemaking related and open to the general public—and ensure employees involved with such engagements are familiar with that guidance.

4. When an agency plans to hold a public rulemaking engagement, it should allow for interested persons to observe the engagement remotely and, when feasible, provide input and ask questions remotely.

5. When an agency decides to hold a public rulemaking engagement, rulemaking personnel should collaborate with personnel who oversee communications, public affairs, public engagement, and other relevant activities for the agency to ensure the engagement reaches the potentially interested members of the public and facilitates effective participation from those persons,

[1] *See, e.g.,* 5 U.S.C. 553(c).

[2] 88 FR 21879 (Apr. 6, 2023).

[3] Admin. Conf. of the U.S., Recommendation 2021–3, *Early Input on Regulatory Alternatives,* 86 FR 36082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018–7, *Public Engagement in Rulemaking,* 84 FR 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017–2, *Negotiated Rulemaking,* 82 FR 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014–6, *Petitions for Rulemaking,* 79 FR 75117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013–5, *Social Media in Rulemaking,* 78 FR 76269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011–8, *Agency Innovations in E-Rulemaking,* 77 FR 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011–1, *Legal Considerations in E-Rulemaking,* 76 FR 48789 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 76–3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking,* 41 FR 29654 (July 19, 1976); Admin. Conf. of the U.S., Recommendation 72–1, *Broadcast of Agency Proceedings,* 38 FR 19791 (July 23, 1973).

[4] Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking 5–6 (May 25, 2023) (report to the Admin. Conf. of the U.S.).

[5] *See* Admin. Conf. of the U.S., Recommendation 2014–4, ''*Ex Parte*'' *Communications in Informal Rulemaking,* 79 FR 35993 (June 25, 2014).

[6] *See, e.g.,* Rehabilitation Act of 1973, 508, 29 U.S.C. 794d; Plain Writing Act of 2010, Public Law 111–274, 124 Stat. 2861; E.O. 13985, 86 FR 7009 (Jan. 20, 2021); E.O. 13,166, 65 FR 50121 (Aug. 11, 2000).

[7] *E.g.,* Admin. Conf. of the U.S., Recommendation 2021–3, *Early Public Input on Regulatory Alternatives,* paragraph 3, 86 FR 36082–36083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018–7, *Public Engagement in Rulemaking,* paragraph 1(b), 84 FR 2146–2147 (Feb. 6, 2019).

[8] This mirrors developments with respect to the use of virtual hearings in agency adjudication. *See* Admin. Conf. of the U.S., Recommendation 2021–6, *Public Access to Agency Adjudicative Proceedings,* 87 FR 1715 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2021–4, *Virtual Hearings in Agency Adjudication,* 86 FR 36083 (July 8, 2021).

[9] Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking (May 25, 2023) (report to the Admin. Conf. of the U.S.).

[10] *Cf.* Recommendation 2021–4, *supra* note 8.

including groups that are affected by the rulemaking and may otherwise have been underrepresented in the agency's administrative process.

**Notice**

6. An agency should include, as applicable, the following information in the public notices for a public rulemaking engagement with a virtual or remote component:

a. The date and time of the engagement, at the beginning of the notice;

b. Options for remote attendance, including a direct link or instructions to obtain a direct link to the internet-based videoconference event and alternative remote attendance options for members of the public without access to broadband internet, at the beginning of the notice;

c. A plain-language summary of the rulemaking and description of the engagement's purpose and agenda and the nature of the public input, if any, the agency is seeking to obtain through the engagement;

d. A link to the web page described in Paragraph 7;

e. Information about opportunities for members of the public to speak during the engagement, including any directions for requesting to speak and any moderation policies, such as limits on the time for speaking;

f. The availability of services such as closed captioning, language interpretation, and telecommunications relay services and access instructions;

g. The availability and location of a recording, a transcript, a summary, or minutes; and

h. Contact information for a person who can answer questions about the engagement or arrange accommodations.

7. To encourage participation in a public rulemaking engagement, the agency should create a dedicated web page for each such engagement that includes the information described in Paragraph 6. The web page should include, as applicable, a link to:

a. The internet-based videoconferencing event, its registration page, or information for alternative remote attendance options for members of the public without access to broadband internet;

b. The **Federal Register** notice;

c. Any materials associated with the engagement, such as an agenda, a program, speakers' biographies, a draft rule, the rulemaking docket, or questions for participants;

d. A livestream of the engagement for the public to observe while it is occurring; and

e. Any recording, transcript, summary, or minutes after the engagement has ended.

8. The Office of the Federal Register (OFR) should update the *Document Drafting Handbook* to provide agencies guidance on drafting **Federal Register** notices for public rulemaking engagements with virtual or remote components that include the information described in Paragraph 6.

9. OFR and the eRulemaking Program should update the ''Document Details'' sidebar on FederalRegister.gov and *Regulations.gov* to include, for any rulemaking in which there is a public rulemaking engagement, a link to the agency web page described in Paragraph 7.

**Managing Virtual Public Engagements**

10. When feasible, each agency should allow interested persons to observe a livestream of the public rulemaking engagement remotely and should not require members of the public to register. Agencies may want to set a registration deadline for those wishing to speak or requiring accommodations.

11. To manage participants' expectations, an agency should communicate the following matters, among others, to participants at the beginning of the event:

a. The purpose and goal of the engagement;

b. The moderation policies, including those governing speaking time limits and whether or why the agency will or will not respond to oral statements made by participants;

c. The management of the public speaking queue;

d. Whether the chat function, if using an internet-based videoconferencing platform, will be disabled or monitored and, if monitored, whether the chat will be included in the record;

e. How participants can access the rulemaking materials throughout the meeting; and

f. Whether the event will be recorded or transcribed and where it will be made available.

12. As agency resources allow, each agency should ensure it has adequate support to run public rulemaking engagements, including their virtual and other remote components. Adequate support might include technological or troubleshooting assistance, a third-party moderating service, or a sufficient number of available staff members.

**Recordings and Transcripts**

13. When an agency holds a public rulemaking engagement, it should record, transcribe, summarize, or prepare meeting minutes of the engagement unless doing so would adversely affect the willingness of public participants to provide input or ask questions.

14. Each agency should, in a timely manner, make any recording, transcript, summary, or minutes of a public rulemaking engagement available in any public docket associated with the rulemaking and on the web page described in Paragraph 7.

**Fees**

15. Agencies should not assess fees on the public for virtual public engagement.

## Administrative Conference Recommendation 2023–3

## Using Algorithmic Tools in Retrospective Review of Agency Rules

*Adopted June 15, 2023*

Retrospective review is the process by which agencies assess existing rules and decide whether they need to be revisited. Consistent with longstanding executive-branch policy, the Administrative Conference has endorsed the practice of retrospective review of agency rules (including those that incorporate standards by reference), encouraged regulatory agencies to cultivate a culture of retrospective review, and urged agencies to establish plans to conduct retrospective reviews periodically.[1] The Conference has also recognized, however, that agencies often have limited resources available to conduct retrospective reviews. To encourage agencies to undertake retrospective reviews despite resource limitations, the Conference has identified opportunities for agencies to conserve resources, for example by taking advantage of internal and external sources of information and expertise.[2]

New technologies may offer additional opportunities for agencies to conserve resources and conduct more robust retrospective review in a cost-effective manner. Among these, algorithmic tools may enable agencies to automate some tasks associated with retrospective review. An algorithmic tool is a computerized process that uses a series of rules or inferences drawn from data to transform specified inputs into outputs to make decisions or support decision making.[3] The use of such tools may also help agencies identify issues that they otherwise might not detect. The General Services Administration (GSA) and several other agencies have already begun experimenting with the use of algorithmic tools to conduct some tasks in service of retrospective review or similar functions.[4]

Although algorithmic tools hold out the promise of lowering the cost of completing governmental tasks and improving the quality, consistency, and predictability of agencies' decisions, agencies' use of algorithmic tools also raises important concerns.[5] Statutes, executive orders, and agency policies highlight many such concerns.[6] In a prior Statement, the Conference itself described concerns about transparency (especially given the

[1] *See, e.g.,* Admin. Conf. of the U.S., Recommendation 2021–2, *Periodic Retrospective Review,* 86 FR 36080 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2017–6, *Learning from Regulatory Experience,* 82 FR 61783 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014–5, *Retrospective Review of Agency Rules,* 79 FR 75114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011–5, *Incorporation by Reference,* 77 FR 2257 (Jan. 17, 2012); Recommendation 95–3, *Review of Existing Agency Regulations,* 60 FR 43108 (Aug. 18, 1995).

[2] Admin. Conf. of the U.S., Recommendation 2014–5, *Retrospective Review of Agency Rules,* 79 FR 75114 (Dec. 17, 2014).

[3] Algorithmic tools include, but are not limited to, applications that use artificial intelligence techniques.

[4] Catherine M. Sharkey, Algorithmic Retrospective Review of Agency Rules (May 3, 2023) (report to the Admin. Conf. of the U.S.).

[5] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies (Feb. 2020) (report to the Admin. Conf. of the U.S.).

[6] *See, e.g.,* AI Training Act, Public Law 117–207, 136 Stat. 2237 (Oct. 17, 2022); E.O. 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 FR 10825 (Feb. 16, 2023); E.O. 13960, Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, 85 FR 78939 (Dec. 3, 2020); E.O. 13859, Maintaining American Leadership in Artificial Intelligence, 84 FR 3967 (Feb. 11, 2019).

proprietary nature of some artificial intelligence (AI) systems), harmful bias, technical capacity, procurement, data usage and storage, privacy, security, and the full or partial displacement of human decision making and discretion that may arise when agencies rely on AI tools.[7] There are also practical challenges associated with the development and use of agency-specific algorithmic tools that may lead agencies to rely on the algorithmic tools developed and used by GSA and other agencies. These challenges include the potentially high startup costs associated with developing or procuring them, the need to develop internal capacity and expertise to use them appropriately, related needs in staffing and training, and the need for ongoing maintenance and oversight.

The Conference recognizes that agencies may be able to leverage algorithmic tools to more efficiently, cost-effectively, and accurately identify rules (including those that incorporate standards by reference) that are outmoded or redundant, contain typographic errors or inaccurate cross-references, or might benefit from resolving issues with intersecting or overlapping rules or standards. Because agencies have only recently begun using algorithmic tools to support retrospective review, this Recommendation does not address the potential use of those tools to perform more complex tasks—such as identifying rules that may need to be modified, strengthened, or eliminated to better achieve statutory goals or reduce regulatory burdens—for which the potential risks and benefits are still unclear and which may raise additional issues regarding agency decision making, including those highlighted above. This Recommendation identifies best practices for agencies to acquire, use, and assess algorithmic tools for retrospective review in a way that accords with applicable legal requirements and promotes accuracy, efficiency, transparency, and accountability. To encourage coordination and collaboration across the executive branch, this Recommendation also encourages GSA to continue to explore options for developing, acquiring, and using algorithmic tools to support retrospective review and share its findings and capabilities with other agencies, and the Office of Management and Budget to provide guidance on the use of these tools to support retrospective review.

**Recommendation**

1. Agencies should assess whether they can use algorithmic tools to more efficiently, cost-effectively, and accurately identify rules (including those that incorporate standards by reference) that are outmoded or redundant, contain typographic errors or inaccurate cross-references, or might benefit from resolving issues with intersecting or overlapping rules or standards.

2. When agencies contemplate using an algorithmic tool to support retrospective review, they should consider whether it would be most efficient, cost-effective, and accurate to develop a new tool in-house, implement a tool developed and made available by another agency, or procure a tool from a commercial vendor or contractor. In making this determination, agencies should assess whether there is an existing tool that meets their needs and, in so doing, consult with other agencies that have experience using algorithmic tools to support retrospective review. If there is no such tool, agencies should consider whether they have sufficient in-house expertise and capacity to develop an adequate tool.

3. Agencies should ensure that agency personnel who use algorithmic tools to support retrospective review have adequate training on the capabilities and risks of those tools and that regulatory decision makers carefully assess the output before relying on it.

4. To promote transparency and build internal expertise, agencies should, when developing or selecting an algorithmic tool to support retrospective review, consider open-source options and those that would maximize interoperability with other government systems. Agencies should ensure that key information about the algorithmic tool's development, operation, and use is available to agency personnel and the public.

5. When agencies publish retrospective review plans and descriptions of specific retrospective reviews, as described in Recommendation 2021–2, *Periodic Retrospective Review,* they should disclose whether, and if so, explain how, they plan to use or used algorithmic tools to support retrospective review. Additionally, when agencies incorporate retrospective reviews in their Learning Agendas and Annual Evaluation Plans, as described in Recommendation 2021–2, they should include information about the use of algorithmic tools.

6. When the analysis deriving from a retrospective review using an algorithmic tool will influence a new rulemaking, agencies should be transparent about their use of the tool and explain how the tool contributed to the decision to develop the new rule.

7. Agencies should share their experiences with each other in using these tools. To manage risk and monitor internal processes, agencies should consider developing their own internal evaluation and oversight mechanisms for algorithmic tools used in retrospective review, both for initial approval of a tool and, as applicable, for regular oversight of the tool.

8. The General Services Administration should continue to explore options for developing, acquiring, and using algorithmic tools to support retrospective review and share its findings and capabilities with other agencies.

9. The Office of Management and Budget should provide guidance on the use of algorithmic tools to support retrospective review.

[7] Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence,* 86 FR 6616 (Jan. 22, 2021).

**Administrative Conference Recommendation 2023–4**

**Online Processes in Agency Adjudication**

*Adopted June 15, 2023*

Millions of people each year navigate adjudication systems administered by federal agencies to, among other actions, access benefits and services, answer charges of legal noncompliance, and settle disputes with third parties. Individuals participating in these systems often expend substantial time and resources completing forms, submitting evidence and arguments, and monitoring their cases, while agencies expend substantial time and resources processing submissions, managing dockets, and providing case updates.

To improve accuracy, efficiency, and accessibility, and fulfill legal obligations to develop electronic business processes,[1] agencies increasingly have deployed online processes by which parties, their representatives, and other interested persons can perform routine tasks such as filing, serving, and viewing forms, briefs, evidence, and other case records or materials.[2] These processes range from simple email-based systems to robust online self-help portals that allow users to update contact information, communicate with agencies, complete forms, submit and view case records or materials, and perform other tasks. These processes ideally link with agencies' own electronic case management systems,[3] which serves also to reduce the time agency staff spend receiving paper records, converting them into an electronic format, and associating them with case files.

If properly deployed, these processes make adjudication systems easier to use and more accessible to the public, reduce the administrative burden on agency staff, and increase the accuracy of information collected during adjudication. However, these processes can also pose significant risks, including increased burdens due to poor design, exposure of agencies' computer systems to malware and other security threats, and ongoing costs of maintenance and upgrades. In designing and implementing online processes, agencies should not only address these risks but also ensure that they meet all legal accessibility requirements.[4] In addition, agencies should

[1] *See, e.g.,* 21st Century Integrated Digital Experience Act, Public Law 115–336, 132 Stat. 5025 (2018); E.O. 14058, 86 FR 71357 (Dec. 16, 2021); OMB, Exec. Off. of the President, M–19–21, Memorandum for Heads of Executive Departments and Agencies, Transition to Electronic Records (June 28, 2019); OMB, Exec. Off. of the President, M–23–07, Memorandum for Heads of Executive Departments and Agencies, Update to Transition to Electronic Records (Dec. 23, 2022); OMB, Exec. Off. of the President, Circular No. A–11, Sec. 280 (2020).

[2] Matthew A. Gluth, Online Processes in Agency Adjudication (May 24, 2023) (report to the Admin. Conf. of the U.S.).

[3] *See* Admin. Conf. of the U.S., Recommendation 2018–3, *Electronic Case Management in Federal Administrative Adjudication,* 83 FR 30683 (June 29, 2018).

[4] *See, e.g.,* Rehabilitation Act of 1973, 508, 29 U.S.C. 794d; Plain Writing Act of 2010, Public Law 111–274, 124 Stat. 2861; E.O. 13985, 86 FR 7009 (Jan. 25, 2021).

make user resources available in languages other than English.[5]

Examples of agencies with online adjudication processes include the Social Security Administration, Department of Veterans Affairs, and U.S. Citizenship and Immigration Services, which have launched robust customer service portals that let parties perform tasks at many stages of adjudication from case initiation through appeal. Others have only recently begun to develop online processes, particularly in response to office closures during the COVID–19 pandemic.

This Recommendation encourages agencies to develop online processes and provides best practices for agencies to consider when doing so. Of course, agencies have different needs, serve different communities, and have different resources available to them. Further, what works best for one agency may not be appropriate for another. This Recommendation identifies steps that agencies can consider at any stage of developing online processes to improve the accuracy, efficiency, and accessibility of their adjudication systems.

**Recommendation**

**Accessing Online Processes in Adjudication Systems**

1. Agencies' online processes should work effectively with relevant electronic case management systems (eCMS) and agency websites where adjudication materials are made publicly available.

2. Agencies should develop online self-help portals that allow users, as applicable and when feasible, to:

a. Update contact information, including email addresses, phone numbers, and physical addresses;

b. Complete and submit forms;

c. File briefs, evidence, and other documents;

d. Receive service of documents, including documents filed by other parties and agency notices and orders;

e. View and download case documents;

f. Make payments (*e.g.,* filing fees, application fees, civil penalties);

g. Schedule meetings, conferences, hearings, and other appointments;

h. Access virtual appointments;

i. View case status information and information about deadlines, appointments, and wait times, when agencies can reliably predict them;

j. Receive reminders about upcoming deadlines and appointments; and

k. Receive notifications about new documents, status changes, and other developments in their cases.

3. Online self-help portals should allow different functionality, with appropriate permissions, for different types of users, including agency staff and contractors, parties, intervenors, representatives and their staff, amici curiae, and the public.

4. Agencies should ensure online self-help portals employ security mechanisms, such as firewalls and encryption, to protect sensitive user information and maintain the system's integrity. Agencies should also ensure self-help portals employ mechanisms to authenticate users when necessary. Agencies that authenticate users by requiring them to register for and log in to online self-help portals should allow users to use *Login.gov* or other universal logins used by government agencies. These security mechanisms should not compromise the ability of non-authenticated users to access public documents.

**Electronic Filing and Forms**

5. Agencies should permit, and consider requiring, parties to file documents electronically.

If agencies require electronic filing, they should implement exceptions for when electronic filing would be impossible or impracticable or a party has demonstrated good cause for using an alternative means of submission.

6. Agencies should ensure that their processes for electronic filing allow users, as applicable and when feasible, to:

a. File documents in batches;

b. File documents of a large enough size to encompass common filings;

c. File documents in multiple file formats, except that users should be required to file documents in a format that cannot be edited, such as Portable Document Format (PDF), unless a specific procedure requires parties to submit documents that can be edited (*e.g.,* a proposed order);

d. Notify the agency that documents being filed contain legally protected or other sensitive information; and

e. Notify the agency that documents are being filed under seal or in camera.

7. Agencies without an eCMS should allow participants in an adjudication to file briefs, exhibits, and other documents electronically by emailing them to a designated agency email address, uploading them to a web-accessible file-hosting service, or transferring them to the agency using a secure file transfer protocol (SFTP).

8. Agencies with an eCMS should develop tools that can be used to submit documents directly into the eCMS. These tools should require users to provide, or allow the system to capture, information about their submission, such as document type, purpose, or date, which would be stored as structured metadata in the eCMS, so long as it would not be confusing or burdensome for users.

9. Agencies with an eCMS should consider developing application programming interfaces (APIs) that allow users, such as representatives, who use their own eCMS to transfer data directly and securely between a user's eCMS and the agency's eCMS, without needing to use a self-help portal as an intermediary.

10. Agencies that have forms or templates for use in adjudications (*e.g.,* applications, appointment of representative, hearing requests, requests for agency appellate review, subpoena requests) should post PDF versions of the forms or templates on their websites and allow users to complete, sign, and submit them electronically. Agencies should adapt frequently used forms as web-based forms that users can complete and submit using a web browser. When feasible, web-based forms should:

a. Be prepopulated with information about a user or case that the agency already has collected in an eCMS or other database; and

b. Be based on prepopulated data and previous responses, requiring users to answer only questions that are relevant to them.

11. Except when explicitly prohibited by statute, agencies should allow participants in adjudications to sign documents electronically and, as applicable, accept as valid electronic signatures:

a. A form or document submitted through an agency's online self-help portal while registered for and logged in to the portal;

b. A cryptographic digital signature;

c. A scanned or other graphical representation of a handwritten signature;

d. A conformed signature (*e.g.,* ''/s/Jane Doe''); and

e. An email used to transmit the document.

12. Agencies should consider whether to review some or all electronically filed documents before associating them with a case file. For example, agencies should ensure that documents are associated with the correct case file, that they comport with agency rules, and that they do not disclose legally protected or other sensitive information, such as when a party files or requests to file a document under seal or in camera.

**Electronic Service**

13. Agencies should allow electronic service, except when electronic service would be impossible or impracticable or a party has good cause for needing alternative means of delivery.

14. Agencies with an eCMS should provide automated service through notice when a document has been filed through the web portal.

15. Agencies without an eCMS should allow parties to serve documents to other parties electronically, such as by emailing documents to other parties. Agencies that allow parties to submit documents using a file-hosting service or SFTP should ensure that all parties are notified when new documents become available.

**Management of Sensitive Documents**

16. Agencies that redact legally protected or other sensitive information from documents before making them available to other parties or publicly available should clarify whether parties should submit redacted versions of documents or whether the agency will make the necessary redactions.

**Scheduling, Notifications, and Reminders**

17. Agencies should provide an online tool for parties to schedule meetings, conferences, hearings, and other appointments efficiently and at times that are reasonably convenient for all participants.

18. Agencies with an eCMS should provide automatic notifications or reminders to users about important events and developments, such as when (a) a new document has been submitted and is available to view; (b) an agency notice or order is available to view; (c) the case status changes; (d) a meeting, conference, hearing, or other appointment is scheduled or upcoming; and (e) a filing deadline is approaching. Notifications and

[5] *See, e.g.,* E.O. 13166, 65 FR 50121 (Aug. 11, 2000).

reminders should be available in an online self-service portal and sent by email and/or by text message, according to user preferences.

**Developing and Improving Online Processes**

19. When designing and implementing online processes, especially before making them mandatory, agencies should consult potential users and relevant stakeholders, including parties, representatives, adjudicators and adjudicative staff, agency personnel who represent the government in adjudicative proceedings, and personnel who provide customer service or oversee customer experience functions for the agency. Agencies should also continuously solicit feedback from users on their online processes, for example through online surveys and listening sessions, and should use that feedback to identify and prioritize improvements.

20. When designing or working with a contractor to design their online processes, agencies should create systems that can be expanded to incorporate new technologies without requiring replacement.

21. Agencies should ensure that their online processes function on multiple platforms including, when practicable, mobile devices.

**Guidance, Training, and Outreach**

22. Agencies should update their rules of practice to permit or, when appropriate, require the use of online processes.

23. Agencies should develop self-help materials (*e.g.,* instruction manuals, reference guides, instructional videos) and, if needed, hold training sessions to help agency personnel and the public understand how to use the agency's online processes. Materials intended for the public should be posted in an appropriate location on the agency's website and made accessible through any online self-help portal.

24. Agencies should conduct public outreach if needed to encourage parties and representatives to use their online processes, even prior to making an online process mandatory.

25. Agencies should make staff available to assist all users of the agency's online processes, including agency personnel, and should inform users when such assistance is available (*e.g.,* during normal business hours).

[FR Doc. 2023–14069 Filed 6–30–23; 8:45 am]

**BILLING CODE 6110–01–P**

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2022–0013]**

### Salmonella in Not-Ready-To-Eat Breaded Stuffed Chicken Products; Correction

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Notice; correction.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is publishing a correction to a proposed determination that published on April 28, 2023. The correction inserts missing information on how to access the proposed determination's Cost Benefit Analysis on the FSIS website.

**DATES:** This correction is effective July 3, 2023.

**FOR FURTHER INFORMATION CONTACT:** Rachel Edelstein, Assistant Administrator, Office of Policy and Program Development, FSIS, USDA; Telephone: (202) 205–0495.

**SUPPLEMENTARY INFORMATION:**

**Correction**

In the **Federal Register** of April 28, 2023, in FR Doc. 2023–09043, on page 26267, in the first column, under the heading *V. Anticipated Costs and Benefits Associated With This Proposed Determination,* FSIS is correcting the statement ''[t]he full analysis is published on the FSIS website as supporting documentation to this **Federal Register** Notice ([insert link]).'' to provide the information on how to access the full Cost-Benefit Analysis. The correct link to this information is: *https://www.fsis.usda.gov/policy/federal-register-rulemaking/federal-register-rules/salmonella-not-ready-eat-breaded-stuffed.*

Done at Washington, DC.

**Paul Kiecker,**

*Administrator.*

[FR Doc. 2023–14008 Filed 6–30–23; 8:45 am]

**BILLING CODE 3410–DM–P**

## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

**[Docket ID: NRCS–2023–0014]**

### Urban Agriculture and Innovative Production Advisory Committee Meeting

**AGENCY:** Natural Resources Conservation Service (NRCS), United States Department of Agriculture (USDA).

**ACTION:** Notice of public and virtual meeting.

**SUMMARY:** The Natural Resources Conservation Service (NRCS) will hold a public meeting of the Urban Agriculture and Innovative Production Advisory Committee (UAIPAC). UAIPAC will convene to discuss proposed recommendations for the Secretary of Agriculture on the development of policies and outreach relating to urban, indoor, and other emerging agriculture production practices. UAIPAC is authorized under the Agriculture Improvement Act of 2018 (2018 Farm Bill) and operates in compliance with the Federal Advisory Committee Act, as amended.

**DATES:**

*Meeting:* The UAIPAC meeting will be held on Tuesday, August 1, 2023, from 3 p.m. to 6 p.m. Eastern Daylight Time (EDT).

*Written Comments:* Written comments will be accepted until 11:59 p.m. EDT on Tuesday, August 15, 2023.

**ADDRESSES:**

*Meeting Location:* The meeting will be held virtually via Zoom Webinar. Pre-registration is required to attend the UAIPAC meeting and access informaton will be provided to registered individuals via email. Registration details can be found at: *https://www.usda.gov/partnerships/federal-advisory-committee-urban-ag.*

*Written Comments:* We invite you to send comments in response to this notice. Go to *https://www.regulations.gov* and search for Docket ID NRCS–2023–0014. Follow the instructions for submitting comments. All written comments received will be publicly available on *www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Brian Guse; Designated Federal Officer; telephone: (202) 205–9723; email: *UrbanAgricultureFederalAdvisoryCommittee@usda.gov*.

Individuals who require alternative means for communication may contact the USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

**SUPPLEMENTARY INFORMATION:**

**UAIPAC Purpose**

The Federal Advisory Committee for Urban Agriculture and Innovative Production is one of several ways that USDA is extending support and building frameworks to support urban agriculture, including issues of equity and food and nutrition access. Section 222 of the Department of Agriculture Reorganization Act of 1994, as amended by section 12302 of the 2018 Farm Bill (7 U.S.C. 6923; Pub. L. 115–334) directed the Secretary to establish an ''Urban Agriculture and Innovative Production Advisory Committee'' to advise the Secretary of Agriculture on any aspect of section 222, including the development of policies and outreach relating to urban, indoor, and other

emerging agricultural production practices as well as identify any barriers to urban agriculture. UAIPAC will host public meetings to deliberate on recommendations for the Secretary of Agriculture. These recommendations provide advice to the Secretary on supporting urban agriculture and innovative production through USDA's programs and services.

**Meeting Agenda**

The agenda items may include, but are not limited to, welcome and introductions; administrative matters; presentations from the UAIPAC or USDA staff; and deliberations for proposed recommendations and plans. The USDA UAIPAC website (*https://www.usda.gov/partnerships/federal-advisory-committee-urban-ag*) will be updated with the final agenda at least 24 hours prior to the meeting.

**Written Comments**

Comments should address specific topics pertaining to urban agriculture and innovative production. Written comments will be accepted until 11:59 p.m. EDT on Tuesday, August 15, 2023. General questions and comments are also accepted at any time via email: *UrbanAgricultureFederalAdvisoryCommittee@usda.gov.*

**Meeting Materials**

All written comments received by Tuesday, August 15, 2023, will be compiled for UAIPAC review and will be included in the meeting minutes. Duplicate comments from multiple individuals will appear as one comment, with a notation that multiple copies of the comment were received. Please visit *https://www.usda.gov/partnerships/federal-advisory-committee-urban-ag* to view the agenda and minutes from the meeting.

**Meeting Accomodations**

If you require reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation, to the person listed under the **FOR FURTHER INFORMATION CONTACT** section. Determinations for reasonable accommodation will be made on a case-by-case basis.

**USDA Non-Discrimination Policy**

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunicaions Relay Service (both voice and text telephone users can initiate this call from any phone). Additionally, program information may be made available in languages other than English.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the FACA Committee: UAIPAC. To ensure that the recommendations of UAIPAC have taken in account the needs of the diverse groups served by USDA, membership will include to the extent possible, individuals with demonstrated ability to represent minorities, women and person with disabilities. USDA is an equal opportunity provider, employer, and lender.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410 or email: *OAC@usda.gov.* USDA is an equal opportunity provider, employer, and lender.

**Cikena Reid,**

*Committee Management Officer, USDA.*

[FR Doc. 2023–14026 Filed 6–30–23; 8:45 am]

**BILLING CODE 3410–16–P**

## DEPARTMENT OF COMMERCE

### Census Bureau

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Military Panel

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on February 6, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

*Agency:* U.S. Census Bureau, Commerce.

*Title:* Military Panel.

*OMB Control Number:* 0607–XXXX.

*Form Number(s):* Not yet determined.

*Type of Request:* Regular submission, new information collection request.

*Number of Respondents:* 15,625 initial screened sample/2,000 panel members.

*Average Hours per Response:* 2 hours per year (10 minutes for screening; 20 minutes for bi-monthly collection).

*Burden Hours:* 6,604.

*Needs and Uses:* The Census Military Panel is a national survey panel by the U.S. Census Bureau (Census) and the U.S. Department of Defense (DOD) consisting of active-duty service members and spouses of active-duty service members that have agreed to be contacted and invited to participate. The ultimate goal for the Military Panel project is to recruit at least 2,000 panel members (1,000 service members and 1,000 spouses) including panelists recruited in the pilot and randomly selected directly from military administrative data.

Potential panelists will be mailed invitations and asked to participate in an online or inbound telephone screener. If the respondent qualifies, they will be invited to join the panel by completing the baseline questionnaire in the same mode (online or inbound telephone). Households who do not respond to the mailed invitation will be in sample for telephone nonresponse follow up. In these cases, an interviewer

would administer the screener and the baseline questionnaire. Once they join the panel, panelists will be eligible for online topical surveys every other month for up to 3 years.

*Affected Public:* Individuals or households.

*Frequency:* Bi-monthly.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* The Census Bureau, on behalf of the Department of Defense, is conducting this study under the authority of 10 U.S.C. 1782. The Census Bureau's authority to conduct surveys for other agencies is 13 U.S.C. 8(b).

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

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 and entering the title of the collection.

**Sheleen Dumas,**

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

[FR Doc. 2023–14094 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–07–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[B–16–2023]**

### Foreign-Trade Zone (FTZ) 44; Authorization of Production Activity; Givaudan Fragrances Corporation; (Fragrance Compounds); Mount Olive, Flanders and, Towaco, New Jersey

On February 28, 2023, Givaudan Fragrances Corporation submitted a notification of proposed production activity to the FTZ Board for its facility within FTZ 44, in Mount Olive, Flanders and Towaco, New Jersey.

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 (88 FR 14328–14329, March 8, 2023). On June 28, 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: June 28, 2023.

**Elizabeth Whiteman,**

*Executive Secretary.*

[FR Doc. 2023–14072 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[B–17–2023]**

### Production Activity Not Authorized; Foreign-Trade Zone (FTZ) 124; Valero Refining—New Orleans L.L.C.; (Renewable Fuels and By-Products); Norco, Louisiana

On February 28, 2023, Valero Refining—New Orleans L.L.C. submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 124A in Norco, Louisiana.

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 (88 FR 14598, March 9, 2023). On June 28, 2023, the applicant was notified of the FTZ Board's decision that further review of the activity is warranted. The production activity described in the notification was not authorized. If the applicant wishes to seek authorization for this activity, it will need to submit an application for production authority, pursuant to section 400.23.

Dated: June 28, 2023.

**Elizabeth Whiteman,**

*Executive Secretary.*

[FR Doc. 2023–14071 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–010, C–570–011]**

### Crystalline Silicon Photovoltaic Products From the People's Republic of China: Final Results of Changed Circumstances Reviews, and Intent To Revoke the Antidumping and Countervailing Duty Orders, in Part

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

**SUMMARY:** The U.S. Department of Commerce (Commerce) is revoking, in part, the antidumping duty and countervailing duty orders on crystalline silicon photovoltaic products (solar products) from the People's Republic of China (China) with respect to certain off-grid small portable crystalline silicon photovoltaic (CSPV) panels.

**DATES:** Applicable July 3, 2023.

**FOR FURTHER INFORMATION CONTACT:** Daniel Alexander, 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) 482–4313.

**SUPPLEMENTARY INFORMATION:**

#### Background

On February 18, 2015, Commerce published the antidumping duty and countervailing duty orders on solar products from China.[1] On August 8, 2022, Shenzen Hello Tech Energy Co., Ltd. (Hello Tech), a Chinese producer and exporter of subject merchandise, requested that Commerce conduct changed circumstances reviews (CCR) to find that it is appropriate to revoke the *Orders,* in part, with respect to certain off-grid small portable CSPV panels, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.216(b).[2] Hello Tech's CCR request included a letter from the American Alliance for Solar Manufacturing (the Alliance), a coalition of domestic producers of solar cells, which stated that the Alliance did not oppose Hello Tech's request for changed circumstances reviews and its proposed exclusion language.[3] On September 29, 2022, we published the notice of initiation of the requested CCRs.[4] In the *Initiation Notice* we invited interested parties to provide comments and/or factual information regarding these CCRs, including comments on industry support and the proposed partial revocation language.[5] We received no comments or factual information.

[1] *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 80 FR 8592 (February 18, 2015) (*AD Order* and *CVD Order,* respectively; collectively, *Orders*).

[2] *See* Hello Tech's Letter, ''Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Hello Tech's Resubmitted Request for Changed Circumstances Reviews,'' dated August 8, 2022 (CCR Request).

[3] *Id.* at Exhibit 7.

[4] *See Crystalline Silicon Photovoltaic Products from the People's Republic of China: Notice of Initiation of Changed Circumstances Reviews, and Consideration of Revocation of the Antidumping and Countervailing Duty Orders in Part,* 87 FR 59043 (September 29, 2022) (*Initiation Notice*).

[5] *Id.,* 87 FR at 59044.

In light of the Alliance's statement of lack of interest in maintaining the *Orders* with respect to the off-grid small portable CSPV panels described by Hello Tech, and in the absence of any other interested party comments addressing the issue of domestic industry support, Commerce preliminarily found that producers accounting for substantially all of the domestic production of the products to which the *Orders* pertain lack interest in the relief provided by those *Orders* with respect to CSPV panels, and announced its intention to revoke, in part, the *Orders* with respect to these products.[6] No interested parties filed comments on the *Preliminary Results.*

**Final Results of Changed Circumstances Reviews and Revocation of the Orders, in Part**

In light of Hello Tech's request, and domestic interested parties' lack of interest and non-opposition in the *Orders* covering the products under consideration, Commerce continues to find, pursuant to sections 751(d)(1) and 782(h)(2) of the Act and 19 CFR 351.222(g), that changed circumstances exist that warrant revocation of the *Orders,* in part. No interested party opposed this partial revocation. Moreover, no parties provided other information or evidence that calls into question the partial revocation described in Commerce's *Preliminary Results.*

Thus, Commerce is revoking, in part, the *Orders* with respect to the following products: Off-grid small portable crystalline silicon photovoltaic panels, with or without a glass cover, with the following characteristics:

(1) a total power output of 200 watts or less per panel;

(2) a maximum surface area of 16,000 $cm^2$ per panel;

(3) no built-in inverter;

(4) an integrated handle or a handle attached to the package for ease of carry;

(5) one or more integrated kickstands for easy installation or angle adjustment; and

(6) a wire of not less than 3 meters either permanently connected or attached to the package that terminates in an 8mm diameter male barrel connector.

The scope description below includes this new exclusion.

**Scope of the Orders**

The merchandise covered by these *Orders* is modules, laminates and/or panels consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including building integrated materials. For purposes of these *Orders,* subject merchandise includes modules, laminates and/or panels assembled in China consisting of crystalline silicon photovoltaic cells produced in a customs territory other than China.

Subject merchandise includes modules, laminates and/or panels assembled in China consisting of crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Excluded from the scope of the *Orders* are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

Also excluded from the scope of these *Orders* are modules, laminates and/or panels assembled in China, consisting of crystalline silicon photovoltaic cells, not exceeding 10,000 mm2 in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cells. Where more than one module, laminate and/or panel is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all modules, laminates and/or panels that are integrated into the consumer good.

Further, also excluded from the scope of these *Orders* are any products covered by the existing antidumping and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules, laminates and/or panels, from China.

Additionally, excluded from the scope of these *Orders* are solar panels that are: (1) less than 300,000 mm2 in surface area; (2) less than 27.1 watts in power; (3) coated across their entire surface with a polyurethane doming resin; and (4) joined to a battery charging and maintaining unit (which is an acrylonitrile butadiene styrene (ABS) box that incorporates a light emitting diode (LED)) by coated wires that include a connector to permit the incorporation of an extension cable. The battery charging and maintaining unit utilizes high-frequency triangular pulse waveforms designed to maintain and extend the life of batteries through the reduction of lead sulfate crystals. The above-described battery charging and maintaining unit is currently available under the registered trademark ''SolarPulse.''

Also excluded from the scope of these *Orders* are off-grid crystalline silicon photovoltaic panels without a glass cover with the following characteristics: (1) total power output of 500 watts or less per panel; (2) maximum surface area of 8,000 cm2 per panel; (3) unit does not include a built-in inverter; (4) unit has visible parallel grid collector metallic wire lines every 2–40 millimeters across each solar panel (depending on model); (5) solar cells are encased in laminated frosted PET material without stitching; (6) the panel is encased in polyester fabric with visible stitching which includes a Velcro-type storage pocket and unit closure, or encased within a Neoprene clamshell (depending on model); and (7) includes LED indicator.

Additionally excluded from the scope of these *Orders* are off-grid small portable crystalline silicon photovoltaic panels, with or without a glass cover, with the following characteristics: (1) a total power output of 200 watts or less per panel; (2) a maximum surface area of 16,000 cm2 per panel; (3) no built-in inverter; (4) an integrated handle or a handle attached to the package for ease of carry; (5) one or more integrated kickstands for easy installation or angle adjustment; and (6) a wire of not less than 3 meters either permanently connected or attached to the package that terminates in an 8mm diameter male barrel connector.

Merchandise covered by these orders is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.8030, 8507.20.8040, 8507.20.8060, 8507.20.8090, 8541.40.6015, 8541.40.6020, 8541.40.6030, 8541.40.6035 and 8501.31.8000. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of these *Orders* is dispositive.[7]

**Application of the Final Results of These Reviews**

Hello Tech requested that Commerce apply the final results of these reviews to ''all unliquidated entries of the merchandise covered by the revocation that are not covered by the final results of an administrative review or automatic

[6] *See Crystalline Silicon Photovoltaic Products from the People's Republic of China: Preliminary Results of Changed Circumstances Reviews, and Intent To Revoke the Antidumping and Countervailing Duty Orders, in Part,* 88 FR 14129 (March 7, 2023) (*Preliminary Results*).

[7] *See Orders.*

liquidation instruction.''[8] Section 751(d)(3) of the Act provides that ''{a} determination under this section to revoke an order . . . shall apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date determined by the administering authority.'' Commerce's general practice is to instruct U.S. Customs and Border Protection (CBP) to liquidate without regard to antidumping and countervailing duties, and to refund any estimated antidumping and countervailing duties on, all unliquidated entries of the merchandise covered by a revocation that are not covered by the final results of an administrative review or automatic liquidation.[9]

Consistent with this practice, we are applying the final results of these CCRs to all unliquidated entries of the merchandise covered by the revocations which have been entered, or withdrawn from warehouse, for consumption on or after February 1, 2021 for the *AD Order* and January 1, 2021 for the *CVD Order.* These are the beginning dates of the earliest periods of review not covered by the final results of an administrative review or automatic liquidation instructions (*i.e.,* February 1, 2021, through January 31, 2022 for the *AD Order* and January 1, 2021, through December 31, 2021 for the *CVD Order*).

### Instructions to CBP

Because we determine that there are changed circumstances that warrant the revocation of the *Orders,* in part, we will instruct CBP to liquidate without regard to antidumping and countervailing duties, and to refund any estimated antidumping and countervailing duties on, all unliquidated entries of the merchandise covered by this partial revocation on or after February 1, 2021 for the *AD Order* and January 1, 2021 for the *CVD Order.*

Commerce intends to issue instructions to CBP no earlier than 35 days after the date of publication of these final results of CCRs in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the 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).

### Administrative Protective Order

This notice serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to a 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 these final results of CCRs in accordance with sections 751(b) and 777(i) of the Act, and 19 CFR 351.216, 19 CFR 351.221(c)(3), and 19 CFR 351.222(g).

Dated: June 22, 2023.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2023–14027 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

## International Trade Administration

## Initiation of Five-Year (Sunset) Reviews

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

**SUMMARY:** In accordance with the Tariff Act of 1930, as amended (the Act), the U.S. Department of Commerce (Commerce) is automatically initiating the five-year reviews (Sunset Reviews) of the antidumping and countervailing duty (AD/CVD) order(s) and suspended investigation(s) listed below. The International Trade Commission (the ITC) is publishing concurrently with this notice its notice of *Institution of Five-Year Reviews,* which covers the same order(s) and suspended investigation(s).

**DATES:** Applicable July 3, 2023.

**FOR FURTHER INFORMATION CONTACT:** Commerce official identified in the *Initiation of Review* section below at AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. For information from the ITC, contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

**SUPPLEMENTARY INFORMATION:**

### Background

Commerce's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (Sunset) Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to Commerce's conduct of Sunset Reviews is set forth in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

### Initiation of Review

In accordance with section 751(c) of the Act and 19 CFR 351.218(c), we are initiating the Sunset Reviews of the following AD and CVD order(s) and suspended investigation(s):

| DOC case No. | ITC case No. | Country | Product | Commerce contact |
|---|---|---|---|---|
| A–570–062 .... | 731–TA–1381 ... | China ..... | Cast Iron Soil Pipe (1st Review) ..... | Mary Kolberg, (202) 482–1785. |
| A–570–983 .... | 731–TA–1201 ... | China ..... | Drawn Stainless Steel Sinks (2nd Review) ... | Mary Kolberg, (202) 482–1785. |
| A–580–895 .... | 731–TA–1378 ... | South Korea | Low Melt Polyester Staple Fiber (1st Review) | Mary Kolberg, (202) 482–1785. |
| A–583–861 .... | 731–TA–1379 ... | Taiwan ..... | Low Melt Polyester Staple Fiber (1st Review) | Mary Kolberg, (202) 482–1785. |
| A–469–817 .... | 731–TA–1377 ... | Spain ..... | Ripe Olives (1st Review) ..... | Mary Kolberg, (202) 482–1785. |
| C–570–063 .... | 701–TA–583 ..... | China ..... | Cast Iron Soil Pipe (1st Review) ..... | Mary Kolberg, (202) 482–1785. |

[8] *See* CCR Request at 21.

[9] *See, e.g., Certain Pasta from Italy: Final Results of Countervailing Duty Changed Circumstances Review and Revocation, In Part,* 76 FR 27634 (May 12, 2011); *Stainless Steel Bar from the United Kingdom: Notice of Final Results of Changed Circumstances Review and Revocation of Order, in Part,* 72 FR 65706 (November 23, 2007); *Notice of Final Results of Antidumping Duty Changed Circumstances Review and Revocation of Order In Part: Certain Corrosion-Resistant Carbon Steel Flat Products from Germany,* 71 FR 66163 (November 13, 2006); *Notice of Final Results of Antidumping Duty Changed Circumstances Reviews and Revocation of Orders in Part: Certain Corrosion-Resistant Carbon Steel Flat Products from Canada and Germany,* 71 FR 14498 (March 22, 2006); and *Notice of Final Results of Antidumping Duty Changed Circumstances Review, and Determination to Revoke Order in Part: Certain Cased Pencils from the People's Republic of China,* 68 FR 62428 (November 4, 2003).

| DOC case No. | ITC case No. | Country | Product | Commerce contact |
|---|---|---|---|---|
| C–570–984 .... | 701–TA–489 ..... | China ..... | Drawn Stainless Steel Sinks (2nd Review) ... | Mary Kolberg, (202) 482–1785. |
| C–469–818 .... | 701–TA–582 ..... | Spain ..... | Ripe Olives (1st Review) ..... | Mary Kolberg, (202) 482–1785. |

**Filing Information**

As a courtesy, we are making information related to sunset proceedings, including copies of the pertinent statute and Commerce's regulations, Commerce's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on Commerce's website at the following address: *https://enforcement.trade.gov/sunset/.* All submissions in these Sunset Reviews must be filed in accordance with Commerce's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS), can be found at 19 CFR 351.303.

In accordance with section 782(b) of the Act, any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information. Parties must use the certification formats provided in 19 CFR 351.303(g). Commerce intends to reject factual submissions if the submitting party does not comply with applicable revised certification requirements.

**Letters of Appearance and Administrative Protective Orders**

Pursuant to 19 CFR 351.103(d), Commerce will maintain and make available a public service list for these proceedings. Parties wishing to participate in any of these five-year reviews must file letters of appearance as discussed at 19 CFR 351.103(d). To facilitate the timely preparation of the public service list, it is requested that those seeking recognition as interested parties to a proceeding submit an entry of appearance within 10 days of the publication of the Notice of Initiation. Because deadlines in Sunset Reviews can be very short, we urge interested parties who want access to proprietary information under administrative protective order (APO) to file an APO application immediately following publication in the **Federal Register** of this notice of initiation. Commerce's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[1]

**Information Required From Interested Parties**

Domestic interested parties, as defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b), wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with Commerce's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, Commerce will automatically revoke the order without further review.[2]

If we receive an order-specific notice of intent to participate from a domestic interested party, Commerce's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that Commerce's information requirements are distinct from the ITC's information requirements. Consult Commerce's regulations for information regarding Commerce's conduct of Sunset Reviews. Consult Commerce's regulations at 19 CFR part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at Commerce.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

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

[2] *See* 19 CFR 351.218(d)(1)(iii).

Dated: June 28, 2023.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2023–14104 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; SelectUSA Investment Promotion Intake Questions

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on April 28, 2023, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

*Agency:* International Trade Administration, Commerce.

*Title:* Investment Promotion Client Intake Questions.

*OMB Control Number:* 0625–XXXX.

*Form Number(s):* None.

*Type of Request:* Regular submission. This is a new information collection.

*Number of Respondents:* 200.

*Average Hours per Response:* 0.5 hours.

*Burden Hours:* 100 hours.

*Needs and Uses:* SelectUSA, within the International Trade Administration, provides programs and services that focus on facilitating job-creating business investment into the United States and raising awareness of the critical role that economic development plays in the U.S. economy. These programs include information products, services, and trade events to potential foreign investors into the United States and to U.S.-based economic development organizations. To

accomplish its mission effectively, SelectUSA requires detailed information from clients in order to provide resources and services that meet each specific client's needs. This information collection item allows ITA to solicit clients' interest for the use of ITA products, services, and trade events. To promote optimal use and effective response to client needs through ITA services and programs, we are requesting approval for this clearance package. Upon approval by OMB, ITA will use the approved information collection to collect client input by the use of multiple data collection methods, including Comment Cards (*i.e.* transactional-based surveys), web-enabled surveys sent via email, telephone interviews, automated telephone surveys, and in-person surveys via mobile devices/laptops/tablets at trade events/shows. The use of these multiple data collection methods is suggested solely to reduce the public burden in responding to requests for input. Without this information, ITA is unable to systematically determine the actual and relative levels of user needs for its programs and products/services and to provide clear, actionable insights for client use. This information will be used for strategic planning, allocation of resources, and stakeholder reporting.

*Affected Public:* Business or other for-profit organizations; not-for-profit institutions; State, local, or Tribal government; and Federal Government.

*Frequency:* As needed.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Public Law 15 U.S.C. *et seq.* and 15 U.S.C. 171 *et seq.*

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

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 and entering the title of the collection.

**Sheleen Dumas,**

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

[FR Doc. 2023–14093 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–DR–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–979, C–570–980]**

### Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results of Changed Circumstances Reviews, and Intent To Revoke the Antidumping and Countervailing Duty Orders, in Part

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

**SUMMARY:** The U.S. Department of Commerce (Commerce) is revoking, in part, the antidumping duty and countervailing duty orders on crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from the People's Republic of China (China) with respect to certain off-grid small portable crystalline silicon photovoltaic (CSPV) panels as described below.

**DATES:** Applicable July 3, 2023.

**FOR FURTHER INFORMATION CONTACT:** Daniel Alexander, 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) 482–4313.

**SUPPLEMENTARY INFORMATION:**

#### Background

On December 7, 2012, Commerce published the antidumping duty and countervailing duty orders on solar cells from China.[1] On August 8, 2022, Shenzen Hello Tech Energy Co., Ltd. (Hello Tech), a Chinese producer and exporter of subject merchandise, requested that Commerce conduct changed circumstances reviews (CCR) to find that it is appropriate to revoke the *Orders,* in part, with respect to certain off-grid small portable CSPV panels, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.216(b).[2] Hello Tech's CCR request included a letter from the American Alliance for Solar Manufacturing (the Alliance), a coalition of domestic producers of solar cells, which stated that the Alliance did not oppose Hello Tech's request for changed circumstances reviews and its proposed exclusion language.[3] On September 29, 2022, we published the notice of initiation of the requested CCRs.[4] In the *Initiation Notice,* we invited interested parties to provide comments and/or factual information regarding these CCRs, including comments on industry support and the proposed partial revocation language.[5] We received no comments or factual information.

In light of the Alliance's statement of lack of interest in maintaining the *Orders* with respect to the off-grid small portable CSPV panels described by Hello Tech, and in the absence of any other interested party comments addressing the issue of domestic industry support, Commerce preliminarily found that producers accounting for substantially all of the domestic production of the products to which the *Orders* pertain lack interest in the relief provided by those *Orders* with respect to CSPV panels, and announced its intention to revoke, in part, the *Orders* with respect to these products.[6] No interested parties filed comments on the *Preliminary Results.*

#### Final Results of Changed Circumstances Reviews and Revocation of the Orders, in Part

In light of Hello Tech's request, and domestic interested parties' lack of interest and non-opposition in the *Orders* covering the products under consideration, Commerce continues to find, pursuant to sections 751(d)(1) and 782(h)(2) of the Act and 19 CFR 351.222(g), that changed circumstances exist that warrant revocation of the *Orders,* in part. No interested party opposed this partial revocation. Moreover, no parties provided other information or evidence that calls into question the partial revocation

[1] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 77 FR 73018 (December 7, 2012) (*AD Order*); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Countervailing Duty Order,* 77 FR 73017 (December 7, 2012) (*CVD Order*) (collectively, *Orders*).

[2] *See* Hello Tech's Letter, ''Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China: Hello Tech's Resubmitted Request for Changed Circumstances Reviews,'' dated August 8, 2022 (CCR Request).

[3] *Id.* at Exhibit 7.

[4] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Notice of Initiation of Changed Circumstances Reviews, and Consideration of Revocation of the Antidumping and Countervailing Duty Orders in Part,* 87 FR 59052 (September 29, 2022) (*Initiation Notice*).

[5] *Id.,* 87 FR at 59053.

[6] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Results of Changed Circumstances Reviews, and Intent To Revoke the Antidumping and Countervailing Duty Orders, in Part,* 88 FR 14131 (March 7, 2023) (*Preliminary Results*).

described in Commerce's *Preliminary Results*.

Thus, Commerce is revoking, in part, the *Orders* with respect to the following products: Off-grid small portable crystalline silicon photovoltaic panels, with or without a glass cover, with the following characteristics:

(1) a total power output of 200 watts or less per panel;
(2) a maximum surface area of 16,000 $cm^2$ per panel;
(3) no built-in inverter;
(4) an integrated handle or a handle attached to the package for ease of carry;
(5) one or more integrated kickstands for easy installation or angle adjustment; and
(6) a wire of not less than 3 meters either permanently connected or attached to the package that terminates in an 8mm diameter male barrel connector.

The scope description below includes this new exclusion.

**Scope of the Orders**

The merchandise covered by these *Orders* is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.

These *Orders* cover crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Merchandise under consideration may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, modules, laminates, panels, building-integrated modules, building-integrated panels, or other finished goods kits. Such parts that otherwise meet the definition of merchandise under consideration are included in the scope of the *Orders*.

Excluded from the scope of the *Orders* are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

Also excluded from the scope of the *Orders* are crystalline silicon photovoltaic cells, not exceeding 10,000mm2 in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Additionally, excluded from the scope of the *Orders* are panels with surface area from 3,450 mm2 to 33,782 mm2 with one black wire and one red wire (each of type 22 AWG or 24 AWG not more than 206 mm in length when measured from panel extrusion), and not exceeding 2.9 volts, 1.1 amps, and 3.19 watts. For the purposes of this exclusion, no panel shall contain an internal battery or external computer peripheral ports.

Also excluded from the scope of the *Orders* are:

1. Off grid CSPV panels in rigid form with a glass cover, with the following characteristics:
(A) a total power output of 100 watts or less per panel;
(B) a maximum surface area of 8,000 cm2 per panel;
(C) do not include a built-in inverter;
(D) must include a permanently connected wire that terminates in either an 8mm male barrel connector, or a two-port rectangular connector with two pins in square housings of different colors;
(E) must include visible parallel grid collector metallic wire lines every 1–4 millimeters across each solar cell; and
(F) must be in individual retail packaging (for purposes of this provision, retail packaging typically includes graphics, the product name, its description and/or features, and foam for transport); and

2. Off grid CSPV panels without a glass cover, with the following characteristics:
(A) a total power output of 100 watts or less per panel;
(B) a maximum surface area of 8,000 cm2 per panel;
(C) do not include a built-in inverter;
(D) must include visible parallel grid collector metallic wire lines every 1–4 millimeters across each solar cell; and
(E) each panel is
1. permanently integrated into a consumer good;
2. encased in a laminated material without stitching, or
3. has all of the following characteristics: (i) the panel is encased in sewn fabric with visible stitching, (ii) includes a mesh zippered storage pocket, and (iii) includes a permanently attached wire that terminates in a female USB–A connector.

In addition, the following CSPV panels are excluded from the scope of the *Orders:* off-grid CSPV panels in rigid form with a glass cover, with each of the following physical characteristics, whether or not assembled into a fully completed off-grid hydropanel whose function is conversion of water vapor into liquid water:

(A) A total power output of no more than 80 watts per panel;
(B) A surface area of less than 5,000 square centimeters (cm2) per panel;
(C) Do not include a built-in inverter;
(D) Do not have a frame around the edges of the panel;
(E) Include a clear glass back panel; and
(F) Must include a permanently connected wire that terminates in a two-port rectangular connector.

Modules, laminates, and panels produced in a third-country from cells produced in China are covered by the *Orders;* however, modules, laminates, and panels produced in China from cells produced in a third-country are not covered by the *Orders*.

Additionally excluded from the scope of these *Orders* are off-grid small portable crystalline silicon photovoltaic panels, with or without a glass cover, with the following characteristics: (1) a total power output of 200 watts or less per panel; (2) a maximum surface area of 16,000 cm2 per panel; (3) no built-in inverter; (4) an integrated handle or a handle attached to the package for ease of carry; (5) one or more integrated kickstands for easy installation or angle adjustment; and (6) a wire of not less than 3 meters either permanently connected or attached to the package that terminates in an 8mm diameter male barrel connector.

Merchandise covered by the *Orders* is currently classified in the Harmonized Tariff System of the United States (HTSUS) under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000. These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of the *Orders* is dispositive.[7]

**Application of the Final Results of These Reviews**

Hello Tech requested that Commerce apply the final results of these reviews to ''all unliquidated entries of the merchandise covered by the revocation that are not covered by the final results of an administrative review or automatic liquidation instruction.'' [8] Section

[7] *See Orders.*
[8] *See* CCR Request at 21.

751(d)(3) of the Act provides that ''{a} determination under this section to revoke an order . . . shall apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date determined by the administering authority.'' Commerce's general practice is to instruct U.S. Customs and Border Protection (CBP) to liquidate without regard to antidumping and countervailing duties, and to refund any estimated antidumping and countervailing duties on, all unliquidated entries of the merchandise covered by a revocation that are not covered by the final results of an administrative review or automatic liquidation.[9]

Consistent with this practice, we are applying the final results of these CCRs to all unliquidated entries of the merchandise covered by the revocations which have been entered, or withdrawn from warehouse, for consumption on or after December 1, 2021 for the *AD Order* and January 1, 2021 for the *CVD Order*. These are the beginning dates of the earliest periods of review not covered by the final results of an administrative review or automatic liquidation instructions (*i.e.,* December 1, 2021, through November 30, 2022 for the *AD Order* and January 1, 2021, through December 31, 2021 for the *CVD Order*).

**Instructions to CBP**

Because we determine that there are changed circumstances that warrant the revocation of the *Orders,* in part, we will instruct CBP to liquidate without regard to antidumping and countervailing duties, and to refund any estimated antidumping and countervailing duties on, all unliquidated entries of the merchandise covered by this partial revocation on or after December 1, 2021 for the *AD Order* and January 1, 2021 for the *CVD Order*.

[9] *See, e.g., Certain Pasta from Italy: Final Results of Countervailing Duty Changed Circumstances Review and Revocation, In Part,* 76 FR 27634 (May 12, 2011); *Stainless Steel Bar from the United Kingdom: Notice of Final Results of Changed Circumstances Review and Revocation of Order, in Part,* 72 FR 65706 (November 23, 2007); *Notice of Final Results of Antidumping Duty Changed Circumstances Review and Revocation of Order In Part: Certain Corrosion-Resistant Carbon Steel Flat Products from Germany,* 71 FR 66163 (November 13, 2006); *Notice of Final Results of Antidumping Duty Changed Circumstances Reviews and Revocation of Orders in Part: Certain Corrosion-Resistant Carbon Steel Flat Products from Canada and Germany,* 71 FR 14498 (March 22, 2006); and *Notice of Final Results of Antidumping Duty Changed Circumstances Review, and Determination to Revoke Order in Part: Certain Cased Pencils from the People's Republic of China,* 68 FR 62428 (November 4, 2003).

Commerce intends to issue instructions to CBP no earlier than 35 days after the date of publication of these final results of CCRs in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the 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).

**Administrative Protective Order**

This notice serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under an APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to a 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 these final results of CCRs in accordance with sections 751(b) and 777(i) of the Act, and 19 CFR 351.216, 19 CFR 351.221(c)(3), and 19 CFR 351.222(g).

Dated: June 22, 2023.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2023–14029 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–533–873]**

### Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Final Results of Antidumping Duty Administrative Reviews of Goodluck India Limited; 2017–2019 and 2019–2020; Correction

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

**ACTION:** Notice; correction.

**SUMMARY:** On June 26, 2023, the U.S. Department of Commerce (Commerce) published a notice in the **Federal Register** of the final results of the antidumping duty administrative reviews of certain cold-drawn mechanical tubing of carbon and alloy steel from India, covering the first (November 22, 2017 through May 31, 2019) and second (June 1, 2019, through May 31, 2020) administrative reviews of Goodluck India Limited (Goodluck). That notice incorrectly stated the period of review which serves as the basis for Goodluck's revised cash deposit rate.

**FOR FURTHER INFORMATION CONTACT:** Javier Barrientos, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2243.

**SUPPLEMENTARY INFORMATION:**

**Correction**

In the **Federal Register** of June 26, 2023, in FR Doc. 2023–13485, on page 41385, make the following correction:

- Under the subheading titled ''Cash Deposit Requirements,'' revise the phrase ''(1) the cash deposit rate for entries for Goodluck will be equal to the weighted-average dumping margin established in the final results of the 2020–2021 review'' to ''(1) the cash deposit rate for entries for Goodluck will be equal to the weighted-average dumping margin established in the final results of the 2019–2020 review.''

**Background**

On June 26, 2023, Commerce published in the **Federal Register** the final results of the antidumping duty administrative reviews of certain cold-drawn mechanical tubing of carbon and alloy steel from India, covering the first (November 22, 2017, through May 31, 2019) and second (June 1, 2019, through May 31, 2020) administrative reviews of Goodluck.[1] Therein, Commerce incorrectly stated that ''the final results of the 2020–2021 review'' were the basis for Goodluck's cash deposit rate. This was incorrect. The 2019–2020 review of Goodluck—the final results of which were covered by the above-referenced **Federal Register** notice—serve as the basis for Goodluck's cash deposit rate.

**Notification to Interested Parties**

This notice is issued and published in accordance with sections 751(a) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.221(b)(5).

Dated: June 27, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2023–14028 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

[1] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Final Results of Antidumping Duty Administrative Reviews of Goodluck India Limited; 2017–2019 and 2019–2020,* 88 FR 41384 (June 26, 2023).

## DEPARTMENT OF COMMERCE

### International Trade Administration

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

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

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

**SUPPLEMENTARY INFORMATION:**

#### Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with 19 CFR 351.213, that the Department of Commerce (Commerce) conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

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

#### Respondent Selection

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

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

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

#### Deadline for Withdrawal of Request for Administrative Review

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

#### Deadline for Particular Market Situation Allegation

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

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

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

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

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

| Antidumping Duty Proceedings | |
|---|---|
| BELGIUM: Citric Acid and Certain Citrate Salts A–423–813 | 7/1/22–6/30/23 |
| COLOMBIA: Citric Acid and Certain Citrate Salts A–301–803 | 7/1/22–6/30/23 |
| FRANCE: Methionine A–427–831 | 7/1/22–6/30/23 |
| INDIA: | |
| Corrosion-Resistant Steel Products A–533–863 | 7/1/22–6/30/23 |
| Fine Denier Polyester Staple Fiber A–533–875 | 7/1/22–6/30/23 |
| Polyethylene Terephthalate (Pet) Film A–533–824 | 7/1/22–6/30/23 |
| IRAN: In-Shell Pistachios A–507–502 | 7/1/22–6/30/23 |
| ITALY: | |
| Certain Pasta A–475–818 | 7/1/22–6/30/23 |
| Corrosion-Resistant Steel Products A–475–832 | 7/1/22–6/30/23 |
| JAPAN: | |
| Clad Steel Plate A–588–838 | 7/1/22–6/30/23 |
| Cold-Rolled Steel Flat Products A–588–873 | 7/1/22–6/30/23 |
| Polyvinyl Alcohol A–588–861 | 7/1/22–6/30/23 |
| Stainless Steel Sheet and Strip in Coils A–588–845 | 7/1/22–6/30/23 |
| Steel Concrete Reinforcing Bar A–588–876 | 7/1/22–6/30/23 |
| MALAYSIA: | |
| Steel Nails A–557–816 | 7/1/22–6/30/23 |
| Welded Stainless Steel Pressure Pipe A–557–815 | 7/1/22–6/30/23 |
| OMAN: Steel Nails A–523–808 | 7/1/22–6/30/23 |
| REPUBLIC OF KOREA: | |
| Corrosion-Resistant Steel Products A–580–878 | 7/1/22–6/30/23 |
| Fine Denier Polyester Staple Fiber A–580–893 | 7/1/22–6/30/23 |
| Passenger Vehicle and Light Truck Tires A–580–908 | 7/1/22–6/30/23 |
| Stainless Steel Sheet and Strip in Coils A–580–834 | 7/1/22–6/30/23 |
| Steel Nails A–580–874 | 7/1/22–6/30/23 |
| SOCIALIST REPUBLIC OF VIETNAM: | |
| Certain Walk-Behind Lawn Mowers and Parts Thereof A–552–830 | 7/1/22–6/30/23 |
| Steel Nails A–552–818 | 7/1/22–6/30/23 |
| Welded Stainless Pressure Pipe A–552–816 | 7/1/22–6/30/23 |
| TAIWAN: | |
| Corrosion-Resistant Steel Products A–583–856 | 7/1/22–6/30/23 |
| Fine Denier Polyester Staple Fiber A–583–860 | 7/1/22–6/30/23 |
| Helical Spring Lock Washers [3] A–583–820 | 6/1/22–5/31/23 |
| Passenger Vehicle and Light Truck Tires A–583–869 | 7/1/22–6/30/23 |
| Polyethylene Terephthalate (Pet) Film A–583–837 | 7/1/22–6/30/23 |
| Stainless Steel Sheet and Strip in Coils A–583–831 | 7/1/22–6/30/23 |
| Steel Nails A–583–854 | 7/1/22–6/30/23 |
| THAILAND: | |
| Carbon Steel Butt-Weld Pipe Fittings A–549–807 | 7/1/22–6/30/23 |
| Citric Acid and Certain Citrate Salts A–549–833 | 7/1/22–6/30/23 |
| Passenger Vehicle and Light Truck Tires A–549–842 | 7/1/22–6/30/23 |
| Weld Stainless Steel Pressure Pipe A–549–830 | 7/1/22–6/30/23 |
| THE PEOPLE'S REPUBLIC OF CHINA: | |
| Carbon Steel Butt-Weld Pipe Fittings A–570–814 | 7/1/22–6/30/23 |
| Certain Walk-Behind Lawn Mowers and Parts Thereof A–570–129 | 7/1/22–6/30/23 |
| Certain Chassis and Subassemblies Thereof A–570–135 | 7/1/22–6/30/23 |
| Certain Sodium Potassium Phosphate Salts A–570–962 | 7/1/22–6/30/23 |
| Certain Steel Grating A–570–947 | 7/1/22–6/30/23 |
| Circular Welded Carbon Quality Steel Pipe A–570–910 | 7/1/22–6/30/23 |
| Collated Steel Staples A–570–112 | 7/1/22–6/30/23 |
| Certain Cold-Rolled Steel Flat Products A–570–029 | 7/1/22–6/30/23 |
| Corrosion-Resistant Steel Products A–570–026 | 7/1/22–6/30/23 |
| Fine Denier Polyester Staple Fiber A–570–060 | 7/1/22–6/30/23 |
| Persulfates A–570–847 | 7/1/22–6/30/23 |
| Quartz Surface Products A–570–084 | 7/1/22–6/30/23 |
| Xanthan Gum A–570–985 | 7/1/22–6/30/23 |
| TURKEY: | |
| Certain Pasta A–489–805 | 7/1/22–6/30/23 |
| Steel Concrete Reinforcing Bar A–489–829 | 7/1/22–6/30/23 |
| UKRAINE: Oil Country Tubular Goods A–823–815 | 7/1/22–6/30/23 |

| Countervailing Duty Proceedings | |
|---|---|
| INDIA: | |
| Corrosion-Resistant Steel Products C–533–864 | 1/1/22–12/31/22 |
| Polyethylene Terephthalate (Pet) Film, Sheet, and Strip C–533–825 | 1/1/22–12/31/22 |
| ITALY: | |
| Certain Pasta C–475–819 | 1/1/22–12/31/22 |
| Corrosion-Resistant Steel Products C–475–833 | 1/1/22–12/31/22 |
| REPUBLIC OF KOREA: Corrosion-Resistant Steel Products C–580–879 | 1/1/22–12/31/22 |
| SOCIALIST REPUBLIC OF VIETNAM: | |
| Passenger Vehicle and Light Truck Tires C–552–829 | 1/1/22–12/31/22 |

| | |
|---|---|
| Certain Steel Nails C–552–819 | 1/1/22–12/31/22 |
| THE PEOPLE'S REPUBLIC OF CHINA: | |
| Certain Walk-Behind Lawn Mowers and Parts Thereof C–570–130 | 1/1/22–12/31/22 |
| Certain Sodium and Potassium Phosphate Salts C–570–963 | 1/1/22–12/31/22 |
| Circular Welded Carbon Quality Steel Pipe C–570–911 | 1/1/22–12/31/22 |
| Cold-Rolled Steel Flat Products C–570–030 | 1/1/22–12/31/22 |
| Collated Steel Staples C–570–113 | 1/1/22–12/31/22 |
| Corrosion-Resistant Steel Products C–570–027 | 1/1/22–12/31/22 |
| Prestressed Concrete Steel Wire Strand C–570–946 | 1/1/22–12/31/22 |
| Certain Quartz Surface Products C–570–085 | 1/1/22–12/31/22 |
| Steel Grating C–570–948 | 1/1/22–12/31/22 |
| TURKEY: | |
| Certain Pasta C–489–806 | 1/1/22–12/31/22 |
| Steel Concrete Reinforcing Bar C–489–830 | 1/1/22–12/31/22 |

**Suspension Agreements**

None.

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

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

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), and *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), Commerce clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders.[4]

Commerce no longer considers the non-market economy (NME) entity as an exporter conditionally subject to an antidumping duty administrative reviews.[5] Accordingly, the NME entity will not be under review unless Commerce specifically receives a request for, or self-initiates, a review of the NME entity.[6] In administrative reviews of antidumping duty orders on merchandise from NME countries where a review of the NME entity has not been initiated, but where an individual exporter for which a review was initiated does not qualify for a separate rate, Commerce will issue a final decision indicating that the company in question is part of the NME entity. However, in that situation, because no review of the NME entity was conducted, the NME entity's entries were not subject to the review and the rate for the NME entity is not subject to change as a result of that review (although the rate for the individual exporter may change as a function of the finding that the exporter is part of the NME entity). Following initiation of an antidumping administrative review when there is no review requested of the NME entity, Commerce will instruct CBP to liquidate entries for all exporters not named in the initiation notice, including those that were suspended at the NME entity rate.

All requests must be filed electronically in Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) on Enforcement and Compliance's ACCESS website at *https://access.trade.gov.*[7] Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[8]

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

[3] Commerce inadvertently listed the case above in the opportunity notice that published on June 1, 2023 (88 FR 35835). The order helical spring lock washers from Taiwan (A–583–820) was revoked with effect from May 26, 2022, and, as such, no administrative review may be requested.

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

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

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

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

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

withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

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

**Establishment of and Updates to the Annual Inquiry Service List**

On September 20, 2021, Commerce published the final rule titled ''*Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*'' in the **Federal Register**.[9] On September 27, 2021, Commerce also published the notice entitled ''*Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions*'' in the **Federal Register**.[10] The *Final Rule* and *Procedural Guidance* provide that Commerce will maintain an annual inquiry service list for each order or suspended investigation, and any interested party submitting a scope ruling application or request for circumvention inquiry shall serve a copy of the application or request on the persons on the annual inquiry service list for that order, as well as any companion order covering the same merchandise from the same country of origin.[11]

In accordance with the *Procedural Guidance,* for orders published in the **Federal Register** before November 4, 2021, Commerce created an annual inquiry service list segment for each order and suspended investigation. Interested parties who wished to be added to the annual inquiry service list for an order submitted an entry of appearance to the annual inquiry service list segment for the order in ACCESS, and on November 4, 2021, Commerce finalized the initial annual inquiry service lists for each order and suspended investigation. Each annual inquiry service list has been saved as a public service list in ACCESS, under each case number, and under a specific segment type called ''AISL-Annual Inquiry Service List.'' [12]

As mentioned in the *Procedural Guidance,* beginning in January 2022, Commerce will update these annual inquiry service lists on an annual basis when the *Opportunity Notice* for the anniversary month of the order or suspended investigation is published in the **Federal Register**.[13] Accordingly, Commerce will update the annual inquiry service lists for the above-listed antidumping and countervailing duty proceedings. All interested parties wishing to appear on the updated annual inquiry service list must take one of the two following actions: (1) new interested parties who did not previously submit an entry of appearance must submit a new entry of appearance at this time; (2) interested parties who were included in the preceding annual inquiry service list must submit an amended entry of appearance to be included in the next year's annual inquiry service list. For these interested parties, Commerce will change the entry of appearance status from ''Active'' to ''Needs Amendment'' for the annual inquiry service lists corresponding to the above-listed proceedings. This will allow those interested parties to make any necessary amendments and resubmit their entries of appearance. If no amendments need to be made, the interested party should indicate in the area on the ACCESS form requesting an explanation for the amendment that it is resubmitting its entry of appearance for inclusion in the annual inquiry service list for the following year. As mentioned in the *Final Rule,*[14] once the petitioners and foreign governments have submitted an entry of appearance for the first time, they will automatically be added to the updated annual inquiry service list each year.

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

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

**Special Instructions for Petitioners and Foreign Governments**

In the *Final Rule,* Commerce stated that, ''after an initial request and placement on the annual inquiry service list, both petitioners and foreign governments will automatically be placed on the annual inquiry service list in the years that follow.'' [15] Accordingly, as stated above and pursuant to 19 CFR 351.225(n)(3), the petitioners and foreign governments will not need to resubmit their entries of appearance each year to continue to be included on the annual inquiry service list. However, the petitioners and foreign governments are responsible for making amendments to their entries of appearance during the annual update to the annual inquiry service list in accordance with the procedures described above.

This notice is not required by statute but is published as a service to the international trading community.

Dated: June 28, 2023.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2023–14096 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–DS–P**

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

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

[11] *Id.*

[12] This segment has been combined with the ACCESS Segment Specific Information (SSI) field which will display the month in which the notice of the order or suspended investigation was published in the **Federal Register**, also known as the anniversary month. For example, for an order under case number A–000–000 that was published in the **Federal Register** in January, the relevant segment and SSI combination will appear in ACCESS as ''AISL-January Anniversary.'' Note that there will be only one annual inquiry service list segment per case number, and the anniversary month will be pre-populated in ACCESS.

[13] *See Procedural Guidance,* 86 FR 53206.

[14] *See Final Rule,* 86 FR 52335.

[15] *Id.*

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### National Artificial Intelligence Advisory Committee

**AGENCY:** National Institute of Standards and Technology, Department of Commerce.

**ACTION:** Notice of open meeting.

**SUMMARY:** The National Institute of Standards and Technology (NIST) announces that the National Artificial Intelligence Advisory Committee (NAIAC or Committee) will hold an open meeting via webcast on July 19,

2023, from 2:00 p.m.–3:30 p.m. Eastern Time. The primary purpose of this meeting is for Committee Members to discuss each NAIAC working group's goals and deliverables. The final agenda will be posted to the NAIAC website: *ai.gov/naiac/.*

**DATES:** The meeting will be held from 2:00 p.m.–3:30 p.m. Eastern Time on Wednesday, July 19, 2023.

**ADDRESSES:** The meeting will be held via webcast. Please see the **SUPPLEMENTARY INFORMATION** section of this notice for instructions on how to attend.

**FOR FURTHER INFORMATION CONTACT:** Alicia Chambers, Committee Liaison Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899, *alicia.chambers@nist.gov* or 301–975–5333, or Melissa Banner, Designated Federal Officer, National Institute of Standards and Technology, 100 Bureau Drive, MS 1000, Gaithersburg, MD 20899, *melissa.banner@nist.gov* or 301–975–5245. Please direct any inquiries to *naiac@nist.gov.*

**SUPPLEMENTARY INFORMATION:** Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. 1001 *et seq.,* notice is hereby given that the NAIAC will meet from 2:00 p.m.–3:30 p.m. Eastern Time on Wednesday, July 19, 2023. The meeting will be open to the public and will be held virtually via webcast. The primary purpose of this meeting is for Committee Members to discuss each NAIAC working group's goals and deliverables. The final agenda and meeting time will be posted to the NAIAC website: *ai.gov/naiac/.*

The NAIAC is authorized by section 5104 of the National Artificial Intelligence Initiative Act of 2020 (Pub. L. 116–283), in accordance with the provisions of the Federal Advisory Committee Act, as amended (FACA), 5 U.S.C. 1001 *et seq.* The Committee advises the President and the National Artificial Intelligence Initiative Office on matters related to the National Artificial Intelligence Initiative. Additional information on the NAIAC is available at *ai.gov/naiac/.*

*Comments:* Individuals and representatives of organizations who would like to offer comments and suggestions related to items on the Committee's agenda for this meeting are invited to submit comments in advance of the meeting. Approximately ten minutes will be reserved for public comments, which will be read on a first-come, first-served basis. Please note that all submitted comments will be treated as public documents and will be made available for public inspection. All comments must be submitted via email with the subject line ''July 19, 2023, NAIAC Meeting Comments'' to *naiac@nist.gov* by 5:00 p.m. Eastern Time, Tuesday, July 18, 2023.

*Virtual Admittance Instructions:* The meeting will be held via webcast. The log-in instructions for the webcast will be made available on *ai.gov/naiac/#MEETINGS.*

**Alicia Chambers,**

*NIST Executive Secretariat.*

[FR Doc. 2023–14025 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–13–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; West Coast Region Highly Migratory Species Vessel Identification Requirements

**AGENCY:** National Oceanic & Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of information collection, request for comment.

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

**DATES:** To ensure consideration, comments regarding this proposed information collection must be received on or before September 1, 2023.

**ADDRESSES:** Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0361 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or specific questions related to collection activities should be directed to Karen Palmigiano, National Marine Fisheries Service (NMFS), West Coast Region (WCR) Sand Point Office, 7600 Sand Point Way—Building 1, Seattle, WA 98115, (562) 980–4238 or *wcr-permits@noaa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

This request is for extension of a currently approved information collection. The success of fisheries management programs depends significantly on tracking catch and effort of participants as well as their history of regulatory compliance. The vessel identification requirement is essential to facilitate these objectives. The ability to link fishing or other activity to the vessel owner or operator is crucial to enforcement of the regulations issued under the authority of the Magnuson-Stevens Fishery Conservation and Management Act to govern domestic and foreign fishing, and under authority of laws implementing international treaties.

Regulations at 50 CFR 660.704 require that all commercial fishing vessels with permits issued under authority of the National Marine Fishery Service's (NMFS) Fishery Management Plan for United States (U.S.) West Coast Highly Migratory Species Fisheries display the vessel's official number (U.S. Coast Guard documentation number or State registration number). The numbers must be of a specific size and format and located at specified locations. The official number must be affixed to each vessel subject to this section in block Arabic numerals at least 10 inches (25.40 centimeters) in height for vessels more than 25 feet (7.62 meters) but equal to or less than 65 feet (19.81 meters) in length; and 18 inches (45.72 centimeters) in height for vessels longer than 65 feet (19.81 meters) in length. Markings must be legible and of a color that contrasts with the background. The display of the identifying number aids in fishery law enforcement.

In the domestic West Coast Region fisheries regulated under 50 CFR part 660, the vessel's official number, United States Coast Guard (USCG) documentation or State registration number is required to be displayed on the port and starboard sides of the deckhouse or hull, and on an appropriate weather deck. The number identifies each vessel and should be visible at distances at sea and in the air. The requirements affect United States (U.S.) vessels participating in the West Coast Highly Migratory Species (HMS) fisheries and West Coast coastal pelagic species fishing vessels, with the exception of HMS Recreational Charter Vessels for which an exemption was granted and became effective September 5, 2007. Charter vessels are no longer

bound by the vessel marking requirements under consideration.

The identification number provides law enforcement personnel with a means to monitor fishing, at-sea processing, and other related activities, in order to ascertain whether the vessel's observed activities are in accordance with those authorized for that vessel. The identifying number is used by NMFS, the USCG, and other marine agencies in issuing citations, prosecutions, and other enforcement actions. Vessels that qualify for specific fisheries are easily identified, and this allows for more cost-effective enforcement. Cooperating fishermen also use this number to report suspicious activities that they observe. Regulation-compliant fishermen ultimately benefit as unauthorized and illegal, unreported, and unregulated (IUU) fishing is deterred and more burdensome regulations may be avoided.

**II. Method of Collection**

The vessels' official numbers are displayed on the vessels.

**III. Data**

*OMB Control Number:* 0648–0361.

*Form Number(s):* None.

*Type of Review:* Regular submission (extension of a current information collection).

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* Non-purse seine respondents: 1,680; Purse seine respondents: 20.

*Estimated Time per Response:* All but purse seine vessels: 45 minutes; purse seine fishing vessels of 400 short tons (362.8 metric tons (mt)) or greater carrying capacity; 1 hour and 30 minutes.

*Estimated Total Annual Burden Hours:* 1,290 hours.

*Estimated Total Annual Cost to Public:* $80.

*Respondent's Obligation:* Mandatory.

*Legal Authority:* Magnuson-Stevens Fishery Conservation and Management Act.

**IV. Request for Comments**

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

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

**Sheleen Dumas,**

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

[FR Doc. 2023–14089 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[RTID 0648–XD116]**

### Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

**ACTION:** Notice; public meeting.

**SUMMARY:** The Mid-Atlantic Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will hold a meeting.

**DATES:** The meeting will be held on Monday, July 24, 2023, starting at 10 a.m. and continue through 1 p.m. on Wednesday, July 26, 2023. See **SUPPLEMENTARY INFORMATION** for agenda details.

**ADDRESSES:** This will be an in-person meeting with a virtual option. SSC members, other invited meeting participants, and members of the public will have the option to participate in person at the Philadelphia Marriott Old City, 1 Dock Street, Philadelphia, PA, or virtually via Webex webinar. Webinar connection instructions and briefing materials will be available at *www.mafmc.org/ssc.*

*Council address:* Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; website: *www.mafmc.org.*

**FOR FURTHER INFORMATION CONTACT:** Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

**SUPPLEMENTARY INFORMATION:** During this meeting, the SSC will make multi-year acceptable biological catch (ABC) recommendations for Longfin Squid, Atlantic Mackerel, Summer Flounder, Scup, and Bluefish based on the results of the recently completed management track stock assessments and peer review. The SSC will recommend new 2024–26 ABC specifications for Longfin Squid and new 2024–25 ABC recommendations Atlantic Mackerel, Summer Flounder, Scup, and Bluefish. The SSC will review the most recent survey and fishery data for Black Sea Bass and make a 2024 ABC recommendation. The SSC will review and provide comment on the NMFS National Standard 1 Technical Guidance document on reference points and status determination. The SSC will also review and provide any additional comments on the draft report from their July 12, 2023 meeting regarding the draft Fisheries Climate Governance Policy that was recently released by NMFS. The SSC may take up any other business as necessary.

A detailed agenda and background documents will be made available on the Council's website (*www.mafmc.org*) prior to the meeting.

**Special Accommodations**

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Shelley Spedden, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: June 28, 2023.

**Rey Israel Marquez,**

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

[FR Doc. 2023–14070 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Patent Trial and Appeal Board (PTAB) Appeals

**AGENCY:** United States Patent and Trademark Office, Department of Commerce.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** The United States Patent and Trademark Office (USPTO), as required by the Paperwork Reduction Act of 1995, invites comments on the extension and revision of an existing information collection: 0651–0063 Patent Trial and Appeal Board (PTAB) Appeals. The purpose of this notice is to allow 60 days for public comment preceding submission of the information collection to OMB.

**DATES:** To ensure consideration, comments regarding this information collection must be received on or before September 1, 2023.

**ADDRESSES:** Interested persons are invited to submit written comments by any of the following methods. Do not submit Confidential Business Information or otherwise sensitive or protected information.

- *Email: InformationCollection@uspto.gov.* Include ''0651–0063 comment'' in the subject line of the message.
- *Federal Rulemaking Portal: https://www.regulations.gov.*
- *Mail:* Justin Isaac, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

**FOR FURTHER INFORMATION CONTACT:** Request for additional information should be directed to Michael Tierney, Vice Chief Administrative Patent Judge, Patent Trial and Appeal Board, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450; by telephone at 571–272–9797; or by email to *Michael.Tierney@uspto.gov.* Additional information about this information collection is also available at *http://www.reginfo.gov* under ''Information Collection Review.''

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

The Patent Trial and Appeal Board (PTAB or Board) is established by statute under 35 U.S.C. 6. This statute directs, in relevant part, that PTAB shall ''on written appeal of an applicant, review adverse decisions of examiners upon applications for patents pursuant to section 134(a).'' PTAB has the authority, under 35 U.S.C. 134 and 306 to decide appeals in applications and *ex parte* reexamination proceedings, and under pre-AIA sections of the Patent Act, *i.e.,* 35 U.S.C. 134, 135, and 315, to decide appeals in *inter partes* reexamination proceedings and interferences. In addition, 35 U.S.C. 6 establishes the membership of PTAB as the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and the Administrative Patent Judges. Each appeal and interference is decided by a merits panel of at least three members of the Board.

The Board's responsibilities under the statute include the review of *ex parte* appeals from adverse decisions of examiners in those situations where a written appeal is taken by a dissatisfied applicant or patent owner. In *inter partes* reexamination appeals, PTAB reviews examiner's decisions adverse to a patent owner or a third-party requester. PTAB's opinions and decisions for publicly available files are published on the USPTO website. The Board also conducts interference proceedings.

The items associated with this information collection include appeals in applications and *ex parte* reexamination proceedings, and appeals in *inter partes* reexamination proceedings and interference proceedings that are governed by the regulations in 37 CFR part 41. Failure to comply with the appropriate regulations may result in dismissal of the appeal or denial of entry of the submission.

This revision and extension of the information collection includes a line item to expressly specify certain filings made to the Board related to interference proceedings, including statements, motions, oppositions, and replies in preliminary and priority phases of an interference.

#### II. Method of Collection

Items in this information collection may be submitted via mail, hand delivery, facsimile, filed as attachments through the USPTO's patent electronic filing system, or through the Patent Trial and Appeal Board End-to-End System (PTAB E2E), a separate electronic filing system.

#### III. Data

*OMB Control Number:* 0651–0063.

*Forms:* (AIA = America Invents Act; SB = Specimen Book).

- *PTO/AIA/31:* (Notice of Appeal from the Examiner to the Patent Trial and Appeal Board).
- *PTO/SB/31:* (Notice of Appeal).
- *PTO/AIA/32:* (Request for Oral Hearing before the Patent Trial and Appeal Board).
- *PTO/SB/32:* (Request for Oral Hearing before the Patent Trial and Appeal Board).

*Type of Review:* Extension and revision of a currently approved information collection.

*Affected Public:* Private sector.

*Respondent's Obligation:* Required to Obtain or Retain Benefits.

*Estimated Number of Respondents:* 12,529 respondents.

*Estimated Number of Responses:* 22,149 responses.

*Estimated Time per Response:* The USPTO estimates that the responses in this information collection will take the public approximately 0.5 to 120 hours to complete. This includes the time to gather the necessary information, create the document, and submit the completed request to the USPTO.

*Estimated Total Annual Respondent Burden Hours:* 238,999 hours.

*Estimated Total Annual Respondent Hourly Cost Burden:* $103,964,565.

TABLE 1—TOTAL BURDEN HOURS AND HOURLY COSTS TO PRIVATE SECTOR RESPONDENTS

| Item No. | Item | Estimated annual respondents (a) | Responses per respondent (b) | Estimated annual responses (a) × (b) = (c) | Estimated time for response (hours) (d) | Estimated burden (hour/year) (c) × (d) = (e) | Rate [1] ($/hour) (f) | Estimated annual respondent cost burden (e) × (f) = (g) |
|---|---|---|---|---|---|---|---|---|
| 1 | Notice of Appeal | 12,312 | 1 | 12,312 | 0.5 | 6,156 | $435 | $2,677,860 |
| 2 | Appeal Brief | *6,768 | 1 | 6,768 | 32 | 216,576 | 435 | 94,210,560 |
| 3 | Amendment to Cancel Claims | *112 | 1 | 112 | 2 | 224 | 435 | 97,440 |
| 4 | Reply Brief | *2,197 | 1 | 2,197 | 5 | 10,985 | 435 | 4,778,475 |

TABLE 1—TOTAL BURDEN HOURS AND HOURLY COSTS TO PRIVATE SECTOR RESPONDENTS—Continued

| Item No. | Item | Estimated annual respondents (a) | Responses per respondent (b) | Estimated annual responses (a) × (b) = (c) | Estimated time for response (hours) (d) | Estimated burden (hour/year) (c) × (d) = (e) | Rate [1] ($/hour) (f) | Estimated annual respondent cost burden (e) × (f) = (g) |
|---|---|---|---|---|---|---|---|---|
| 5 ..... | Petitions to the Chief Administrative Patent Judge Under 37 CFR 41.3. | *46 | 1 | 46 | 4 | 184 | 435 | 80,040 |
| 6 ..... | Request for Oral Hearing ..... | *477 | 1 | 477 | 0.5 | 239 | 435 | 103,965 |
| 7 ..... | Request for Rehearing Before the PTAB ... | 207 | 1 | 207 | 5 | 1,035 | 435 | 450,225 |
| 8 ..... | Statements, Motions, Oppositions, and Replies in Preliminary and Priority Phases of an Interference. | 10 | 3 | 30 | 120 | 3,600 | 435 | 1,566,000 |
| | Totals ..... | 12,529 | ..... | 22,149 | ..... | 238,999 | ..... | 103,964,565 |

[1] 2021 Report of the Economic Survey published by the Committee on Economics of Legal Practice of the American Intellectual Property Law Association (AIPLA); pg. F–27. The USPTO uses the average billing rate for attorneys in private firms which is $435 per hour.

*These lines (2–6) are subsets of the respondents from line 1, and not included in the total for this column. USPTO includes these numbers to show how the values in column C are calculated.

*Estimated Total Annual Respondent Non-hourly Cost Burden:* $17,185,623. There are no capital start-up, maintenance cost, or recordkeeping costs associated with this information collection. However, USPTO estimates that the total annual (non-hour) cost burden for this information collection, in the form of filing fees ($17,183,424) and postage ($2,199) is $17,185,623.

*Filing Fees*

The 12 filing fees associated with this information collection as outlined in the table below:

TABLE 2—FILING FEES

| Item No. | Fee code | Item | Estimated annual responses (a) | Fee ($) (b) | Total cost ($) (a) × (b) = (c) |
|---|---|---|---|---|---|
| 1 ..... | 1401 | Notice of appeal (undiscounted) ..... | 8,737 | $840 | $7,339,080 |
| 1 ..... | 2401 | Notice of appeal (small) ..... | 3,230 | 336 | 1,085,280 |
| 1 ..... | 3401 | Notice of appeal (micro) ..... | 345 | 168 | 57,960 |
| 2 ..... | 1404 | Filing a brief in support of an appeal in an *inter partes* reexamination proceeding (undiscounted) ..... | 1 | 2,100 | 2,100 |
| 2 ..... | 2404 | Filing a brief in support of an appeal in an *inter partes* reexamination proceeding (small) ..... | 1 | 840 | 840 |
| 2 ..... | 3404 | Filing a brief in support of an appeal in an *inter partes* reexamination proceeding (micro) ..... | 1 | 420 | 420 |
| 4 ..... | 1413 | Forwarding an Appeal in an Application or *Ex Parte* Reexamination Proceeding to the Board (undiscounted). | 3,131 | 2,360 | 7,389,160 |
| 4 ..... | 2413 | Forwarding an Appeal in an Application or *Ex Parte* Reexamination Proceeding to the Board (small) | 797 | 944 | 752,368 |
| 4 ..... | 3413 | Forwarding an Appeal in an Application or *Ex Parte* Reexamination Proceeding to the Board (micro) | 91 | 472 | 42,952 |
| 6 ..... | 1403 | Request for oral hearing (undiscounted) ..... | 319 | 1,360 | 433,840 |
| 6 ..... | 2403 | Request for oral hearing (small) ..... | 134 | 544 | 72,896 |
| 6 ..... | 3403 | Request for oral hearing (micro) ..... | 24 | 272 | 6,528 |
| | | Totals ..... | 16,811 | ..... | 17,183,424 |

*Postage Costs*

Although the USPTO prefers that the items in this information collection be submitted electronically, responses may be submitted by mail through the United States Postal Service (USPS). The USPTO estimates that 1% of the 22,149 items will be submitted in the mail resulting in 221 mailed items. The USPTO estimates that the average postage cost for a mailed submission, using a Priority Mail 2-day flat rate legal envelope, will be $9.95. Therefore, the USPTO estimates the total mailing costs for this information collection at $2,199.

## IV. Request for Comments

The USPTO is soliciting public comments to:

(a) Evaluate 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;

(b) Evaluate the accuracy of the Agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected; and

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

All comments submitted in response to this notice are a matter of public record. USPTO will include or summarize each comment in the request to OMB to approve this information collection. Before including an address, phone number, email address, or other personally identifiable information (PII) in a comment, be aware that the entire comment—including PII—may be made publicly available at any time. While you may ask in your comment to withhold PII from public view, USPTO cannot guarantee that it will be able to do so.

**Justin Isaac,**

*Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.*

[FR Doc. 2023–14014 Filed 6–30–23; 8:45 am]

**BILLING CODE 3510–16–P**

## DEPARTMENT OF EDUCATION

### President's Advisory Commission on Advancing Educational Equity, Excellence, and Economic Opportunity for Hispanics

**AGENCY:** President's Advisory Commission on Advancing Educational Equity, Excellence, and Economic Opportunity for Hispanics, U.S. Department of Education.

**ACTION:** Announcement of an open meeting.

**SUMMARY:** This notice sets forth the agenda for the July 20, 2023, virtual meeting of the President's Advisory Commission on Advancing Educational Equity, Excellence, and Economic Opportunity for Hispanics (Commission), and provides information on how members of the public may attend the meeting and submit written comments pertaining to the work of the Commission.

**DATES:** The virtual meeting will be held on Thursday, July 20, 2023, from 12:00 p.m.to 5:00 p.m. EDT.

**ADDRESSES:** The meeting will be conducted virtually.

**FOR FURTHER INFORMATION CONTACT:** Emmanuel Caudillo, Designated Federal Official, President's Advisory Commission on Advancing Educational Equity, Excellence, and Economic Opportunity for Hispanics, U.S. Department of Education, 400 Maryland Avenue SW, Room 7E220, Washington, DC 20202, telephone: (202) 453–5529, or email: *Emmanuel.Caudillo@ed.gov.*

**SUPPLEMENTARY INFORMATION:**

*The Commission's Statutory Authority and Function:* The Commission is established by Executive Order 14045 (September 13, 2021) and continued by Executive Order 14048 (September 30, 2021). The Commission is also governed by the provisions of 5 U.S.C chapter 10 (Federal Advisory Committees), which sets forth standards for the formation and use of advisory committees. The Commission's duties are to advise the President, through the Secretary of Education, on matters pertaining to educational equity and economic opportunity for the Hispanic and Latino community in the following areas: (i) what is needed for the development, implementation, and coordination of educational programs and initiatives at the U.S. Department of Education (Department) and other agencies to improve educational opportunities and outcomes for Hispanics and Latinos; (ii) how to promote career pathways for in-demand jobs for Hispanic and Latino students, including registered apprenticeships, internships, fellowships, mentorships, and work-based learning initiatives; (iii) ways to strengthen the capacity of institutions, such as Hispanic-serving Institutions, to equitably serve Hispanic and Latino students and increase the participation of Hispanic and Latino students, Hispanic-serving school districts, and the Hispanic community in the programs of the Department and other agencies; (iv) how to increase public awareness of and generate solutions for the educational and training challenges and equity disparities that Hispanic and Latino students face and the causes of these challenges; and (v) approaches to establish local and national partnerships with public, private, philanthropic, and nonprofit stakeholders to advance the mission and objectives of this order, consistent with applicable law.

*Meeting Agenda:* The agenda for the Commission meeting includes: (1) discussion and vote by members of the Commission to establish Commission subcommittee(s), which will meet to work on items pertaining to the work of the Commission and present subcommittee(s) findings to the full Commission for discussion during open, public Commission meetings,; (2) presentations from federal leaders on topics related to Executive Order 14045; and (3) discussion around next steps towards advancing duties of the Commission, as outlined by Executive Order 14045.

*Access to the Meeting:* Members of the public may register to attend the meeting virtually by completing the link at *https://www.ed.gov/hispanicinitiative* or emailing *WhiteHouseHispanicInitiative@ed.gov* by 5 p.m. EDT on Wednesday, July 19, 2023. Instructions on how to access the meeting will be emailed to members of the public that register to attend the meeting and will be posted to *https://www.ed.gov/hispanicinitiative* by Wednesday, July 19, 2023 by 6 p.m. EDT.

*Submission of written public comments:* Written comments pertaining to the work of the Commission may be submitted electronically to *WhiteHouseHispanicInitiative@ed.gov* by 5 p.m. EDT on Wednesday July 19, 2023. Include in the subject line: ''Written Comments: Public Comment.'' The email must include the name(s), title, organizations/affiliation, mailing address, email address, and telephone number of the person(s) submitting the comment. Comments should be submitted as a Microsoft Word document or in a medium compatible with Microsoft Word (not a PDF file) that is attached to the electronic mail message (email) or provided in the body of an email message. Please do not send material directly to members of the Commission.

*Access to Records of the Meeting:* The Department will post the official report of the meeting on the Commission's website, at *https://sites.ed.gov/hispanic-initiative/presidential-advisory-commission/,* no later than 90 days after the meeting. Pursuant to 5 U.S.C. 1009(b), the public may request to inspect records of the meeting at 400 Maryland Avenue SW, Washington, DC, by emailing *Emmanuel.Caudillo@ed.gov* or by calling (202) 453–5529 to schedule an appointment.

*Reasonable Accommodations:* The meeting platform and access code are accessible to individuals with disabilities. If you will need an auxiliary aid or service for the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice at least one week before the meeting date. Although we will attempt to meet a request received after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

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

*Authority:* Executive Order 14045 (September 13, 2021) and continued by Executive Order 14048 (September 30, 2021).

**Donna Harris-Aikens,**

*Deputy Chief of Staff for Strategy, Office of the Secretary.*

[FR Doc. 2023–14030 Filed 6–30–23; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2023–SCC–0070]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; NCEE System Clearance for Design and Field Studies 2023–2026

**AGENCY:** Institute of Education Sciences (IES), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

**DATES:** Interested persons are invited to submit comments on or before August 2, 2023.

**ADDRESSES:** Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Michael Fong, 202–245–8407.

**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:* NCEE System Clearance For Design and Field Studies 2023–2026.

*OMB Control Number:* 1850–0952.

*Type of Review:* A revision of a currently approved ICR.

*Respondents/Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Annual Responses:* 6,000.

*Total Estimated Number of Annual Burden Hours:* 3,000.

*Abstract:* This is a request for a 3-year generic clearance for the National Center for Education Evaluation (NCEE) that will allow it to collect preliminary or exploratory information to aid in study design. The procedures expected to be used include but are not limited to exploratory surveys and interviews, focus groups, cognitive laboratory activities, pilot testing versions of an intervention or data collection approach, small-scale experiments that explore questionnaire design, incentives, or mode, and usability testing.

Dated: June 28, 2023.

**Juliana Pearson,**

*PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.*

[FR Doc. 2023–14043 Filed 6–30–23; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2023–SCC–0118]**

### Agency Information Collection Activities; Comment Request; Protection and Advocacy of Individual Rights Program Assurances

**AGENCY:** Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

**DATES:** Interested persons are invited to submit comments on or before September 1, 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–0118. 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 Samuel Pierre, (202) 245–6488.

**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:* Protection and Advocacy of Individual Rights Program Assurances.

*OMB Control Number:* 1820–0625.

*Type of Review:* Extension without change of a currently approved ICR.

*Respondents/Affected Public:* State, local, and Tribal governments.

*Total Estimated Number of Annual Responses:* 57.

*Total Estimated Number of Annual Burden Hours:* 9.

*Abstract:* Section 509 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended by the title IV of Workforce Innovation and Opportunity Act (WIOA) and its implementing Federal Regulations at 34 CFR part 381, require the PAIR grantees to submit an application to the RSA Commissioner in order to receive assistance under Section 509 of the Rehabilitation Act. The Rehabilitation Act requires that the application contain Assurances to which the grantees must comply. Section 509(f) of the Rehabilitation Act specifies the Assurances. All 57 PAIR grantees are required to be part of the protection and advocacy system in each State established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 6041 *et seq.*).

Dated: June 27, 2023.

**Juliana Pearson,**

*PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.*

[FR Doc. 2023–14024 Filed 6–30–23; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2023–SCC–0075]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Master Generic Plan for Customer Surveys and Focus Groups

**AGENCY:** Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

**DATES:** Interested persons are invited to submit comments on or before August 2, 2023.

**ADDRESSES:** Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. Reginfo.gov provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Stephanie Valentine, 202–453–7061.

**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:* Master Generic Plan for Customer Surveys and Focus Groups.

*OMB Control Number:* 1800–0011.

*Type of Review:* An extension without change of a currently approved ICR.

*Respondents/Affected Public:* State, Local, and Tribal Governments; Individuals or Households.

*Total Estimated Number of Annual Responses:* 225,703.

*Total Estimated Number of Annual Burden Hours:* 57,722.

*Abstract:* Surveys to be considered under this generic will only include those surveys that improve customer service or collect feedback about a service provided to individuals or entities directly served by ED. The results of these customer surveys will help ED managers plan and implement program improvements and other customer satisfaction initiatives. Focus groups that will be considered under the generic clearance will assess customer satisfaction with a direct service or will be designed to inform a customer satisfaction survey ED is considering. Surveys that have the potential to influence policy will not be considered under this generic clearance.

Dated: June 28, 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. 2023–14085 Filed 6–30–23; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Secretary of Energy Advisory Board

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Department of Energy hereby publishes a notice of open meeting of the Secretary of Energy Advisory Board (SEAB). This meeting will be held virtually for members of the public, and in-person for SEAB members. The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Wednesday, July 26, 2023; 10:30 a.m.–3:00 p.m. Eastern Time

**ADDRESSES:** Virtual meeting for members of the public. SEAB members only will participate in-person at the Princeton Plasma Physics Laboratory, 100 Stellarator Rd., Princeton, New Jersey 08540. Registration is required by registering at the SEAB July 26 meeting page at: *www.energy.gov/seab/seab-meetings.*

**FOR FURTHER INFORMATION CONTACT:** David Borak, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585; email: *seab@hq.doe.gov;* telephone: (202) 586–5216.

**SUPPLEMENTARY INFORMATION:**

*Background:* The Board was established to provide advice and recommendations to the Secretary on the Administration's energy policies; the Department's basic and applied research and development activities; economic and national security policy; and other activities as directed by the Secretary.

*Purpose of the Meeting:* This is the eighth meeting of Secretary Jennifer M. Granholm's SEAB.

*Tentative Agenda:* The meeting will start at 10:30 a.m. Eastern Time on July 26, 2023. The tentative meeting agenda includes: roll call, remarks from the Secretary, remarks from the SEAB chair, discussion of workforce of the clean energy economy, and public comments. The meeting will conclude at approximately 3:00 p.m. Meeting materials can be found here: *https://www.energy.gov/seab/seab-meetings.*

*Public Participation:* The meeting is open to the public via a virtual meeting option. Individuals who would like to attend must register for the meeting here: *https://www.energy.gov/seab/seab-meetings.*

Individuals and representatives of organizations who would like to offer comments and suggestions may do so during the meeting. Approximately 15 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but will not exceed three minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so via email, *seab@hq.doe.gov,* no later than 5:00 p.m. on Tuesday, July 25, 2023.

Those not able to attend the meeting or who have insufficient time to address the committee are invited to send a written statement to David Borak, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, or email to: *seab@hq.doe.gov.*

*Minutes:* The minutes of the meeting will be available on the SEAB website or by contacting Mr. Borak. He may be reached at the above postal address or email address, or by visiting SEAB's website at *www.energy.gov/seab.*

Signed in Washington, DC, on June 27, 2023.

**LaTanya Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2023–14033 Filed 6–30–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Advanced Scientific Computing Advisory Committee

**AGENCY:** Office of Science, Department of Energy.

**ACTION:** Notice of renewal.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Advanced Scientific Computing Advisory Committee will be renewed for a two-year period beginning on June 28, 2023.

**FOR FURTHER INFORMATION CONTACT:** Christine Chalk at (301) 903–5152 or email: *christine.chalk@science.doe.gov.*

**SUPPLEMENTARY INFORMATION:** The Committee will provide advice to the Director, Office of Science, Department of Energy (DOE), on the Advanced Scientific Computing Research Program managed by the Office of Advanced Scientific Computing Research.

Additionally, the renewal of the Advanced Scientific Computing Advisory Committee has been determined to be essential to the conduct of DOE business and to be in the public interest in connection with the performance of duties imposed upon DOE, by law and agreement. The Committee will operate in accordance with the provisions of the Federal Advisory Committee Act, adhering to the rules and regulations in implementation of that Act.

### Signing Authority

This document of the Department of Energy was signed on June 28, 2023, by Sarah E. Butler, Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on June 28, 2023.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

[FR Doc. 2023–14063 Filed 6–30–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### National Nuclear Security Administration

### Advisory Committee for Nuclear Security; Correction

**AGENCY:** Office of Defense Programs, National Nuclear Security Administration, Department of Energy.

**ACTION:** Notice of closed meeting; correction.

**SUMMARY:** On June 26, 2023, the Department of Energy published a notice of closed meeting announcing a meeting on July 19, 2023, of the Advisory Committee for Nuclear Security (88 FR 121). This document makes a correction to that notice.

**FOR FURTHER INFORMATION CONTACT:** Allyson Koncke-Fernandez, Office of Policy and Strategic Planning (NA–1.1) National Nuclear Security Administration, U.S. Department of Energy, 1000 Independence Ave. SW, Washington, DC 20585, (202) 287–5327; *allyson.koncke-fernandez@nnsa.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

### Corrections

In the **Federal Register** of April 24, 2023, in FR Doc. 2023–13472, on page 41392, please make the following corrections:

In that notice under **DATES**, second column, first paragraph, the meeting time has been changed. The original time was 10:00 a.m. to 3:00 p.m. The new time is 9:00 a.m. to 5:00 p.m.

The reason for the correction is a scheduling conflict with the original meeting time.

Signed in Washington, DC, on June 27, 2023.

**LaTanya Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2023–14035 Filed 6–30–23; 8:45 am]

**BILLING CODE 6450–01–P**

## 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 Instituting Proceedings

*Docket Numbers:* RP23–844–000.

*Applicants:* El Paso Natural Gas Company, L.L.C.

*Description:* § 4(d) Rate Filing: Negotiated Rate Agreement Update (SRP August 2023) to be effective 8/1/2023.

*Filed Date:* 6/26/23.

*Accession Number:* 20230626–5112.

*Comment Date:* 5 p.m. ET 7/10/23.

*Docket Numbers:* RP23–845–000.

*Applicants:* Iroquois Gas Transmission System, L.P.

*Description:* § 4(d) Rate Filing: 6.27.23 Negotiated Rates—Mercuria Energy America, LLC R–7540–02 to be effective 7/1/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5003.

*Comment Date:* 5 p.m. ET 7/10/23.

*Docket Numbers:* RP23–846–000.

*Applicants:* El Paso Natural Gas Company, L.L.C.

*Description:* § 4(d) Rate Filing: Negotiated Rate Agreements Update (Pioneer 2023) to be effective 7/1/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5051.

*Comment Date:* 5 p.m. ET 7/10/23.

*Docket Numbers:* RP23–847–000.

*Applicants:* Texas Eastern Transmission, LP.

*Description:* § 4(d) Rate Filing: Negotiated Rates—DTE eff 7–1–23 to be effective 7/1/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5060.

*Comment Date:* 5 p.m. ET 7/10/23.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

**Filings in Existing Proceedings**

*Docket Numbers:* RP22–501–000.

*Applicants:* ANR Pipeline Company.

*Description:* Refund Report: Amended Settlement Refund Report to be effective N/A.

*Filed Date:* 6/26/23.

*Accession Number:* 20230626–5057.

*Comment Date:* 5 p.m. ET 7/10/23.

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.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14058 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2241–000]**

### Flat Ridge 5 Wind Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Flat Ridge 5 Wind Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14051 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 2333–094]**

### Rumford Falls Hydro LLC; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2333–094.

c. *Date filed:* September 29, 2022. Supplemented on March 30 and June 9, 2023.

d. *Applicant:* Rumford Falls Hydro LLC.

e. *Name of Project:* Rumford Falls Hydroelectric Project.

f. *Location:* On the Androscoggin River in the Town of Rumford, Oxford County, Maine.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Luke Anderson, Rumford Falls Hydro LLC, Brookfield Renewable, 150 Main St., Lewiston, Maine 04240, (207) 755–5613, *luke.anderson@brookfieldrenewable.com.*

i. *FERC Contact:* Ryan Hansen at (202) 502–8074 or email at *ryan.hansen@ferc.gov.*

j. *Deadline for filing motions to intervene and protests, comments, recommendations, preliminary terms and conditions, and preliminary prescriptions:* 60 days from the issuance date of this notice; reply comments are due 105 days from the issuance date of this notice.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

The Commission strongly encourages electronic filing. Please file motions to intervene, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. All filings must clearly identify the project name and docket number on the first page: Rumford Falls Hydroelectric Project (P–2333–094).

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing and is now ready for environmental analysis.

The Council on Environmental Quality (CEQ) issued a final rule on April 20, 2022, revising the regulations under 40 CFR parts 1502, 1507, and 1508 that Federal agencies use to implement the National Environmental Policy Act (NEPA) (see National Environmental Policy Act Implementing Regulations Revisions, 87 FR 23453–70). The final rule became effective on May 20, 2022. Commission staff intends to conduct its NEPA review in accordance with CEQ's new regulations.

l. The existing Rumford Falls Project consists of two developments, the Upper Station and Lower Station. The Upper Station Development consists of the following existing facilities: (1) a concrete gravity dam with a 464-foot-long, 37-foot-high ogee type spillway section with 32-inch-high, pin-supported wooden flashboards; (2) a reservoir with a storage capacity of 2,900 acre-feet and a surface area of approximately 419 acres at a maximum headwater elevation of 601.24 feet; [1] (3) a 2,300-foot-long, 150-foot-wide forebay; (4) a gatehouse containing two headgates for each of the four penstocks for a total of eight headgates with trashracks; (5) four 110-foot-long underground steel-plate penstocks, three of which are 12 feet in diameter, and one of which is 13 feet in diameter; (6) a masonry powerhouse integral with the dam that is composed of two adjoining stations (a) a 30-foot-wide, 110-foot-long, 92-foot-high Old Station, containing one horizontal generating unit with a capacity of 4,300 kilowatts (kW), and (b) a 60-foot-wide, 140-foot-long, 76-foot-high New Station containing three vertical generating units, two with a capacity of 8,100 kW each, and one with a capacity of 8,800 kW; (7) four 11.5-kilovolt (kV) overhead transmission lines, two of which are de-energized, and the other two are: a 4,500-foot-long line 2 and a 4,200-foot-long line 3; and (8) appurtenant facilities.

The Lower Station Development consists of the following existing facilities: (1) a rock-filled, wooden cribbed and concrete-capped Middle Dam, with a 328.6-foot-long, 20-foot-high gravity spillway section with a crest elevation of 502.74 feet with 16-inch-high, pin-supported, wooden flashboards; (2) a reservoir with storage capacity of 141 acre-feet and a surface area of 21 acres at a normal maximum headwater elevation of 502.7 feet; (3) a 120-foot-long concrete headgate structure located adjacent to the dam with ten steel headgates and a waste weir section perpendicular to the headgate structure with a crest elevation of 502.6 feet and 10-inch-high flashboards regulating flow to the Middle Canal; (4) a 2,400-foot-long Middle Canal with a width ranging from 75 to 175 feet and a depth from 8 to 11 feet; (5) a gatehouse containing two headgates, trashracks, and other appurtenant equipment regulating flow from the canal into two penstocks; (6) two 815-foot-long, 12-foot-diameter, steel-plate penstocks conveying flow from the gatehouse to two surge tanks; (7) two 36-foot-diameter, 50.5-foot-high cylindrical surge tanks; (8) two 77-foot-long, 12-foot-diameter steel penstocks conveying flow from the surge tanks to the powerhouse; (9) a masonry powerhouse containing two identical vertical units, each with a 7,600-kW capacity; (10) two 600-foot-long, 11.5-kV parallel generator leads; and (11) appurtenant facilities.

Rumford Falls Hydro LLC operates the project in a run-of-river mode and does not propose any changes to project facilities or operation. The project would continue to generate an estimated average of 270,800 megawatt-hours annually.

m. This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

[1] All elevations are in National Geodetic Vertical Datum of 1929.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) bear in all capital letters the title ''PROTEST,'' ''MOTION TO INTERVENE,'' ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''PRELIMINARY TERMS AND CONDITIONS,'' or ''PRELIMINARY FISHWAY PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. *Procedural Schedule:* The application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

| Milestone | Target date |
|---|---|
| Filing of Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions | August 25, 2023. |
| Filing of Reply Comments | October 9, 2023. |

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

q. The applicant must file no later than 60 days following the date of issuance of this notice: (1) a copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification. Please note that the certification request must comply with 40 CFR 121.5(b), including documentation that a pre-filing meeting request was submitted to the certifying authority at least 30 days prior to submitting the certification request. Please also note that the certification request must be sent to the certifying authority and to the Commission concurrently.

Dated: June 26, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–13995 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2236–000]**

### Chisholm Trail Solar Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Chisholm Trail Solar Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help

members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14054 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2233–000]**

### Algodon Solar Energy Holdings LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Algodon Solar Energy Holdings LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14057 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2243–000]**

### Lazbuddie Wind Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Lazbuddie Wind Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

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Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14049 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2235–000]**

### Chisholm Trail Solar Energy Holdings LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Chisholm Trail Solar Energy Holdings LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14055 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2240–000]**

### Flat Ridge 5 Wind Energy Holdings LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Flat Ridge 5 Wind Energy Holdings LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14052 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2238–000]**

### Flat Ridge 4 Wind, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Flat Ridge 4 Wind, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14053 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2242–000]**

### Lazbuddie Wind Energy Holdings LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Lazbuddie Wind Energy Holdings LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

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20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14050 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

*Docket Numbers:* EC23–99–000.

*Applicants:* Northern Indiana Public Service Company LLC, Dunns Bridge Solar Center, LLC, Indiana Crossroads Wind Farm LLC, Meadow Lake Solar Park LLC, Rosewater Wind Farm LLC.

*Description:* Joint Application for Authorization Under Section 203 of the Federal Power Act of Northern Indiana Public Service Company LL, et al.

*Filed Date:* 6/26/23.

*Accession Number:* 20230626–5191.

*Comment Date:* 5 p.m. ET 7/17/23.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

*Docket Numbers:* EL23–79–000.

*Applicants:* FuelCell Energy, Inc.

*Description:* Petition for Declaratory Order of FuelCell Energy, Inc.

*Filed Date:* 6/23/23.

*Accession Number:* 20230623–5191.

*Comment Date:* 5 p.m. ET 7/24/23.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER10–2654–001; ER10–2334–008; ER11–3406–009; ER12–1923–008; ER12–1925–008; ER22–2827–003; ER22–2950–001; ER23–108–001.

*Applicants:* MD Solar 2, LLC, Vitol PA Wind Marketing LLC, Bluegrass Solar, LLC, Patton Wind Farm, LLC, Big Savage, LLC, Highland North LLC, Big Sky Wind, LLC, Vitol Inc.

*Description:* Triennial Market Power Analysis for Northeast Region of Vitol Inc., et al.

*Filed Date:* 6/26/23.

*Accession Number:* 20230626–5195.

*Comment Date:* 5 p.m. ET 8/25/23.

*Docket Numbers:* ER10–3050–012; ER10–3053–012.

*Applicants:* Whitewater Hill Wind Partners, LLC, Cabazon Wind Partners, LLC.

*Description:* Notice of Change in Status of Cabazon Wind Partners, LLC, et al.

*Filed Date:* 6/26/23.

*Accession Number:* 20230626–5189.

*Comment Date:* 5 p.m. ET 7/17/23.

*Docket Numbers:* ER13–342–018.

*Applicants:* CPV Shore, LLC.

*Description:* Triennial Market Power Analysis for Northeast Region of CPV Shore, LLC.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5109.

*Comment Date:* 5 p.m. ET 8/28/23.

*Docket Numbers:* ER16–700–008.

*Applicants:* CPV Towantic, LLC.

*Description:* Triennial Market Power Analysis for Northeast Region of CPV Towantic, LLC.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5111.

*Comment Date:* 5 p.m. ET 8/28/23.

*Docket Numbers:* ER16–701–007.

*Applicants:* CPV Valley, LLC.

*Description:* Triennial Market Power Analysis for Northeast Region of CPV Valley, LLC.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5108.

*Comment Date:* 5 p.m. ET 8/28/23.

*Docket Numbers:* ER17–1531–010.

*Applicants:* CPV Fairview, LLC.

*Description:* Triennial Market Power Analysis for Northeast Region of CPV Fairview, LLC.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5105.

*Comment Date:* 5 p.m. ET 8/28/23.

*Docket Numbers:* ER17–1840–001; ER15–2534–001; ER22–729–002; ER22–784–003.

*Applicants:* CPV Maple Hill Solar, LLC, CPV Retail Energy LP, Saddleback Ridge Wind, LLC, Canton Mountain Wind, LLC.

*Description:* Updated Triennial Market Power Analysis for Northeast Region of CPV Canton Mountain Wind, LLC, et al.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5116.

*Comment Date:* 5 p.m. ET 8/28/23.

*Docket Numbers:* ER18–803–001.

*Applicants:* EDF Trading North America, LLC.

*Description:* Triennial Market Power Analysis for Northeast Region of EDF Trading North America, LLC.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5110.

*Comment Date:* 5 p.m. ET 8/28/23.

*Docket Numbers:* ER22–2580–002.

*Applicants:* CPV Three Rivers, LLC.

*Description:* Triennial Market Power Analysis for Northeast Region of CPV Three Rivers, LLC.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5112.

*Comment Date:* 5 p.m. ET 8/28/23.

*Docket Numbers:* ER23–1000–002.

*Applicants:* ISO New England Inc., The Narragansett Electric Company.

*Description:* Tariff Amendment: ISO New England Inc. submits tariff filing per 35.17(b): ISO New England Inc. and The Narragansett Electric Company; ER23–1000–000 to be effective 12/31/9998.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5119.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–1003–002.

*Applicants:* ISO New England Inc., The Narragansett Electric Company.

*Description:* Compliance filing: ISO New England Inc. submits tariff filing per 35: ISO New England Inc. and The Narragansett Electric Company; ER23–1003–000 to be effective 12/31/9998.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5123.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–1261–001.

*Applicants:* Dynegy Marketing and Trade, LLC.

*Description:* Dynegy Marketing and Trade, LLC submits a compliance filing to the May 5, 2023 Commission order, detailing its actual regulatory costs incurred in connection with the cost recovery.

*Filed Date:* 6/22/23.

*Accession Number:* 20230622–5150.

*Comment Date:* 5 p.m. ET 7/13/23.

*Docket Numbers:* ER23–1668–001.

*Applicants:* Estrella Solar, LLC.

*Description:* Tariff Amendment: Estrella Solar MBR Tariff to be effective 5/1/2023.

*Filed Date:* 6/26/23.

*Accession Number:* 20230626–5139.

*Comment Date:* 5 p.m. ET 7/6/23.

*Docket Numbers:* ER23–1669–001.

*Applicants:* Raceway Solar 1, LLC.

*Description:* Tariff Amendment: Raceway Solar, 1 MBR Tariff to be effective 5/1/2023.

*Filed Date:* 6/26/23.

*Accession Number:* 20230626–5140.

*Comment Date:* 5 p.m. ET 7/6/23.

*Docket Numbers:* ER23–1829–000.

*Applicants:* Shady Oaks Wind 2, LLC.

*Description:* Supplement to May 4, 2023, Shady Oaks Wind 2, LLC submits tariff filing.

*Filed Date:* 6/23/23.

*Accession Number:* 20230623–5187.

*Comment Date:* 5 p.m. ET 7/14/23.

*Docket Numbers:* ER23–1847–001.

*Applicants:* The Potomac Edison Company, PJM Interconnection, L.L.C.

*Description:* Tariff Amendment: The Potomac Edison Company submits tariff filing per 35.17(b): Potomac Submits Amendment of Borderline Service Agreement, SA No. 6408 to be effective 6/1/2010.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5095.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2239–000.

*Applicants:* HQC Solar Holdings 1, LLC.

*Description:* Petition for Limited Waiver of HQC Solar Holdings 1, LLC.

*Filed Date:* 6/20/23.

*Accession Number:* 20230620–5304.

*Comment Date:* 5 p.m. ET 7/5/23.

*Docket Numbers:* ER23–2259–000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: 4092 NPPD Surplus Interconnection GIA to be effective 6/23/2023.

*Filed Date:* 6/26/23.

*Accession Number:* 20230626–5132.

*Comment Date:* 5 p.m. ET 7/17/23.

*Docket Numbers:* ER23–2260–000.

*Applicants:* El Paso Electric Company.

*Description:* Tariff Amendment: Termination of Service Agreement No. 316, EPE LGIA with Great Divide Wind Farm to be effective 6/2/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5001.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2261–000.

*Applicants:* Midcontinent Independent System Operator, Inc., Wabash Valley Power Association, Inc.

*Description:* § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2023–06–27_Revisions to Schs 7, 8, and 9 to add WVPA in AES Indiana Pricing Zone to be effective 7/1/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5002.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2262–000.

*Applicants:* Midcontinent Independent System Operator, Inc., Wabash Valley Power Association, Inc.

*Description:* § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2023–06–27_Rate Schedule 57 AES Indiana-WVPA JPZ Revenue Allocation Agreement to be effective 7/1/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5005.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2263–000.

*Applicants:* Fowler Ridge Wind Farm LLC.

*Description:* Initial rate filing: Certificate of Concurrence to be effective 8/5/2013.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5027.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2264–000.

*Applicants:* Trailstone Renewables, LLC.

*Description:* § 205(d) Rate Filing: Normal filing 2023 to be effective 6/28/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5031.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2265–000.

*Applicants:* TrailStone Energy Marketing, LLC.

*Description:* § 205(d) Rate Filing: Normal filing 2023 to be effective 6/28/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5036.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2266–000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: Revisions to Attachment AE Concerning Resource Settlements to be effective 12/31/9998.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5037.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2267–000.

*Applicants:* CPV Canton Mountain Wind, LLC.

*Description:* § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 6/28/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5038.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2268–000.

*Applicants:* CPV Saddleback Ridge Wind, LLC.

*Description:* § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 6/28/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5040.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2269–000.

*Applicants:* PacifiCorp.

*Description:* § 205(d) Rate Filing: Seventh Amended and Restated TSOA, Rate Schedule No. 297 to be effective 8/27/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5056.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2270–000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: 1977R19 Nemaha-Marshall Electric Cooperative NITSA and NOA to be effective 9/1/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5090.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2271–000.

*Applicants:* Southwest Power Pool, Inc.

*Description:* § 205(d) Rate Filing: 2415R18 Kansas Municipal Energy Agency NITSA and NOA to be effective 9/1/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5098.

*Comment Date:* 5 p.m. ET 7/18/23.

*Docket Numbers:* ER23–2272–000.

*Applicants:* DRW Energy Trading LLC.

*Description:* Baseline eTariff Filing: Baseline new to be effective 7/5/2023.

*Filed Date:* 6/27/23.

*Accession Number:* 20230627–5121.

*Comment Date:* 5 p.m. ET 7/18/23.

Take notice that the Commission received the following electric securities filings:

*Docket Numbers:* ES23–52–000.

*Applicants:* Montana-Dakota Utilities Co.

*Description:* Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Montana-Dakota Utilities Co.

*Filed Date:* 6/26/23.

*Accession Number:* 20230626–5181.
*Comment Date:* 5 p.m. ET 7/17/23.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14059 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2244–000]**

### Pixley Solar Energy Holdings LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Pixley Solar Energy Holdings LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14048 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2237–000]**

### Flat Ridge 4 Wind Holdings LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Flat Ridge 4 Wind Holdings LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the

Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14060 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2234–000]**

### Algodon Solar Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Algodon Solar Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14056 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER23–2245–000]**

### Pixley Solar Energy LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Pixley Solar Energy LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 17, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the

eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov*.

Dated: June 27, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–14047 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 1175–024]**

### Appalachian Power Company; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-capacity Amendment of License.

b. *Project No:* 1175–024.

c. *Date Filed:* June 21, 2023.

d. *Applicant:* Appalachian Power Company.

e. *Name of Project:* London-Marmet Hydroelectric Project.

f. Location: The project is located on the Kanawha River, in Kanawha and Fayette counties, West Virginia, and occupies Federal land administered by the U.S. Army Corps of Engineers.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Christopher J. Jeter, PE, Lawson-Fisher Associates P.C., 525 West Washington Avenue, South Bend, IN 46601, (574) 234–3167, *cjeter@lawson-fisher.com*.

i. *FERC Contact:* Jeremy Jessup, (202) 502–6779, *Jeremy.Jessup@ferc.gov*.

j. Deadline for filing comments, motions to intervene, and protests: July 26, 2023.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp*. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp*. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–1175–024. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The licensee proposes a minor modification of the project boundary at the London Development to accommodate planned maintenance of project ancillary facilities. The existing project boundary encompasses security fencing around project facilities. The licensee proposes to relocate and expand the current location of the security fence to improve the physical security of these facilities. The proposed amendment would add 0.257 acres to the project boundary. The licensee states that the relocation of the fence would not change licensed project operations or result in modifications of license conditions. The area where work is proposed is heavily disturbed and immediately adjacent to the project. The licensee intends to complete the fencing improvement in the third quarter of 2023.

l. *Locations of the Application:* This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or

other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Filing and Service of Documents: Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor 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.

p. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: June 26, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–13996 Filed 6–30–23; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2023–0154; FRL–10803–02–OCSPP]**

## FIFRA Scientific Advisory Panel (SAP); Examination of Microcosm/Mesocosm Studies for Evaluating the Effects of Atrazine on Aquatic Plant Communities; Notice of Availability, and Request for Comment

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

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA or ''Agency'') is announcing the availability of and soliciting public comment on the ''Examination of Microcosm/Mesocosm Studies for Evaluating the Effects of Atrazine on Aquatic Plant Communities,'' that is being submitted to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Scientific Advisory Panel (SAP) for peer review. The document is available for public review and comment. The FIFRA SAP will consider and review the document at a 3-day virtual public meeting that was previously announced in the **Federal Register** of March 24, 2023, The virtual public meeting will be held on August 22–24, 2023, via a webcast platform such as ''*Zoomgov.com*'' and audio teleconference.

**DATES:** The following is a chronological listing of the dates for the specific activities that are described in more detail under **SUPPLEMENTARY INFORMATION.**

August 2, 2023—Deadline for providing written comments.

August 8, 2023—Deadline for submitting a request for special accommodations to allow EPA time to process the request before the meeting.

August 18, 2023—Deadline for registering to be listed on the meeting agenda to make oral comments during the virtual meeting.

August 22–24, 2023—Scheduled virtual public meeting of the FIFRA SAP.

August 24, 2023—Deadline for those not making oral comments to register to receive the links to observe the meeting.

**ADDRESSES:** *To comment:* Submit written comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0154, through *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not electronically submit any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Copyrighted material will not be posted without explicit permission from the copyright holder. Members of the public should also be aware that personal information included in any written comments may be posted on the internet at *https://www.regulations.gov.* Additional information on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

*To register for the meeting:* For information on how to register and access the virtual public meeting, please refer to the FIFRA SAP website at *https://www.epa.gov/sap.* EPA intends to announce registration instructions on the FIFRA SAP website by early July 2023. You may also subscribe to the following listserv for alerts regarding this and other FIFRA SAP-related activities at *https://public.govdelivery.com/accounts/USAEPAOPPT/subscriber/new?topic_id=USAEPAOPPT_101.T.*

*To request special accommodations:* For information on access or services for individuals with disabilities, and to request accommodation for a disability, please contact the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT.**

**FOR FURTHER INFORMATION CONTACT:** The DFO, Tamue Gibson, Mission Support Division, Office of Program Support, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency; telephone number: (202) 564–7642 or the main office number: (202) 564–8450; email address: *gibson.tamue@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. What action is the Agency taking?*

EPA is announcing the availability of and soliciting public comment on the document entitled ''Examination of Microcosm/Mesocosm Studies for Evaluating the Effects of Atrazine on Aquatic Plant Communities,'' which is available in the docket. EPA is also announcing a 3-day virtual public meeting on August 22–24, 2023, for the FIFRA SAP to consider and review the Agency's examination. This August 2023 meeting was previously announced in the **Federal Register** of March 24, 2023 (88 FR 17843 (FRL–10803–01–OCSPP)). EPA will be soliciting comments from the FIFRA SAP on the Agency's examination related to 11 microcosm and mesocosm studies evaluating the toxicity of atrazine to the exposed aquatic plant communities.

This document provides instructions for accessing the materials provided to the FIFRA SAP, submitting written comments, and registering to provide oral comments and attend the virtual meeting.

*B. What is the Agency's authority for taking this action?*

The FIFRA SAP is a federal advisory committee established in 1975 under FIFRA, 7 U.S.C. 136 *et seq.,* to provide independent scientific advice to EPA on health and safety issues related to pesticides. The FIFRA SAP operates in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. 10, and

supports activities under FIFRA, the Federal Food, Drug, and Cosmetic Act (FFDCA) and other applicable statutes.

*C. Does this action apply to me?*

This action is directed to the public in general. This action may be of interest to persons who are or may be required to conduct testing of chemical substances under the FFDCA and FIFRA. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

*D. What should I consider as I submit my comments to EPA?*

1. Submitting CBI.

Contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** for instructions before submitted CBI or other sensitive information. Do not submit this information to EPA electronically (*e.g.,* through *https://www.regulations.gov* or email). Clearly mark the part or all of the information that you claim to be CBI. For confidential information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for preparing your comments.

When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov/dockets/commenting-epa-dockets.* See also the instructions in Unit III.

## II. Background

*A. What is the purpose of the FIFRA SAP?*

The FIFRA SAP serves as one of the primary scientific peer review mechanisms of EPA's Office of Chemical Safety and Pollution Prevention (OCSPP) and is structured to provide independent scientific advice, information, and recommendations to the EPA Administrator on pesticides and pesticide-related issues as to the impact of regulatory actions on human health and the environment. The FIFRA SAP is composed of a permanent panel consisting of seven members who are appointed by the EPA Administrator from nominees provided by the National Institutes of Health and the National Science Foundation. FIFRA established a Science Review Board consisting of at least 60 scientists who are available to the FIFRA SAP on an *ad hoc* basis to assist in reviews conducted by the FIFRA SAP. As a scientific peer review mechanism, the FIFRA SAP provides comments, evaluations, and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. Members of the FIFRA SAP are scientists who have sufficient professional qualifications, including training and experience, to provide expert advice and recommendations to the Agency.

*B. Why did EPA develop this document?*

EPA participated in several FIFRA SAP meetings related to atrazine's impact on the environment (*e.g.,* 2003, 2007, 2009, 2012). In June 2012, the EPA presented the ''Problem Formulation for the Environmental Fate and Ecological Risk Assessment for Atrazine'' to the FIFRA SAP. That problem formulation provided an overview of atrazine use, exposure, and toxicity for assessing the ecological risk from atrazine use. One of the major considerations for the 2012 FIFRA SAP was the process that the EPA used to estimate an aquatic plant community-based concentration equivalent-level of concern (CE–LOC). The CE–LOC is a 60-day average concentration of atrazine that, when exceeded, presents a greater than 50 percent chance of negatively affecting the productivity, structure, and/or function of an aquatic plant community.

Cosm studies examining the toxicity of atrazine to aquatic plant communities are a significant part of the process to estimate the CE–LOC. Accordingly, from 2002 to 2016, the EPA considered over 70 cosm studies obtained from the open literature or submitted to the EPA. The 2012 FIFRA SAP identified 11 specific cosm studies from that dataset (Table 1, page 42–43 of the meeting report) as warranting further review (in terms of their inclusion/exclusion in the analysis or the effect/no effect determinations for specific measured endpoints) because of concerns about study design or performance flaws, as well as the interpretation of results.

In response to the 2012 FIFRA SAP, the EPA re-evaluated the 11 specific cosm studies identified by the FIFRA SAP and presented this re-evaluation in the 2013 ''Addendum to the Problem Formulation for the Ecological Risk Assessment to be Conducted for the Registration Review of Atrazine'' and the 2016 ''Refined Ecological Risk Assessment for Atrazine.'' In conducting this 2013 and 2016 re-evaluation, EPA considered comments from the 2012 FIFRA SAP and the public. This re-evaluation did not result in a change in the Agency's understanding or interpretation of those 11 studies. After the issuance of the 2016 ecological risk assessment and the 2022 ''Proposed Revisions to the Atrazine Interim Registration Review Decision,'' the EPA received additional public comments about the 11 studies, including a reminder that the Agency had stated in 2016 its intent to convene a FIFRA SAP meeting, along with renewed requests to convene a FIFRA SAP meeting, regarding the studies.

The EPA is returning to the FIFRA SAP to seek feedback on the outcome of the EPA's 2023 evaluation regarding the inclusion of the 11 studies, and if appropriate, effect/no effect determinations for specific measured endpoints from the studies that were identified by the 2012 FIFRA SAP.

## III. Virtual Public Meeting of the FIFRA SAP

*A. How can I access the documents submitted for review to the FIFRA SAP?*

These documents, including the reevaluation document mentioned above and all background documents, related supporting materials, and draft charge questions provided to the FIFRA SAP are available in the docket at *https://www.regulations.gov* (docket ID No. EPA–HQ–OPP–2023–0154) and the FIFRA SAP website at *https://www.epa.gov/sap.* In addition, as additional background materials become available and are provided to the FIFRA SAP, EPA will include those additional background documents (*e.g., FIFRA SAP* members and consultants participating in the meeting and the meeting agenda) in the docket and accessible through the FIFRA SAP website.

After the public meeting, the FIFRA SAP will prepare meeting minutes and a final report document summarizing its recommendations to the EPA. This document will also be posted on in the docket and available at *regulations.gov* and the FIFRA SAP website.

*B. How can I provide comments for the FIFRA SAP's consideration?*

To ensure proper receipt of comments it is imperative that you identify docket ID No. EPA–HQ–OPP–2023–0154 in the subject line on the first page of your comments and follow the instructions in this unit.

1. Written comments.

The Agency encourages written comments for this meeting be submitted by the deadlines set in the **DATES** section

of this document and following the instructions in this document.

2. Oral comments.

The Agency encourages each individual or group wishing to make brief oral comments to the FIFRA SAP during the peer review virtual public meeting to follow the registration instructions that will be announced on the FIFRA SAP website by early July 2023. Oral comments before the FIFRA SAP during the peer review virtual public meeting are limited to five minutes. In addition, each speaker should submit a written copy of their oral comments and any supporting materials (*e.g.,* presentation slides) to the DFO prior to the meeting for distribution to the FIFRA SAP by the DFO.

*C. How can I participate in the virtual public meeting?*

The virtual public meeting will be held via a webcast platform such as ''*Zoomgov.com*'' and audio teleconference. You must register online to receive the webcast meeting link and audio teleconference information. Please follow the registration instructions that will be announced on the FIFRA SAP website.

*Authority:* 5 U.S.C. 10; 7 U.S.C. 136 *et seq.;* 21 U.S.C. 301 *et seq.*

Dated: June 27, 2023.

**Michal Freedhoff,**

*Assistant Administrator, Office of Chemical Safety and Pollution Prevention.*

[FR Doc. 2023–14065 Filed 6–30–23; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–10912–01–ORD]**

### Ambient Air Monitoring Equivalent and Equivalent Methods; Designation of One New Equivalent Method

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

**ACTION:** Notice of the designation of a new equivalent method for monitoring ambient air quality.

**SUMMARY:** Notice is hereby given that the Environmental Protection Agency (EPA) has designated one new equivalent method for measuring concentrations of $PM_{10}$ in ambient air.

**FOR FURTHER INFORMATION CONTACT:** Robert Vanderpool, Air Methods and Characterization Division (MD–D205–03), Center for Environmental Measurements and Modeling, U.S. EPA, Research Triangle Park, North Carolina 27711. Phone: 919–541–7877. Email: *Vanderpool.Robert@epa.gov.*

**SUPPLEMENTARY INFORMATION:** In accordance with regulations at 40 CFR part 53, the EPA evaluates various methods for monitoring the concentrations of those ambient air pollutants for which EPA has established National Ambient Air Quality Standards (NAAQS) as set forth in 40 CFR part 50. Monitoring methods that are determined to meet specific requirements for adequacy are designated by the EPA as either equivalent or equivalent methods (as applicable), thereby permitting their use under 40 CFR part 58 by States and other agencies for determining compliance with the NAAQS. A list of all equivalent or equivalent methods that have been previously designated by EPA may be found at *https://www.epa.gov/ttn/amtic/criteria.html.*

The EPA hereby announces the designation of one new equivalent method for measuring concentrations of $PM_{10}$ in ambient air. This designation is made under the provisions of 40 CFR part 53, as amended on October 26, 2015 (80 FR 65291–65468). The new equivalent method for $PM_{10}$ is an automated method (monitor) utilizing the measurement principle based on inertial separation of the $PM_{10}$ size range with filter sample collection followed by analysis by beta attenuation. This newly designated equivalent method is identified as follows:

EQPM–0423–260,''Thermo Scientific Model 5030iQ SHARP Monitor'' operated at a flow rate of 16.67 liters per minute for 24-hour average measurements configured for $PM_{10}$ measurements with a louvered $PM_{10}$ size selective inlet as specified in 40 CFR 50 Appendix L, Figs. L–2 through L–19, inlet connector, and operational calibration and servicing as outlined in the Model 5030iQ SHARP instructional manual. Model 5030iQ instrument firmware version 01.0.09 or later.

This application for an equivalent method determination for this $PM_{10}$ method was received by the Office of Research and Development on February 22, 2023. This monitor is commercially available from the applicant, Thermo Fisher Scientific, Air Quality Instruments, Environmental Instruments Division, 27 Forge Parkway, Franklin, MA 02038.

A representative test analyzer was tested in accordance with the applicable test procedures specified in 40 CFR part 53, as amended on October 26, 2015. After reviewing the results of those tests and other information submitted by the applicant, EPA has determined, in accordance with 40 CFR part 53, that this method should be designated as an equivalent method.

As a designated equivalent method, this method is acceptable for use by states and other air monitoring agencies under the requirements of 40 CFR part 58, Ambient Air Quality Surveillance. For such purposes, this method must be used in strict accordance with the operation or instruction manual associated with the method and subject to any specifications and limitations (*e.g.,* configuration or operational settings) specified in the designated method description (see the identification of the method above).

Use of the method also should be in general accordance with the guidance and recommendations of applicable sections of the ''Quality Assurance Handbook for Air Pollution Measurement Systems, Volume I,'' EPA/600/R–94/038a and ''Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II, Ambient Air Quality Monitoring Program,'' EPA–454/B–13–003, (both available at *https://www.epa.gov/ttn/amtic/qalist.html*). Provisions concerning modification of such methods by users are specified under section 2.8 (Modifications of Methods by Users) of appendix C to 40 CFR part 58.

Consistent or repeated noncompliance with any of these conditions should be reported to: Director, Air Methods and Characterization Division (MD–D205–03), Center for Environmental Measurements and Modeling, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

Designation of this equivalent method is intended to assist the States in establishing and operating their air quality surveillance systems under 40 CFR part 58. Questions concerning the commercial availability or technical aspects of the method should be directed to the applicant.

**Alice Gilliland,**

*Acting Director, Center for Environmental Measurements and Modeling.*

[FR Doc. 2023–14083 Filed 6–30–23; 8:45 am]

**BILLING CODE 6560–50–P**

## FARM CREDIT SYSTEM INSURANCE CORPORATION

### Board of Directors Meeting

**SUMMARY:** Notice of the forthcoming regular meeting of the Board of Directors of the Farm Credit System Insurance Corporation (FCSIC), is hereby given in accordance with the provisions of the Bylaws of the FCSIC.

**DATES:** 10 a.m., Wednesday, July 12, 2023.

**ADDRESSES:** You may observe the open portions of this meeting in person at 1501 Farm Credit Drive, McLean, Virginia 22102–5090, or virtually. If you would like to virtually attend, at least 24 hours in advance, visit *FCSIC.gov,* select ''News & Events,'' then select ''Board Meetings.'' From there, access the linked ''Instructions for board meeting visitors'' and complete the described registration process.

**FOR FURTHER INFORMATION CONTACT:** If you need more information or assistance for accessibility reasons, or have questions, contact Ashley Waldron, Secretary to the Board. Telephone: 703–883–4009. TTY: 703–883–4056.

**SUPPLEMENTARY INFORMATION:** Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public. The following matters will be considered:

**Portions Open to the Public**

- Approval of Minutes for April 12, 2023
- Quarterly FCSIC Financial Reports
- Quarterly Report on Insured Obligations
- Quarterly Report on Annual Performance Plan
- Mid-Year Review of Insurance Premium Rates
- Policy Statement Concerning Assistance

**Portions Closed to the Public**

- Quarterly Report on Insurance Risk

**Ashley Waldron,**

*Secretary to the Board.*

[FR Doc. 2023–14067 Filed 6–30–23; 8:45 am]

**BILLING CODE 6705–01–P**

## FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

### Notice of Request for Comment on an Exposure Draft Titled Transitional Amendment to SFFAS 54

**AGENCY:** Federal Accounting Standards Advisory Board.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the Federal Accounting Standards Advisory Board (FASAB) has released an exposure draft of a proposed Statement of Federal Financial Accounting Standards (SFFAS) titled *Transitional Amendment to SFFAS 54.* Respondents are encouraged to comment on any part of the exposure draft.

**DATES:** Written comments are requested by July 27, 2023.

**ADDRESSES:** Written comments should be sent to *fasab@fasab.gov* or Monica R. Valentine, Executive Director, Federal Accounting Standards Advisory Board, 441 G Street NW, Suite 1155, Washington, DC 20548. The exposure draft is available on the FASAB website at *https://www.fasab.gov/documents-for-comment/.* Copies can be obtained by contacting FASAB at (202) 512–7350.

**FOR FURTHER INFORMATION CONTACT:** Ms. Monica R. Valentine, Executive Director, 441 G Street NW, Suite 1155, Washington, DC 20548, or call (202) 512–7350.

(Authority: 31 U.S.C. 3511(d); Federal Advisory Committee Act, 5 U.S.C. 1001–1014)

Dated: June 27, 2023.

**Monica R. Valentine,**

*Executive Director.*

[FR Doc. 2023–14000 Filed 6–30–23; 8:45 am]

**BILLING CODE 1610–02–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–0357; FR ID 151597]**

### Information Collection Being Submitted for Review and Approval to Office of Management and Budget

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it can further reduce the information collection burden for small business concerns with fewer than 25 employees.

**DATES:** Written comments and recommendations for the proposed information collection should be submitted on or before August 2, 2023.

**ADDRESSES:** Comments should be sent to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *https://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review ,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

**SUPPLEMENTARY INFORMATION:** The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C.

3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

*OMB Control No.*: 3060–0357.

*Title:* Recognized Private Operating Agency (RPOA), 47 CFR 63.701.

*Form Number:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 2 respondents; 3 responses.

*Estimated Time per Response:* 3–6 hours.

*Frequency of Response:* On occasion reporting requirement.

*Obligation To Respond:* Required to obtain or retain benefits. The Commission has statutory authority for this collection pursuant to Sections 4(i), 4(j), 201–205, 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(j), 201–25, 214 and 403.

*Total Annual Burden:* 8 hours.

*Annual Cost Burden:* $4,810.

*Needs and Uses:* The Federal Communications Commission (Commission) is requesting that the Office of Management and Budget (OMB) to approve a revision to OMB Control No. 3060–0357—Recognized Private Operating Agency—47 CFR 63.701. The Commission is developing revised and new electronic forms for this collection as part of the Commission's modernization of its online, web-based electronic filing system—the International Bureau filing system (IBFS). This information collection seeks approval for the new and revised forms for requests to be designated as a Recognized Operating Agency (ROA), and reflects changes in the costs and burdens associated with these applications.

At the request of the U.S. Department of State (State Department), the Commission adopted a voluntary program by which companies that provide enhanced services could seek designation as a recognized private operating agency. The term recognized private operating agency was used in the International Telecommunication Convention, the international agreement that created the International Telecommunication Union (ITU), to refer to private-sector providers of international telecommunication services that had been ''recognized'' either by the government of the country in which they had been incorporated, or the country where they operated. Today, the term recognized private operating agency is interchangeable with the term recognized operating agency (ROA).

Most providers of international telecommunications services to or from the U.S. hold either an authorization under section 214 of the Communications Act or a radio license under section 301 of the Act. The issuance of such authorizations or licenses is public evidence that the U.S. government ''recognizes'' the entities to which they are issued. However, providers of enhanced services are not licensed or authorized. They are permitted to begin operations without any formal applications or notifications. It is not, therefore, immediately apparent to foreign governments that a U.S. enhanced service provider has been ''recognized'' within the meaning of the ITU Convention. As a consequence, such entities have sometimes found foreign governments unwilling to let them operate in those countries.

As a result, providers requested that the Commission and the State Department develop a program whereby enhanced service providers could be formally designated as ROAs. The program that was developed calls for those entities wishing to obtain such a designation to submit an application to the Commission setting forth pertinent information about the provider and the services it proposes to provide and a pledge by the provider that it would abide by all international obligations to which the U.S. is a signatory. The Commission places the application on public notice and allows interested parties to comment on the application.

The Commission then makes a recommendation, based on the application and comments, to the State Department either to grant or deny the request. The State Department then acts on the recommendation and notifies the ITU of any applications that it grants. ROA designation is voluntary. If an enhanced service provider does not find such designation necessary, it is not required to file an application. In order to implement this program, the Commission adopted 47 CFR 63.701 to set forth the information that must be contained in an application for designation as an ROA. ROA designations do not have expiration dates. They continue indefinitely, unless revoked for cause. ROAs are not required to file any reports or other information with the Commission throughout their indefinite period of designation. Any party requesting designation as an ROA within the meaning of the International Telecommunication Convention must file a request for such designation with the Commission. This filing includes a statement of the nature of the services to be provided and a statement that the applicant is aware that it is obligated under Article 6 of the ITU to obey the mandatory provisions thereof, and all regulations promulgated there under, and a pledge that it will engage in no conduct or operations that contravene such mandatory provisions and that it will otherwise obey the Convention and regulations in all respects. The applicant must also include a statement that it is aware that failure to comply will result in an order from the Commission to cease and desist from future violations of an ITU regulation and may result in revocation of its ROA status by the State Department.

ICFS Modernization of ROA Electronic Forms. The Commission seeks OMB approval of revisions to its ROA application forms and the addition of new forms that will be electronically filed through ICFS. The new online forms will ensure the Commission collects the information required by the Commission's rules. The use of such online forms will reduce costs and administrative burdens on applicants, resulting in greater efficiencies, and improve transparency to the public. Once the Commission receives approval for the new forms from OMB, as required by section 1.10006 of the Commission's rules, we will announce the availability of mandated e-forms and their effective dates.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2023–14011 Filed 6–30–23; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–1029; FR ID 151358]**

### Information Collection Being Submitted for Review and Approval to Office of Management and Budget

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC

seeks specific comment on how it can further reduce the information collection burden for small business concerns with fewer than 25 employees.

**DATES:** Written comments and recommendations for the proposed information collection should be submitted on or before August 2, 2023.

**ADDRESSES:** Comments should be sent to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *https://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

**SUPPLEMENTARY INFORMATION:** The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

*OMB Control No.:* 3060–1029.

*Title:* Data Network Identification Code (DNIC).

*Form No.:* N/A.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Business or other for-profit entities.

*Number of Respondents:* 1 respondent; 3 responses.

*Estimated Time per Response:* 0.5–4 hours.

*Frequency of Response:* On occasion reporting requirement.

*Obligation To Respond:* Required to obtain or retain benefits. The statutory authority for this collection is contained in Sections 1, 4(i)–(j), 201–205, 211, 214, 219–220, 303(r), 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 201–205, 211, 214, 219–220, 303(r), 309 and 403.

*Total Annual Burden:* 4 hours.

*Annual Cost Burden:* $1,850.

*Needs and Uses:* The Federal Communications Commission (''Commission'') is requesting that the Office of Management and Budget (OMB) to approve a revision to OMB Control No. 3060–1029—Data Network Identification Code (DNIC). The Commission is developing revised and new electronic forms for this collection as part of the Commission's modernization of its online, web-based electronic filing system—the International Bureau filing system (IBFS). This information collection seeks approval for the new and revised forms to request an International Signaling Point Code (ISPC), and reflects changes in the costs and burdens associated with these applications.

A Data Network Identification Code (DNIC) is a unique, four-digit number designed to provide discrete identification of individual public data networks. The DNIC is intended to identify and permit automated switching of data traffic to particular networks. The DNIC is the central device of the international data numbering plan developed by the International Telecommunications Union (ITU) and set forth in Recommendation X.121. Prior to the availability of electronic web-based application forms in 1999, the Commission used an informal process for assigning DNICs. In the informal system, a company desiring a code would notify the Commission that it wishes one assigned and demonstrate that it has the ability to originate and terminate international traffic (*e.g.,* by showing an interconnection arrangement with a U.S. international carrier) and the Commission would assign a DNIC. In 1986, the Commission established procedures for the assignment of DNICs to interested data network operators. Today, the operators of public data networks file an application for a DNIC in IBFS. The DNIC is obtained on a one-time only basis unless there is a change in ownership or the owner chooses to relinquish the code to the Commission.

IBFS Modernization of DNIC Electronic Forms. The Commission seeks OMB approval of revisions to its DNIC application form and the addition of new forms that will be electronically filed through IBFS. The new online forms will ensure the Commission collects the information required by the Commission's rules. The use of such online forms will reduce costs and administrative burdens on applicants, resulting in greater efficiencies, and improve transparency to the public. Once the Commission receives approval for the new forms from OMB, as required by section 1.10006 of the Commission's rules, we will announce the availability of mandated e-forms and their effective dates.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2023–14013 Filed 6–30–23; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–0057; FR ID 151421]**

### 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 September 1, 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:* 3060–0057.

*Title:* Application for Equipment Authorization, FCC Form 731.

*Form Number:* FCC Form 731.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents and Responses:* 11,305 respondents; 24,873 responses.

*Estimated Time per Response:* 0.1–40 hours.

*Frequency of Response:* On occasion and other ongoing reporting requirements.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 154(i), 301, 302a, 303, 309(j), 312, 316, and the Secure Equipment Act of 2021, Public Law 117–55, 135 Stat. 423.

*Total Annual Burden:* 206,863 hours.

*Total Annual Cost:* $50,155,140.

*Needs and Uses:* The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60-day comment period to obtain the three-year clearance. The information will be used by the Commission to fulfill its statutory mandate under the Secure Equipment Act of 2021, Public Law 117–55, 135 Stat. 423 (2021) to implement prohibitions in its equipment authorization program that will protect the nation's telecommunications systems from equipment that has been determined to pose an unacceptable risk to national security or the safety of U.S. persons.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2023–14012 Filed 6–30–23; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–10847]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**DATES:** Comments on the collection(s) of information must be received by the OMB desk officer by August 2, 2023.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

**FOR FURTHER INFORMATION CONTACT:** William Parham at (410) 786–4669.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Negotiation Data

Elements under Sections 11001 and 11002 of the Inflation Reduction Act; *Use:* Under the authority in sections 11001 and 11002 of the Inflation Reduction Act of 2022 (Pub. L. 117–169), the Centers for Medicare & Medicaid Services (CMS) is implementing the Medicare Drug Price Negotiation Program (the ''Negotiation Program''), codified in sections 1191 through 1198 of the Social Security Act (''the Act''). The Act establishes the Negotiation Program to negotiate maximum fair prices (''MFPs''), defined at 1191(c)(3) of the Act, for certain high expenditure, single source selected drugs covered under Medicare Part B and Part D. For the first year of the Negotiation Program, the Secretary of Health and Human Services (the ''Secretary'') will select 10 Part D high expenditure, single source drugs for negotiation.

The statute requires that CMS consider certain data from Primary Manufacturers as part of the negotiation process. These data include the data required to calculate non-FAMP for selected drugs for the purpose of establishing a ceiling price, as outlined in section 1193(a)(4)(A), and the negotiation factors outlined in section 1194(e)(1) for the purpose of formulating offers and counteroffers process pursuant to section 1193(a)(4)(B). Some of these data are held by the Primary Manufacturer and are not currently available to CMS. Data described in section 1194(e)(1) and 1193(a)(4) must be submitted by the Primary Manufacturer.

Section 1194(e)(2) requires CMS to consider certain data on alternative treatments to the selected drug. Because the statute does not specify where these data come from, CMS will allow for optional submission from Primary Manufacturers and the public. CMS will additionally review existing literature, conduct internal analyses, and consult subject matter and clinical experts on the factors listed in 1194(e)(2) to ensure consideration of such factors. Manufacturers may optionally submit this information as part of their Negotiation Data Elements Information Collection Request Form. The public may optionally submit evidence about alternative treatments. *Form Number:* CMS–10847 (OMB control number: 0938–NEW); *Frequency:* Occasionally; *Affected Public:* Individuals and Households, Private Sector (Business or other for-profits and Not-for-profit institutions); *Number of Respondents:* 3,300; *Total Annual Responses:* 3,000; *Total Annual Hours:* 17,000. (For policy questions regarding this collection contact Lara Strawbridge at 410–786–6880.)

Dated: June 29, 2023.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2023–14176 Filed 6–30–23; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–1800–N]**

### Inflation Reduction Act (IRA) Revised Program Guidance

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing the availability of CMS' revised guidance for the Medicare Drug Price Negotiation Program for the implementation of the Inflation Reduction Act. CMS will be releasing additional Inflation Reduction Act-related guidance; all can be viewed on the dedicated Inflation Reduction Act section of the CMS website.

**ADDRESSES:** Inquiries related to the revised guidance should be sent to *IRARebateandNegotiation@cms.hhs.gov* with the relevant subject line, ''Medicare Drug Price Negotiation Program Guidance.''

**SUPPLEMENTARY INFORMATION:** The Inflation Reduction Act was signed into law on August 16, 2022. Sections 11001 and 11002 of the Inflation Reduction Act (IRA) (Pub. L. 117–169), signed into law on August 16, 2022, established the Medicare Drug Price Negotiation Program (hereafter the ''Negotiation Program'') to negotiate Maximum Fair Prices (MFPs) for certain high expenditure, single source drugs and biological products. The requirements for this program are described in sections 1191 through 1198 of the Social Security Act (hereafter ''the Act'') as added by sections 11001 and 11002 of the Inflation Reduction Act.

To obtain copies of the revised guidance and the responses to comments from the initial guidance, as well as other Inflation Reduction Act-related documents, please access the CMS Inflation Reduction Act website by copying and pasting the following web address into your web browser: *https://www.cms.gov/inflation-reduction-act-and-medicare.* If interested in receiving CMS Inflation Reduction Act updates by email, individuals may sign up for CMS Inflation Reduction Act's email updates at *https://www.cms.gov/About-CMS/Agency-Information/Aboutwebsite/EmailUpdates.*

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Evell J. Barco Holland, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: June 28, 2023.

**Evell J. Barco Holland,**

*Federal Register Liaison, Centers for Medicare & Medicaid Services.*

[FR Doc. 2023–14097 Filed 6–30–23; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2023–N–2440]**

### Cardiovascular and Renal Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice; establishment of a public docket; request for comments.

**SUMMARY:** The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Cardiovascular and Renal Drugs Advisory Committee. The general function of the committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

**DATES:** The meeting will be held on September 13, 2023, from 9 a.m. to 4 p.m. Eastern Time.

**ADDRESSES:** All meeting participants will be heard, viewed, captioned, and recorded for this advisory committee meeting via an online teleconferencing and/or video conferencing platform.

Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FDA is establishing a docket for public comment on this meeting. The

docket number is FDA–2023–N–2440. The docket will close on September 12, 2023. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of September 12, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Comments received on or before August 29, 2023, will be provided to the committee. Comments received after that date will be taken into consideration by FDA. In the event that the meeting is cancelled, FDA will continue to evaluate any relevant applications or information, and consider any comments submitted to the docket, as appropriate.

You may submit comments as follows:

*Electronic Submissions*

Submit electronic comments in the following way:

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

*Written/Paper Submissions*

Submit written/paper submissions as follows:

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

*Instructions:* All submissions received must include the Docket No. FDA–2023–N–2440 for ''Cardiovascular and Renal Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

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

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

**FOR FURTHER INFORMATION CONTACT:** Joyce Frimpong, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–7973, email: *CRDAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before the meeting.

**SUPPLEMENTARY INFORMATION:**

*Agenda:* The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing and/or video conferencing platform. The committee will discuss supplemental new drug application (sNDA) 210922–s015, for ONPATTRO (patisiran) lipid complex for injection, submitted by Alnylam Pharmaceuticals, Inc., for the proposed treatment of the cardiomyopathy of wild-type or hereditary transthyretin-mediated amyloidosis in adults.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting. Background material and the link to the online teleconference and/or video conference meeting will be available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link. The meeting will include slide presentations with audio and video components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

*Procedure:* Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. All electronic and written submissions to the Docket (see **ADDRESSES**) on or before August 29, 2023, will be provided to the committee. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Eastern Time. Those individuals interested in making formal

oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before August 21, 2023. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by August 22, 2023.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Joyce Frimpong (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*). This meeting notice also serves as notice that, pursuant to 21 CFR 10.19, the requirements in 21 CFR 14.22(b), (f), and (g) relating to the location of advisory committee meetings are hereby waived to allow for this meeting to take place using an online meeting platform. This waiver is in the interest of allowing greater transparency and opportunities for public participation, in addition to convenience for advisory committee members, speakers, and guest speakers. No participant will be prejudiced by this waiver, and that the ends of justice will be served by allowing for this modification to FDA's advisory committee meeting procedures.

Dated: June 27, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2023–14037 Filed 6–30–23; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Lists of Designated Primary Medical Care, Mental Health, and Dental Health Professional Shortage Areas

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** This is the first of two notices planned for the coming months informing the public of the availability of the complete lists of all geographic areas, population groups, and facilities designated as primary medical care, dental health, and mental health professional shortage areas (HPSAs). This notice includes the lists of HPSAs in a designated status as of April 28, 2023. The lists are available on the shortage area topic page on HRSA's *data.hrsa.gov* website and includes HPSAs which are proposed for withdrawal but currently remain designated. HRSA is extending the transition time communicated in the notice published on July 7, 2022, for jurisdictions and facilities to prepare for potential loss of HPSA designations. HPSA designations that are currently proposed for withdrawal will remain in this status until they are re-evaluated in preparation for the publication of the January 2, 2024, HPSA **Federal Register** notice. If these HPSAs do not meet the requirements for designation by the data pull scheduled for November 15, 2023, they will be withdrawn with the publication of a second **Federal Register** notice planned for January 2, 2024.

**ADDRESSES:** Complete lists of HPSAs designated as of April 28, 2023, are available on the website at *https://data.hrsa.gov/tools/health-workforce/shortage-areas/frn.* Frequently updated information on HPSAs is available at *https://data.hrsa.gov/topics/health-workforce/health-workforce-shortage-areas.* Information on shortage designations is available at *https://bhw.hrsa.gov/workforce-shortage-areas/shortage-designation.*

**FOR FURTHER INFORMATION CONTACT:** For further information on the HPSA designations listed on the website or to request additional designation, withdrawal, or reapplication for designation, please contact Anthony Estelle, Chief, Shortage Designation Branch, Division of Policy and Shortage Designation, Bureau of Health Workforce (BHW), HRSA, 5600 Fishers Lane, Room 11W16, Rockville, Maryland 20857, *sdb@hrsa.gov* or (301) 945–0942.

**SUPPLEMENTARY INFORMATION:**

#### Background

Section 332 of the Public Health Service (PHS) Act, 42 U.S.C. 254e, provides that the Secretary shall designate HPSAs based on criteria established by regulation. HPSAs are defined in section 332 to include (1) urban and rural geographic areas with shortages of health professionals, (2) population groups with such shortages, and (3) facilities with such shortages. Section 332 further requires that the Secretary annually publish lists of the designated geographic areas, population groups, and facilities. This notice meets that requirement. The lists of HPSAs are to be reviewed at least annually and revised as necessary.

Final regulations (42 CFR part 5) were published in 1980 that include the criteria for designating HPSAs. Criteria were defined for seven health professional types: primary medical care, dental, psychiatric, vision care, podiatric, pharmacy, and veterinary care. The criteria for correctional facility HPSAs were revised and published on March 2, 1989 (54 FR 8735). The criteria for psychiatric HPSAs were expanded to mental health HPSAs on January 22, 1992 (57 FR 2473). Currently funded PHS Act programs use only the primary medical care, mental health, or dental HPSA or relevant sub-score designations such as Maternity Care Target Areas.

HPSA designation offers access to potential Federal assistance. Public or private nonprofit entities are eligible to apply for assignment of National Health Service Corps personnel to provide primary medical care, mental health, or dental health services in or to these HPSAs. National Health Service Corps health professionals enter into service agreements to serve in federally designated HPSAs. Entities with clinical training sites located in HPSAs are eligible to receive priority for certain residency training program grants administered by HRSA's BHW. Other Federal programs also utilize HPSA designations. For example, under authorities administered by the Centers for Medicare & Medicaid Services, certain qualified providers in geographic area HPSAs are eligible for increased levels of Medicare reimbursement.

#### Content and Format of Lists

The three lists of designated HPSAs are available on the HRSA Data Warehouse shortage area topic web page and include a snapshot of all geographic

areas, population groups, and facilities that were designated HPSAs as of April 28, 2023. This notice incorporates the most recent annual reviews of designated HPSAs (including those that have been proposed for withdrawal but have not yet been withdrawn) which can be located on HRSA's *data.hrsa.gov* website and supersedes the HPSA lists published in the **Federal Register** on July 7, 2022, (87 FR 40540–40451).

In addition, all Indian Tribes that meet the definition of such Tribes in the Indian Health Care Improvement Act of 1976, 25 U.S.C. 1603, are automatically designated as population groups with primary medical care and dental health professional shortages. Further, the Health Care Safety Net Amendments of 2002 provides eligibility for automatic facility HPSA designations for all federally qualified health centers (FQHCs) and rural health clinics that offer services regardless of ability to pay. Specifically, these entities include FQHCs funded under section 330 of the PHS Act, FQHC Look-Alikes, and Tribal and urban Indian clinics operating under the Indian Self-Determination and Education Act of 1975 (25 U.S.C. 450) or the Indian Health Care Improvement Act. Many, but not all, of these entities are included on this listing. Since they are automatically designated by statute, absence from this list does not exclude them from HPSA designation; facilities eligible for automatic designation are included in the database when they are identified.

Each list of designated HPSAs is arranged by state. Within each state, the list is presented by county. If only a portion (or portions) of a county is (are) designated, a county is part of a larger designated service area, or a population group residing in a county or a facility located in the county has been designated, the name of the service area, population group, or facility involved is listed under the county name. A county that has a whole county geographic or population group HPSA is indicated by the phrase ''County'' following the county name.

**Development of the Designation and Withdrawal Lists**

Requests for designation or withdrawal of a particular geographic area, population group, or facility as a HPSA are received continuously by BHW. Under a Cooperative Agreement between HRSA and the 54 state and territorial Primary Care Offices (PCOs), PCOs conduct needs assessments and submit applications to HRSA to designate HPSAs. BHW also receives other requests for designation from other sources and refers them to PCOs for review. As part of the HPSA designation process, interested parties, including Governors, state Primary Care Associations, and state professional associations, are notified of requests so that they may submit their comments and recommendations.

BHW reviews each recommendation for possible addition, continuation, revision, or withdrawal. Following review, BHW notifies the appropriate agency, individuals, and interested organizations of each designation of a HPSA, rejection of recommendation for HPSA designation, revision of a HPSA designation, and/or advance notice of pending withdrawals from the HPSA list. Designations (or revisions of designations) are effective as of the date on the notification from BHW and are updated daily on the HRSA Data Warehouse website. While this list is a snapshot of HPSAs at a point in time, HPSA designations are regularly being updated so the best source of current designation status is the HRSA Data Warehouse website at (*https://data.hrsa.gov/tools/shortage-area*).

State and territorial PCOs will have additional time to update their HPSA designations. HPSA designations that are currently proposed for withdrawal will remain in this status until they are re-evaluated in mid-November in preparation for the publication of the January 2, 2024, HPSA **Federal Register** notice. If these HPSAs do not meet the requirements for designation as of November 15, 2023, they will be withdrawn with the publication of a second **Federal Register** notice planned for January 2, 2024.

**Carole Johnson,**

*Administrator.*

[FR Doc. 2023–14092 Filed 6–30–23; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Indian Health Service

### Request for Public Comment: 60-Day Information Collection: Indian Health Service Forms To Implement the Privacy Rule

**AGENCY:** Indian Health Service, Department of Health and Human Services.

**ACTION:** Notice and request for comments. Request for extension of approval.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, the Indian Health Service (IHS) invites the general public to comment on the information collection titled, ''IHS Forms to Implement the Privacy Rule'' Office of Management and Budget (OMB) Control Number 0917–0030. This previously approved information collection project was last published in the **Federal Register** (84 FR 42935) on August 19, 2019, and allowed 30 days for public comment. No public comment was received in response to the notice. This notice announces the IHS's intent to submit the collection, which expires August 31, 2023, to OMB for approval of an extension with modifications, and to solicit comments on specific aspects of the information collection.

**DATES:** September 1, 2023. Your comments regarding this information collection are best assured of having full effect if received within 60 days of the date of this publication.

**ADDRESSES:** Send your written comments, requests for more information on the collection, or requests to obtain a copy of the data collection instrument and instructions to Heather McClane, Privacy Officer, by email at: *Heather.McClane@ihs.gov* or telephone at (240) 479–8521.

**FOR FURTHER INFORMATION CONTACT:** To request additional information, please contact Evonne Bennett, Information Collection Clearance Officer by email at: *Evonne.Bennett@ihs.gov* or telephone at (240) 472–1996.

**SUPPLEMENTARY INFORMATION:** The purpose of this notice is to allow 60 days for public comment to be submitted to the IHS. A copy of the supporting statement is available at *www.regulations.gov* (see Docket ID IHS_FRDOC_0001).

*Title of Collection:* 0917–0030, IHS Forms to Implement the Privacy Rule (45 CFR parts 160 and 164). *Type of Information Collection Request:* Extension of the currently approved information collection, with modifications 0917–0030, IHS Forms to Implement the Privacy Rule (45 CFR parts 160 and 164). *Form(s):* IHS–810, IHS–912–1, IHS–912–2, IHS–913, IHS–917, IHS–XXX, and IHS–963. *Need and Use of Information Collection:* This collection of information is made necessary by the Department of Health and Human Services Rule entitled ''Standards for Privacy of Individually Identifiable Health Information'' (Privacy Rule) (45 CFR parts 160 and 164). The Privacy Rule implements the privacy requirements of the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, creates national standards to protect an individual's personal health

information, and gives patients increased access to their medical records. 45 CFR 164.508, 164.520, 164.522, 164.526, and 164.528 of the Rule require the collection of information to implement these protection standards and access requirements. The IHS will use the following data collection instruments to meet the information collection requirements contained in the Rule.

**(a) 45 CFR 164.508—Authorization for Use or Disclosure of Protected Health Information (IHS–810)**

45 CFR 164.508 requires covered entities to obtain or receive a valid authorization for its use or disclosure of protected health information for purposes that are not otherwise authorized or required by HIPAA (*e.g.,* treatment, payment and healthcare operations). Under this provision, individuals may initiate a written authorization permitting covered entities to release their protected health information to entities of their choosing. The form IHS–810 ''Authorization for Use or Disclosure of Protected Health Information'' is used by patients at IHS facilities to document and authorize the use, disclosure or release of their protected health information from their medical record to anyone they specify.

**(b) 45 CFR 164.520—Acknowledgement of Receipt of the IHS Notice of Privacy Practices (IHS–XXX)**

This provision requires covered entities to provide a Notice of Privacy Practices to patients and to document compliance with the notice requirements by retaining copies of written acknowledgments of the receipt of the notice or documentation of good faith efforts to obtain written acknowledgment. The IHS developed the form (IHS–XXX) ''Acknowledgement of Receipt of IHS Notice of Privacy Practices'' to obtain the written acknowledgment of the receipt of the IHS Notice of Privacy Practices.

**(c) 45 CFR 164.522(a)(1)—Request For Restriction(s) (IHS–912–1)**

Under the Privacy Rule, an individual can request to restrict the use of their information with some exceptions. Section 164.522(a)(1) requires a covered entity to permit individuals to request that the covered entity restrict certain uses and disclosures of their protected health information. The covered entity may or may not agree to the restriction, and it is only required to agree in certain limited situations. The form IHS–912–1 ''Request for Restrictions(s)'' is used to document an individual's request for restriction of their protected health information and whether the IHS agreed or disagreed with the requested restriction.

**(d) 45 CFR 164.522(b)(1)—Request for Confidential Communication by Alternative Means or Alternate Location (IHS–963)**

This provision requires covered entities to permit individuals to request and must accommodate reasonable requests by individuals to receive communications of protected health information from the covered health care provider by alternative means or at alterative locations. The form IHS–963 ''Request for Confidential Communication By Alternative Means or Alternate Location'' is used to permit individuals to request communications by alternative means or locations.

**(e) 45 CFR 164.522(a)(2)—Request For Revocation of Restriction(s) (IHS–912–2)**

Section 164.522(a)(2) permits a covered entity to terminate its agreement to a restriction when the individual agrees to or requests the termination in writing. The form IHS–912–2 ''Request for Revocation of Restriction(s)'' is used to document the agency or individual request to terminate a formerly agreed to restriction regarding the use and disclosure of protected health information. A previous request to restrict information may be revoked by the individual or IHS, subject to the limitations set forth in § 164.522(a)(2).

**(f) 45 CFR 164.528 and HHS Privacy Act Regulations, 45 CFR 5b.9(c)—Request for an Accounting of Disclosures (IHS–913)**

These provisions require the IHS, as a covered entity and an agency within HHS, to permit individuals to request that the IHS provide an accounting of disclosures of the individual's protected health information and/or record. The form IHS–913 ''Request for an Accounting of Disclosures'' is used for the collection of information for the purpose of processing an accounting of disclosures requested by the patient and/or personal representative, and to document that request.

(g) 45 CFR 164.526—Request for Correction/Amendment of Protected Health Information (IHS–917)

This provision requires covered entities to permit an individual to request that the covered entity amend protected health information. If the covered entity accepts the requested amendment, in whole or in part, the covered entity must inform the individual that the request for an amendment is accepted. If the covered entity denies the requested amendment, in whole or in part, the covered entity must provide the individual with a written denial. The form IHS–917 ''Request Correction/Amendment of Protected Health Information'' is used for individuals to submit their request and to document the IHS's acceptance or denial of a patient's request to correct or amend their protected health information.

Completed forms used in this collection of information are filed in the IHS ''Medical, Health and Billing Records,'' a Privacy Act System of Records. *Affected Public:* Individuals and households. *Type of Respondents:* Individuals. *Burden Hours:* The table below provides the following details for this information collection: types of data collection instruments, estimated number of respondents, number of responses per respondent, average burden hour per response.

TABLE—ESTIMATED ANNUAL BURDEN HOURS

| Data collection instruments | Estimated number of respondents | Responses per respondent | Average burden hour per response * | Total annual burden hours |
|---|---|---|---|---|
| ''Authorization for Use or Disclosure of Protected Health Information'' (OMB No. 0917–0030, IHS–810) | 210,954 | 1 | 10/60 | 35,159 |
| ''Request for Restriction(s)'' (OMB No. 0917–0030, IHS–912–1) | 214 | 1 | 10/60 | 36 |
| ''Request for Revocation of Restriction(s)'' (OMB No. 0917–0030, IHS–912–2) | 3 | 1 | 10/60 | .5 |
| ''Request for Accounting of Disclosures'' (OMB No. 0917–0030, IHS–913) | 39 | 1 | 10/60 | 6.5 |

TABLE—ESTIMATED ANNUAL BURDEN HOURS—Continued

| Data collection instruments | Estimated number of respondents | Responses per respondent | Average burden hour per response * | Total annual burden hours |
|---|---|---|---|---|
| "Request for Correction/Amendment of Protected Health Information" (OMB No. 0917–0030, IHS–917) | 54 | 1 | 10/60 | 9 |
| Acknowledgement of Receipt of the Notice of Privacy Practices Protected Health Information (IHS–XXX) | 39 | 1 | 10/60 | 6.5 |
| "Request for Confidential Communication by Alternative Means or Alternate Location" No. 0917–0030 (IHS–963) | 214 | 1 | 10/60 | 36 |
| Total Annual Burden | 211,303 | | | 35,253.5 |

* For ease of understanding, burden hours are provided in actual minutes.

The total estimated burden for this collection of information is 35,253.5 hours.

There are no capital costs, operating costs and/or maintenance costs to respondents to report.

*Requests for Comments:* Your written comments and/or suggestions are invited on one or more of the following points:

(a) Whether the information collection activity is necessary to carry out an agency function;

(b) Whether the agency processes the information collected in a useful and timely fashion;

(c) The accuracy of the public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information);

(d) Whether the methodology and assumptions used to determine the estimates are logical;

(e) Ways to enhance the quality, utility, and clarity of the information being collected; and

(f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

**P. Benjamin Smith,**

*Deputy Director, Indian Health Service.*

[FR Doc. 2023–14017 Filed 6–30–23; 8:45 am]

**BILLING CODE 4165–16–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory General Medical Sciences Council.

The meeting will be held as a virtual meeting and open to the public. as indicated below. Individuals who plan to view the virtual meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should submit a request using the following link: *https://www.nigms.nih.gov/Pages/ContactUs.aspx* at least 5 days prior to the event. The open session will also be videocast, closed captioned, and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov*).

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Advisory General Medical Sciences Council.

*Date:* September 7, 2023.

*Open:* 9:30 a.m. to 12:30 p.m.

*Agenda:* For the discussion of program policies and issues; opening remarks; report of the Director, NIGMS; and other business of the Council.

*Place:* National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

*Closed:* 1:30 p.m. to 4:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Erica L. Brown, Ph.D., Director, Division of Extramural Activities, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 2AN24C, Bethesda, MD 20892, 301–594–4499, *erica.brown@nih.gov*.

Members of the public are welcome to provide written comments by emailing *NIGMS_DEA_Mailbox@nigms.nih.gov* at least 3 days in advance of the meeting. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.nigms.nih.gov/About/Council,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: June 27, 2023.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–13994 Filed 6–30–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Topics in Cancer Immunology.

*Date:* July 19, 2023.

*Time:* 10:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Hybrid Meeting).

*Contact Person:* Sarita Kandula Sastry, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20782, 301–402–4788, *sarita.sastry@nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Glia Function, Neurodegeneration and Neuroregulation.

*Date:* July 25, 2023.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Kirk Thompson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, 301–435–1242, *kgt@mail.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Macromolecular Biophysics and Biological Chemistry.

*Date:* July 25, 2023.

*Time:* 10:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Michael Eissenstat, Ph.D., Scientific Review Officer, BCMB IRG Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, 301–435–1722, *eissenstatma@csr.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Topics in Clinical Informatics and Data Analytics.

*Date:* July 25, 2023.

*Time:* 10:00 a.m. to 7:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Kristen Prentice, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3112, MSC 7808, Bethesda, MD 20892, (301) 496–0726, *prenticekj@mail.nih.gov*.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; HEAL RFAs: Career Transition Awards.

*Date:* July 25, 2023.

*Time:* 11:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Katherine M. Malinda, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4140, MSC 7814, Bethesda, MD 20892, (301) 435–0912, *malindakm@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: June 27, 2023.

**Victoria E. Townsend,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–13993 Filed 6–30–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Substance Abuse and Mental Health Services Administration

### Current List of HHS-Certified Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine and Oral Fluid Drug Testing for Federal Agencies

**AGENCY:** Substance Abuse and Mental Health Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Department of Health and Human Services (HHS) notifies Federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITFs) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs using Urine or Oral Fluid (Mandatory Guidelines).

**FOR FURTHER INFORMATION CONTACT:** Anastasia Donovan, Division of Workplace Programs, SAMHSA/CSAP, 5600 Fishers Lane, Room 16N06B, Rockville, Maryland 20857; 240–276–2600 (voice); *Anastasia.Donovan@samhsa.hhs.gov* (email).

**SUPPLEMENTARY INFORMATION:** In accordance with Section 9.19 of the Mandatory Guidelines, a notice listing all currently HHS-certified laboratories and IITFs is published in the **Federal Register** during the first week of each month. If any laboratory or IITF certification is suspended or revoked, the laboratory or IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory or IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the internet at *https://www.samhsa.gov/workplace/resources/drug-testing/certified-lab-list.*

The Department of Health and Human Services (HHS) notifies federal agencies of the laboratories and Instrumented Initial Testing Facilities (IITFs) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines) using Urine and of the laboratories currently certified to meet the standards of the Mandatory Guidelines using Oral Fluid.

The Mandatory Guidelines using Urine were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November 25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); April 30, 2010 (75 FR 22809); and on January 23, 2017 (82 FR 7920).

The Mandatory Guidelines using Oral Fluid were first published in the **Federal Register** on October 25, 2019 (84 FR 57554) with an effective date of January 1, 2020.

The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71 and allowed urine drug testing only. The Mandatory Guidelines using Urine have since been revised, and new Mandatory Guidelines allowing for oral fluid drug testing have been published. The Mandatory Guidelines require strict standards that laboratories and IITFs must meet in order to conduct drug and specimen validity tests on specimens for federal agencies. HHS does not allow IITFs to conduct oral fluid testing.

To become certified, an applicant laboratory or IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory or IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and IITFs in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines using Urine and/or Oral Fluid. An HHS-certified laboratory or IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA), which attests that the test facility has met minimum standards. HHS does not allow IITFs to conduct oral fluid testing.

#### HHS-Certified Laboratories Approved To Conduct Oral Fluid Drug Testing

In accordance with the Mandatory Guidelines using Oral Fluid dated October 25, 2019 (84 FR 57554), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on oral fluid specimens:

At this time, there are no laboratories certified to conduct drug and specimen validity tests on oral fluid specimens.

**HHS-Certified Instrumented Initial Testing Facilities Approved To Conduct Urine Drug Testing**

In accordance with the Mandatory Guidelines using Urine dated January 23, 2017 (82 FR 7920), the following HHS-certified IITFs meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Dynacare, 6628 50th Street NW, Edmonton, AB Canada T6B 2N7, 780–784–1190, (Formerly: Gamma-Dynacare Medical Laboratories)

**HHS-Certified Laboratories Approved To Conduct Urine Drug Testing**

In accordance with the Mandatory Guidelines using Urine dated January 23, 2017 (82 FR 7920), the following HHS-certified laboratories meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Alere Toxicology Services, 1111 Newton St., Gretna, LA 70053, 504–361–8989/800–433–3823, (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.)

Alere Toxicology Services, 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130, (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.)

Clinical Reference Laboratory, Inc., 8433 Quivira Road, Lenexa, KS 66215–2802, 800–445–6917

Desert Tox, LLC, 5425 E Bell Rd., Suite 125, Scottsdale, AZ, 85254, 602–457–5411/623–748–5045

DrugScan, Inc., 200 Precision Road, Suite 200, Horsham, PA 19044, 800–235–4890

Dynacare *, 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519–679–1630, (Formerly: Gamma-Dynacare Medical Laboratories)

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662–236–2609

Laboratory Corporation of America Holdings, 7207 N Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986, (Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Corporation of America Holdings, 1904 TW Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984, (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group)

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339, (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center)

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–873–8845, (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.)

Legacy Laboratory Services Toxicology, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295

MedTox Laboratories, Inc., 402 W County Road D, St. Paul, MN 55112, 651–636–7466/800–832–3244

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612–725–2088. Testing for Veterans Affairs (VA) Employees Only

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942, (Formerly: Centinela Hospital Airport Toxicology Laboratory)

Phamatech, Inc., 15175 Innovation Drive, San Diego, CA 92128, 888–635–5840

Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403, 610–631–4600/877–642–2216, (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

U.S. Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085, Testing for Department of Defense (DoD) Employees Only

**Anastasia Marie Donovan,**

*Public Health Advisor, Division of Workplace Programs.*

[FR Doc. 2023–14046 Filed 6–30–23; 8:45 am]

**BILLING CODE 4162–20–P**

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on January 23, 2017 (82 FR 7920). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2352]**

### Changes in Flood Hazard Determinations

**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

**DATES:** These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the

community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

**ADDRESSES:** The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

**SUPPLEMENTARY INFORMATION:** The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

**Nicholas A. Shufro,**

*Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.*

| State and county | Location and case No. | Chief executive officer of community | Community map repository | Online location of letter of map revision | Date of modification | Community No. |
|---|---|---|---|---|---|---|
| California: Ventura | City of Thousand Oaks (23–09–0130P). | The Honorable Kevin McNamee, Mayor, City of Thousand Oaks, 2100 Thousand Oaks Boulevard, Thousand Oaks, CA 91362. | Public Works Department, 2100 Thousand Oaks Boulevard, Thousand Oaks, CA 91362. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 6, 2023 ..... | 060422 |
| Colorado: | | | | | | |
| Adams ..... | City of Northglenn (22–08–0686P). | The Honorable Meredith Leighty, Mayor, City of Northglenn, 11701 Community Center Drive, Northglenn, CO 80233. | City Hall, 11701 Community Center Drive, Northglenn, CO 80233. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 8, 2023 ..... | 080257 |
| Adams ..... | City of Thornton (22–08–0686P). | The Honorable Jan Kulmann, Mayor, City of Thornton, 9500 Civic Center Drive, Thornton, CO 80229. | City Hall, 9500 Civic Center Drive, Thornton, CO 80229. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 8, 2023 ..... | 080007 |
| Connecticut: Fairfield. | Town of Wilton (22–01–0739P). | Lynne Vanderslice, First Selectperson, Town of Wilton, 238 Danbury Road, Wilton, CT 06897. | Town Hall, 238 Danbury Road, Wilton, CT 06897. | *https://msc.fema.gov/portal/advanceSearch.* | Aug. 25, 2023 .... | 090020 |
| Delaware: New Castle. | Unincorporated areas of New Castle County (23–03–0350P). | Matthew Meyer, New Castle County Executive, 87 Reads Way, New Castle, DE 19720. | New Castle County Land Use Department, 87 Reads Way, New Castle, DE 19720. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 7, 2023 ..... | 105085 |
| Florida: | | | | | | |
| Charlotte ..... | Unincorporated areas of Charlotte County (22–04–5489P). | Bill Truex, Chair, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948. | Charlotte County Building Department, 18400 Murdock Circle, Port Charlotte, FL 33948. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 6, 2023 ..... | 120061 |
| Polk ..... | Unincorporated areas of Polk County (22–04–3447P). | Bill Beasley, Polk County Manager, 330 West Church Street, Bartow, FL 33831. | Polk County Land Development Division, 330 West Church Street, Bartow, FL 33831. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 7, 2023 ..... | 120261 |

| State and county | Location and case No. | Chief executive officer of community | Community map repository | Online location of letter of map revision | Date of modification | Community No. |
|---|---|---|---|---|---|---|
| Sumter | City of Coleman (22–04–4974P). | The Honorable Milton Hill, Mayor, City of Coleman, P.O. Box 456, Coleman, FL 33521. | Water Department, 3502 East Warm Springs Avenue, Coleman, FL 33521. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 1, 2023 | 120616 |
| Sumter | City of Wildwood (22–04–4974P). | The Honorable Ed Wolf, Mayor, City of Wildwood, 100 North Main Street, Wildwood, FL 34785. | City Hall, 100 North Main Street, Wildwood, FL 34785. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 1, 2023 | 120299 |
| Massachusetts: Barnstable. | Town of Falmouth (23–01–0305P). | Nancy R. Taylor, Chair, Town of Falmouth Select Board, 59 Town Hall Square, Falmouth, MA 02540. | Building Department, 59 Town Hall Square,Falmouth, MA 02540. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 11, 2023 | 255211 |
| Montana: Gallatin | Unincorporated areas of Gallatin County (23–08–0301P). | Zach Brown, Chair, Gallatin County Commission, 311 West Main Street, Room 306, Bozeman, MT 59715. | Gallatin County Department of Planning and Community Development, 311 West Main Street, Room 108, Bozeman, MT 59715. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 18, 2023 | 300027 |
| Pennsylvania: | | | | | | |
| Dauphin | Township of South Hanover (22–03–1207P). | Lynn Wuestner, Township of South Hanover Manager, 161 Patriot Way, Hershey, PA 17033. | Township Hall, 161 Patriot Way, Hershey, PA 17033. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 1, 2023 | 420395 |
| Montgomery | Township of Upper Dublin (22–03–0783P). | Kurt Ferguson, Township of Upper Dublin Manager, 370 Commerce Drive, Fort Washington, PA 19034. | Community Planning and Zoning Department, 370 Commerce Drive, Fort Washington, PA 19034. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 11, 2023 | 420708 |
| Tennessee: Hamilton. | Unincorporated areas of Hamilton County (22–04–4850P). | The Honorable Weston Wamp, Mayor, Hamilton County, 625 Georgia Avenue, Chattanooga, TN 37402. | Hamilton County Engineering Department, 1250 Market Street, Suite 3046, Chattanooga, TN 37402. | *https://msc.fema.gov/portal/advanceSearch.* | Aug. 28, 2023 | 470071 |
| Texas: | | | | | | |
| Bexar | Unincorporated areas of Bexar County (22–06–1980P). | The Honorable Peter Sakai, Bexar County Judge, 101 West Nueva Street, 10th Floor, San Antonio, TX 78205. | Bexar County Public Works Department, 1948 Probandt Street, San Antonio, TX 78205. | *https://msc.fema.gov/portal/advanceSearch.* | Aug. 28, 2023 | 480035 |
| Collin | City of Lowry Crossing (22–06–2654P). | The Honorable Bob Petitt, Mayor, City of Lowry Crossing, 1405 South Bridgefarmer Road, Lowry Crossing, TX 75069. | City Hall, 1405 South Bridgefarmer Road, Lowry Crossing, TX 75069. | *https://msc.fema.gov/portal/advanceSearch.* | Aug. 28, 2023 | 481631 |
| Collin | City of Melissa (22–06–2373P). | The Honorable Jay Northcut, Mayor, City of Melissa, 3411 Barker Avenue, Melissa, TX 75454. | City Hall, 3411 Barker Avenue, Melissa, TX 75454. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 5, 2023 | 481626 |
| Collin | Unincorporated areas of Collin County (22–06–2373P). | The Honorable Chris Hill, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071. | Collin County Administration Building, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 5, 2023 | 480130 |
| Collin | Unincorporated areas of Collin County (22–06–2654P). | The Honorable Chris Hill, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071. | Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071. | *https://msc.fema.gov/portal/advanceSearch.* | Aug. 28, 2023 | 480130 |
| Dallas | City of Mesquite (22–06–2973P). | The Honorable Daniel Aleman, Jr., Mayor, City of Mesquite, P.O. Box 850137, Mesquite, TX 75185. | George A. Venner Sr. Municipal Center, 1515 North Galloway Avenue, Mesquite, TX 75149. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 5, 2023 | 485490 |
| Montgomery | Unincorporated areas of Montgomery County (23–06–0661P). | The Honorable Mark J. Keough, Montgomery County Judge, 501 North Thompson, Suite 401, Conroe, TX 77301. | Montgomery County Alan B. Sadler Commissioners Court Building, 501 North Thompson, Suite 100, Conroe, TX 77301. | *https://msc.fema.gov/portal/advanceSearch.* | Aug. 24, 2023 | 480483 |
| Tarrant | City of Grand Prairie (22–06–2829P). | The Honorable Ron Jensen, Mayor, City of Grand Prairie, P.O. Box 534045, Grand Prairie, TX 75053. | City Hall, 300 West Main Street, Grand Prairie, TX 75050. | *https://msc.fema.gov/portal/advanceSearch.* | Aug. 10, 2023 | 485472 |

| State and county | Location and case No. | Chief executive officer of community | Community map repository | Online location of letter of map revision | Date of modification | Community No. |
|---|---|---|---|---|---|---|
| Tarrant ..... | City of Fort Worth (22–06–2756P). | The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102. | T/PW Engineering Vault, 200 Texas Street, Fort Worth, TX 76102. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 11, 2023 .... | 480596 |
| Tarrant ..... | Unincorporated areas of Tarrant County (22–06–2756P). | The Honorable Tim O'Hare, Tarrant County Judge, 100 East Weatherford Street, Suite 501, Fort Worth, TX 76196. | Tarrant County Administration Building, 100 East Weatherford Street, Fort Worth, TX 76196. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 11, 2023 .... | 480582 |
| Travis ..... | Unincorporated areas of Travis County (22–06–2414P). | The Honorable Andy Brown, Travis County Judge, P.O. Box 1748, Austin, TX 78767. | Travis County Transportation and Natural Resources Department, 700 Lavaca Street, 5th Floor, Austin, TX 78701. | *https://msc.fema.gov/portal/advanceSearch.* | Aug. 28, 2023 .... | 481026 |
| Virginia: Prince William. | City of Manassas (22–03–1152P). | W. Patrick Pate, City of Manassas Manager, 9027 Center Street, Manassas, VA 20110. | City Hall, 9027 Center Street, Manassas, VA 20110. | *https://msc.fema.gov/portal/advanceSearch.* | Sep. 1, 2023 ..... | 510122 |

[FR Doc. 2023–14087 Filed 6–30–23; 8:45 am]
**BILLING CODE 9110–12–P**

## DEPARTMENT OF HOMELAND SECURITY

## Federal Emergency Management Agency

**[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2350]**

## Proposed Flood Hazard Determinations

**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**DATES:** Comments are to be submitted on or before October 2, 2023.

**ADDRESSES:** The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2350, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

**FOR FURTHER INFORMATION CONTACT:** Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

**SUPPLEMENTARY INFORMATION:** FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://*

*hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

**Nicholas A. Shufro,**

*Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.*

| Community | Community map repository address |
|---|---|
| **Cook County, Illinois and Incorporated Areas Project: 16–05–2865S Preliminary Date: September 22, 2021 and November 18, 2022** | |
| City of Elgin | Public Works Department, Engineering Department, 150 Dexter Court, Elgin, IL 60120. |
| Unincorporated Areas of Cook County | Cook County Building and Zoning Department, 69 West Washington Street, 28th Floor, Chicago, IL 60602. |
| Village of Barrington Hills | Village Hall, 112 Algonquin Road, Barrington Hills, IL 60010. |
| Village of Hoffman Estates | Village Hall, 1900 Hassell Road, Hoffman Estates, IL 60169. |
| Village of Inverness | Village Hall, 1400 Baldwin Road, Inverness, IL 60067. |
| Village of Schaumburg | Atcher Municipal Center, Community Development Department, 101 Schaumburg Court, Schaumburg, IL 60193. |
| Village of South Barrington | Village Hall, 30 South Barrington Road, South Barrington, IL 60010. |
| Village of Streamwood | Public Works Department, 565 South Bartlett Road, Streamwood, IL 60107. |
| **Kane County, Illinois and Incorporated Areas Project: 16–05–2865S Preliminary Date: September 22, 2021** | |
| City of Elgin | Public Works Department, Engineering Department, 150 Dexter Court, Elgin, IL 60120. |
| Unincorporated Areas of Kane County | Water Resources Department, Kane County Government Center, 719 South Batavia Avenue, Building A, Geneva, IL 60134. |
| Village of South Elgin | Community Development Office, 10 North Water Street, South Elgin, IL 60177. |
| **Stevens County, Minnesota and Incorporated Areas Project: 18–05–0004S Preliminary Date: February 28, 2023** | |
| Township of Swan Lake | Swan Lake Township Hall, 43967 150th Street, Morris, MN 56267. |

[FR Doc. 2023–14088 Filed 6–30–23; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[Docket ID FEMA–2023–0002]**

### Final Flood Hazard Determinations

**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below. The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP).

**DATES:** The date of October 5, 2023, has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

**ADDRESSES:** The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *https://msc.fema.gov* by the date indicated above.

**FOR FURTHER INFORMATION CONTACT:** Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the

new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

**Nicholas A. Shufro,**

*Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.*

| Community | Community map repository address |
|---|---|
| **Archuleta County, Colorado and Incorporated Areas Docket No.: FEMA–B–2187** | |
| Unincorporated Areas of Archuleta County | Archuleta County Commissioner's Office, 398 Lewis Street, Pagosa Springs, CO 81147. |
| **Lake County, Illinois and Incorporated Areas Docket No.: FEMA–B–2120** | |
| City of Highland Park | Public Services Building, 1150 Half Day Road, Highland Park, IL 60035. |
| City of Lake Forest | Municipal Services Building, 800 North Field Drive, Lake Forest, IL 60045. |
| City of North Chicago | City Hall, 1850 Lewis Avenue, North Chicago, IL 60064. |
| City of Waukegan | Public Works Building, 1700 North McAree Road, Waukegan, IL 60085. |
| City of Zion | City Hall, 2828 Sheridan Road, Zion, IL 60099. |
| Unincorporated Areas of Lake County | Lake County Central Permit Facility, 500 West Winchester Road, Unit 101, Libertyville, IL 60048. |
| Village of Beach Park | Village Hall, 11270 West Wadsworth Road, Beach Park, IL 60099. |
| Village of Grayslake | Village Hall, 10 South Seymour Avenue, Grayslake, IL 60030. |
| Village of Gurnee | Village Hall, 325 North O'Plaine Road, Gurnee, IL 60031. |
| Village of Lake Bluff | Village Hall, 40 East Center Avenue, Lake Bluff, IL 60044. |
| Village of Libertyville | Schertz Building, 200 East Cook Avenue, Libertyville, IL 60048. |
| Village of Lindenhurst | Village Hall, 2301 East Sand Lake Road, Lindenhurst, IL 60046. |
| Village of Old Mill Creek | Village Hall, 19020 Old Grass Lake Road, Old Mill Creek, IL 60046. |
| Village of Round Lake Beach | Village Hall, 1937 North Municipal Way, Round Lake Beach, IL 60073. |
| Village of Third Lake | Village Hall, 87 North Lake Avenue, Third Lake, IL 60030. |
| Village of Wadsworth | Village Hall, 14155 Wadsworth Road, Wadsworth, IL 60083. |
| Village of Winthrop Harbor | Village Hall, 830 Sheridan Road, Winthrop Harbor, IL 60096. |
| **Mitchell County, Kansas and Incorporated Areas Docket No.: FEMA–B–2265** | |
| City of Beloit | Municipal Building, 119 North Hersey Avenue, Beloit, KS 67420. |
| City of Cawker City | City Hall, 804 Locust Street, Cawker City, KS 67430. |
| City of Glen Elder | City Hall, 213 South Market Street, Glen Elder, KS 67446. |
| City of Hunter | City Hall, 1776 1st Street, Hunter, KS 67452. |
| City of Scottsville | Mitchell County Emergency Management Office, 114 South Campbell Avenue, Beloit, KS 67420. |
| City of Simpson | Simpson City Hall, 107 North Elkhorn Street, Beloit, KS 67420. |
| Unincorporated Areas of Mitchell County | Mitchell County Emergency Management Office, 114 South Campbell Avenue, Beloit, KS 67420. |
| **Henderson County, Kentucky and Incorporated Areas Docket No.: FEMA–B–2177** | |
| City of Henderson | Municipal Center, 222 1st Street, Henderson, KY 42420. |
| Unincorporated Areas of Henderson County | Henderson County, Peabody Building, 1990 Barrett Court, Suite C, Henderson, KY 42420. |
| **Union County, Kentucky and Incorporated Areas Docket No.: FEMA–B–2177** | |
| City of Morganfield | Union County Planning Commission Office, 100 West Main Street, Morganfield, KY 42437. |
| City of Uniontown | Union County Planning Commission Office, 100 West Main Street, Morganfield, KY 42437. |
| Unincorporated Areas of Union County | Union County Planning Commission Office, 100 West Main Street, Morganfield, KY 42437. |

| Community | Community map repository address |
|---|---|
| **Webster County, Kentucky and Incorporated Areas Docket No.: FEMA–B–2177** | |
| Unincorporated Areas of Webster County | Webster County Courthouse, 25 U.S. Highway 41–A South, Dixon, KY 42409. |
| **Missoula County, Montana and Incorporated Areas Docket No.: FEMA–B–2236** | |
| Unincorporated Areas of Missoula County | Missoula County Community and Planning Services Department, 127 East Main Street, Suite 2, Missoula, MT 59802. |

[FR Doc. 2023–14086 Filed 6–30–23; 8:45 am]
**BILLING CODE 9110–12–P**

## DEPARTMENT OF HOMELAND SECURITY

### Transportation Security Administration

**[Docket No. TSA–2004–19515]**

### Intent To Request Extension From OMB of One Current Public Collection of Information: Air Cargo Security Requirements

**AGENCY:** Transportation Security Administration, DHS.

**ACTION:** 60-Day notice.

**SUMMARY:** The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0040, abstracted below that we will submit to OMB for an extension in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. This ICR involves three broad categories of affected populations operating under a security program: aircraft operators, foreign air carriers, and indirect air carriers. The collections of information that make up this ICR include security programs, security threat assessments (STA) on certain individuals, known shipper data via the Known Shipper Management System (KSMS), Indirect Air Carrier Management System (IACMS), and evidence of compliance recordkeeping.

**DATES:** Send your comments by September 1, 2023.

**ADDRESSES:** Comments may be emailed to *TSAPRA@tsa.dhs.gov* or delivered to the TSA PRA Officer, Information Technology (IT), TSA–11, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6011.

**FOR FURTHER INFORMATION CONTACT:** Christina A. Walsh at the above address, or by telephone (571) 227–2062.

**SUPPLEMENTARY INFORMATION:**

#### Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation will be available at *https://www.reginfo.gov* upon its submission to OMB. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

#### Information Collection Requirement

*OMB Control Number 1652–0040 Air Cargo Security Requirements, 49 CFR parts 1515, 1540, 1542, 1544, 1546, and 1548.* Under the authority of 49 U.S.C. 44901, TSA's regulations impose screening requirements for cargo and other property transported on commercial aircraft (passenger and all-cargo). Chapter XII of title 49, Code of Federal Regulations defines how TSA screens all property, including U.S. mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard passenger and cargo aircraft. Pursuant to the requirements of the Implementing Recommendations of the 9/11 Commission Act of 2007, TSA now screens 100 percent of cargo transported on passenger aircraft [1] and continues to improve cargo security with a multi-layered approach to cargo screening. Collections of information associated with these cargo screening requirements fall under OMB control number 1652–0053.

The extension of this ICR is necessary to ensure compliance with TSA's regulations covering the acceptance, handling, and screening of cargo transported by air. The uninterrupted collection of this information will allow TSA to continue to ensure implementation of these vital security measures for the protection of the traveling public.

*Data Collection*

This information collection requires entities regulated by TSA, which includes aircraft operators, foreign air carriers, and indirect air carriers (IACs), to collect certain information as part of the implementation of a standard security program, to submit modifications to the standard security program to TSA for approval, and update such programs as necessary. As part of these security programs, the regulated entities must also collect personal information and submit such information to TSA so that TSA may conduct STAs on individuals with unescorted access to cargo. This includes each individual who is a general partner, officer, or director of an IAC or an applicant to be an IAC, and certain owners of an IAC or an applicant to be an IAC; and any individual who has responsibility for screening cargo under 49 CFR parts 1544, 1546, or 1548.

Further, both companies and individuals whom aircraft operators, foreign air carriers, and IACs have qualified to ship cargo on passenger aircraft, also referred to as ''known shippers,'' must submit information to TSA. This information is collected electronically through the KSMS. In

[1] *See* section 1602 of Public Law 110–53 (August 3, 2007; 121 Stat. 266), as codified at 49 U.S.C. 44901(g).

accordance with TSA security program requirements, regulated entities may use an alternate manual submission method to identify known shippers.

Regulated entities must also enter into IACMS the information required from applicants requesting to be approved as IACs in accordance with 49 CFR 1548.7 and the information required for their IAC annual renewal. Regulated entities must also maintain records, including records pertaining to security programs, training, and compliance to demonstrate adherence with the regulatory requirements. These records must be made available to TSA upon request. The forms used in this collection of information include the Aviation Security Known Shipper Verification Form and the Security Threat Assessment Application.

Finally, select aircraft operators and foreign air carriers operating under certain amendments to their security programs must provide to TSA detailed screening volumes and the methodology utilized to arrive at these volumes, as well as demonstrating progress toward full compliance with the cargo security measures specified in such amendments.

*Estimated Burden Hours*

This ICR covers multiple activities. TSA estimates that there will be—

(1) 3,575 annual respondents regarding Security Programs, for an annual hour burden of 14,335;

(2) 1,546 annual respondents regarding Security Program Amendments, for an annual hour burden of 1,546.

(3) 98,500 annual responses from regulated entities applying for an STA, for an annual hour burden of 24,625;

(4) 801,400 annual responses from regulated entities accessing the KSMS, for an annual hour burden of 28,067; and

(5) 3,575 annual respondents to the Security Program and STA recordkeeping requirement, for an annual hour burden of 8,504.

Comprehensively, TSA estimates total annual respondents of 3,575 and annual burden of 77,077 hours for this collection.

Dated: June 28, 2023.

**Christina A. Walsh,**

*TSA Paperwork Reduction Act Officer, Information Technology.*

[FR Doc. 2023–14095 Filed 6–30–23; 8:45 am]

**BILLING CODE 9110–05–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–7071–N–09]**

## 60-Day Notice of Proposed Information Collection: Technical Suitability Products, OMB Control No.: 2502–0313

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Department of Housing and Urban Development (HUD).

**ACTION:** Notice.

**SUMMARY:** HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

**DATES:** *Comments Due Date:* September 1, 2023.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be submitted 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. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at *PaperworkReductionActOffice@hud.gov.*

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

### A. Overview of Information Collection

*Title of Information Collection:* Technical Suitability of Products.

*OMB Approval Number:* 2502–0313.

*OMB Expiration Date:* 3/31/2024.

*Type of Request:* Revision of a currently approved collection.

*Form Number:* HUD–92005, Description of Materials.

*Description of the need for the information and proposed use:* This information is needed under HUD's Technical Suitability of Products program, which provides for the acceptance of new materials and products used in buildings financed with HUD-insured mortgages. This includes new single-family homes, multi-family homes, and healthcare-type facilities.

*Respondents:* Business or other for-profit.

*Estimated Number of Respondents:* 39.

*Estimated Number of Responses:* 39.

*Frequency of Response:* 1.

*Average Hours per Response:* 26.

*Total Estimated Burden:* 1,131 hours.

### B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

**C. Authority**

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

**Jeffrey D. Little,**

*General Deputy Assistant Secretary for Housing.*

[FR Doc. 2023–14066 Filed 6–30–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Geological Survey

**[GX23GB00UM20200; OMB Control Number 1028–0133]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Earth Mapping Resources Initiative (Earth MRI) Competitive Cooperative Agreement Program With State Geological Surveys

**AGENCY:** U.S. Geological Survey, Department of the Interior.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) will seek Office of Management and Budget (OMB) approval of an extension of a previously approved information collection.

**DATES:** Interested persons are invited to submit comments on or before August 2, 2023.

**ADDRESSES:** Send your comments on this information collection request (ICR) by mail to USGS, Information Collections Clearance Officer, 12201 Sunrise Valley Drive, MS 159, Reston, VA 20192; or by email to *gs-info_collections@usgs.gov.* Please reference OMB Control Number ''1028–0133 Earth MRI'' in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact James Mosely by email at *jmosley@usgs.gov,* or by telephone at (703) 648–6312. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

**SUPPLEMENTARY INFORMATION:** In accordance with the PRA (44 U.S.C. 3501 *et seq.* and 5 CFR 1320.8(d)(1)), we provide the general public and other federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on April 25, 2023 (88 FR 25010). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personally identifiable information (PII) in your comment, you should be aware that your entire comment—including your PII—may be made publicly available at any time. While you can ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

*Abstract:* Public Law 117–58, section 40201, ''*Earth Mapping Resources Initiative*'' contained in the Bipartisan Infrastructure Law (BIL) (November 15, 2021) authorizes and accelerates the mapping efforts of the Earth Mapping Resources Initiative (Earth MRI).

Earth MRI is a component of the U.S. Geological Survey (USGS) Mineral Resources Program and is a national effort to carry out the fundamental resources- and mapping mission of the USGS. The goal of Earth MRI is to modernize the surface and subsurface geologic mapping of the United States, with a focus on identifying areas that may have the potential to contain mineral resources.

The BIL directed the USGS to accelerate efforts to carry out fundamental integrated topographic, geologic, geochemical, and geophysical mapping and provide interpretation of subsurface and above-ground (mine waste) critical-mineral resources data at a funding level of $320,000,000 annually for five years (FY2022–FY2026). The USGS developed a new competitive cooperative agreement program with the state geological surveys to support mine-waste activities authorized and funded by the BIL. State geological surveys apply for funds through an annual competitive agreement process. Individual state projects last for up to two years.

BIL section 40201 stipulates that the USGS may enter into cooperative agreements with state geological surveys to accelerate the efforts of Earth MRI. The BIL requires the USGS to collect information necessary to ensure that cooperative-agreement funds authorized by this legislation are used in accordance with the BIL and federal assistance requirements under 2 CFR 200. Information collected by Earth MRI as part of the consolidated workplan is described below. The USGS seeks OMB approval to continue to collect this information to manage and monitor cooperative agreement awards to comply with the BIL.

*Title of Collection:* Earth Mapping Resources Initiative (Earth MRI) Competitive Cooperative Agreement Program with State Geological Surveys.

*OMB Control Number:* 1028–0133.

*Form Number:* None.

*Type of Review:* Extension of a currently approved collection.

*Respondents/Affected Public:* 20.

*Total Estimated Number of Annual Respondents:* 20.

*Total Estimated Number of Annual Responses:* 84 (20 applications, 48 total six-month progress reports, and 16 final technical reports).

*Estimated Completion Time per Response:* We expect to receive 20 applications, each taking approximately 60 hours to complete (totaling 1,200 burden hours). We anticipate awarding

an average of 16 agreements per year. The 16 award recipients are required to submit 6-month progress reports throughout the duration of the project, and a final technical report. We estimate an additional eight hours for each six-month progress report (24 hours per award recipient, totaling 384 burden hours) and 20 hours for each cooperative agreement recipient to complete and submit a final technical report due within 90 days of the project ending date (totaling 320 burden hours).

*Total Estimated Number of Annual Burden Hours:* 1,904.

*Respondent's Obligation:* Required to obtain or retain a benefit.

*Frequency of Collection:* On occasion.

*Total Estimated Annual Non-hour Burden Cost:* None.

An agency may not conduct or sponsor, nor is a person required to respond to, a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the PRA (44 U.S.C. 3501 *et seq.*).

**Sarah J. Ryker,**

*Associate Director for Energy and Mineral Resources, U.S. Geological Survey.*

[FR Doc. 2023–14038 Filed 6–30–23; 8:45 am]

**BILLING CODE 4338–11–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[BLM_ES_FRN_MO4500172068]**

### Notice of Intent To Amend the Resource Management Plan and Prepare an Associated Environmental Assessment; Notice of Realty Action: Proposed Sale of Public Lands in Simpson County, MS

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of intent; notice of realty action.

**SUMMARY:** In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) Eastern States State Director intends to prepare a resource management plan (RMP) amendment with an associated environmental assessment (EA) for the non-competitive direct sale of public land in Simpson County, Mississippi, and by this notice is announcing the beginning of the scoping period to solicit public comments and identify issues, providing the planning criteria for public review, and announcing a comment period on the proposed realty action offering for sale a tract of public land.

**DATES:** The BLM requests that the public submit comments concerning the scope of the analysis, potential alternatives, and identification of relevant information and studies by August 17, 2023. To afford the BLM the opportunity to consider issues raised by commenters in the Draft RMP Amendment and EA, please ensure your comments are received prior to the close of the 45-day scoping period or 15 days after the last public meeting, whichever is later.

**ADDRESSES:** You may submit comments on issues and planning criteria related to the Proposed RMP Amendment and Non-Competitive Direct Sale of Public Land in Simpson County, Mississippi, by any of the following methods:

- *Website: https://eplanning.blm.gov/eplanning-ui/project/2016717/510.*
- *Mail:* ATTN: Mississippi Tract 37, Southeastern States District Office, 273 Market Street, Flowood, MS 39232.

Documents pertinent to this proposal may be examined online at *https://eplanning.blm.gov/eplanning-ui/project/2016717/510* and at the Southeastern States District Office.

**FOR FURTHER INFORMATION CONTACT:** Vicki Craft, Realty Specialist, telephone (601) 317–6971; address Southeastern States District Office, 273 Market Street, Flowood, MS 39232; email *vcraft@blm.gov.* Contact Ms. Craft to have your name added to our mailing list. 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:** This document provides notice that the BLM Eastern States State Director intends to prepare an RMP amendment with an associated EA for the non-competitive direct sale of public land in Simpson County, Mississippi, announces the beginning of the scoping process, and seeks public input on issues and planning criteria. The RMP amendment is being considered to allow the BLM to evaluate the disposal of 12.3 acres of public land to Dempsey Sullivan, which would require amending the existing 2009 Mississippi RMP. The direct sale is subject to the applicable provisions of section 203 of FLPMA and BLM land-sale regulations at 43 CFR 2710. Publication of this notice in the **Federal Register** also segregates the subject land from all forms of appropriation under the public land laws, including the general mining laws, and from the mineral leasing and geothermal leasing laws, except for the sale provisions of FLPMA.

The planning area is in Simpson County, Mississippi, and encompasses approximately 12.3 acres of public land.

The scope of this land use planning process does not include addressing the evaluation or designation of areas of critical environmental concern (ACECs), and the BLM is not considering ACEC nominations as part of this process.

#### Purpose and Need

The need of the proposed action is to resolve an inadvertent, unauthorized use on public lands that were omitted from an official Federal survey in the early 1800's in Simpson County, Mississippi. The purpose for the proposed action is to transfer from Federal ownership the small parcel of land that is logistically and economically difficult to manage (FLPMA, 43 U.S.C. 1713(a)(1)). The BLM needs to amend the 2009 Mississippi RMP because section 203 of FLPMA specifically requires that land made available for disposal under the sale authority be clearly identified in the relevant land use plan. The BLM proposes to amend the 2009 Mississippi RMP to identify the tract as available for disposal through sale.

#### Preliminary Alternatives

The RMP identifies parcels suitable for disposal, and the subject land is not currently listed as available for disposal. The BLM will analyze the suitability for disposal of the 12.3 acres per the criteria listed in FLPMA section 203(a). The RMP amendment would allow for the land to be sold if it is found suitable for disposal.

The BLM is considering a direct sale of the following described land:

**St. Stephens Meridian, Mississippi**

T. 9 N., R. 17 W., Tract 37.

The area described contains 12.3 acres, according to the official plat of the survey of the said land on file with the BLM.

The conveyance document, if issued, will contain the following terms, covenants, conditions, and reservations:

1. All the mineral deposits in the land so patented pursuant to FLPMA (43 U.S.C. 1719), including, without limitation, substances subject to disposition under the general mining laws, the general mineral leasing laws, the Materials Act and the Geothermal Steam Act, and to it, its permittees,

licensees, lessees, and mining claimants, the right to prospect for, mine, and remove the minerals owned by the United States under applicable law and such regulations as the Secretary of the Interior may prescribe. This reservation includes necessary access and exit rights and the right to conduct all necessary and incidental activities including, without limitation, all drilling, underground, open pit or surface mining operations, storage, and transportation facilities deemed reasonably necessary.

Unless otherwise provided by separate agreement with the surface owner, mining claimants, permittees, licensees, and lessees of the United States shall reclaim disturbed areas to the extent prescribed by regulations issued by the Secretary of the Interior.

All causes of action brought to enforce the rights of the surface owner under the regulations above referred to shall be instituted against mining claimants, permittees, licensees, and lessees of the United States; and the United States shall not be liable for the acts or omissions of its mining claimants, permittees, licensees, and lessees.

2. An appropriate indemnification clause protecting the United States from claims arising out of the patentee's use, occupancy, or operations on the patented land.

The No Action Alternative would not amend the 2009 Mississippi RMP to allow for the disposal of Tract 37. Tract 37 would be retained in Federal ownership and the BLM would continue to manage the small, isolated tract.

The BLM welcomes comments on all preliminary alternatives as well as suggestions for additional alternatives.

**Planning Criteria**

The planning criteria guide the planning effort and lay the groundwork for effects analysis by identifying the preliminary issues and their analytical frameworks. Preliminary issues for the planning area have been identified by BLM personnel and from early engagement conducted for this planning effort with Federal, State, and local agencies; Tribes; and stakeholders. The BLM has identified two preliminary issues for this planning effort's analysis:

(1) How would lands and realty be impacted by or impact the proposed sale?

(2) How would the proposed sale impact opportunities for public recreation and hunting?

**Public Scoping Process**

This notice of intent initiates the scoping period and public review of the planning criteria, which guide the development and analysis of the RMP Amendment and EA.

The BLM does not intend to hold any public meetings, in-person or virtual, during the public scoping period. Should the BLM later determine to hold public meetings, the specific date(s) and location(s) of any meeting will be announced at least 15 days in advance through announcements in the *Magee Courier* and the *Mt. Olive Tribune* newspapers as well as on the BLM Eastern States' Facebook page.

**Sale Notifications**

The segregation will terminate upon issuance of a conveyance or July 3, 2025, whichever occurs first. The BLM is no longer accepting land-use applications affecting the subject public land, except applications to amend previously filed right-of-way applications or existing authorizations to increase grant terms in accordance with 43 CFR 2807.15 and 43 CFR 2886.15.

The notification of the proposed RMP amendment and EA and, if applicable, signed finding of no significant impact (FONSI) would begin a 30-day protest period subject to BLM Manual Section 2711.1 step 4(d) on the land-sale decision. The BLM Eastern States State Director will review all protests and may sustain, vacate, or modify the RMP amendment and land sale, in whole or in part. In the absence of any protests and FONSI, the BLM may select the approved RMP amendment alternative and prepare a decision record which would document the final determination of the Department of the Interior for the land sale.

In addition to publication of this notice in the **Federal Register**, the BLM will publish this notice in the *Magee Courier* and the *Mt. Olive Tribune* newspapers once a week for three consecutive weeks. Any other subsequent notices related to the RMP amendment and land sale may also be published in the *Magee Courier* and the *Mt. Olive Tribune* newspapers.

**Interdisciplinary Team**

The BLM will use an interdisciplinary approach to develop the plan to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in this planning effort: outdoor recreation, archaeology, wildlife, lands and realty, soils, vegetation, sociology, and economics.

**Additional Information**

The BLM will identify, analyze, and consider mitigation to address the reasonably foreseeable impacts to resources from the proposed plan amendment and all analyzed reasonable alternatives and, in accordance with 40 CFR 1502.14(e), include appropriate mitigation measures not already included in the proposed plan amendment or alternatives. Mitigation may include avoidance, minimization, rectification, reduction or elimination over time, and compensation; it may also be considered at multiple scales, including the landscape scale.

The BLM will utilize and coordinate the NEPA and land use planning processes for this planning effort to help support compliance with applicable procedural requirements under the Endangered Species Act (16 U.S.C. 1536), and section 106 of the National Historic Preservation Act (54 U.S.C. 306108) as provided in 36 CFR 800.2(d)(3), including public involvement requirements of section 106. The information about historic and cultural resources and threatened and endangered species within the area potentially affected by the proposed plan will assist the BLM in identifying and evaluating impacts to such resources.

The BLM will consult with Tribal Nations on a government-to-government basis in accordance with Executive Order 13175, BLM Manual Section 1780, and other Departmental policies. The BLM will send invitations to potentially affected Tribal Nations prior to consultation meetings. The BLM will provide additional opportunities for government-to-government consultation during the NEPA process. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with Tribal Nations and stakeholders that may be interested in or affected by the Proposed RMP Amendment and Non-Competitive Direct Sale of Public Land in Simpson County, Mississippi, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate in the development of the environmental analysis as a cooperating agency.

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.

(Authority: 40 CFR 1501.9, 43 CFR 1610.2, and 43 CFR 2710)

**Mitchell Leverette,**

*State Director, BLM Eastern States.*

[FR Doc. 2023–14045 Filed 6–30–23; 8:45 am]

**BILLING CODE 4331–18–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0036105; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Santa Barbara Museum of Natural History, Santa Barbara, CA

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Santa Barbara Museum of Natural History has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were removed from Lake County, IL.

**DATES:** Repatriation of the human remains in this notice may occur on or after August 2, 2023.

**ADDRESSES:** Luke Swetland, President and CEO, Santa Barbara Museum of Natural History, 2559 Puesta del Sol, Santa Barbara, CA 93105, telephone (805) 682–4711, email *lswetland@sbnature2.org.*

**SUPPLEMENTARY INFORMATION:** This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Santa Barbara Museum of Natural History. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Santa Barbara Museum of Natural History.

#### Description

Human remains representing, at minimum, one individual were removed from Lake County, Illinois. On an unknown date, a cranium and mandible were collected by Charles Herman, and on October 10th, 1926, they were donated to the Santa Barbara Museum of Natural History. These human remains were described as ''Skull of male Illini. Age about 45 years.'' No associated funerary objects are present.

#### Cultural Affiliation

The human remains in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: Geographical, kinship, biological, archeological, linguistic, folkloric, oral traditional, historical, and other information or expert opinion.

#### Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Santa Barbara Museum of Natural History has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- There is a relationship of shared group identity that can be reasonably traced between the human remains described in this notice and the Ho-Chunk Nation; Iowa Tribe of Kansas and Nebraska; Miami Tribe of Oklahoma; Peoria Tribe of Indians of Oklahoma; Prairie Band Potawatomi Nation; Sac & Fox Nation, Oklahoma; and the Winnebago Tribe of Nebraska.

#### Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after August 2, 2023. If competing requests for repatriation are received, the Santa Barbara Museum of Natural History must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The Santa Barbara Museum of Natural History is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

*Authority:* Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: June 21, 2023.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2023–14075 Filed 6–30–23; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0036103; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Indiana Department of Transportation, Indianapolis, IN

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Indiana Department of Transportation, though its agent, Ball State University, Applied Anthropology Laboratories, has completed an inventory of human remains and associated funerary objects and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any Indian Tribe. The human remains and associated funerary objects were removed from Henry County, IN.

**DATES:** Disposition of the human remains and associated funerary objects in this notice may occur on or after August 2, 2023.

**ADDRESSES:** Kevin C. Nolan, Ball State University, Applied Anthropology Laboratories, 2000 University Avenue, Muncie, IN 47306, telephone (765) 285–5325, email *kcnolan@bsu.edu.*

**SUPPLEMENTARY INFORMATION:** This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Indiana Department of Transportation. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by Ball State University, Applied

Anthropology Laboratories and Indiana Department of Transportation.

**Description**

In 1987, human remains representing, at minimum, 12 individuals were removed from Site 12–Hn–298 in Henry County, IN. When this site was disturbed during earth-moving activities by Indiana Department of Highways, a salvage excavation was initiated by Ball State University to document the features exposed. The salvage excavations uncovered 12 human burials and 26 other precontact-era cultural features. Radiocarbon dates from the site fall generally in the Late Woodland period (1,000 ± 50, 1430 ± 60, and 1,050 ± 80 RCYBP), with one Late Archaic projectile recovered in back dirt also indicating possibly multiple temporal components. Investigator (Donald Cochran) determined the burials and features represent an Albee phase occupation (ca. 800 to 1200 CE). The human remains have since been curated at Ball State University, Applied Anthropology Laboratories under accession number 87.27. The human remains belong to four juveniles, three female adults, four male adults, and one adult of indeterminate sex. The age of these individuals range from less than 6 months to over 60 years. The 5,600 associated funerary objects are 3,922 faunal elements, 16 animal bone beads, 98 shell beads, 31 animal bone tools, 1,064 floral remains or charcoal samples, 134 ceramics, 27 bifaces or biface fragments, 154 pieces of lithic debitage, 24 unifacial tools, eight cores, one ocher, three celts, 90 fire-cracked rocks, 20 miscellaneous stones, one piece of quartz, one piece of glass, two pieces of metal, one piece of cinder, one plastic button, and two soil samples.

**Aboriginal Land**

The human remains and associated funerary objects in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. The following information was used to identify the aboriginal land: a final judgment of the Indian Claims Commission or the United States Court of Claims, and the 1818 Treaty of St. Mary's.

**Determinations**

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the Indiana Department of Transportation has determined that:

- The human remains described in this notice represent the physical remains of 12 individuals of Native American ancestry.
- The 5,600 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- No relationship of shared group identity can be reasonably traced between the human remains and associated funerary objects and any Indian Tribe.
- The human remains and associated funerary objects described in this notice were removed from the aboriginal land of the Delaware Nation, Oklahoma; Delaware Tribe of Indians; and the Miami Tribe of Oklahoma.

**Requests for Disposition**

Written requests for disposition of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary objects described in this notice to a requestor may occur on or after August 2, 2023. If competing requests for disposition are received, the Indiana Department of Transportation must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary objects are considered a single request and not competing requests. The Ball State University, Applied Anthropology Laboratories, on behalf of the Indiana Department of Transportation, is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

*Authority:* Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: June 21, 2023.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2023–14081 Filed 6–30–23; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0036100; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Texas Department of Transportation, Austin, TX

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Texas Department of Transportation (TxDOT) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Anderson County, TX.

**DATES:** Repatriation of the human remains and associated funerary objects in this notice may occur on or after August 2, 2023.

**ADDRESSES:** Scott Pletka, TxDOT, 6230 East Stassney Lane, Austin, TX 78701, telephone (512) 865–8694, email *scott.pletka@txdot.gov.*

**SUPPLEMENTARY INFORMATION:** This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of TxDOT. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by TxDOT.

**Description**

In August and September of 2021, human remains representing, at minimum, three individuals were removed from site 41AN162 in Anderson County, TX, by archeologists working on behalf of TxDOT. A non-funerary pit feature yielded a lower right canine tooth belonging to an adult and a deciduous upper left central incisor tooth belonging to a juvenile. No associated funerary objects are present. An individual burial yielded one lower premolar, three lower molars, and four upper molars belonging to a juvenile. The 47 associated funerary objects are one possible Kiam Incised vessel, three unidentified plainware vessels, 41 incised and grog-tempered ceramic

sherds, one piece of lithic debitage, and one liter of soil fill.

**Cultural Affiliation**

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, biological, geographical, historical, and expert opinion.

**Determinations**

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, TxDOT has determined that:

- The human remains described in this notice represent the physical remains of three individuals of Native American ancestry.
- The 47 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Caddo Nation of Oklahoma.

**Requests for Repatriation**

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after August 2, 2023. If competing requests for repatriation are received, TxDOT must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. TxDOT is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

*Authority:* Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: June 21, 2023.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2023–14074 Filed 6–30–23; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0036101; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion Amendment: California Department of Parks and Recreation, Sacramento, CA

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice; amendment.

**SUMMARY:** In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California Department of Parks and Recreation has amended a Notice of Inventory Completion in the **Federal Register** on September 28, 2012. This notice amends the number of associated funerary objects in a collection removed from Shannon County, SD.

**DATES:** Disposition of the human remains and associated funerary objects in this notice may occur on or after August 2, 2023.

**ADDRESSES:** Dr. Leslie L. Hartzell, NAGPRA Coordinator, California Department of Parks and Recreation, P.O. Box 942896, Sacramento, CA 94296–0001, telephone (916) 425–8016, email *Leslie.Hartzell@parks.ca.gov.*

**SUPPLEMENTARY INFORMATION:** This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the California Department of Parks and Recreation. The National Park Service is not responsible for the determinations in this notice. Additional information on the amendments and determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the California Department of Parks and Recreation.

**Amendment**

This notice amends the determinations published in a Notice of Inventory Completion in the **Federal Register** (77 FR 59647–59648, September 28, 2012). Disposition of the items in the original Notice of Inventory Completion has not occurred. During consultation regarding the original notice, Department of Parks and Recreation staff located and subsequently identified additional associated funerary objects from the Wounded Knee Massacre Site.

| Site | Original No. | Amended No. | Amended description |
|---|---|---|---|
| Wounded Knee Massacre Site in Shannon County, SD. | 2 | 12 | four photographs, two armlets, two bandanas, one arm band, one lot of beads, one periodical, and one spur. |

**Determinations (As Amended)**

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the California Department of Parks and Recreation has determined that:

- The human remains represent the physical remains of two individuals of Native American ancestry.
- The 12 objects are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects and the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Oglala Sioux Tribe; and the Standing Rock Sioux Tribe of North & South Dakota.

**Requests for Disposition**

Written requests for disposition of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in

**ADDRESSES.** Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains and associated funerary objects in this notice to a requestor may occur on or after August 2, 2023. If competing requests for disposition are received, the California Department of Parks and Recreation must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains and associated funerary objects are considered a single request and not competing requests. The California Department of Parks and Recreation is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

*Authority:* Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.11, and 10.13.

Dated: June 21, 2023.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2023–14082 Filed 6–30–23; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0036104; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Edge of the Cedars State Park Museum, Blanding, UT

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Edge of the Cedars State Park Museum (ECSPM) has completed an inventory of human remains and has determined that there is no cultural affiliation between the human remains and any Indian Tribe. The human remains were removed from Utah.

**DATES:** Disposition of the human remains in this notice may occur on or after August 2, 2023.

**ADDRESSES:** Chris Hanson, Manager, Edge of the Cedars State Park Museum, 660 W 400 N, Blanding, UT 84511–4000, telephone (435) 678–2238, email *chanson@utah.gov.*

**SUPPLEMENTARY INFORMATION:** This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the ECSPM. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the ECSPM.

**Description**

Human remains of 13 individuals were inadvertently discovered in the State of Utah by the public. These human remains were recovered by local law enforcement agencies and transferred to the Utah State Medical Examiner's Office throughout the decade of the 1980s. Very little information is known concerning the human remains other than the counties where they were recovered. No associated funerary objects are present.

**Aboriginal Land**

The human remains in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. The following information was used to identify the aboriginal land: a final judgment of the Indian Claims Commission.

**Determinations**

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the ECSPM has determined that:

- The human remains described in this notice represent the physical remains of 13 individuals of Native American ancestry.
- No relationship of shared group identity can be reasonably traced between the human remains and any Indian Tribe.
- The human remains described in this notice were removed from the aboriginal land of the Confederated Tribes of the Goshute Reservation, Nevada and Utah; Northwestern Band of the Shoshone Nation; Paiute Indian Tribe of Utah (Cedar Band of Paiutes, Kanosh Band of Paiutes, Koosharem Band of Paiutes, Indian Peaks Band of Paiutes, and Shivwits Band of Paiutes); and the Ute Indian Tribe of the Uintah & Ouray Reservation, Utah.

**Requests for Disposition**

Written requests for disposition of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains described in this notice to a requestor may occur on or after August 2, 2023. If competing requests for disposition are received, the ECSPM must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains are considered a single request and not competing requests. The ECSPM is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

*Authority:* Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: June 21, 2023.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2023–14077 Filed 6–30–23; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**[NPS–WASO–NAGPRA–NPS0036106; PPWOCRADN0–PCU00RP14.R50000]**

### Notice of Inventory Completion: Central Washington University, Ellensburg, WA

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), Central Washington University has completed an inventory of human remains and has determined that there is no cultural affiliation between the human remains and any Indian Tribe. The human remains were removed from the Olympic Peninsula, WA.

**DATES:** Disposition of the human remains in this notice may occur on or after August 2, 2023.

**ADDRESSES:** Lourdes Henebry-DeLeon, Department of Anthropology and Museum Studies, Central Washington University, 400 E University Way, Ellensburg, WA 98926–7544, telephone (509) 963–2671, email *Lourdes.Henebry-DeLeon@cwu.edu.*

**SUPPLEMENTARY INFORMATION:** This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Central Washington University. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by Central Washington University.

### Description

Around 1920, human remains representing, at minimum, one individual were removed from an unknown location on the Olympic Peninsula, WA, by Paul Brenton. In 1940, Dwight Brenton donated an ''Indian skull & 2 leg bones'' to the Burke Museum. In 1974, the Burke Museum transferred the left and right femurs (Burke Museum number 19–14869) to Central Washington University (Central Washington University number 3170) and retained the cranium (Burke Museum number 19–14868). (On February 19, 2013, the Burke Museum published a Notice of Inventory Completion in the **Federal Register** for the cranium (78 FR 11675–11676).) No associated funerary objects are present.

### Aboriginal Land

The human remains in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. The following information was used to identify the aboriginal land: a final judgment of the Indian Claims Commission, the Treaty of the Quinault River of 1855, the Treaty of Neah Bay of 1855, and the Treaty of Point No Point of 1855.

### Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, the Central Washington University has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- No relationship of shared group identity can be reasonably traced between the human remains and associated funerary objects and any Indian Tribe.
- The human remains described in this notice were removed from the aboriginal land of the Hoh Indian Tribe; Jamestown S'Klallam Tribe; Lower Elwha Tribal Community; Makah Indian Tribe of the Makah Indian Reservation; Port Gamble S'Klallam Tribe; Quileute Tribe of the Quileute Reservation; Quinault Indian Reservation; and the Skokomish Indian Tribe.

### Requests for Disposition

Written requests for disposition of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains described in this notice to a requestor may occur on or after August 2, 2023. If competing requests for disposition are received, Central Washington University must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains are considered a single request and not competing requests. Central Washington University is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

*Authority:* Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: June 21, 2023.

**Melanie O'Brien,**

*Manager, National NAGPRA Program.*

[FR Doc. 2023–14080 Filed 6–30–23; 8:45 am]

**BILLING CODE 4312–52–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–489 and 731–TA–1201 (Second Review)]**

## Drawn Stainless Steel Sinks From China; Institution of Five-Year Reviews

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping and countervailing duty orders on drawn stainless steel sinks from China would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

**DATES:** Instituted July 3, 2023. To be assured of consideration, the deadline for responses is August 2, 2023. Comments on the adequacy of responses may be filed with the Commission by September 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** Calvin Chang (202–205–3062), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—On April 11, 2013, the Department of Commerce (''Commerce'') issued antidumping and countervailing duty orders on imports of drawn stainless steel sinks from China (78 FR 21592 and 21596). Following the first five-year reviews by Commerce and the Commission, effective August 28, 2018, Commerce issued a continuation of the antidumping and countervailing duty orders on imports of drawn stainless steel sinks from China (83 FR 43847). The Commission is now conducting second reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's

determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

*Definitions.*—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Country* in these reviews is China.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations and its expedited first five-year review determinations, the Commission defined the *Domestic Like Product* as drawn stainless steel sinks coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations and its expedited first five-year review determinations, the Commission defined the *Domestic Industry* as all U.S. producers of drawn stainless steel sinks.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

*Participation in the proceeding and public service list.*—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.*—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

*Certification.*—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

*Written submissions.*—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is August 2, 2023. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is September 14, 2023. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 23–5–573, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

*Inability to provide requested information.*—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall

notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

*Information To Be Provided in Response to This Notice of Institution:* As used below, the term ''firm'' includes any related firms.

Those responding to this notice of institution are encouraged, but not required, to visit the USITC's website at *https://usitc.gov/reports/response_noi_worksheet,* where one can download and complete the ''NOI worksheet'' Excel form for the subject proceeding, to be included as attachment/exhibit 1 of your overall response.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 2017.

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2022, except as noted (report quantity data in number of sinks and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in number of sinks and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in number of sinks and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours

per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* after 2017, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

*Authority:* This proceeding is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: June 26, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–13849 Filed 6–30–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 731–TA–1378–1379 (Review)]**

## Low Melt Polyester Staple Fiber From South Korea and Taiwan; Institution of Five-Year Reviews

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping duty orders on low melt polyester staple fiber from South Korea and Taiwan would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

**DATES:** Instituted July 3, 2023. To be assured of consideration, the deadline for responses is August 2, 2023. Comments on the adequacy of responses may be filed with the Commission by September 12, 2023.

**FOR FURTHER INFORMATION CONTACT:** Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—On August 16, 2018, the Department of Commerce (''Commerce'') issued antidumping duty orders on imports of low melt polyester staple fiber from South Korea and Taiwan (83 FR 40752). The Commission is conducting reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

*Definitions.*—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are South Korea and Taiwan.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, the Commission defined a single *Domestic Like Product* consisting of all low melt polyester staple fiber, coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined the *Domestic Industry* to include all domestic producers of low melt polyester staple fiber.

(5) The *Order Date* is the date that the antidumping duty orders under review became effective. In these reviews, the *Order Date* is August 16, 2018.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

*Participation in the proceeding and public service list.*—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons,

or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.*—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

*Certification.*—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

*Written submissions.*—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is August 2, 2023. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is September 12, 2023. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 23–5–574, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

*Inability to provide requested information.*—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

*Information To Be Provided in Response to This Notice of Institution:* If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

Those responding to this notice of institution are encouraged, but not required, to visit the USITC's website at *https://usitc.gov/reports/response_noi_worksheet,* where one can download and complete the ''NOI worksheet'' Excel form for the subject proceeding, to be included as attachment/exhibit 1 of your overall response.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business

association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in § 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date.*

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2022, except as noted (report quantity data in pounds and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in pounds and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in any *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in pounds and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

*Authority:* This proceeding is being conducted under authority of Title VII of the Tariff Act of 1930; this notice is

published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: June 26, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–13858 Filed 6–30–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–582 and 731–TA–1377 (Review)]**

## Ripe Olives From Spain; Institution of Five-Year Reviews

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping and countervailing duty orders on ripe olives from Spain would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

**DATES:** Instituted July 3, 2023. To be assured of consideration, the deadline for responses is August 2, 2023. Comments on the adequacy of responses may be filed with the Commission by September 12, 2023.

**FOR FURTHER INFORMATION CONTACT:** Caitlyn Hendricks (202–205–2058), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—On August 1, 2018, the Department of Commerce (''Commerce'') issued antidumping and countervailing duty orders on imports of ripe olives from Spain (83 FR 37465 and 37469). The Commission is conducting reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

*Definitions.*—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Country* in these reviews is Spain.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, the Commission defined a single *Domestic Like Product* consisting of all ripe olives, coextensive with Commerce's scope.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined the *Domestic Industry* as all U.S. processors of ripe olives.

(5) The *Order Date* is the date that the antidumping and countervailing duty orders under review became effective. In these reviews, the *Order Date* is August 1, 2018.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

*Participation in the proceeding and public service list.*—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.*—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

*Certification.*—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to

the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

*Written submissions.*—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is August 2, 2023. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is September 12, 2023. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 23–5–575, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

*Inability to provide requested information.*—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

*Information To Be Provided in Response to This Notice of Institution:* As used below, the term ''firm'' includes any related firms.

Those responding to this notice of institution are encouraged, but not required, to visit the USITC's website at *https://usitc.gov/reports/response_noi_worksheet,* where one can download and complete the ''NOI worksheet'' Excel form for the subject proceeding, to be included as attachment/exhibit 1 of your overall response.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in § 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date.*

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2022, except as noted (report quantity data in short tons dry weight and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have

expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in short tons dry weight and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in short tons dry weight and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

*Authority:* This proceeding is being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: June 26, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–13857 Filed 6–30–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–583 and 731–TA–1381 (Review)]**

## Cast Iron Soil Pipe Fittings From China; Institution of Five-Year Reviews

**AGENCY:** United States International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission hereby gives notice that it has instituted reviews pursuant to the Tariff Act of 1930 (''the Act''), as amended, to determine whether revocation of the antidumping and countervailing duty orders on cast iron soil pipe fittings from China would be likely to lead to continuation or recurrence of material injury. Pursuant to the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission.

**DATES:** Instituted July 3, 2023. To be assured of consideration, the deadline for responses is August 2, 2023. Comments on the adequacy of responses may be filed with the Commission by September 14, 2023.

**FOR FURTHER INFORMATION CONTACT:** Kristina Lara (202–205–3386), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:**

*Background.*—On August 31, 2018, the Department of Commerce (''Commerce'') issued antidumping and

countervailing duty orders on imports of cast iron soil pipe fittings from China (83 FR 44566 and 44570). The Commission is conducting reviews pursuant to section 751(c) of the Act, as amended (19 U.S.C. 1675(c)), to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. Provisions concerning the conduct of this proceeding may be found in the Commission's Rules of Practice and Procedure at 19 CFR part 201, subparts A and B, and 19 CFR part 207, subparts A and F. The Commission will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

*Definitions.*—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Country* in these reviews is China.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original affirmative determinations, the Commission defined the *Domestic Like Product* as all cast iron soil pipe fittings, except drain bodies.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original affirmative determinations, the Commission defined the *Domestic Industry* as all U.S. producers of cast iron soil pipe fittings, except drain bodies. The Commission excluded one domestic producer from the *Domestic Industry* under the related parties provision.

(5) The *Order Date* is the date that the antidumping and countervailing duty orders under review became effective. In these reviews, the *Order Date* is August 31, 2018.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

*Participation in the proceeding and public service list.*—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the proceeding as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the proceeding.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation or an earlier review of the same underlying investigation. The Commission's designated agency ethics official has advised that a five-year review is not the same particular matter as the underlying original investigation, and a five-year review is not the same particular matter as an earlier review of the same underlying investigation for purposes of 18 U.S.C. 207, the post-employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 79 FR 3246 (Jan. 17, 2014), 73 FR 24609 (May 5, 2008). Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation or an earlier review of the same underlying investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Charles Smith, Office of the General Counsel, at 202–205–3408.

*Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.*—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this proceeding available to authorized applicants under the APO issued in the proceeding, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the proceeding. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

*Certification.*—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this proceeding must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that information submitted in response to this request for information and throughout this proceeding or other proceeding may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

*Written submissions.*—Pursuant to § 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is August 2, 2023. Pursuant to § 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is September 14, 2023. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings. Also, in accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the proceeding must be served on all other parties to the proceeding (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the proceeding you do not need to serve your response).

Please note the Secretary's Office will accept only electronic filings at this

time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

No response to this request for information is required if a currently valid Office of Management and Budget (''OMB'') number is not displayed; the OMB number is 3117 0016/USITC No. 23–5–572, expiration date June 30, 2023. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

*Inability to provide requested information.*—Pursuant to § 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to § 776(b) of the Act (19 U.S.C. 1677e(b)) in making its determinations in the reviews.

*Information To Be Provided in Response to This Notice of Institution:* As used below, the term ''firm'' includes any related firms.

Those responding to this notice of institution are encouraged, but not required, to visit the USITC's website at *https://usitc.gov/reports/response_noi_worksheet,* where one can download and complete the ''NOI worksheet'' Excel form for the subject proceeding, to be included as attachment/exhibit 1 of your overall response.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is an interested party under 19 U.S.C. 1677(9) and if so, how, including whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association (a majority of whose members are interested parties under the statute), or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this proceeding by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping and countervailing duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in § 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in § 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date.*

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2022, except as noted (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) the value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject*

*Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2022 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in the *Subject Country* (that is, the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) The quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(13) (OPTIONAL) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

*Authority:* This proceeding is being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.61 of the Commission's rules.

By order of the Commission.

Issued: June 26, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–13850 Filed 6–30–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–1366]**

## Certain Semiconductor Devices, and Methods of Manufacturing Same and Products Containing the Same; Institution of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on May 26, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of Efficient Power Conversion Corporation of El Segundo, California. Supplements to the complaint were filed on June 14 and 15, 2023. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain semiconductor devices, and methods of manufacturing same and products containing the same by reason of the infringement of certain claims of U.S. Patent No. 8,350,294 (''the '294 patent''); U.S. Patent No. 8,404,508 (''the '508 patent''); U.S. Patent No. 9,748,347 (''the '347 patent''); and U.S. Patent No. 10,312,335 (''the '335 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

**ADDRESSES:** The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

**SUPPLEMENTARY INFORMATION:**

*Authority:* The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2023).

*Scope of Investigation:* Having considered the complaint, the U.S. International Trade Commission, on June 28, 2023, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1–3 of the '294 patent; claim 1 of the '508 patent; claims 1–3 of the '347 patent; and claims 1–7 of the '335 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''GaN-on-Si semiconductor devices, GaN FETs, GaN high electron mobility transistors, and products incorporating such transistors, which are bidirectional transistors, multichip modules, and demo boards'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) *The complainant is:*

Efficient Power Conversion Corporation, 909 N Pacific Coast Highway, Suite 230, El Segundo, CA 90245

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Innoscience (Zhuhai) Technology, Company, Ltd., No. 39, Jinyuan 2nd Road, High-Tech Zone, Zhuhai, Guangdong, 519099 China

Innoscience America, Inc., 5451 Great America Pkwy., Suite 125, Santa Clara, CA 95054

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: June 28, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–14091 Filed 6–30–23; 8:45 am]

**BILLING CODE 7020–02–P**

## LEGAL SERVICES CORPORATION

### Sunshine Act Meetings

**TIME AND DATE:** The Finance Committee of the Legal Services Corporation Board of Directors will meet virtually on July 10, 2023. The meeting will commence at 4:00 p.m. EDT and will continue until the conclusion of the Committee's agenda.

**PLACE:**

*Public Notice of Virtual Meeting:* LSC will conduct the July 10, 2023 meeting via Zoom.

*Public Observation:* Unless otherwise noted herein, the Finance Committee meeting will be open to public observation via Zoom. Members of the public who wish to participate remotely in the public proceedings may do so by following the directions provided below.

**Directions for Open Sessions**

*July 10, 2023*

To join the Zoom meeting by computer, please use this link.

- *https://lsc-gov.zoom.us/j/89061455147?pwd=K0ZNNEhhcXh5b1FFQUVXV2RhNDA0QT09*
- *Meeting ID:* 890 6145 5147
- *Passcode:* 71023

To join the Zoom meeting by telephone, please dial one of the following numbers:

- 301 715 8592 (Washington, DC)
- +1 646 876 9923 (New York)
- +1 312 626 6799 (Chicago)
- +1 253 215 8782 (Tacoma)
- +1 346 248 7799 (Houston)
- +1 408 638 0968 (San Jose)
- *Meeting ID:* 890 6145 5147
- *Passcode:* 71023

Once connected to Zoom, please immediately mute your computer or telephone. Members of the public are asked to keep their computers or telephones muted to eliminate background noise. To avoid disrupting the meetings, please refrain from placing the call on hold if doing so will trigger recorded music or other sound.

From time to time, the Finance Committee Chair may solicit comments from the public. To participate in the meeting during public comment, use the 'raise your hand' or 'chat' functions in Zoom and wait to be recognized by the Chair before stating your questions and/or comments.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

1. Approval of Meeting Agenda
2. Approval of Minutes of Finance Committee's Meeting on June 12, 2023
3. Public Comment Regarding Fiscal Year 2025 Budget Request
4. Consider and Act on Resolution # 2023–XXX, Adopting LSC's Appropriation Request for Fiscal Year 2025
5. Public Comment on Other Matters
6. Consider and Act on Other Business
7. Consider and Act on Adjournment of Meeting

**CONTACT PERSON FOR MORE INFORMATION:** Cheryl DuHart, Administrative Coordinator, at (202) 295–1621. Questions may also be sent by electronic mail to *duhartc@lsc.gov.*

*Non-Confidential Meeting Materials:* Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC website, at *https://www.lsc.gov/about-lsc/board-meeting-materials.*

(Authority: 5 U.S.C. 552b.)

Dated: June 29, 2023.

**Stefanie Davis,**

*Senior Associate General Counsel for Regulations, Legal Services Corporation.*

[FR Doc. 2023–14190 Filed 6–29–23; 4:15 pm]

**BILLING CODE 7050–01–P**

## NATIONAL SCIENCE FOUNDATION

### Committee Management Renewals

The National Science Foundation (NSF) management officials having responsibility for the advisory committees listed below have determined that renewing these groups for another two years is necessary and in the public interest in connection with the performance of duties imposed upon the Director, National Science Foundation (NSF), by 42 U.S.C. 1861 *et seq.* This determination follows consultation with the Committee Management Secretariat, General Services Administration.

Committees:

Advisory Committee for Biological Sciences, #1110

Advisory Committee for Cyberinfrastructure, #25150

Advisory Committee for STEM Education, #1119 (formerly, the Advisory Committee for Education and Human Resources)

Advisory Committee for Engineering, #1170

Advisory Committee for Geosciences, #1755

Advisory Committee for Integrative Activities, #1373

Alan T. Waterman Award Committee, #1172

Proposal Review Panel for Atmospheric and Geospace Sciences, #10751

Proposal Review Panel for Behavioral and Cognitive Sciences, #10747

Proposal Review Panel for Biological Infrastructure, #10743
Proposal Review Panel for Earth Sciences, #1569
Proposal Review Panel for Emerging Frontiers in Biological Sciences, #44011
Proposal Review Panel for Environmental Biology, #10744
Proposal Review Panel for Geosciences, #1756
Proposal Review Panel for Integrative Organismal Systems, #10745
Proposal Review Panel for Molecular and Cellular Biosciences, #10746
Proposal Review Panel for Ocean Sciences, #10752
Proposal Review Panel for Research on Learning in Formal and Informal Settings, #59
Proposal Review Panel for Social, Behavioral and Economic Sciences, #1766
Proposal Review Panel for Social and Economic Sciences, #10748
Proposal Review Panel for Integrative Activities, #2469
Proposal Review Panel for International Science and Engineering, #10749
Proposal Review Panel for Equity for Excellence in STEM, #1199 (formerly, the Proposal Review Panel for Human Resource Development)

Effective date for renewal is June 28, 2023. For more information, please contact Crystal Robinson, NSF, at (703) 292–8687.

Dated: June 28, 2023.

**Crystal Robinson,**

*Committee Management Officer.*

[FR Doc. 2023–14039 Filed 6–30–23; 8:45 am]

**BILLING CODE 7555–01–P**

## PENSION BENEFIT GUARANTY CORPORATION

### Proposed Submission of Information Collection for OMB Review; Comment Request; Missing Participants

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Notice of intent to request extension of OMB approval of an information collection.

**SUMMARY:** The Pension Benefit Guaranty Corporation (PBGC) intends to request that the Office of Management and Budget extend approval under the Paperwork Reduction Act of a collection of information under PBGC's regulation on Missing Participants. PBGC needs the information submitted by plans under this collection to search for missing participants and beneficiaries and pay their benefits. This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

**DATES:** Comments must be received on or before September 1, 2023 to be assured of consideration.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: paperwork.comments@pbgc.gov.* Refer to Missing Participants and/or OMB Control No. 1212–0069 in the subject line.
- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101.

Commenters are strongly encouraged to submit comments electronically. Commenters who submit comments on paper by mail should allow sufficient time for mailed comments to be received before the close of the comment period.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to Missing Participants and/or OMB Control No. 1212–0069. All comments received will be posted without change to PBGC's website, *https://www.pbgc.gov,* including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

Copies of this information collection may be obtained by writing to Disclosure Division (*disclosure@pbgc.gov*), Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101, or calling 202–229–4040 during normal business hours. If you are deaf or hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Cibinic, Deputy Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101; 202–229–6352; *cibinic.stephanie@pbgc.gov.* If you are deaf or hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

**SUPPLEMENTARY INFORMATION:** The process of closing out a terminated pension plan or other retirement plan involves the disposition of plan assets to satisfy the benefits of plan participants and beneficiaries. One difficulty faced by plan administrators in closing out terminated plans is how to provide for the benefits of missing persons. Section 4050 of ERISA and 29 CFR part 4050 establishes a program under which the Pension Benefit Guaranty Corporation (PBGC) holds the retirement benefits for missing participants and beneficiaries in terminated plans and seeks to reunite those participants and beneficiaries with the benefits being held for them. The program is applicable to certain defined benefit (DB) pension plans covered by PBGC's single-employer or multiemployer insurance programs, and to defined contribution (DC) plans and small professional service DB plans not covered by PBGC's insurance programs.

The Missing Participant Program (MPP) for each of the four types of plans follows the same basic design. The most prominent difference among them lies in the mandatory or voluntary nature of the program. For plans covered by the title IV insurance programs, participation in the MPP is mandatory. For plans not covered by the title IV insurance programs, PBGC's regulation permits, but does not require, such plans to participate in the MPP.

PBGC needs information from plans that participate in the MPP to identify the plans and the missing participants and beneficiaries, to search for missing participants and beneficiaries, to determine the persons entitled to benefits that the plans transfer to PBGC and the forms and amounts of benefits payable, and to refer claimants of benefits being held elsewhere to the institutions holding the benefits.

PBGC intends to make the following modifications to the information collection in this renewal:

- PBGC is proposing a requirement for plans that are filing information about more than five missing individuals (participants or beneficiaries) to provide that information in a spreadsheet file. PBGC provides a user-friendly template that may be used for this purpose.
- PBGC is adding a question to the DB plan forms (MP–100, 300, and 400) asking if the plan has a default beneficiary provision, and, if yes, requiring an attachment of it. (This question is already on the DC plan form (MP–200)).
- PBGC is updating references on the DB plan forms and instructions that relate to de minimis benefit amounts of $5,000 or less to reflect the change under section 304 of the SECURE 2.0

Act increasing that amount to $7,000 as of January 1, 2024.[1]

• PBGC is adding a box to the DC plan form for the person certifying the form to check whether they are the plan's plan administrator or the plan's qualified termination administrator.

Finally, PBGC intends to make other clarifying and editorial changes to the forms and instructions.

PBGC estimates that it will receive over the next 3 years an annual average of 345 filings from plans under this collection of information. PBGC further estimates that the average annual burden of this collection of information is 70 hours and $498,000. The actual hour burden and cost burden per plan will vary depending on plan size and other factors.

The existing collection of information was approved under OMB control number 1212–0069 (expires January 31, 2024). PBGC intends to request that OMB extend its approval of this collection of information for three years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC is soliciting public comments to—

• 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 methodologies and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

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

Issued in Washington, DC.

**Stephanie Cibinic,**

*Deputy Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.*

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**BILLING CODE 7709–02–P**

[1] SECURE 2.0 Act of 2022, Division T of the Consolidated Appropriations Act, 2023, Public Law 117–328 (Dec. 29, 2022).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97815; File No. SR–PEARL–2023–27]**

## 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

June 27, 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 June 16, 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.[3]

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.

[3] All references to the ''Exchange'' in this filing mean MIAX Pearl Options. Any references to the equities trading facility of MIAX PEARL, LLC, will specifically be referred to as ''MIAX Pearl Equities.''

#### *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[4] and non-Members; (2) amend the calculation of fees for MIAX Express Network Full Service (''MEO'')[5] 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.[6] At the same time, MIAX also increased its 10Gb ULL connectivity fee from $9,300 to $10,000 per month.[7] 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.[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. The Exchange bifurcated 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

[4] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[5] The term ''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.

[6] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

[7] *See* Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02).

[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.miaxglobal.com/alert/2022/08/12/miax-options-and-miax-pearl-options-announce-planned-network-changes-0.* The Exchange will continue to provide access to both the Exchange and MIAX over a single shared 1Gb

Continued

the 2021 increase discussed above,[10] the Exchange experienced ongoing increases in expenses, particularly internal expenses.[11] 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.[12]

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.[13] 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'').[14] On February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (SR–PEARL–2023–08) (the ''Second Proposal'').[15] On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (SR–PEARL–2023–19) (the ''Third Proposal'').[16] On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with this further revised proposal (SR–PEARL–2023–27).[17]

The Exchange previously included a cost analysis in the Initial, Second, and Third Proposals. 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[18] (together with MIAX 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, Second, and Third Proposals, the fees themselves have not changed since the Initial, Second, or Third Proposals 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*[19] 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.[20] 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.[21] 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'').[22] 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.'' [23] The Commission denied requests by various exchanges and plan participants for reconsideration of the

connection. *See* Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR–PEARL–2022–60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR–MIAX–2022–48).

[10] The Exchange notes 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).

[11] 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.

[12] For the avoidance of doubt, all references to costs in this filing, including the cost categories discussed below, refer to costs incurred by MIAX Pearl Options only and not MIAX Pearl Equities, the equities trading facility.

[13] The Exchange notes that MIAX will make a similar filing to increase its 10Gb ULL connectivity fees.

[14] *See* Securities Exchange Act Release No. 96632 (January 10, 2023), 88 FR 2707 (January 17, 2023) (SR–PEARL–2022–62).

[15] *See* Securities Exchange Act Release No. 97082 (March 8, 2023), 88 FR 15825 (March 14, 2023) (SR–PEARL–2023–05).

[16] *See* Securities Exchange Act Release No. 97420 (May 2, 2023), 88 FR 29701 (May 8, 2023) (SR–PEARL–2023–19).

[17] The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently, information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange has provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff's information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition.

[18] The term ''MIAX Emerald'' means MIAX Emerald, LLC. *See* Exchange Rule 100.

[19] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[20] *Id.*

[21] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[22] *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).

[23] *Id.* at page 2.

Remand Order.[24] 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.'' [25] 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.[26] 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.'' [27] 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.'' [28] 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.'' [29]

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* [30] and remanded for further proceedings consistent with its opinion.[31] 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.'' [32] 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.[33] 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.*'' [34] 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.[35]

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.'' [36] 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'').[37] The legacy exchanges all established a significantly higher baseline for access

[24] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[25] Order Denying Reconsideration, 2019 WL 2022819, at * 13.

[26] *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).

[27] *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'').

[28] *Id.*

[29] *Id.*

[30] *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.

[31] *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.*

[32] *Id.* at *2; *see also id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[33] *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'').

[34] *Id.*

[35] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[36] *See supra* note 31, at page 2.

[37] 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.*

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 [38] 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.[39] 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.[40] 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 [41] and $80,383,000 for 2021.[42] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020 [43] and $22,843,000 for 2021.[44] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020 [45] and $44,800,000 for 2021.[46] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020 [47] and $30,687,000 for 2021.[48] 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.[49] 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.'' [50]

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,[51] 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

[38] 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.

[39] *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).

[40] 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.

[41] 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.*

[42] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[43] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[44] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[45] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[46] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[47] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[48] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[49] 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.*

[50] *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.

[51] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

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 . . .'',[52] 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 Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[53] 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 [54] 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,[55] 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; [56] 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.[57]

* * * * *

10Gb ULL Connectivity Fee Change

MIAX Pearl Options recently filed a proposal to no longer operate 10Gb connectivity to MIAX Pearl Options 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.[58] This proposal: (i) sets forth the applicable fees for the bifurcated 10Gb ULL network; (ii) removes provisions in the Fee Schedule that provide for a shared 10Gb ULL network; and (iii) specifies that market participants may continue to connect to both MIAX Pearl Options and MIAX via the 1Gb network.

MIAX Pearl Options bifurcated the MIAX Pearl Options and MIAX 10Gb ULL networks in the first quarter of 2023, which change became effective on January 23, 2023. The Exchange issued an alert on August 12, 2022 publicly announcing the planned network change and implementation plan and dates to provide market participants adequate time to prepare.[59] Upon bifurcation of the 10Gb ULL network, subscribers need to purchase separate connections to MIAX Pearl Options and MIAX at the applicable rate. The Exchange's proposed amended rate for 10Gb ULL connectivity is described

[52] *See supra* note 27, at note 1.

[53] *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).

[54] 15 U.S.C. 78f(b)(4).

[55] 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.

[56] 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.*

[57] 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.

[58] *See supra* note 9.

[59] *Id.*

below. Prior to the bifurcation of the 10Gb ULL networks, subscribers to 10Gb ULL connectivity were able to connect to both MIAX Pearl Options 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 [60] via a 10Gb ULL fiber connection and to specify that this fee is for a dedicated connection to MIAX Pearl Options and no longer provides access to MIAX. Specifically, MIAX Pearl Options 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'').[61] 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 MIAX Pearl Options 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, shared 1Gb connection, 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,[62] a Full Service MEO Port-Single,[63] and a Limited Service MEO Port.[64] For one monthly price, a Member may be allocated two (2) Full-Service MEO Ports of either type per matching engine [65] and may request Limited Service MEO Ports for which MIAX Pearl will assess Members Limited Service MEO Port fees based on a sliding scale for the number of Limited Service MEO Ports utilized each month. The two (2) Full-Service MEO Ports that may be allocated per matching engine to a Member may consist of: (a) two (2) Full Service MEO Ports—Bulk; (b) two (2) Full Service MEO Ports—Single; or (c) one (1) Full Service MEO Port—Bulk and one (1) Full Service MEO Port—Single.

Currently, the Exchange assesses Members Full Service MEO Port Fees, either for a Full Service MEO Port—Bulk and/or for a Full Service MEO Port—Single, based upon the monthly total volume executed by a Member and its Affiliates [66] on the Exchange, across all origin types, not including Excluded Contracts,[67] as compared to the Total Consolidated Volume (''TCV''),[68] 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 [69] and Electronic Exchange Members [70] (''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-

[60] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[61] 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.miaxglobal.com/markets/us-options/miax-options/fees* (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.'').

[62] ''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.

[63] ''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.

[64] ''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.

[65] 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.

[66] ''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.

[67] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[68] ''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.

[69] 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.

[70] 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.

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.[71] 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.[72]

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.[73] The Exchange will assess MIAX Pearl Options Market Makers the monthly Market Maker Full Service MEO Port (Bulk) fee based on the greatest number of classes listed on MIAX Pearl Options that the MIAX Pearl Options 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 Options 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 Options. In particular, the Exchange proposes to adopt footnote ''**'' following the Market Maker Full Service MEO Port (Bulk) fee table for these Monthly Full Service MEO Port (Bulk) tier levels. New proposed footnote ''**'' will provide that if the Market Maker's total monthly executed volume during the relevant month is less than 0.040% of the total monthly TCV for MIAX Pearl-listed option classes for that month, then the fee will be $6,000 instead of the fee otherwise applicable to such level.

The purpose of the alternative lower fee designated in proposed footnote ''**'' is to provide a lower fixed fee to 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.[74] 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

[71] *See* MIAX Fee Schedule, Section 5)d)ii) and MIAX Emerald Fee Schedule, Section 5)d)ii).

[72] *See id.*

[73] 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.

[74] *See* MIAX Fee Schedule, Section 5)d)ii), note ''*'' and MIAX Emerald Fee Schedule, Section 5)d)ii), note ''▪''.

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,[75] 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.[76] This fee had been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.[77] The Exchange proposes to increase Full Service MEO Port fees, with the highest monthly fee of $12,000 for the Full Service MEO Ports (Bulk). Market Makers will continue to receive two (2) Full Service MEO Ports to each matching engine to which they connect for the single flat monthly fee. Assuming a Market Maker connects to all twelve (12) matching engines during the month, with two Full Service MEO Ports per matching engine, this would result in an effective fee of $500 per Full Service MEO Port ($12,000 divided by 24).

FULL SERVICE MEO PORTS (BULK)

| | Number of match engines | Total number of ports for market maker to connect to all match engines | Total fee (monthly) | Effective per port fee |
|---|---|---|---|---|
| Pricing Based on Market Maker Being Charged the Highest Tier (Current) .. | 12 | 24 | $5,000 | $208.33 |
| Pricing Based on Market Maker Being Charged the Highest Tier (as proposed) ..... | 12 | 24 | 12,000 | 500 |

Full Service MEO Port (Single) Fee Changes

*Current Full Service MEO Port (Single) Fees.* The Exchange currently assesses all Members (Market Makers and EEMs) monthly Full Service MEO Port (Single) fees as follows:

(i) if its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $2,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $3,375; and

(iii) if its volume falls within the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $3,750.

*Proposed Full Service MEO Port (Single) Fees.* The Exchange proposes to 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

[75] *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.

[76] *Id. See also infra* notes 101 to 108 and accompanying text.

[77] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

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,[78] 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.[79] 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[80] in general, and furthers the objectives of Section 6(b)(4) of the Act[81] 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[82] 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[83] and the Staff Guidance,[84] 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.'' [85] 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.'' [86] 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.'' [87]

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 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[88] 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.[89] 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

[78] *See id.*

[79] *See* MIAX Fee Schedule, Section 5)d)ii); MIAX Emerald Fee Schedule, Section 5)d)ii).

[80] 15 U.S.C. 78f(b).

[81] 15 U.S.C. 78f(b)(4).

[82] 15 U.S.C. 78f(b)(5).

[83] *See supra* note 26.

[84] *See supra* note 27.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *See* MIAX PEARL Successfully Launches Trading Operations, dated February 6, 2017, *available at https://www.miaxglobal.com/sites/default/files/alert-files/MIAX_Press_Release_02062017.pdf.*

[89] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR–PEARL–2017–10).

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.[90]

Later in 2018, as the Exchange's market share increased,[91] the Exchange adopted nominal fees for Full Service MEO Ports.[92] The Exchange last increased the fees for its 10Gb ULL fiber connections from $9,300 to $10,000 per month on January 1, 2021.[93] 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'. . . .'' [94]

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.'' [95]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [96] 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.'' [97] 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.'' [98] 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.'' [99]

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 with a reasonable 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 connectivity and port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

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[90] *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).

[91] The Exchange experienced a monthly average trading volume of 3.94% for the month of March 2018. *See* the ''Market Share'' section of the Exchange's website, *available at www.miaxglobal.com.*

[92] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[93] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

[94] *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)).

[95] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[96] *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.'').

[97] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[98] *Id.*

[99] *See* Staff Guidance, *supra* note 27.

| Exchange | Type of connection or port | Monthly fee (per connection or per port) |
|---|---|---|
| MIAX Pearl Options (as proposed) (equity options market share of 7.05% for the month of May 2023) [a]. | 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 [b] (equity options market share of 6.59% for the month of May 2023) [c]. | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port [d] | 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") [e] (equity options market share of 6.18% for the month of May 2023) [f]. | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port | $1,100 per port. |
| NYSE American LLC ("NYSE American") [g] (equity options market share of 7.34% for the month of May 2023) [h]. | 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") [i] (equity options market share of 2.00% for the month of May 2023) [j]. | 10Gb Ultra connection | $15,000 per connection. |
| | SQF Port | $1,250 per port. |

[a] *See supra* note 91.
[b] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.
[c] *See supra* note 91.
[d] Similar to the MIAX Pearl Options' MEO Ports, SQF ports are primarily utilized by Market Makers.
[e] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.
[f] *See supra* note 91.
[g] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.
[h] *See supra* note 91.
[i] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.
[j] *See supra* note 91.

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.[100] 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 Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes proposed by MIAX Pearl Options.

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

[100] *See* Specialized Quote Interface Specification, Nasdaq PHLX, Nasdaq Options Market, Nasdaq BX Options, Version 6.5a, Section 2, Architecture (revised August 16, 2019), *available at http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/SQF6.5a-2019-Aug.pdf.* The Exchange notes that it is unclear whether the NASDAQ exchanges include connectivity to each matching engine for the single fee or charge per connection, per matching engine. *See also* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020). The Exchange notes that NYSE provides a link to an Excel file detailing the number of matching engines per options exchange, with Arca and Amex having 19 and 17 matching engines, respectively.

options market.[101] 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.[102]

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.[103] 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 Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options. 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.[104] If the Exchange is not at the national best bid or offer (''NBBO''),[105] 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.[106]

With respect to the submission of orders, Members may also choose not to purchase any connection 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,[107] or request sponsored access [108] through a member of an exchange in order to submit a trade directly to an options exchange.[109] 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).[110] 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

[101] 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.''

[102] Service Bureaus may obtain ports on behalf of Members.

[103] *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.

[104] *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.*

[105] *See* Exchange Rule 100.

[106] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[107] 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.

[108] 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.

[109] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[110] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at,* US Direct-Extranet Connection (nasdaqtrader.com); *and* Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); *and* 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

customers of their own.[111] 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 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 Options Market Maker terminated their MIAX Pearl Options 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 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 Options commenced operations as a national securities exchange on February 7, 2017.[112] The Exchange and MIAX 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 allowed 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,[113] the connectivity needs of Members and market participants has increased every year since the launch of MIAX Pearl Options 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 Options' 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 ongoing and future 10Gb ULL connectivity and access demands.[114]

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

[111] 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.

[112] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (establishing MIAX Pearl Options 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 Options' affiliate, MIAX, via a single, shared connection).

[113] *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).

[114] 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.

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.[115] 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 six (6) overall 10Gb ULL connectivity subscriptions across MIAX Pearl Options and MIAX. This immaterial increase in overall connections reflects 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 an exchange 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 and port 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,[116] and Rule 19b–4 thereunder,[117] with respect to the types of information exchanges should provide when filing fee changes, and Section 6(b) of the Act,[118] which requires, among other things, that exchange fees be reasonable and equitably allocated,[119] not designed to permit unfair discrimination,[120] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[121] 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.[122] 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 [123]) 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

[115] *See supra* note 9.

[116] 15 U.S.C. 78s(b)(1).

[117] 17 CFR 240.19b–4.

[118] 15 U.S.C. 78f(b).

[119] 15 U.S.C. 78f(b)(4).

[120] 15 U.S.C. 78f(b)(5).

[121] 15 U.S.C. 78f(b)(8).

[122] *See* Staff Guidance, *supra* note 27.

[123] 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.

Analysis'').[124] 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 for each cost driver as part of its 2023 budget review process. The 2023 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior management, department heads, and the Finance Team. Each department head is required to send a ''bottom up'' budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and 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, simple only or simple and complex markets, auction functionality, etc.), which may impact message traffic, individual system architectures that impact platform size,[125] 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. All of these factors result in different allocation percentages among the Exchange and its affiliated markets, *i.e.,* the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange's parent company currently owns and operates four separate and distinct marketplaces, the Exchange must determine the costs associated with each actual market—as opposed to the Exchange's parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, the Exchange's parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers, due to the unique factors of each marketplace as described above. This allocation methodology also ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, *e.g.,* connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to each of the cost drivers set forth below. 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 to 10Gb ULL connectivity), with smaller allocations to Full Service MEO Ports (3.4%), and the remainder to the provision of other connectivity, other ports, transaction execution, membership services and market data services (36%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This 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 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, which was again

[124] 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.

[125] For example, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, MIAX maintains 24 matching engines and MIAX Emerald maintains 12 matching engines.

recently further refined, 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 and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity and port 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 aggregate monthly cost to provide 10Gb ULL connectivity and Full Service MEO Port services, is $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.

Lastly, the Exchange notes that, based on: (i) the total expense amounts contained in this filing (which are 2023 projected expenses), and (ii) the total expense amounts contained in the related MIAX Pearl Equities filing (also 2023 projected expenses), MIAX PEARL, LLC's total costs have increased at a greater rate over the last three years than the total costs of MIAX PEARL, LLC's affiliated exchanges, MIAX and MIAX Emerald. This is also reflected in the total costs reported in MIAX PEARL, LLC's Form 1 filings over the last three years, when comparing MIAX PEARL, LLC to MIAX PEARL, LLC's affiliated exchanges, MIAX and MIAX Emerald. This is primarily because that MIAX PEARL, LLC operates two markets, one for options and one for equities, while MIAX and MIAX Emerald each operate only one market. This is also due to higher current expense for MIAX PEARL, LLC for 2022 and 2023, due to a hardware refresh (*i.e.,* replacing old hardware with new equipment) for MIAX Pearl Options, as well as higher costs associated with MIAX Pearl Equities due to greater development efforts to grow that newer marketplace.[126] The Exchange confirms that there is no double counting of expenses between the options and equities platform of MIAX Pearl; the greater expense amounts of the MIAX PEARL, LLC (relative to its affiliated exchanges, MIAX and MIAX Emerald) is solely attributed to the unique factors of MIAX Pearl discussed above.

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 each cost driver (*e.g.,* as set forth below, the Exchange allocated approximately 26.9% of its overall Human Resources cost to offering physical connectivity).

| Cost drivers | Allocated annual cost[k] | Allocated monthly cost[l] | % 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 and 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 |

k. The Annual Cost includes figures rounded to the nearest dollar.
l. 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.

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because MIAX Pearl Options' cost allocation methodology utilizes the actual projected costs of MIAX Pearl Options (which are specific to MIAX Pearl Options, and are independent of the costs projected and utilized by MIAX Pearl Options' affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. MIAX Pearl Options provides additional explanation below (including the reason for the deviation) for the significant differences.

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

[126] *See, e.g.,* Securities Exchange Act Release Nos. 94301 (February 23, 2022), 87 FR 11739 (March 2, 2022) (SR–PEARL–2022–06) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 2617(b) To Adopt Two New Routing Options, and To Make Related Changes and Clarifications to Rules 2614(a)(2)(B) and 2617(b)(2)); 94851 (May 4, 2022), 87 FR 28077 (May 10, 2022) (SR–PEARL–2022–15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Exchange Rule 532, Order Price Protection Mechanisms and Risk Controls); 95298 (July 15, 2022), 87 FR 43579 (July 21, 2022) (SR–PEARL–2022–29) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by MIAX PEARL, LLC To Amend the Route to Primary Auction Routing Option Under Exchange Rule 2617(b)(5)(B)); 95679 (September 6, 2022), 87 FR 55866 (September 12, 2022) (SR–PEARL–2022–34) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 2614, Orders and Order Instructions, To Adopt the Primary Peg Order Type); 96205 (November 1, 2022), 87 FR 67080 (November 7, 2022) (SR–PEARL–2022–43) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 2614, Orders and Order Instructions and Rule 2618, Risk Settings and Trading Risk Metrics To Enhance Existing Risk Controls); 96905 (February 13, 2023), 88 FR 10391 (February 17, 2023) (SR–PEARL–2023–03) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 2618 To Add Optional Risk Control Settings); 97236 (March 31, 2023), 88 FR 20597 (April 6, 2023) (SR–PEARL–2023–15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rules 2617 and 2626 Regarding Retail Orders Routed Pursuant to the Route to Primary Auction Routing Option).

(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 weighted average of 42.9% of each employee's time from the above group assigned to the Exchange based on the above-described allocation methodology. 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, sales, membership, and finance personnel), for which the Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who 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 (excluding employees at non-options/equities exchange subsidiaries of Miami International Holdings, Inc. (''MIH''), the holding company of the Exchange and its affiliated markets), 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 each market's individual Human Resources expense. Then, 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.[127] This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management, of which the Exchange allocated 42.9% of each of their employee's time assigned to the Exchange, as stated above. The Exchange notes that senior level executives' time was only allocated to the Human Resources costs to the extent that 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 (External Fees, Cabling, Switches, etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity cost driver 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 providers for connectivity to the entire U.S. options industry, 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 providers to connect to other national securities exchanges and the Options Price Reporting Authority (''OPRA''). 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 provided by 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 expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of internet Services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (*e.g.,* re-pricing of orders to avoid locked or crossed markets and trading collars). Since external market data from other exchanges is consumed at the Exchange's matching engine level, (to which 10Gb ULL connectivity provides access) in order to validate orders before additional orders enter the matching engine or are executed, the Exchange believes it is reasonable to allocate a small amount of such costs to 10Gb ULL connectivity.

The Exchange relies on content service providers for data feeds for the entire U.S. options industry, as well as content 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 content service providers to receive market data from OPRA, 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. 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 receive market data and, therefore, would not be able to

[127] MIAX Pearl Options notes that while 12.3 full time equivalents (''FTEs'') were allocated in this filing to MIAX Pearl Options and a similar number of FTEs in a similar filing by the Exchange's affiliates, MIAX Emerald (11.7 FTEs) and MIAX (12.9 FTEs), the overall cost percentage allocated for each differs due to the individual level of compensation for each employee assigned to work on projects for the exchanges.

operate and support its System Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2023 budget process differ among the Exchange and its affiliated markets for the internet Services and External Market Data cost driver, even though, but for MIAX Emerald, the allocation percentages are generally consistent across markets (*e.g.,* MIAX Emerald, MIAX, MIAX Pearl Options and MIAX Pearl Equities allocated 84.8%, 73.3%, 73.3% and 72.5%, respectively, to the same cost driver). This is because: (i) a different percentage of the overall internet Services and External Market Data cost driver was allocated to MIAX Emerald and its affiliated markets due to the factors set forth under the first step of the 2023 budget review process described above (unique technical architecture, market structure, and business requirements of each marketplace); and (ii) MIAX Emerald itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its systems. The Exchange notes while the percentage MIAX Emerald allocated to the internet Services and External Market Data cost driver is greater than the Exchange and its other affiliated markets, the overall dollar amount allocated to the Exchange under the initial step of the 2023 budget process is lower than its affiliated markets. However, the Exchange believes that this is not, in dollar amounts, a significant difference. This is because the total dollar amount of expense covered by this cost driver is relatively small compared to other cost drivers and is due to nuances in exchange architecture that require different initial allocation amount under the first step of the 2023 budget process described above. Thus, non-significant differences in percentage allocation amounts in a smaller cost driver create the appearance of a significant difference, even though the actual difference in dollar amounts is small.

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 by market 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.

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.[128] The Exchange notes that this allocation is greater than MIAX and MIAX Emerald options exchanges by a significant amount as MIAX Pearl Options allocated 58.6% of its Hardware and Software Maintenance and License expense towards 10Gb ULL connectivity, while MIAX and MIAX Emerald allocated 49.8% and 50.9%, respectively, to the same category of expense. Also, MIAX Pearl Equities allocated a higher percentage of the same category of expense (58%) towards its Hardware and Software Maintenance and License expense for 10Gb ULL connectivity, which MIAX Pearl Equities explains in its own proposal to amend its 10Gb ULL connectivity fees. This is because MIAX Pearl Options is in the process of replacing and upgrading various hardware and software used to operate its options trading platform in order to maintain premium network performance. At the time of this filing, the Exchange is undergoing a major hardware refresh, replacing older hardware with new hardware. This hardware includes servers, network switches, cables, optics, protocol data units, and cabinets, to maintain a state-of-the-art technology platform. Because of the timing of the hardware refresh with the timing of this filing, the Exchange has materially higher expense than its affiliates.

Depreciation

All physical assets, software and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and 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. The Exchange also included in the Depreciation cost driver certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity 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 10Gb ULL connectivity. As noted above, the Exchange allocated 58.2% of its allocated depreciation costs to providing physical 10Gb ULL 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. For example, the percentages the Exchange and its affiliate, MIAX, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are nearly identical. However, the Exchange's dollar amount is less than that of MIAX by approximately $35,000 per month due to two factors: first, MIAX has undergone a technology refresh since the time MIAX Pearl Options launched in 2017, leading to it

[128] This expense may be greater than the Exchange's affiliated markets, specifically MIAX and MIAX Emerald, because, unlike the MIAX and MIAX Emerald, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its Members' and Equity Members' access and connectivity needs. This added gateway contributes to the difference in allocations between MIAX Pearl, MIAX and MIAX Emerald. This expense also differs in dollar amount among the MIAX Pearl (options and equities markets), MIAX, and MIAX Emerald because each market may maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

having more hardware that software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Pearl Options maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Pearl Options' hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall physical connectivity costs because 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. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also included in the Exchange's general shared expense cost driver.[129] 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 Center, as described above), Full Service MEO Ports do not require as many broad or indirect resources as other core services.

* * * * *

Approximate Cost per 10Gb Connection per Month

After determining the approximate allocated monthly cost related to 10Gb connectivity, 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. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, *i.e.,* actual number of 10Gb ULL connections.

* * * * *

Costs Related To Offering Full Service MEO Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Full Service MEO Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 8.3% of its overall Human Resources cost to offering Full Service MEO Ports).

| Cost drivers | Allocated annual cost [m] | Allocated monthly cost [n] | % Of all |
|---|---|---|---|
| Human Resources | $1,159,831 | $96,653 | 8.3 |
| Connectivity (external fees, cabling, switches, etc.) | 1,589 | 132 | 1.4 |
| Internet Services and 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 |

m. *See supra* note k (describing rounding of Annual Costs).
n. *See supra* note l (describing rounding of Monthly Costs based on Annual Costs).

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Full Service MEO Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

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 Full Service MEO 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 Full Service MEO Ports and maintaining performance thereof. The Exchange notes that senior level executives were allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Full Service MEO

[129] 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.

Ports.[130] This includes personnel from the following Exchange departments that are predominately involved in providing Full Service MEO Ports: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing Full Service MEO Ports. 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 (External Fees, Cabling, Switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Full Service MEO Ports, the Exchange also includes a portion of its costs related to 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 includes external market data costs towards the provision of Full Service MEO Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (*e.g.,* halted securities).[131] Thus, since market data from other exchanges is consumed at the Exchange's Full Service MEO 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 Full Service MEO Ports.

The Exchange notes that the allocation for the internet Services and External Market Data cost driver is lower than that of its affiliate, MIAX, as MIAX allocated 7.2% of its internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For March 2023, MIAX Market Makers utilized 1,782 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,028 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for March 2023, MIAX Pearl Options Members utilized only 432 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Full Service MEO Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Full Service MEO Ports (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).

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.

The Exchange notes that this allocation is less than its affiliate, MIAX, as MIAX allocated 7.2% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For March 2023, MIAX Market Makers utilized 1,782 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,028 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for March 2023, MIAX Pearl Options Members utilized only 432 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Depreciation

The vast majority of the software the Exchange uses to provide Full Service MEO Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Full Service MEO Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time.

All hardware and software 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. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange to Full Service MEO Ports because such software is related to the provision of Full Service MEO Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Full Service MEO Ports.

[130] The Exchange notes that while 3.9 FTEs were allocated in this filing to the Exchange related to Full Service MEO Ports and a similar number of FTEs in similar filings by the Exchange's affiliates, MIAX Emerald (2.5 FTEs) and MIAX (3.0 FTEs) related to their Limited Service MEI Ports, the overall cost percentage allocated for each differs due to the individual level of compensation for each employee assigned to work on projects for the exchanges.

[131] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

The Exchange 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.

For example, the Exchange notes that the percentage it allocated to the depreciation cost driver for Full Service MEO Ports and the percentage its affiliate, MIAX, allocated to the depreciation cost driver for MIAX's Limited Service MEI Ports, differ by only 2.4%. However, MIAX's approximate dollar amount is greater than that of MIAX Pearl Options by approximately $9,000 per month. This is due to two primary factors. First, MIAX has under gone a technology refresh since the time MIAX Pearl Options launched in 2017, leading to it having more hardware that software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Pearl Options maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Pearl Options' hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall Full Service MEO Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide application sessions. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 4.0% of the overall cost for directors was allocated to providing Full Service MEO Ports. The Exchange notes that the 3.6% allocation of general shared expenses for Full Service MEO Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Full Service MEO Ports have several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange.

Lastly, the Exchange notes that this allocation is less than its affiliate, MIAX, as MIAX allocated 9.8% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.6% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For March 2023, MIAX Market Makers utilized 1,782 Limited Service MEI Ports and MIAX Emerald Market Makers utilized 1,028 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for March 2023, MIAX Pearl Options Members utilized only 432 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.

* * * * *

Approximate Cost per Limited Service MEI Port per Month

The total monthly cost allocated to Full Service MEO Ports of $137,012 was divided by the number of chargeable 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 charged 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 10Gb ULL and 1Gb ULL connectivity 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 and port 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 actual costs may be higher or lower. 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 may 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 [132]

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 and port 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 will equal $11,567,509. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $17,496,000. The Exchange believes this represents a modest profit of 34% when compared to the cost of providing 10Gb ULL connectivity services, which could decrease over time.[133] The Exchange's Cost Analysis estimates the annual cost to provide Full Service MEO Port services will equal $1,644,132. Based on current Full Service MEO Port services usage, the Exchange would generate annual revenue of approximately $1,644,000. The Exchange believes this would result in a small negative margin after calculating the cost of providing Full Service MEO Port services, which could decrease further over time.[134]

Based on the above discussion, even if the Exchange earns the above revenue or incrementally more or less, the proposed fees are fair and reasonable because they will not result in excessive pricing that deviates from that of other exchanges or a 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

[132] For purposes of calculating revenue for 10Gb ULL connectivity, the Exchange used revenues for February 2023, the first full month for which it provided dedicated 10Gb ULL connectivity to MIAX Pearl Options and ceased operating a shared 10Gb ULL network with MIAX.

[133] Assuming the U.S. inflation rate continues at its current rate, the Exchange believes that the projected profit margins in this proposal will decrease; however, the Exchange cannot predict with any certainty whether the U.S. inflation rate will continue at its current rate or its impact on the Exchange's future profits or losses. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited June 15, 2023).

[134] *Id.*

associated with network 10Gb ULL connectivity and Full Service MEO Port services.

The Exchange also notes that this the resultant profit margin differs slightly from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and operations costs, as described in the cost allocation methodology above; different technical architecture (*e.g.,* the number of matching engines per exchange, *i.e.,* the Exchange maintains 12 matching engines while MIAX maintains 24 matching engines); and different maturity phase of the Exchange and its affiliated markets (*i.e.,* start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection ($13,500 per month for the Exchange vs. $15,000 per month for Nasdaq).[135] NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees ($13,500 for the Exchange vs. $22,000 per month for NYSE American).[136] Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (*i.e.,* more subscribers to 10Gb ULL connectivity on the Exchange than its affiliated markets or vice versa).

* * * * *

The Exchange has operated at a cumulative net annual loss since it launched operations in 2017.[137] This is due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as low latency 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 does not believe it should now be penalized for seeking to raise its fees as it now needs to upgrade its technology and absorb increased. 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 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 connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), 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—or seeking to earn—supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

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 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 that result from sharing costs across multiple platforms. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with 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 Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive 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. Further, if Commission Staff is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined 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, as is reflected in the proposal, the Exchange continuously

[135] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[136] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[137] 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.*

and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost 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 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.[138] 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.[139] 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, as noted above for 10Gb ULL connectivity, Market Makers who reach the highest tier for Full Service MEO Ports (Bulk) account for 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 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 during anticipated peak market conditions. The need to support 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.[140] Thus, as the number of connections a Market Maker has increases, the related pull on Exchange resources also increases. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange.

The Exchange further believes that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory because, for the flat fee, the Exchange provides each Member two (2) Full Service MEO Ports for each matching engine to which that Member is connected. Unlike other options exchanges that provide similar port functionality and charge fees on a per port basis,[141] 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.[142] 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

[138] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[139] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[140] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[141] *See supra* notes b to j and accompanying text.

[142] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

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 [143] 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 Options Market Maker terminated their membership on January 1, 2023 as a direct result of the proposed fee changes.[144] The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to connect to all options exchanges. There is no reason to believe that our proposed price increase will harm another exchange's ability to compete. There are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. There is also a range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. Market participants are free to choose which exchange or reseller to use to satisfy their business needs. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange also believes that the proposed fees for 10Gb connectivity are appropriate and warranted in light of it bifurcating 10Gb connectivity between the Exchange and MIAX and would not impose any burden on competition because this is a technology driven change that would assist the Exchange in recovering costs related to providing dedicating 10Gb connectivity to the Exchange while enabling it to continue to meet current and anticipated demands for connectivity by its Members and other market participants. Separating its 10Gb network from MIAX would enable the Exchange to better compete with other exchanges by ensuring it can continue to provide

[143] *See supra* note 137.

[144] 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 90. 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.

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.[145] 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.[146] 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.'' [147] 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.[148]

The proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[149] 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.[150] 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.'' [151] 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.[152]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[153] 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.[154]

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.[155] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[156] 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.[157] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[158] BZX,[159] and Cboe EDGA Exchange, Inc.[160]

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

[145] *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.

[146] *Id.* at 71676.

[147] *Id.*

[148] *Id.* at 71676.

[149] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *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'').

[154] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011).

[155] *Id.* at 18426.

[156] *Id.*

[157] *Id.*

[158] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[159] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[160] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeEDGA–2022–004).

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, one comment letter on the Second Proposal, and one comment letter on the Third Proposal, all from the same commenter.[161] In their letters, 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 letters, 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,[162] and Rule 19b–4(f)(2) [163] 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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–PEARL–2023–27 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–2023–27. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–PEARL–2023–27 and should be submitted on or before July 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[164]

**Vanessa A. Countryman,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97813; File No. SR–EMERALD–2023–14]**

## Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule To Modify Certain Connectivity and Port Fees

June 27, 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 June 16, 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

[161] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP (''SIG''), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, *and* letters from Gerald D. O'Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023 and May 24, 2023.

[162] 15 U.S.C. 78s(b)(3)(A)(ii).

[163] 17 CFR 240.19b–4(f)(2).

[164] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 the 2021 increase discussed above, the Exchange experienced ongoing increases in expenses, particularly internal expenses.[9] As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $11,361,586 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] On, February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (SR–EMERALD–2023–05) (the ''Second Proposal'').[11] On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (SR–EMERALD–2023–12) (the ''Third Proposal'').[12] On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with this further revised proposal (SR–EMERALD–2023–14).[13]

The Exchange previously included a cost analysis in the Initial, Second and

[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 Exapress 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.

[10] *See* Securities Exchange Act Release No. 96628 (January 10, 2023), 88 FR 2651 (January 17, 2023) (SR–EMERALD–2023–01).

[11] *See* Securities Exchange Act Release No. 97079 (March 8, 2023), 88 FR 15764 (March 14, 2023) (SR–EMERALD–2023–05).

[12] *See* Securities Exchange Act Release No. 97422 (May 2, 2023), 88 FR 29750 (May 8, 2023) (SR–EMERALD–2023–12).

[13] The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently, information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange has provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff's information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition.

Third Proposals. 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 [14] (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, Second, and Third Proposals, the fees themselves have not changed since the Initial, Second, or Third Proposals 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* [15] 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.[16] 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.[17] 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'').[18] 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.'' [19] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[20] 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.'' [21] 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.[22] 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.'' [23] 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.'' [24] 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.'' [25]

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* [26] and remanded for further proceedings consistent with its opinion.[27] 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.'' [28] 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

[14] The term ''MIAX'' means Miami International Securities Exchange, LLC. *See* Exchange Rule 100.

[15] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[16] *Id.*

[17] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[18] *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).

[19] *Id.* at page 2.

[20] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[21] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[22] *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).

[23] 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'').

[24] *Id.*

[25] *Id.*

[26] *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.

[27] *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.*

[28] *Id.* at *2; *see also id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

previously remanded.[29] 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.*'' [30] 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.[31]

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.'' [32] 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'').[33] 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 [34] 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.[35] 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.[36] 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 [37] and $80,383,000 for 2021.[38] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of

[29] *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'').

[30] *Id.*

[31] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[32] *See supra* note 27, at page 2.

[33] 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.*

[34] 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.

[35] *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).

[36] 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.

[37] 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.*

[38] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

$19,016,000 for 2020 [39] and $22,843,000 for 2021.[40] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020 [41] and $44,800,000 for 2021.[42] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020 [43] and $30,687,000 for 2021.[44] 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.[45] 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.'' [46]

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,[47] 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 . . .'',[48] 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. For example, the Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[49] 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 [50] 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,[51] 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; [52] 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

[39] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[40] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[41] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[42] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[43] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[44] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[45] 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.*

[46] *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.

[47] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[48] *See supra* note 23, at note 1.

[49] *See* Securities Exchange Act Release Nos. 94889 (May 11, 2022), 87 FR 29928 (May 17, 2022) (SR–EMERALD–2022–19); 94718 (April 14, 2022), 87 FR 23633 (April 20, 2022) (SR–EMERALD–2022–15); 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).

[50] 15 U.S.C. 78f(b)(4).

[51] 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.

[52] 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.*

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.[53]

* * * * *

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[54] via a 10Gb ULL fiber connection. Specifically, the Exchange proposes to amend Sections (5)(a)–(b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from $10,000 per month to $13,500 per month (''10Gb ULL Fee'').[55]

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[56] and two (2) Limited Service MEI Ports[57] per matching engine[58] to which each Market Maker connects. Market Makers may also request additional Full 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.[59] The Exchange believes a tiered-pricing structure will encourage Market Makers to be more efficient when determining how to connect to the Exchange. This should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System[60]

[53] 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.

[54] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[55] Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section (4)(c) of the Exchange's Fee Schedule. *See* Section (4)(c) of the Exchange's fee schedule *available at https://www.miaxglobal.com/markets/us-options/miax-options/fees* (providing that ''Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.'').

[56] 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.

[57] 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.

[58] 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.

[59] 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.

[60] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

in accordance with its fair access requirements under Section 6(b)(5) of the Act.[61]

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, Market Makers who take the maximum amount of Limited Service MEI Ports account for approximately greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for approximately less than 1% of message traffic over the network. In the Exchange's experience, Market Makers who only utilize the two free Limited Service MEI Ports do not have a business need for the high performance network solutions required by Market Makers who take the maximum amount of Limited Service MEI Ports. The Exchange's high performance network solutions and supporting infrastructure (including employee support), provides unparalleled system throughput and the capacity to handle approximately 18 million quote messages per second. Based on May 2023 trading results, the Exchange handles over approximately 8.6 billion quotes on an average day, and more than 189 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generated more than 111 billion quotes (and more than 5 billion quotes on an average day), and Market Makers who utilized only the two free Limited Service MEI Ports generated approximately 40 billion quotes (and approximately 1.8 billion quotes on an average day). Also for May 2023, Market Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 936 million quotes per day; Market Makers who utilized 5–6 Limited Service MEI Ports submitted an average of 578 million quotes on an average day; and Market Makers who utilized 3–4 Limited Service MEI Ports submitted an average of 176 million quotes on an average day.

To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[62] Thus, as the number of connections a Market Maker has increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange proposes no fee or lower fees for those Market Makers who receive fewer Limited Service MEI Ports since those Market Makers generally tend to send the least amount of orders and messages over those connections. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who take the most Limited Service MEI Ports pay for the vast majority of the shared network resources from which all Member and non-Member users benefit, but is designed and maintained from a capacity standpoint to specifically handle the message rate and performance requirements of those Market Makers.

The Exchange proposes to increase its monthly Limited Service MEI Port fees 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[63] in general, and furthers the objectives of Section 6(b)(4) of the Act[64] 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[65] 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[66] and the Staff Guidance,[67] 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.''[68] 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.''[69] In the Staff Guidance, the Commission Staff further states that, ''[i]f an SRO

[61] *See* 15 U.S.C. 78f(b). The Exchange may offer access on terms that are not unfairly discriminatory among its Members, and ensure sufficient capacity and headroom in the System. The Exchange monitors the System's performance and makes adjustments to its System based on market conditions and Member demand.

[62] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[63] 15 U.S.C. 78f(b).

[64] 15 U.S.C. 78f(b)(4).

[65] 15 U.S.C. 78f(b)(5).

[66] *See supra* note 22.

[67] *See supra* note 23.

[68] *Id.*

[69] *Id.*

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.'' [70]

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.

[70] *Id.*

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange initially adopted a fee of $50 per port, after the first two Limited Service MEI Ports that are provided free of charge, and the Exchange incurred all the costs associated to provide those first two Limited Service MEI Ports since it commenced operations in March 2019. At that same time, the Exchange only charged $6,000 per month for each 10Gb ULL connection. As a new exchange entrant, the Exchange chose to offer connectivity and ports at very low fees to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.[71]

[71] *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,[72] 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.[73] 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'. . . .'' [74]

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

[72] The Exchange experienced a monthly average trading volume of 3.43% for the month of October 2020. *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*

[73] *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).

[74] *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)).

promoting market competition in its broader forms that are most important to investors and listed companies.'' [75]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [76] 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.'' [77] 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.'' [78] 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.'' [79]

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 with a reasonable 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 connectivity or port 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 3.04% for the month of May 2023).[80] | 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 [81] (equity options market share of 6.59% for the month of May 2023).[82] | 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'') [83] (equity options market share of 6.18% for the month of May 2023).[84] | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port [85] | $1,100 per port. |
| NYSE American LLC (''NYSE American'') [86] (equity options market share of 7.34% for the month of May 2023).[87] | 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'') [88] (equity options market share of 2.00% for the month of May 2023).[89] | 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 Options, experienced a decrease in membership as the result of similar fees proposed herein. One MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023, as a direct result of the proposed connectivity and port fee changes proposed by MIAX Pearl Options.

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.[90] A very small number of market participants choose to become a member of all sixteen options

[75] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[76] *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.'').

[77] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[78] *Id.*

[79] *See* Staff Guidance, *supra* note 23.

[80] *See supra* note 72.

[81] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[82] *See supra* note 72.

[83] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.

[84] *See supra* note 72.

[85] Similar to the Exchange's MEI Ports, SQF ports are primarily utilized by Market Makers.

[86] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[87] *See supra* note 72.

[88] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.

[89] *See supra* note 72.

[90] 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.''

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.[91]

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.[92] 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 Options Pearl Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options (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.[93] If the Exchange is not at the national best bid or offer (''NBBO''),[94] 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.[95]

With respect to the submission of orders, Members may also choose not to purchase any connection 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,[96] or request sponsored access [97] through a member of an exchange in order to submit a trade directly to an options exchange.[98] 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).[99] 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.[100] 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 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

[91] Service Bureaus may obtain ports on behalf of Members.

[92] *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.

[93] *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.*

[94] *See* Exchange Rule 100.

[95] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[96] 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.

[97] 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.

[98] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[99] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at,* U.S. Direct-Extranet Connection (*nasdaqtrader.com*); *and* Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); *and* 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[100] 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.

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 Options Market Maker terminated their MIAX Pearl Options 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 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 and port 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,[101] and Rule 19b–4 thereunder,[102] with respect to the types of information exchanges should provide when filing fee changes, and Section 6(b) of the Act,[103] which requires, among other things, that exchange fees be reasonable and equitably allocated,[104] not designed to permit unfair discrimination,[105] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[106] 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.[107] 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) [108] going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of $13,500 per month for each physical 10Gb ULL connection. The Exchange also proposes to modify its Fee Schedule to charge tiered rates for additional Limited Service MEI Ports.

In 2020, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[109] 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 for each cost driver as part of its 2023 budget review process. The 2023 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior management, department heads, and the Finance Team. Each department head is required to send a ''bottom up'' budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and 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, simple only or simple and complex markets, auction functionality, etc.), which may impact message traffic, individual system architectures that impact platform size,[110] 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.

All of these factors result in different allocation percentages among the Exchange and its affiliated markets, *i.e.,* the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange's parent company currently owns and operates four separate and distinct marketplaces, the

[101] 15 U.S.C. 78s(b)(1).

[102] 17 CFR 240.19b–4.

[103] 15 U.S.C. 78f(b).

[104] 15 U.S.C. 78f(b)(4).

[105] 15 U.S.C. 78f(b)(5).

[106] 15 U.S.C. 78f(b)(8).

[107] *See* Staff Guidance, *supra* note 23.

[108] 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.

[109] 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.

[110] 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.

Exchange must determine the costs associated with each actual market—as opposed to the Exchange's parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, the Exchange's parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers, due to the unique factors of each marketplace as described above. This allocation methodology also ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, *e.g.,* connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to each of the cost drivers set forth below. 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 to 10Gb connectivity), with smaller allocations to additional Limited Service MEI Ports (4.6%), and the remainder to the provision of other connectivity, other ports, transaction execution, membership services and market data services (33.5%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This 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 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, which was again recently further refined, 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 and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity and port 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 aggregate monthly cost to provide 10Gb ULL connectivity and Limited Service MEI Port services, including both physical 10Gb connections and Limited Service MEI Ports, is $1,095,054 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Limited Service MEI Ports by 12 months, then adding both numbers together), as further detailed below.

Costs Related to Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for each cost driver (*e.g.,* as set forth below, the Exchange allocated approximately 28.1% of its overall Human Resources cost to offering physical connectivity).

| Cost drivers | Allocated annual cost [111] | Allocated monthly cost [112] | % Of all |
|---|---|---|---|
| Human Resources | $3,520,856 | $293,405 | 28 |

[111] The Annual Cost includes figures rounded to the nearest dollar.

[112] The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

| Cost drivers | Allocated annual cost [111] | Allocated monthly cost [112] | % Of all |
|---|---|---|---|
| Connectivity (external fees, cabling, switches, etc.) | 71,675 | 5,973 | 61.9 |
| Internet Services and 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. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drives for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

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 weighted average of 42.4% of each employee's time from the above group assigned to the Exchange based on the above-described allocation methodology. 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, sales, membership and finance personnel), for which the Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who 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 have 184 employees (excluding employees at non-options/equities exchange subsidiaries of Miami International Holdings, Inc. (''MIH''), the holding company of the Exchange and its affiliated markets), 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 each market's individual Human Resources expense. Then, 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.[113] This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management, of which the Exchange allocated 42.4% of each of their employee's time assigned to the Exchange, as stated above. The Exchange notes that senior level executives' times was only allocated to the Human Resources costs to the extent that 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 (External Fees, Cabling, Switches, etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity cost driver 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 providers for connectivity to the entire U.S. options industry, 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 providers to connect to other national securities exchanges and the Options Price Reporting Authority (''OPRA''). The Exchange understands that these service providers provide services to most, if

[113] The Exchange notes that while 11.7 full time equivalents (''FTEs'') were allocated in this filing to the Exchange and a similar number of FTEs in a similar filing by the Exchange's affiliate, MIAX (12.9 FTEs), the overall cost percentage allocated for each differs due to the individual level of compensation for each employee assigned to work on projects for the exchanges.

not all, of the other U.S. exchanges and other market participants. Connectivity provided by 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 provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of internet Services and external market data. The internet services cost driver includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (*e.g.,* re-pricing of orders to avoid locked or crossed markets and trading collars). Since external market data from other exchanges is consumed at the Exchange's matching engine level, (to which 10Gb ULL connectivity provides access) in order to validate orders before additional orders enter the matching engine or are executed, the Exchange believes it is reasonable to allocate a small amount of such costs to 10Gb ULL connectivity.

The Exchange relies on various content service providers for data feeds for the entire U.S. options industry, as well as content 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 content service providers to receive market data from OPRA, 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. 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 receive market data and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2023 budget process differ among the Exchange and its affiliated markets for the internet Services and External Market Data cost driver, even though, but for the Exchange, the allocation percentages are generally consistent across markets (*e.g.,* MIAX Emerald, MIAX, MIAX Pearl Options and MIAX Pearl Equities allocated 84.8%, 73.3%, 73.3% and 72.5%, respectively, to the same cost driver). This is because: (i) a different percentage of the overall internet Services and External Market Data cost driver was allocated to the Exchange and its affiliated markets due to the factors set forth under the first step of the 2023 budget review process described above (unique technical architecture, market structure, and business requirements of each marketplace); and (ii) the Exchange itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its systems. The Exchange notes while the percentage it allocated to the internet Services and External Market Data cost driver is greater than its affiliated markets, the overall dollar amount allocated to the Exchange under the initial step of the 2023 budget process is lower than its affiliated markets. However, the Exchange believes that this is not, in dollar amounts, a significant difference. This is because the total dollar amount of expense covered by this cost driver is relatively small compared to other cost drivers and is due to nuances in exchange architecture that require different initial allocation amount under the first step of the 2023 budget process described above. Thus, non-significant differences in percentage allocation amounts in a smaller cost driver create the appearance of a significant difference, even though the actual difference in dollar amounts is small.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (61.9%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity by market 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.

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.[114]

Depreciation

All physical assets, software, and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and 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. The Exchange also included in the

[114] This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl (the options and equities markets), 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. This expense also differs in dollar amount among the Exchange, MIAX Pearl (options and equities), and MIAX because each market may maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

Depreciation cost driver certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity 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 10Gb ULL connectivity. As noted above, the Exchange allocated 63.8% of its allocated depreciation costs to providing physical 10Gb ULL 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. For example, the percentages the Exchange and its affiliate, MIAX, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are nearly identical. However, the Exchange's dollar amount is lower than that of MIAX by approximately $32,000 per month due to two factors: first, MIAX has undergone a technology refresh since the time MIAX Emerald launched in February 2019, leading MIAX to have more hardware that software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall physical connectivity costs because 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. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also included in the Exchange's general shared expenses cost driver.[115] 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 Center, as described above), Limited Service MEI Ports do not require as many broad or indirect resources as other core services.

* * * * *

Approximate Cost per 10Gb ULL Connection per Month

After determining the approximate allocated monthly cost related to 10Gb connectivity, 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. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, *i.e.,* actual number of 10Gb ULL connections.

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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 MEI 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 | Allocated annual cost [116] | Allocated monthly cost [117] | % Of all |
|---|---|---|---|
| Human Resources | $737,784 | $61,482 | 5.9 |
| Connectivity (external fees, cabling, switches, etc.) | 3,713 | 309 | 3.2 |
| Internet Services and External Market Data | 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 |

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers described by the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The

[115] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

[116] *See supra* note 111 (describing rounding of Annual Costs).

[117] *See supra* note 112 (describing rounding of Monthly Costs based on Annual Costs).

Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

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 allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Limited Service MEI Ports.[118] This includes personnel from the following Exchange departments that are predominately involved in providing Limited Service MEI Ports: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing and maintaining Limited Service MEI Ports. 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 (External Fees, Cabling, Switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Limited Service MEI Ports, the Exchange also includes a portion of its costs related to 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 includes external market data costs towards the provision of Limited Service MEI Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (*e.g.,* halted securities).[119] Thus, since market data from other exchanges is consumed at the Exchange's 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.

The Exchange notes that the allocation for the internet Services and External Market Data cost driver is greater than that of its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 3.2% of its internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For March 2023, MIAX Emerald Market Makers utilized 1,028 Limited Service MEI ports and MIAX Market Makers utilized 1,782 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for March 2023, MIAX Pearl Options Members utilized only 432 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Limited Service MEI Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Limited Service MEI Ports (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).

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. The Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 3.2% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For March 2023, MIAX Market Makers utilized 1,782 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,028 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for March 2023, MIAX Pearl Options Members utilized only 432 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage

[118] The Exchange notes that while 2.5 FTEs were allocated in this filing to the Exchange and a similar number of FTEs in a similar filing by the Exchange's affiliate, MIAX (3.0 FTEs), the overall cost percentage allocated for each differs due to the individual level of compensation for each employee assigned to work on projects for the exchanges.

[119] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

of expense than MIAX Pearl Options, which has a lower port count.

Depreciation

The vast majority of the software the Exchange uses to provide Limited Service MEI Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Limited Service MEI Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time. All hardware and software 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. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange because such software is related to the provision of Limited Service MEI Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Limited Service MEI Ports.

The Exchange 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. For example, the Exchange notes that the percentages it and its affiliate, MIAX, allocated to the depreciation cost driver for Limited Service MEI Ports differ by only 2.6%. However, MIAX's approximate dollar amount is greater than that of MIAX Emerald by approximately $10,000 per month. This is due to two primary factors. First, MIAX has under gone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware that software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

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 Center, 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.

Lastly, the Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 10.3% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.6% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For March 2023, MIAX Market Makers utilized 1,782 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,028 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for March 2023, MIAX Pearl Options Members utilized only 432 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.[120]

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Approximate Cost per Limited Service MEI Port per Month

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.

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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

[120] MIAX allocated a slightly lower amount (9.8%) of this cost as compared to MIAX Emerald (10.3%). This is not a significant difference. However, both allocations resulted in an identical cost amount of $0.8 million, despite MIAX having a higher number of Limited Service MEI Ports. MIAX Emerald was allocated a higher cost per Limited Service MEI Port due to the additional resources and expenditures associated with maintaining its recently enhanced low latency network.

(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 10Gb ULL and 1Gb connectivity 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 and port 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 actual costs may be higher or lower. 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 may 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 and port 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 will equal $11,361,586. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $16,524,000. The Exchange believes this represents a modest profit of 31% when compared to the cost of providing 10Gb ULL connectivity services which could decrease over time.[121]

The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services will equal $1,779,066. Based on current Limited Service MEI Port services usage, the Exchange would generate annual revenue of approximately $2,809,200. The Exchange believes this would result in an estimated profit margin of 37% after calculating the cost of providing Limited Service MEI Port services, which profit margin could decrease over time.[122] The Exchange notes that the cost to provide Limited Service MEI Ports is higher than the cost for the Exchange's affiliate, MIAX Pearl Options, to provide Full Service MEO Ports due to the substantially higher number of Limited Service MEI Ports used by Exchange Members. For example, the Exchange's Members are currently allocated 1,028 Limited Service MEI Ports compared to only 432 Full Service MEO Ports (Bulk and Single combined) allocated to MIAX Pearl Options members.

Based on the above discussion, the Exchange believes that even if the Exchange earns the above revenue or incrementally more or less, the proposed fees are fair and reasonable because they will not result in pricing that deviates from that of other exchanges or a 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 also notes that this the resultant profit margin differs slightly from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and operations costs, as described in the cost allocation methodology above; different technical architecture (*e.g.,* the number of matching engines per exchange, *i.e.,* the Exchange maintains only 12 matching engines while MIAX maintains 24 matching engines); and different maturity phase of the Exchange and its affiliated markets (*i.e.,* start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection ($13,500 per month for the Exchange vs. $15,000 per month for Nasdaq).[123] NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees ($13,500 per month for the Exchange vs. $22,000 per month for NYSE American).[124] Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (*i.e.,* more subscribers to 10Gb ULL connectivity on the Exchange than its affiliated markets or vice versa).

* * * * *

The Exchange has operated at a cumulative net annual loss since it launched operations in 2019.[125] This is due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as low latency 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 does not believe that it should now be penalized for seeking to raise its fees as it now needs to upgrades its technology and absorb increased costs. 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 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 connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), 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

[121] Assuming the U.S. inflation rate continues at its current rate, the Exchange believes that the projected profit margins in this proposal will decrease; however, the Exchange cannot predict with any certainty whether the U.S. inflation rate will continue at its current rate or its impact on the Exchange's future profits or losses. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited June 14, 2023).

[122] *Id.*

[123] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[124] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[125] 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.*

earning—or seeking to earn—supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

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 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 that result from sharing costs across multiple platforms. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with 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 Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive 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. Further, if Commission Staff is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined 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, as is reflected in the proposal, the Exchange continuously and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost 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 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.[126] 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, as noted above for 10Gb ULL connectivity, Market Makers who take the maximum amount of Limited Service MEI Ports account for greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for 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 May 2023 trading results, the Exchange handles over approximately 8.6 billion quotes on an average day, and more than 189 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generated more than 111 billion quotes (and more than 5 billion quotes on an average day), and Market Makers who utilized only the two free Limited Service MEI Ports generated approximately 40 billion quotes (and approximately 1.8 billion quotes on an average day). Also for May 2023, Market Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 936 million quotes per day; Market Makers who utilized 5–6 Limited Service MEI Ports submitted an

[126] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

average of 578 million quotes on an average day; and Market Makers who utilized 3–4 Limited Service MEI Ports submitted an average of 176 million quotes on an average 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 during anticipated peak market conditions. The need to support 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.[127] 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.

Meanwhile, the Exchange proposes incrementally higher fees for those that purchase additional Limited Service MEI Ports because those with the greatest number of Limited Service MEI Ports generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange. The firms that purchase numerous Limited Service MEI Ports do so for competitive reasons and based on their business needs, which include a desire to access the market more quickly using the lowest latency connections. These firms are generally engaged in sending liquidity removing orders to the Exchange and may require more connections as they compete to access resting liquidity. Consider the following example: a Member has just sent numerous messages and/or orders over one of their Limited Service MEI Ports that are now in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book. That Member may choose to send that order over another Limited Service MEI Port it maintains with less message traffic to help ensure that their liquidity taking order accesses the Exchange more quickly because that connection's queue is shorter.

In addition, Members frequently add and drop connections mid-month to determine which connections have the least latency (and engage in the same practice with Limited Service MEI Ports). This results in increased costs to the Exchange to frequently make changes in the data center (or its network) and provide the additional technical and personnel support necessary to satisfy these requests. Given the difference in network utilization and technical support provided, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who utilize 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, because the network is largely designed and maintained to specifically handle the message rate, capacity 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 and maintain 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.[128] Thus, as the number of connections a Market Maker has increases, the related demand on Exchange resources also increases. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Limited Service MEI Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange operated at a cumulative net annual loss since its launch in 2019[129] 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

[127] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[128] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[129] *See supra* note 125.

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.[130] 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.

Lastly, the Exchange does not believe its proposal to implement incrementally higher fees for those that purchase more Limited Service MEI Ports will place certain market participants at a relative disadvantage to other market participants because those with the greatest number of Limited Service MEI Ports tend generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange, resulting in greater demands and additional burdens on Exchange resources (as described above). The firms that purchase numerous Limited Service MEI Ports do so for competitive reasons and choose to utilize numerous connections based on their business needs, which include a desire to attempt to access the market quicker using the lowest latency connections. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more connections to competitively access resting liquidity. All firms purchase the amount of Limited Service MEI Ports they require based on their own business decisions and similarly situated firms are subject to the same fees.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change and price increase will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As this is a fee increase, arguably if set too high, this fee would make it easier for other exchanges to compete with the Exchange. Only if this were a substantial fee decrease could this be considered a form of predatory pricing. In contrast, the Exchange believes that, without this fee increase, we are potentially at a competitive disadvantage to certain other exchanges that have in place higher fees for similar services. As we have noted, the Exchange believes that connectivity fees can be used to foster more competitive transaction pricing and additional infrastructure investment and there are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. 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, one

[130] 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 71. 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.

comment letter on the Second Proposal, and on comment letter on the Third Proposal, all from the same commenter.[131] In their letters, 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 letters, 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,[132] and Rule 19b–4(f)(2) [133] 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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–EMERALD–2023–14 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–EMERALD–2023–14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–EMERALD–2023–14 and should be submitted on or before July 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[134]

**Vanessa A. Countryman,**

*Secretary.*

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**BILLING CODE 8011–01–P**

[131] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP (''SIG''), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, *and* letters from Gerald D. O'Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023 and May 24, 2023.

[132] 15 U.S.C. 78s(b)(3)(A)(ii).

[133] 17 CFR 240.19b–4(f)(2).

[134] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97808; File No. SR–ICC–2023–010]**

## Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Clearance of Additional Credit Default Swap Contracts

June 27, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] and Rule 19b–4,[2] notice is hereby given that on June 13, 2023, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared primarily by ICC. On June 19, 2023, ICC filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 (the ''proposed rule change''), from interested persons.

## I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed rule change is to revise the ICC Rulebook (the ''Rules'') to provide for the clearance of additional Standard Emerging Market Sovereign CDS contracts and Standard Western European Sovereign Single Name CDS contracts (collectively, the ''Sovereign Contracts'').

## II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC 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. ICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

*(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

(a) Purpose

The purpose of the proposed rule change is to adopt rules that will

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, ICC provided an updated version of the Exhibit 5.

provide the basis for ICC to clear additional credit default swap contracts. ICC proposes to make such change effective following Commission approval of the proposed rule change. ICC believes the addition of these contracts will benefit the market for credit default swaps by providing market participants the benefits of clearing, including reduction in counterparty risk and safeguarding of margin assets pursuant to clearing house rules. Clearing of the additional Sovereign Contracts will not require any changes to ICC's Risk Management Framework or other policies and procedures constituting rules within the meaning of the Securities Exchange Act of 1934 (''Act'').

ICC proposes amending Subchapter 26D and Subchapter 26I of its Rules to provide for the clearance of additional Sovereign Contracts, specifically the Socialist Republic of Vietnam, Romania, and Kingdom of Sweden. These additional Sovereign Contracts have terms consistent with the other SES and SWES Contracts approved for clearing at ICC and governed by Subchapter 26D and Subchapter 26I of the Rules. Minor revisions to Subchapter 26D (Standard Emerging Market Sovereign (''SES'') Single Name) and 26I (Standard Western European Sovereign (''SWES'') Single Name) are made to provide for clearing the additional Sovereign Contracts. Specifically, in Rule 26D–102 (Definitions), ''Eligible SES Reference Entities'' is modified to include the Socialist Republic of Vietnam and Romania in the list of specific Eligible SES Reference Entities to be cleared by ICC. Also, specifically, in Rule 26I–102 (Definitions), ''Eligible SWES Reference Entities'' is modified to include the Kingdom of Sweden in the list of specific Eligible SWES Reference Entities to be cleared by ICC.

(b) Statutory Basis

Section 17A(b)(3)(F) of the Act [4] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions; to assure the safeguarding of securities and funds which are in the custody or control of ICC or for which it is responsible; and to comply with the provisions of the Act and the rules and regulations thereunder. The additional Sovereign Contracts proposed for clearing are similar to the Sovereign Contracts currently cleared by ICC, and will be cleared pursuant to ICC's existing clearing arrangements and related financial safeguards, protections and risk management procedures. Clearing of the additional Sovereign Contracts will allow market participants an increased ability to manage risk and ensure the safeguarding of margin assets pursuant to clearing house rules. ICC believes that acceptance of the new Sovereign Contracts, on the terms and conditions set out in the Rules, is consistent with the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and transactions cleared by ICC, the safeguarding of securities and funds in the custody or control of ICC or for which it is responsible, and the protection of investors and the public interest, within the meaning of Section 17A(b)(3)(F) of the Act.[5]

Clearing of the additional Sovereign Contracts will also satisfy the relevant requirements of Rule 17Ad–22,[6] as set forth in the following discussion.

Rule 17Ad–22(e)(6)(i) [7] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market. In terms of financial resources, ICC will apply its existing margin methodology to the new Sovereign Contracts, which are similar to the Sovereign Contracts currently cleared by ICC. ICC believes that this model will provide sufficient margin requirements to cover its credit exposure to its clearing members from clearing such contracts, consistent with the requirements of Rule 17Ad–22(e)(6)(i).[8]

Rule 17Ad–22(e)(4)(ii) [9] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining additional financial resources at the minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the two participant families that would potentially cause the largest aggregate credit exposure for the covered clearing agency in extreme but plausible market conditions. ICC believes its Guaranty Fund, under its existing methodology, will, together with the required initial margin, provide sufficient financial resources to support the clearing of the additional Sovereign Contracts, consistent with the requirements of Rule 17Ad–22(e)(4)(ii).[10]

Rule 17Ad–22(e)(17) [11] requires, in relevant part, each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to manage its operational risks by (i) identifying the plausible sources of operational risk, both internal and external, and mitigating their impact through the use of appropriate systems, policies, procedures, and controls; and (ii) ensuring that systems have a high degree of security, resiliency, operational reliability, and adequate, scalable capacity. ICC believes that its existing operational and managerial resources will be sufficient for clearing of the additional Sovereign Contracts, consistent with the requirements of Rule 17Ad–22(e)(17),[12] as the new contracts are substantially the same from an operational perspective as existing contracts.

Rule 17Ad–22(e)(8), (9) and (10) [13] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to define the point at which settlement is final to be no later than the end of the day on which payment or obligation is due and, where necessary or appropriate, intraday or in real time; conduct its money settlements in central bank money, where available and determined to be practical by the Board, and minimize and manage credit and liquidity risk arising from conducting its money settlements in commercial bank money if central bank money is not used; and establish and maintain transparent written standards that state its obligations with respect to the delivery of physical instruments, and establish and maintain operational practices that identify, monitor, and manage the risks associated with such physical deliveries. ICC will use its existing rules, settlement procedures and account structures for the new Sovereign Contracts, which are similar to the SWES and SES Contracts currently cleared by ICC, consistent with the requirements of Rule 17Ad–

[4] 15 U.S.C. 78q–1(b)(3)(F).

[5] *Id.*

[6] 17 CFR 240.17Ad–22.

[7] 17 CFR 240.17Ad–22(e)(6)(i).

[8] *Id.*

[9] 17 CFR 240.17Ad–22(e)(4)(ii).

[10] *Id.*

[11] 17 CFR 240.17Ad–22(e)(17)(i) and (ii).

[12] *Id.*

[13] 17 CFR 240.17Ad–22(e)(8), (9) and (10).

22(e)(8), (9) and (10)[14] as to the finality and accuracy of its daily settlement process and addressing the risks associated with physical deliveries.

Rule 17Ad–22(e)(2)(i) and (v)[15] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility. ICC determined to accept the additional Sovereign Contracts for clearing in accordance with its governance process, which included review of the contract and related risk management considerations by the ICC Risk Committee and approval by its Board. These governance arrangements continue to be clear and transparent, such that information relating to the assignment of responsibilities and the requisite involvement of the ICC Board and committees is clearly detailed in the ICC Rules and policies and procedures, consistent with the requirements of Rule 17Ad–22(e)(2)(i) and (v).[16]

Rule 17Ad–22(e)(13)[17] requires each covered clearing agency to establish, implement, maintain, and enforce written policies and procedures reasonably designed to ensure it has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations by, at a minimum, requiring its participants and, when practicable, other stakeholders to participate in the testing and review of its default procedures, including any close-out procedures, at least annually and following material changes thereto. ICC will apply its existing default management policies and procedures for the additional Sovereign Contracts. ICC believes that these procedures allow for it to take timely action to contain losses and liquidity demands and to continue meeting its obligations in the event of clearing member insolvencies or defaults in respect of the additional single name, in accordance with Rule 17Ad–22(e)(13).[18]

*(B) Clearing Agency's Statement on Burden on Competition*

ICC does not believe the proposed amendments will have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the purpose of the proposed rule change is to adopt rules that will provide the basis for ICC to clear additional credit default swap contracts. The additional Sovereign Contracts will be available to all ICC participants for clearing. The clearing of the additional Sovereign Contracts by ICC does not preclude the offering of the additional Sovereign Contracts for clearing by other market participants. Accordingly, ICC does not believe that clearance of the additional Sovereign Contracts will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*(C) Clearing Agency's Statement on Comments on the Proposed Rule Change*

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–ICC–2023–010 on the subject line.

*Paper Comments*

Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to file number SR–ICC–2023–010. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's website at *https://www.theice.com/clear-credit/regulation.*

Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR–ICC–2023–010 and should be submitted on or before July 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2023–13998 Filed 6–30–23; 8:45 am]

**BILLING CODE 8011–01–P**

[14] *Id.*

[15] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

[16] *Id.*

[17] 17 CFR 240.17Ad–22(e)(13).

[18] *Id.*

[19] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF STATE

**[Public Notice: 12119]**

### Plenary Meeting of the Binational Bridges and Border Crossings Group in Washington, DC

**ACTION:** Notice of a meeting.

**SUMMARY:** Delegates from the U.S. and Mexican governments, the states of California, Arizona, New Mexico, and Texas, and the Mexican states of Baja California, Sonora, Chihuahua, Coahuila, Nuevo Laredo, and Tamaulipas will participate in a plenary meeting of the U.S.-Mexico Binational Bridges and Border Crossings Group on

Friday, July 21, 2023, in Washington, DC. The purpose of this meeting is to discuss operational matters involving existing and proposed international bridges and border crossings and their related infrastructure and to exchange technical information as well as views on policy. This meeting will include a public session on Friday, July 21, 2023, from 8:30 a.m. until 11:30 a.m. This session will allow proponents of proposed bridges and border crossings and related projects to make presentations to the delegations and members of the public.

**DATES:** July 21, 2023.

**FOR FURTHER INFORMATION CONTACT:** For further information on the meeting and to attend the public session, please contact Hillary Quam, Border Coordinator, in the Office of Mexican Affairs' Border Affairs Unit via email at *WHA-BorderAffairs@state.gov,* by phone at 202–647–9894, or by mail at the Office of Mexican Affairs, Room 3924, Department of State, 2201 C Street NW, Washington, DC 20520.

**Christopher Bodington,**

*Border Affairs Officer, Office of Mexican Affairs, Department of State.*

[FR Doc. 2023–14021 Filed 6–30–23; 8:45 am]

**BILLING CODE 4710–29–P**

## DEPARTMENT OF TRANSPORTATION

### Maritime Administration

**[Docket No. MARAD–2023–0119]**

### Deepwater Port License Application: Grand Isle LNG Operating Company, LLC; Notice of Intent; Notice of Public Meeting

**AGENCY:** Maritime Administration, U.S. Department of Transportation.

**ACTION:** Notice and request for comments.

**SUMMARY:** The U.S. Coast Guard (USCG), in coordination with the Maritime Administration (MARAD), will prepare an environmental impact statement (EIS) as part of the environmental review of the Grand Isle LNG Operating Company, LLC (Applicant) deepwater port license application. The application proposes the ownership, construction, operation, and eventual decommissioning of an offshore natural gas export deepwater port, known as the Grand Isle LNG Export Deepwater Port Development Project, that would be located in Federal waters approximately 11.3 nautical miles (13 statute miles, or 20.9 kilometers) offshore Plaquemines Parish, Louisiana in a water depth of approximately 68 to 72 feet (20.7 to 21.9 meters). The deepwater port would allow for the loading of liquefied natural gas (LNG) trading carriers. This Notice of Intent (NOI) requests public participation in the scoping process, provides information on how to participate and announces an informational open house and public meeting. Pursuant to the criteria provided in the Deepwater Port Act of 1974, as amended, Louisiana is the designated Adjacent Coastal State (ACS) for this application.

**DATES:** Comments must be received on or before 30 days from the date of publication of this **Federal Register** notice. MARAD and USCG will hold one in-person Public Meeting in connection with scoping for the Grand Isle LNG Export Deepwater Port Development Project.

The in-person public meeting will be held on July 27, 2023, at the Grand Isle Multiplex, 3101 LA–1, Grand Isle, LA 70358 from 4 p.m. to 6 p.m. Central Daylight Time (CDT). The public meeting will be preceded by an open house from 3 p.m. to 4 p.m. CDT. The public meeting may end later than the stated time, depending on the number of persons who wish to make a comment on the record.

Additionally, materials submitted in response to this request for comments on the Grand Isle LNG Export Deepwater Port Development Project deepwater port license application must be submitted to the *www.regulations.gov* website or the Federal Docket Management Facility as detailed in the **ADDRESSES** section below by the close of the comment period.

**ADDRESSES:** You may submit comments identified by DOT Docket Number MARAD–2023–0119 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2023–0119 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* The Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is U.S. Department of Transportation, MARAD–2023–0119, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590. Call 202–493–0402 to determine facility hours prior to hand delivery.

**Note:** If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, and/or a telephone number in a cover page so that we can contact you if we have questions regarding your submission.

*Instructions:* All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

For assistance, please contact either the Maritime Administration via email at *Deepwater.Ports@dot.gov,* or the U.S. Coast Guard via email at *DeepwaterPorts@uscg.mil.* Include ''MARAD–2023–0119'' in the subject line of the message. This email will not be relied on for the intake of comments for this deepwater port license application. To submit written comments and other material submissions, please follow the directions above. Please do not submit written comments or other materials to the email addresses in this section. Improperly submitted comments interfere with MARAD and USCG's ability to help others seeking assistance with comment submission or public meeting attendance.

**SUPPLEMENTARY INFORMATION:**

#### Public Meetings and Open House

We encourage you to attend the informational open house and public meeting to learn about, and comment on, the proposed deepwater port. You will have the opportunity to submit comments on the scope and significance of the issues related to the proposed deepwater port that should be addressed in the EIS.

In order to allow everyone a chance to speak at a public meeting, we may limit speaker time, extend the meeting hours, or both. You must identify yourself, and any organization you represent, by name. Your remarks will be recorded and/or transcribed for inclusion in the public docket.

You may submit written material through docket submission either in place of, or in addition to, speaking. Written material should include your name and address and will be included in the public docket.

Public docket materials will be made available to the public on the Federal Docket Management Facility website (see **ADDRESSES**).

If you plan to participate in the open house or public meetings and require special assistance such as sign language interpretation, non-English language interpretation services or other reasonable accommodation, please notify MARAD or the USCG (see **ADDRESSES**) at least 5 business days in advance of the public meetings. Include

your contact information as well as information about your specific needs.

**Request for Comments**

We request public comment on this proposal. The comments may relate to, but are not limited to, the environmental impact of the proposed action, including those on alternatives or relevant information, studies, or analysis with respect to the licensing of the deepwater port. All comments will be accepted. The public meeting is not the only opportunity you have to comment on the Grand Isle LNG Export Deepwater Port Development Project deepwater port license application. In addition to, or in place of, attending a meeting, you may submit comments directly to the Federal Docket Management Facility during the public comment period (see **DATES**). We will consider all substantive comments and material received during the 30-day scoping period.

The license application, comments, and associated documentation, as well as the draft and final EISs (when published), are available for viewing at the Federal Docket Management System (FDMS) website: *http://www.regulations.gov* under docket number MARAD–2023–0119.

Public comment submissions should include:

- Docket number MARAD–2023–0119.
- Your name and address.

Submit comments or material using only one of the following methods:

- Electronically (preferred for processing) to the Federal Docket Management System (FDMS) website: *http://www.regulations.gov* under docket number MARAD–2023–0119.
- By mail to the Federal Docket Management Facility (MARAD–2023–0119), U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- By fax to the Federal Docket Management Facility at 202–366–9826.

Faxed or mailed submissions must be unbound, no larger than 8½ by 11 inches and suitable for copying and electronic scanning. The format of electronic submissions should also be no larger than 8½ by 11 inches. If you mail your submission and want to know when it reaches the Federal Docket Management Facility, please include a stamped, self-addressed postcard or envelope.

For additional information please contact USCG via email at *DeepwaterPorts@uscg.mil* and MARAD via email at *Deepwater.Ports@dot.gov.* Include ''MARAD–2023–0119'' in the subject line of the message. These email addresses will not be relied on for the intake of comments on the Grand Isle LNG Export Deepwater Port Development Project deepwater port license application. To submit written comments and other material submissions, please follow the directions above.

Regardless of the method used for submitting comments, all submissions will be posted, without change, to the FDMS website (*http://www.regulations.gov*) and will include any personal information you provide. Therefore, submitting this information to the docket makes it public. You may wish to read the Privacy and Use Notice that is available on the FDMS website and the U.S. Department of Transportation Privacy Act Notice that appeared in the **Federal Register** on April 11, 2000 (65 FR 19477), see Privacy Act. You may view docket submissions at the Federal Docket Management Facility or electronically on the FDMS website.

**Background**

Information about deepwater ports, the statutes, and regulations governing their licensing, including the application review process, and the receipt of the current application for the proposed Grand Isle LNG Export Deepwater Port Development Project appears in the Grand Isle LNG Export Deepwater Port Development Project Notice of Application, June 27, 2023, edition of the **Federal Register**. The ''Summary of the Application'' from that publication is reprinted below for your convenience.

Consideration of a deepwater port license application includes review of the proposed deepwater port's impact on the natural and human environment. For the proposed deepwater port it has been determined that review must include preparation of an EIS. This NOI is required by 40 CFR 1501.9. It briefly describes the proposed action, possible alternatives, and our proposed scoping process. You can address any questions about the proposed action, the scoping process, or the EIS to MARAD or USCG (see **ADDRESSES**).

**Proposed Action and Alternatives**

The proposed action requiring environmental review is the Federal licensing of the proposed deepwater port described in ''Summary of the Application'' below. The alternatives to licensing the proposed port are: (1) licensing with conditions (including conditions designed to mitigate environmental impact), (2) evaluation of proposed deepwater port and onshore site/pipeline route alternatives or (3) denying the application, which for purposes of environmental review is the ''no-action'' alternative.

**Summary of the Application**

The application proposes the ownership, construction, operation, and eventual decommissioning of the Grand Isle LNG Export Deepwater Port Development Project deepwater port (''DWP'') terminal to be located approximately 11.3 nautical miles (13 statute miles, or 20.9 kilometers) offshore Plaquemines Parish, Louisiana. The project would involve the installation of two nominal 2.1 MTPA liquefaction systems installed in the West Delta Outer Continental Shelf Lease Block 35 (WD–35), in approximately 68 to 72 feet of water. The proposed Grand Isle LNG Export Deepwater Port Development Project DWP would export liquefied natural gas (LNG) up to 4.2 million metric tons per annum (MMTPA).

The proposed Grand Isle LNG Export Deepwater Port Development Project DWP would consist of fixed and floating components. These components would include eight (8) platforms, two (2) floating storage units (FSUs), and three (3) interconnecting lateral pipelines for feed gas supply. The eight platforms would include two (2) gas treatment platforms; two (2) LNG liquefaction platforms; two (2) LNG loading platforms; one (1) accommodations platform; and one (1) thermal oxidizer platform. Each platform would be connected via a series of eight (8) linking bridges; the two FSUs would be connected using two (2) telescopic gangways.

The LNG would be loaded onto standard LNG carriers with nominal cargo capacities between 125,000 and 180,000 cubic meters (m3) (average expected size is 155,000 m3) for the export of LNG, including to Free Trade Agreement (FTA) and non-FTA nations.

The project would be completed in two phases. Phase 1 construction would include five (5) platforms (a gas treatment platform, an LNG liquefaction platform, an LNG loading platform, the accommodations platform, and the thermal oxidizer platform), one (1) FSU, and interconnect lateral pipelines. Phase 1 would produce 2.1 MMTPA of LNG. Phase 2 construction would be expected to begin one year after the beginning of Phase 1 construction. Phase 2 would include the remaining three (3) platforms (a gas treatment platform, an LNG liquefaction platform, and an LNG loading platform) and an additional FSU. Phase 2 would increase

the production of the project to 4.2 MMTPA of LNG.

The feed gas supply to the project would be transported via three (3) new pipeline laterals. A new 24-inch-diameter lateral, 1.11 statute miles (1.79 kilometers) in length, would tie-in to the existing Kinetica Partners 24-inch (61-centimeter) pipeline. A new 20-inch lateral, 0.43 statute mile (0.69 kilometer) in length, would tie-in to the existing 20-inch (51-centimeter) Kinetica Partners pipeline. Finally, a new 20-inch-diameter lateral, 4.75 statute miles (7.64 kilometers) in length, would tie-in to the existing 18-inch (46-centimeter) High Point Gas Transmission pipeline.

The fabrication and assembly yards for the DWP's fixed components would be located in south Louisiana. One (1) purpose-built transport barge and three (3) project-specific tugs would also be built in south Louisiana. The two (2) FSUs proposed for the project would be repurposed LNG carriers. These would be converted to FSUs in a shipyard located in Europe or Asia.

The onshore components would consist of an existing receiving area/warehouse with an onsite office. These components would be located at one of the existing fabrication yards in Louisiana.

For Phases 1 and 2, platform and pile fabrication and assembly would be contracted to various existing fabrication yards in south Louisiana with the capacity to build and load out up to a 10,000-short-ton deck. Most of the major equipment (*e.g.,* generators, cranes, gas compressors, and gas treating equipment) would be purchased, fabricated, and assembled at vendor suppliers and then shipped pre-commissioned and ready to install on each of the platform topsides.

The living quarters and helideck that are part of the accommodations platform would be prefabricated and shipped separately. The selected contractor would install the prefabricated quarters onto the accommodations platform deck at the onshore fabrication yard. The piles and risers would be fabricated at a fabrication yard in the south Louisiana region. Subsea assemblies would be fabricated and tested at a fabrication yard.

The purpose-built transport barge and the three project-specific tugs would be built in a south Louisiana shipyard. The tugs and barge would be used during both installation phases of the DWP.

**Scoping Process**

Public scoping is an early and open process for identifying and determining the scope of issues to be addressed in the EIS. Scoping begins with this notice, continues through the public comment period (see Dates), and ends when USCG and MARAD have completed the following actions:

- Invites the participation of Federal, State, Tribal, and local agencies, the Applicant, and other interested persons;
- Determines the actions, alternatives and impacts described in 40 CFR 1508.25;
- Identifies and eliminates from detailed study, those issues that are not significant or that have been covered elsewhere;
- Identifies other relevant permitting, environmental review, and consultation requirements;
- Indicates the relationship between timing of the environmental review and other aspects of the application process.

Once the scoping process is complete, USCG, in coordination with MARAD, will prepare a draft EIS. When complete, MARAD will publish a **Federal Register** notice announcing public availability of the Draft EIS. (If you want that notice to be sent to you, please see **ADDRESSES**). You will have an opportunity to review and comment on the Draft EIS. MARAD, the USCG, and other appropriate cooperating agencies will consider the received substantive comments and then prepare the Final EIS. As with the Draft EIS, we will announce the availability of the Final EIS. The Act requires a final public hearing be held in the ACS. Its purpose is to receive comments on matters related to whether or not a deepwater port license should be issued to the applicant by the Maritime Administrator. The final public hearing will be held after the Final EIS is made available for public review.

**Privacy Act**

Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). For information on DOT's compliance with the Privacy Act, please visit *https://www.transportation.gov/privacy.*

(Authority: 49 CFR 1.93.)

By Order of the Maritime Administrator.

**T. Mitchell Hudson, Jr.,**

*Secretary, Maritime Administration.*

[FR Doc. 2023–13474 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–81–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2022–0032]**

### Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Request for Comment; Strategies To Improve Drug Recognition Expert (DRE) Officers' Performance and Law Enforcement Agencies' DRE Programs

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Notice and request for comments on a request for approval of a new information collection.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) summarized below will be submitted to the Office of Management and Budget (OMB) for review and approval. The ICR describes the nature of the information collection and its expected burden. This is a new information collection to study ways to help improve DRE Officers' performance and Law Enforcement DRE programs. A **Federal Register** notice with a 60-day comment period soliciting comments on the following information collection was published on August 31, 2022, Docket No. NHTSSA–2022–0032. Three sources submitted comments. In general, the submitted comments reflected that they were in support of the project's efforts. No adjustments were needed to the project plan.

**DATES:** Comments must be submitted on or before August 2, 2023.

**ADDRESSES:** Written comments and recommendations for the proposed information collection, including suggestions for reducing burden, should be submitted to the Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain.* To find this particular information collection, select ''Currently under Review—Open for Public Comment'' or use the search function.

**FOR FURTHER INFORMATION CONTACT:** For additional information or access to background documents, contact: Jacqueline Milani, NPD220 (routing symbol), (202) 913–3925, National Highway Traffic Safety Administration, Enforcement and Justice Services Division, Room number: W44–206, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Please identify the relevant

collection of information by referring to its OMB Control Number.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501 *et seq.*), a Federal agency must receive approval from the Office of Management and Budget (OMB) before it collects certain information from the public and a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. In compliance with these requirements, this notice announces that the following information collection request will be submitted OMB.

*Title:* Strategies to Improve DRE Officers' Performance and Law Enforcement Agencies' DRE Programs.

*OMB Control Number:* New.

*Form Number:* 1662, 1663, 1680.

*Type of Request:* New request.

*Type of Review Requested:* Regular.

*Length of Approval Requested:* Three years from date of approval.

*Summary of the Collection of Information:*

- Application information will be collected to enroll Law Enforcement Agencies with DRE programs. The application will include fields for the agency name, address, point of contact name, email address, and phone number. It will request information about existing DRE processes and procedures, tools and strategies used, and how the agency plans to implement new or enhance existing processes and procedures.
- Selected agencies will be required to submit via email, monthly reports documenting activities conducted in the reporting month and planned for the next month. The monthly reports will also include information on equipment/technology received as of the date of the report.
- Quarterly reports will be required and will be collected through telephone conversations between the selected agencies and the support contractor. These calls will serve to discuss what has occurred within the past quarter in relation to the project, such as how the tools and technologies have been implemented, any challenges faced and how they were or will be addressed, any successes to date, and lessons learned.

*Description of the Need for the Information and Proposed Use of the Information:* NHTSA was established by the Highway Safety Act of 1970 (Pub. L. 91–605, section 202(a), 84 Stat. 1713, 1739–40). Its mission is to reduce the number of deaths, injuries, and economic losses resulting from motor vehicle crashes on our nation's highways. To further this mission, NHTSA conducts research on driver behavior and traffic safety to develop efficient and effective means of bringing about safety improvements. Impaired driving resulting from cannabis or other drug use poses challenges for our nation's law enforcement officers, prosecutors, toxicologists, highway safety offices, and others. As the number of States legalizing marijuana continues to increase, the need for effective strategies to address the growing concerns about impaired driving is imperative. Law enforcement agencies are eager for strategies to improve their efficiency, consistency, and completeness of their DRE programs. This program will play a critical role in a State's efforts to reduce impaired driving. This project will allow NHTSA to provide participating law enforcement agencies with information and resources to improve their DRE officers' performance and enforcement programs overall. This collection of information is necessary to allow interested enforcement agencies with DRE programs to submit an application that shares information about their current DRE program. This is a demonstration project. Agency applications will be collected and used as baseline data. This information will be compiled and used to better understand process outcomes that other law enforcement agencies could use to replicate and improve their programs.

*60-Day Notice:* A **Federal Register** notice with a 60-day comment period soliciting public comments on the following information collection was published on August 31, 2022 (87 FR 53548). Comments were received from three sources. Each comment received shared that the submitter was in support of the initiative. There are no responses to the comments and no changes made to the project's workplan, final deliverables, and subsequently no changes to the information collection plan. NHTSA acknowledges the support submitted by the three sources as follows:

*Comment 1:* Objectivity will be enhanced in an effort to eliminate human error, methods of automating and standardizing the DRE tests such as through the use of standardized instructions, automating the tests with technology and other tools, and improving data capture throughout the tests to generate a meaningful body of evidence.

*Comment 2:* The results of the study will have practical utility.

*Comment 3:* Additional training proposed by the NHTSA will assist officers in detecting impaired drivers and interacting with them.

*Affected Public:* Selected law enforcement agencies with DRE programs willing to participate.

*Estimated Number of Respondents:* Subject to available funds and available time to collect approximately 3-years of participation data.

*Frequency:* 1 application to share information about their Law Enforcement Agency, monthly reports to share information on process measures on how the project is going.

*Number of Responses:* Approximately 15 agencies will apply. Each will submit 1 application, 36 monthly reports and 12 quarterly calls.

*Estimated Total Annual Burden Hours:* Total overall Burden Hours will be approximately 440 hours.

*Estimated Total Annual Burden Cost:* The total estimated burden hours for each participating agency is 88 hours. Assuming 15 agencies respond and are selected, the total estimated burden hours for all agencies is 1,320 hours. The estimated total burden hours for any agency that submits an application but is not selected is 1 hour. This is a 36-month effort, assuming agencies are selected by March 2023 and provide monthly reports through March 2026. The average annual burden for all agencies is 440 hours or 29.33 hour per respondent.

*Public Comments Invited:* You are asked to comment on any aspects of this information collection, including (a) 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; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Authority:* The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29.

Issued in Washington, DC.

**Nanda Narayanan Srinivasan,**

*Associate Administrator, Research and Program Development.*

[FR Doc. 2023–13856 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

**[Docket No. NHTSA–2022–0058; Notice 1]**

### Polaris Group of America, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Receipt of petition.

**SUMMARY:** Polaris Group of America, Inc., (Polaris), has determined that certain motorcycles manufactured by Indian Motorcycle Company do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective Devices, and Associated Equipment.* Indian Motorcycle Company, on behalf of Polaris, filed an original noncompliance report dated April 13, 2022, and later amended the report on September 9, 2022. Polaris petitioned NHTSA on May 13, 2022, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces receipt of Polaris's petition.

**DATES:** Send comments on or before August 2, 2023.

**ADDRESSES:** Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- *Mail:* Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except for Federal Holidays.
- *Electronically:* Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at *https://www.regulations.gov/.* Follow the online instructions for submitting comments.
- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petition is granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at *https://www.regulations.gov* by following the online instructions for accessing the dockets. The docket ID number for this petition is shown in the heading of this notice.

DOT's complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

**FOR FURTHER INFORMATION CONTACT:** Leroy Angeles, Safety Compliance Engineer, Office of Vehicle Safety Compliance, NHTSA, (202) 366–5304.

**SUPPLEMENTARY INFORMATION:**

*I. Overview:* Polaris determined that certain motorcycles manufactured by Indian Motorcycle Company do not fully comply with paragraph S7.3.5 and Table I–c of FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment* (49 CFR 571.108).

Indian Motorcycle Company, on behalf of Polaris, filed an original noncompliance report dated April 13, 2022, and amended it on September 9, 2022, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Polaris petitioned NHTSA on May 13, 2022, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance.*

This notice of receipt of Polaris's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or another exercise of judgment concerning the merits of the petition.

*II. Motorcycles Involved:* Approximately 12,619 of the following motorcycles manufactured by Indian Motorcycle Company between July 10, 2018, and April 1, 2022, were reported by the manufacturer:

- 2019–2020, 2022 Indian FTR 1200,
- 2019–2020, 2022 Indian FTR 1200 S,
- 2020, 2022 Indian FTR 1200 Rally,
- 2022 Indian FTR R Carbon,
- 2020–2022 Indian Challenger,
- 2020–2022 Indian Challenger Limited,
- 2020–2021 Indian Challenger Dark Horse,
- 2022 Challenger Elite,
- 2022 Indian Challenger Dark Horse Icon,
- 2022 Indian Challenger JD Limited Edition,
- 2022 Indian Pursuit Limited,
- 2022 Indian Pursuit Limited Premium,
- 2022 Indian Pursuit Limited Premium Icon,
- 2022 Indian Pursuit Premium Dark Horse,
- 2022 Indian Pursuit Dark Horse Premium,
- 2022 Indian Pursuit Dark Horse Premium Icon.

*III. Noncompliance:* Polaris explains that the subject motorcycles are equipped with a specific Antilock Braking System (ABS) module that can cause the subject motorcycle to experience inadvertent stop lamp illumination without rider input during certain riding conditions when a loss of wheel contact with the ground occurs.

*IV. Rule Requirements: Stop lamps* are lamps giving a steady light to the rear of a vehicle to indicate a vehicle is stopping or diminishing speed by braking. Paragraph S7.3.5 and Table I–c of FMVSS No. 108 include the requirements relevant to this petition. Stop lamps equipped on motorcycles must be steady burning. In addition, they must be activated upon application of the service brakes. The stop lamp may also be activated by a device designed to retard the motion of the vehicle.

*V. Summary of Polaris' Petition:* The following views and arguments presented in this section, ''V. Summary of Polaris' Petition,'' are the views and arguments provided by Polaris. They

have not been evaluated by the Agency and do not reflect the views of the Agency. Polaris describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

Polaris explains that the subject noncompliance occurs due to an inadvertent software logic error. Specifically, Polaris says the subject noncompliance occurs because a ''loss of wheel contact may result in a front and rear wheel speed differential that exceeds the calibration threshold within the ABS module software.'' This causes the ABS module to provide a signal to the ECM, which then illuminates the brake lights, even when there is no brake application by the motorcycle user.

Polaris believes that the subject noncompliance is inconsequential to motor vehicle safety because the brake light is illuminated for 500 milliseconds and only occurs under certain conditions. Polaris says that the resulting brake light illumination is ''analogous to a rider tapping the brake lever or pedal to cancel cruise control, thereby illuminating the lights, but not meaningfully engaging the brake system to decelerate.'' Other than the subject noncompliance, Polaris states that the affected motorcycles comply with FMVSS No. 108 requirements. Furthermore, Polaris says it is not aware of any crashes or injuries related to the subject noncompliance.

Polaris references three previous petitions NHTSA has granted ''for lighting requirements where a technical noncompliance exists but does not create an adverse effect on safety.''

• In a petition submitted by Daimler Trucks North America,[1] Polaris points to the following NHTSA statement: ''when a vehicle with air brakes experiences a low-air event and notifies that driver of a brake system malfunction, NHTSA believes that the driver would likely respond by pulling over to the side of the road and taking the vehicle out of service until the brake system can be repaired.''

• Polaris cited a decision notice for a General Motor's petition for inconsequential noncompliance [2] and stated that, ''NHTSA noted that a number of factors led them to the conclusion that under the specific circumstances described in GM's Petition would have a low probability of occurrence and would neither be long lasting nor likely to occur during a period when parking lamps are generally in use.'' Polaris also points to a statement in this petition where NHTSA stated, ''when the noncompliance does occur, other lamps remain functional. The combination of all of the factors, specific to this case, abate the risk to safety.''

• In a petition submitted by General Motors Corporation,[3] Polaris points to the following NHTSA statement, ''[e]ven if a visible CHMSL illumination occurs upon hazard flasher activation, it would almost certainly have no adverse effect on safety. However, if a CHMSL illuminated due to this condition when the vehicle was on the road, a following driver would likely see a brief single flash of the CHMSL. As a practical matter, the following driver might not notice this flash at all. Even if he or she did, there would seem to be no likelihood of driver confusion or inappropriate responses.'' Polaris also points to another statement in this petition where NHTSA stated, ''[w]e can foresee no negative effects on motor vehicle safety if a vehicle's CHMSL is briefly illuminated as described upon activation of the hazard warning lamps. The intended use of a hazard warning lamp and the momentary activation of the CHMSL do not provide a conflicting message. The illumination of the CHMSL is intended to signify that the vehicles brakes are being applied and that the vehicle might be decelerating. Hazard warning lamps are intended as a more general message to nearby drivers that extra attention should be given to the vehicle. A brief illumination of the CHMSL while activating the hazard warning lamps would not confuse the intended general message, nor would the brief illumination in the absence of the other brake lamps cause confusion that the brakes were unintentionally applied.''

Polaris concludes by stating its belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety and its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition only applies to the subject motorcycles that Polaris no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant motorcycles under their control after Polaris notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8)

**Otto G. Matheke, III,**

*Director, Office of Vehicle Safety Compliance.*

[FR Doc. 2023–14064 Filed 6–30–23; 8:45 am]

**BILLING CODE 4910–59–P**

[1] *Daimler Trucks North America, Grant of Petition for Decision of Inconsequential Noncompliance;* 87 FR 14325 (March 24, 2022).

[2] *General Motors, LLC, Grant of Petition for Decision of Inconsequential Noncompliance;* 83 FR 7847 (February 22, 2018).

[3] *General Motors Corporation; Grant of Application for Decision of Inconsequential Noncompliance;* 66 FR 32871 (June 18, 2001).

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Notice of OFAC Sanctions Actions

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them. OFAC is also publishing an update to the identifying information of one person currently included on the SDN List.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

**FOR FURTHER INFORMATION CONTACT:** OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

**SUPPLEMENTARY INFORMATION:**

**Electronic Availability**

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

**Notice of OFAC Action(s)**

On June 27, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following individual and entities are blocked under the relevant sanctions authority listed below.

BILLING CODE 4810–AL–P

## Individual

1. IVANOV, Nikolayevich Andrey (Cyrillic: ИВАНОВ, Николаевич Андрей), House - 113A, Ust-Labinskiy 352303, Russia; House - 36/ APPT - 3, Kolomna 140415, Russia; Moskovskaya Oblast, Russia; DOB 13 Apr 1983; nationality Russia; citizen Russia; Gender Male; Identification Number M0381 (Russia); alt. Identification Number B90381 (Russia) (individual) [RUSSIA-EO14024] (Linked To: PRIGOZHIN, Yevgeniy Viktorovich).

   Designated pursuant to section 1(a)(vii) of Executive Order 14024 of April 15, 2021, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation," 86 FR 20249, 3 CFR, 2021 Comp., p. 542 (Apr. 15, 2021) (E.O. 14024), for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Yevgeniy Prigozhin, a person whose property and interests in property are blocked pursuant to E.O. 14024.

## Entities

2. DIAMVILLE SAU (a.k.a. DIAM VILLE; a.k.a. DIAMVILLE; a.k.a. DIAMVILLE COMPANY; a.k.a. DIAMVILLE SAUAG), Avenue of the Martyrs, 1st District, Bangui, Central African Republic; Organization Established Date 28 Mar 2019; Organization Type: Support activities for other mining and quarrying [RUSSIA-EO14024] (Linked To: PRIGOZHIN, Yevgeniy Viktorovich).

   Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Yevgeniy Prigozhin, a person whose property and interests in property are blocked pursuant to E.O. 14024.

3. INDUSTRIAL RESOURCES GENERAL TRADING (Arabic: اندستر ريسورسز للتجارة العامة) (a.k.a. INDUSTRIAL RESOURCES GENERAL TRADING LLC), Al Hawai Tower, 88, Sheikh Zayed Road, 2nd Floor, Office 203, Dubai, United Arab Emirates; P.O. Box 74345, Dubai, United Arab Emirates; Website www.iruae.ae; Organization Established Date 21 Sep 2010; Organization Type: Non-specialized wholesale trade; Business

Registration Number 10469466 (United Arab Emirates) [RUSSIA-EO14024] (Linked To: PRIGOZHIN, Yevgeniy Viktorovich).

Designated pursuant to section 1(a)(vi)(B) of E.O. 14024 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, Yevgeniy Prigozhin, a person whose property and interests in property are blocked pursuant to E.O. 14024.

4. LIMITED LIABILITY COMPANY DM (Cyrillic: ОБЩЕСТВО С ОГРАНИЧЕННОЙ ОТВЕТСТВЕННОСТЬЮ "ДМ") (a.k.a. "DM, LLC"), 4-N-3/413, СН.Р./Ofis, Liter A, 6B, Ul. Tallinskaya, St. Petersburg 195196, Russia; House 6, Litera A, Office 302, Tallinskaya Street, St. Petersburg City 195196, Russia; Organization Established Date 01 Nov 2017; Organization Type: Non-specialized wholesale trade; Tax ID No. 7806293796 (Russia); Registration Number 781434142955 (Russia) [RUSSIA-EO14024] (Linked To: PRIGOZHIN, Yevgeniy Viktorovich).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Yevgeniy Prigozhin, a person whose property and interests in property are blocked pursuant to E.O. 14024.

5. MIDAS RESSOURCES SARLU (a.k.a. MIDAS RESSOURCES; a.k.a. MIDAS RESSOURCES LIMITED LIABILITY; a.k.a. MIDAS RESSOURCES MINING COMPANY; a.k.a. MIDAS RESSOURCES SURL; a.k.a. MIDAS SURL; a.k.a. "MIDAS RESOURCES"), Bangui, Central African Republic; Ndassima, Central African Republic; Website www.midasrs.com; Organization Established Date 12 Nov 2019; Organization Type: Mining of other non-ferrous metal ores; Target Type Private Company [RUSSIA-EO14024] (Linked To: PRIGOZHIN, Yevgeniy Viktorovich).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Yevgeniy Prigozhin, a person whose property and interests in property are blocked pursuant to E.O. 14024.

Dated: June 27, 2023.

**Andrea Gacki,**

*Director, Office of Foreign Assets Control, U.S. Department of the Treasury.*

[FR Doc. 2023–14031 Filed 6–30–23; 8:45 am]

**BILLING CODE 4810–AL–C**

## DEPARTMENT OF THE TREASURY

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; New Markets Tax Credit Program Community Development Entity (CDE) Certification Application

**AGENCY:** Departmental Offices, U.S. Department of the Treasury.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** The Department of the Treasury will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on this request.

**DATES:** Comments should be received on or before August 2, 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.

**FOR FURTHER INFORMATION CONTACT:** Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

**SUPPLEMENTARY INFORMATION:**

**Community Development Financial Institutions Fund (CDFI Fund)**

*Title:* New Markets Tax Credit Program Community Development Entity (CDE) Certification Application.

*OMB Control Number:* 1559–0014.

*Type of Review:* Reinstatement of a previously approved collection.

*Description:* 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.

*Form:* NMTC CDE Certification Application.

*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.

*Frequency of Response:* Once.

*Estimated Total Number of Annual Responses:* 300.

*Estimated Time per Response:* 4 hours.

*Estimated Total Annual Burden Hours:* 1,200.

*Authority:* 44 U.S.C. 3501 *et seq.*

**Spencer W. Clark,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2023–14090 Filed 6–30–23; 8:45 am]

**BILLING CODE 4810–70–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–XXXX]**

### Agency Information Collection Activity: Request for Retroactive Induction for a Period Previously Completed Under Chapter 33 (Chapter 31—Veteran Readiness and Employment)

**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 new 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 September 1, 2023.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy 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–XXXX'' 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 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–XXXX'' 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:* 38 U.S.C. 3102, 3103, 3108, 5113.

*Title:* Request For Retroactive Induction For A Period Previously Completed Under Chapter 33 (Chapter 31—Veteran Readiness and Employment), VA form 28–10286.

*OMB Control Number:* 2900–XXXX.

*Type of Review:* Request for approval of a new collection.

*Abstract:* The Department of Veterans Affairs (VA) through its Veterans Benefits Administration (VBA) administers an integrated program of benefits and services, established by law, for Veterans, service personnel, and their dependents and/or beneficiaries. Title 38 U.S.C. 5101(a) provides that a specific claim in the form provided by the Secretary must be filed for benefits to be paid to any individual under the laws administered by the Secretary. Additionally, 38 U.S.C. 501(a) provides VA the authority to collect this information. VA Form (VAF) 28–10286, Request For Retroactive Induction for a Period Previously Completed Under Chapter 33, collects information that the Veteran Readiness and Employment (VR&E) program needs to verify if a Service member or Veteran meets the criteria for retroactive induction for a period previously completed under chapter 33 (38 U.S.C. 3102, 3103, 3108, 5113).

*Affected Public:* Individuals and households.

*Estimated Annual Burden:* 33,000 hours.

*Estimated Average Burden per Respondent:* 20 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:* 99,000.

By direction of the Secretary.

**Maribel Aponte,**

*VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.*

[FR Doc. 2023–14032 Filed 6–30–23; 8:45 am]

**BILLING CODE 8320–01–P**


# FEDERAL REGISTER

Vol. 88 Monday,
No. 126 July 3, 2023

Part II

## Department of Health and Human Services

Office of Inspector General

42 CFR Parts 1003 and 1005
Grants, Contracts, and Other Agreements: Fraud and Abuse; Information Blocking; Office of Inspector General's Civil Money Penalty Rules; Final Rule

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Office of Inspector General**

**42 CFR Parts 1003 and 1005**

**RIN 0936–AA09**

## Grants, Contracts, and Other Agreements: Fraud and Abuse; Information Blocking; Office of Inspector General's Civil Money Penalty Rules

**AGENCY:** Office of Inspector General (OIG), Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the civil money penalty (CMP) regulations of the Department of Health and Human Services (HHS) Office of Inspector General (OIG) to: incorporate new CMP authority for information blocking; incorporate new authorities for CMPs, assessments, and exclusions related to HHS grants, contracts, other agreements; and increase the maximum penalties for certain CMP violations.

**DATES:** This final rule is effective August 2, 2023, except for the additions of §§ 1003.1400, 1003.1410, and 1003.1420 (amendatory instruction 10), which are effective on September 1, 2023.

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**SUPPLEMENTARY INFORMATION:**

### I. Executive Summary

#### *A. Purpose and Need for Regulatory Action*

This final rule implements three statutory provisions: (1) the amendment of the Public Health Service Act (PHSA), 42 U.S.C. 300jj–52, by the 21st Century Cures Act (Cures Act) authorizing OIG to investigate claims of information blocking and providing the Secretary of HHS (Secretary) authority to impose CMPs for information blocking; (2) the amendment of the Civil Monetary Penalties Law (CMPL), 42 U.S.C. 1320a–7a, by the Cures Act, Public Law 114–255, section 5003, authorizing HHS to impose CMPs, assessments, and exclusions upon individuals and entities that engage in fraud and other misconduct related to HHS grants, contracts, and other agreements (42 U.S.C. 1320a–7a(o)–(s)); and (3) the increase in penalty amounts in the CMPL effected by the Bipartisan Budget Act of 2018 (BBA 2018), Public Law 115–123. Each of these statutory amendments is discussed further below.

First, section 4004 of the Cures Act added section 3022 to the PHSA, 42 U.S.C. 300jj–52 which, among other provisions, provides OIG the authority to investigate claims of information blocking and authorizes the Secretary to impose CMPs against a defined set of individuals and entities that OIG determines committed information blocking. Investigating and taking enforcement action against individuals and entities that engage in information blocking are consistent with OIG's history of investigating serious misconduct that impacts HHS programs and beneficiaries. Information blocking poses a threat to patient safety and undermines efforts by providers, payers, and others to make the health system more efficient and effective. Information blocking may also constitute an element of a fraud scheme, such as by forcing unnecessary tests or conditioning information exchange on referrals. Addressing the negative effects of information blocking is consistent with OIG's mission to protect the integrity of HHS programs, as well as the health and welfare of program beneficiaries.

In this final rule, we implement section 3022(b)(2)(C) of the PHSA, which requires that the CMP for information blocking follow the procedures of section 1128A of the Social Security Act (SSA). Specifically, the final rule adds the information blocking CMP authority to the existing regulatory framework for the imposition and appeal of CMPs, assessments, and exclusions (42 CFR parts 1003 and 1005) pursuant to section 3022(b)(2)(C) of the PHSA (42 U.S.C. 300jj–52(b)(2)(C)). The amendments give individuals and entities subject to CMPs for information blocking the same procedural rights that currently exist under 42 CFR parts 1003 and 1005. Through this final rule, we codify this new information blocking authority at 42 CFR 1003.1400, 1003.1410, and 1003.1420.

The final rule also explains OIG's approach to enforcement, which will focus on information blocking allegations that pose greater risk to patients, providers, and health care programs, as well as OIG's anticipated consultation and coordination with the Office of the National Coordinator for Health Information Technology (ONC) and other agencies, as appropriate, in reviewing and investigating allegations of information blocking.

On May 1, 2020, ONC published a final rule, 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program (ONC Final Rule), in the **Federal Register**. 85 FR 25642, May 1, 2020. Among other things, ONC through the ONC Final Rule promulgated the information blocking regulations defining information blocking and establishing exceptions to that definition. OIG's final rule incorporates the relevant information blocking regulations at 45 part 171 as the basis for imposing CMPs for information blocking.

Second, this final rule modifies 42 CFR parts 1003 and 1005 to add the new authority related to fraud and other misconduct involving grants, contracts, and other agreements into the existing regulatory framework for the imposition and appeal of CMPs, assessments, and exclusions. The additions: (1) expressly enumerate in the regulation the grant, contract, and other agreement fraud and misconduct CMPL authority; and (2) give individuals and entities sanctioned for fraud and other misconduct related to HHS grants, contracts, and other agreements the same procedural and appeal rights that currently exist under 42 CFR parts 1003 and 1005 for those sanctioned under the CMPL and other statutes for fraud and other misconduct related to, among other things, the Federal health care programs. In this final rule, we codify these new authorities and their corresponding sanctions in the regulations at 42 CFR 1003.110, 1003.130, 1003.140, 1003.700, 1003.710, 1003.720, 1003.1550, 1003.1580, and 1005.1.

On February 9, 2018, the President signed into law the BBA 2018. Section 50412 of the BBA 2018 amended the CMPL to increase the amounts of certain CMPs. 42 U.S.C. 1320a–7a(a), (b). This final rule codifies the increased CMPs at 42 CFR part 1003. Specifically, for conformity with the CMPL as amended by the BBA 2018, we revise the CMPs contained at 42 CFR 1003.210, 1003.310, and 1003.1010.

#### *B. Legal Authority*

The legal authority for this regulatory action is found in the SSA and the PHSA, as amended by the Cures Act and the BBA 2018. The legal authority for the changes is listed by the parts of title 42 of the Code of Federal Regulations (CFR) that we propose to modify:

*1003:* 42 U.S.C. 1320a–7a(a)–(b), (o)–(s); 42 U.S.C. 300jj–52

*1005:* 42 U.S.C. 1320a–7a(o)–(s); 42 U.S.C. 300jj–52

#### *C. Proposed Rule*

On April 24, 2020, OIG published a proposed rule (proposed pule) in the **Federal Register** setting forth certain proposed amendments to the CMP rules of HHS OIG. 85 FR 22979, April 24, 2020. The proposed rule set forth

proposed regulations that would: (1) incorporate the new CMP authority for information blocking; (2) incorporate new authorities for CMPs, assessments, and exclusions related to HHS grants, contracts, other agreements; and (3) increase the maximum penalties for certain CMP violations. We solicited comments on those three proposed regulatory additions and changes to obtain public input. Specific to information blocking, we also provided information on—but did not propose regulations for—our expected enforcement priorities, the investigation process, and our experience with investigating conduct that includes an intent element. We received 49 timely comments, 48 of which were unique, from a broad range of stakeholders.

*D. Final Rule*

This final rule incorporates into OIG's CMP regulations at 42 CFR parts 1003 and 1005 two new CMP authorities established by the Cures Act related to: (1) information blocking; and (2) fraud and other misconduct involving HHS grants, contracts, and other agreements. The final rule also incorporates into 42 CFR part 1003 new maximum CMP amounts for certain offenses, as set by the BBA 2018.

In the context of information blocking, the Cures Act authorizes CMPs for any practice that is likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information (EHI) if the practice is conducted by an entity that is: a developer of certified health information technology (IT); offering certified health IT; a health information exchange (HIE); or a health information network (HIN) and the entity knows or should know that the practice is likely to interfere with, prevent, or materially discourage the access, exchange, or use of EHI.

The ONC Final Rule implements certain Cures Act information blocking provisions, including defining terms and establishing reasonable and necessary activities that do not constitute information blocking or ''exceptions'' to the definition of information blocking. OIG and ONC have coordinated extensively on the ONC Final Rule and this final rule to align both sets of regulations. As proposed, we incorporate the regulatory definitions and exceptions in ONC's regulations at 45 CFR part 171 related to information blocking as the basis for imposing CMPs and determining the amount of penalty imposed.

In the context of HHS grants, contracts, and other agreements, the Cures Act authorizes CMPs, assessments, and exclusions for:

- knowingly presenting or causing to be presented a specified claim under a grant, contract, or other agreement that a person knows or should know is false or fraudulent;
- knowingly making, using, or causing to be made or used any false statement, omission, or misrepresentation of a material fact in any application, proposal, bid, progress report, or other document that is required to be submitted in order to directly or indirectly receive or retain funds provided in whole or in part by HHS pursuant to a grant, contract, or other agreement;
- knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent specified claim under a grant, contract, or other agreement;
- knowingly making, using, or causing to be made or used, a false record or statement material to an obligation to pay or transmit funds or property to HHS with respect to a grant, contract, or other agreement;
- knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit funds or property to HHS with respect to a grant, contract, or other agreement; and
- failing to grant timely access, upon reasonable request, to OIG for the purposes of audits, investigations, evaluations, or other statutory functions of OIG in matters involving grants, contracts, or other agreements.

We further codify changes to the CMP regulations at 42 CFR part 1003 to conform with the CMP amounts contained in the SSA, as amended by the BBA 2018.

## II. Background

For more than 35 years, OIG has exercised authority to impose CMPs, assessments, and exclusions in furtherance of its mission to protect Federal health care and other Federal programs from fraud, waste, and abuse. The Cures Act established new CMP authorities related both to information blocking and to fraud and other prohibited conduct involving HHS grants, contracts, and other agreements. OIG also received authority through the BBA 2018 to impose larger CMPs for certain offenses committed after February 9, 2018.

*A. Overview of OIG Civil Money Penalty Authorities*

The CMPL (section 1128A of the SSA, 42 U.S.C. 1320a–7a) was enacted in 1981 to provide HHS with the statutory authority to impose CMPs, assessments, and exclusions upon persons who commit fraud and other misconduct related to Federal health care programs, including Medicare and Medicaid. The Secretary delegated the CMPL's authorities to OIG. 53 FR 12993, April 20, 1988. HHS has promulgated regulations at 42 CFR parts 1003 and 1005 that: (1) enumerate specific bases for the imposition of CMPs, assessments, and exclusion under the CMPL and other CMP statutes; (2) set forth the appeal rights of persons subject to those sanctions; and (3) outline the procedures under which a sanctioned party may appeal the sanction. Since 1981, Congress has created various other CMP authorities related to fraud and abuse that were delegated by the Secretary to OIG and added to part 1003.

*B. The Cures Act and the ONC Final Rule*

The Cures Act added section 3022 of the PHSA, which defines conduct that constitutes information blocking by health IT developers of certified health IT, entities offering certified health IT, HIEs, HINs, and health care providers. Section 3022(a) of the PHSA defines information blocking as a practice that—(A) except as required by law or specified by the Secretary pursuant to rulemaking under section 3022(a)(3), is likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information; and (B)(i) if conducted by a health information technology developer, exchange, or network, such developer, exchange, or network knows, or should know, that such practice is likely to interfere with, prevent, or materially discourage the access, exchange, or use of electronic health information; or (ii) if conducted by a health care provider, such provider knows that such practice is unreasonable and is likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information. Section 3022(a)(3) of the PHSA provides that the Secretary shall, through rulemaking, identify reasonable and necessary activities that do not constitute information blocking, and section 3022(a)(4) of the PHSA states that the term ''information blocking'' does not include any conduct that occurred before January 13, 2017. The ONC Final Rule implements these sections of the PHSA at 45 CFR part 171.

Section 3022(b)(1) of the PHSA authorizes OIG to investigate claims of information blocking described in section 3022(a) of the PHSA, and to investigate claims that health IT developers of certified health IT or other

entities offering certified health IT have submitted false attestations under section 3001(c)(5)(D) of the PHSA as part of ONC's program for the voluntary certification of health IT (ONC Health IT Certification Program). Section 3022(b)(2)(A) authorizes the Secretary to impose CMPs not to exceed $1 million per violation on health IT developers of certified health IT or other entities offering certified health IT, HIEs, and HINs that OIG determines, following an investigation, committed information blocking. Section 3022(b)(2)(A) also provides that a determination of the CMP amounts shall consider factors such as the nature and extent of the information blocking and harm resulting from such information blocking including, where applicable, the number of patients affected, the number of providers affected, and the number of days the information blocking persisted. Section 3022(b)(2)(C) of the PHSA applies the procedures of section 1128A of the SSA to CMPs imposed under section 3022(b)(2) of the PHSA in the same manner as such provisions apply to a CMP or proceeding under section 1128A(a) of the SSA. This final rule implements section 3022(b)(2)(A) and (C) of the PHSA.

Furthermore, section 3022(b)(2)(B) of the PHSA provides that any health care provider determined by OIG to have committed information blocking shall be referred to the appropriate agency to be subject to appropriate disincentives using authorities under applicable Federal law, as the Secretary of HHS sets forth through notice and comment rulemaking. This final rule does not implement section 3022(b)(2)(B) of the PHSA. However, a health IT developer of certified health IT, HIE, or HIN as defined in 45 CFR 171.102 determined by OIG to have committed information blocking could be subject to CMPs under this final rule even if that entity also met the definition of a health care provider at 45 CFR 171.102. For additional discussion related to health care providers that meet a definition of an actor subject to CMPs, see section IV.A.3. of this preamble.

The Cures Act also identifies ways for ONC, the Office for Civil Rights (OCR), and OIG to consult, refer, and coordinate. For example, section 3022(b)(3) of the PHSA states that OIG may refer instances of information blocking to OCR when a consultation regarding the health privacy and security rules promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) will resolve such information blocking claims. Additionally, section 3022(d)(1) of the PHSA requires ONC to share information with OIG as required by law. For additional discussion related to coordination, see section III.A.5 of the proposed rule preamble and section III.B. of this preamble.

ONC's information blocking regulations at 45 CFR part 171 and the OIG CMP regulation at 42 CFR part 1003, subpart N, are designed to work in tandem. As a result, we encourage parties to read this final rule together with the ONC Final Rule. The ONC Final Rule defined ''information blocking''—and specific terms related to information blocking—as well as implemented exceptions to the definition of information blocking. This final rule describes the parameters and procedures applicable to the CMP for information blocking.

The Cures Act amended the CMPL to give HHS the authority to impose CMPs, assessments, and exclusions upon persons that commit fraud and other misconduct related to HHS grants, contracts, and other agreements. 42 U.S.C. 1320a–7a(o)–(s). This authority allows for the imposition of sanctions for a wide variety of fraudulent and improper conduct involving HHS grants, contracts, and other agreements including, among other things, the making of false or fraudulent specified claims to HHS, the submission of false or fraudulent documents to HHS, and the creation of false records related to HHS grants, contracts, or other agreements. The authority applies to a broad array of situations in which HHS provides funding, directly or indirectly, in whole or in part, pursuant to a grant, contract, or other agreement. The Cures Act also created a new set of definitions related to grant, contract, and other agreement fraud and misconduct, outlined the sanctions for violation of the statute, and referenced the procedures to be used when imposing sanctions under the statute.

### *C. The Bipartisan Budget Act of 2018*

The BBA 2018 amended the CMPL to increase certain CMP amounts contained in 42 U.S.C. 1320a–7a(a) and (b). The BBA 2018 increased the maximum CMP amounts in section 1128A(a) of the SSA (42 U.S.C. 1320a–7a) from $10,000 to $20,000; from $15,000 to $30,000; and from $50,000 to $100,000. The BBA 2018 increased the maximum CMP amounts in section 1128A(b) of the SSA from $2,000 to $5,000 in paragraph (1), from $2,000 to $5,000 in paragraph (2), and from $5,000 to $10,000 in paragraph (3)(A)(i). This statutory increase in CMP amounts is effective for acts committed after the date of enactment, February 9, 2018. This final rule updates our regulations to reflect the increased CMP amounts authorized by the 2018 BBA amendments.

## III. OIG's Anticipated Approach to Information Blocking CMP Enforcement

The preamble to the proposed rule provided a nonbinding, informational overview of our anticipated information blocking enforcement priorities and the investigative process. We provided this information in the preamble to the proposed rule for informational purposes only and did not propose regulations on these topics. We received several comments on these topics, which are publicly available at *https://www.regulations.gov/docket/HHSIG-2020-0001/comments.* To improve public understanding of how we anticipate we will approach information blocking CMP enforcement, we further provide in section III of this preamble an informational statement to supplement the discussion set forth in the proposed rule. We note that this discussion of anticipated approach is limited to our investigation of those entities subject to CMPs and does not apply to the investigation of health care providers that may be referred for disincentives under section 3022(b)(2)(B) of the PHSA.

### *A. Anticipated Priorities*

The preamble to the proposed rule set forth our anticipated information blocking enforcement priorities as conduct that: (1) resulted in, is causing, or had the potential to cause patient harm; (2) significantly impacted a provider's ability to care for patients; (3) was of long duration; (4) caused financial loss to Federal health care programs, or other government or private entities; or (5) was performed with actual knowledge. We explained that we will select cases for investigation based on these priorities and expect that the enforcement priorities will evolve as OIG gains more experience investigating information blocking. We also emphasized that the definition of information blocking—as defined in section 3022(a) of the PHSA and 45 CFR 171.103(a)—includes an element of intent and that OIG lacked the authority to seek CMPs for information blocking against actors who did not have the requisite intent. We continue to anticipate the same enforcement priorities as set out in the preamble of the proposed rule and supplement that discussion below. We provide this explanation so that the public and stakeholders have a better understanding of how we anticipate allocating our resources to enforce the

CMP for information blocking. Prioritization ensures OIG can effectively allocate its resources to target information blocking allegations that have more negative effects on patients, providers, and health care programs. Our enforcement priorities will inform our decisions about which information blocking allegations to pursue, but these priorities are not dispositive. Each allegation will present unique facts and circumstances that must be assessed individually. Each allegation will be assessed to determine whether it implicates one or more of the enforcement priorities, or otherwise merits further investigation and potential enforcement action. There is no specific formula we can apply to every allegation that allows OIG to effectively evaluate and prioritize which claims merit investigation.

As addressed in section III.B of this preamble, we anticipate coordinating closely with ONC and other agencies as appropriate in reviewing allegations. Although our statement of anticipated priorities is framed around individual allegations, OIG may evaluate allegations and prioritize investigations based in part on the volume of claims relating to the same (or similar) conduct by the same actor. That evaluation would include assessment of all information blocking claims received by ONC through the standardized process to receive claims from the public.

We clarify here that OIG's anticipated priority relating to patient harm is not specific to individual harm, but rather may broadly encompass harm to a patient population, community, or the public. Additionally, with respect to our anticipated priority relating to actual knowledge, we note that health IT developers of certified health IT and health information exchanges and networks do not have to have actual knowledge in order to commit information blocking. But the conduct of someone who has actual knowledge is generally more egregious than the conduct of someone who only should know that their practice is likely to interfere with, prevent, or materially discourage access, exchange, or use of EHI. As a general matter, we would likely prioritize cases in which an actor has actual knowledge over cases in which the actor only should have known that the practice was likely to interfere with, prevent, or materially discourage the access, exchange, or use of EHI.

Finally, we are stating that our current anticipated enforcement priorities may lead to investigations of anti-competitive conduct or unreasonable business practices. The ONC Final Rule provides, as examples, conduct that may implicate the information blocking provision, anti-competitive or unreasonable conduct, such as unconscionable or one-sided business terms for the access, exchange, or use of EHI, or the licensing of an interoperability element. For example, a contract containing unconscionable terms related to sharing of patient data could be anti-competitive conduct that impedes a provider's ability to care for patients. 85 FR 25812, May 1, 2020. A claim of such conduct would implicate OIG's enforcement priority related to a provider's ability to care for patients. Anti-competitive conduct resulting in information blocking could implicate other enforcement priorities as well, depending on the facts.

OIG's enforcement priorities are a tool we use to triage allegations and allocate resources. We can and do expect to investigate allegations of other information blocking conduct not covered by the priorities. If conduct or patterns of conduct raise concerns, OIG may choose to investigate those allegations. And as we gain more experience with investigating information blocking, we will reassess our priorities accordingly. For example, as patients continue to adopt and use technology to access their EHI, the number of patients that will request their EHI directly from a health IT developer of certified health IT or HIE may increase. That may generate more allegations related to patient access to their EHI. Trends or changes in the types of allegations we receive may affect enforcement priorities in the future.

*B. Coordination With Other Agencies*

The Cures Act identified ways for ONC, OCR, and OIG to consult, refer, and coordinate on information blocking claims. We elaborate on those processes here for informational purposes only.

Section 3022(d)(1) of the PHSA states that ONC may serve as a technical consultant to OIG. Because ONC promulgated the information blocking regulations and exceptions, OIG will closely consult with ONC throughout the investigative process. ONC's subject matter expertise is vital to our evaluation of information blocking allegations. OIG will continue working closely with ONC as ONC develops information blocking guidance.

Section 3022(d)(3) of the PHSA requires ONC to implement a standardized process for the public to submit reports on claims of information blocking, and section 3022(d)(1) requires ONC to share information with OIG as required by law. ONC has a standardized process for the public to submit reports on claims of information blocking through this website: *https://inquiry.healthit.gov/support/plugins/servlet/desk/portal/6*. In addition to the process required by the PHSA, OIG has its own hotline process through which individuals may submit claims of information blocking online at *https://tips.oig.hhs.gov/* or by calling 1–800–447–8477. Regardless of whether a claim is made to ONC or OIG, ONC and OIG will coordinate in evaluating claims of information blocking and share information as permitted by law.

Whether OIG's or ONC's authority is appropriate to address a claim of information blocking will depend on the facts and circumstances of the allegation and the results of an investigation. For example, ONC and OIG may initially agree that a claim is most appropriately evaluated through an OIG investigation. ONC has authority to take action against an individual or entity that is a developer participating in the ONC Health IT Certification Program. 45 CFR 170.580. OIG has authority to impose CMPs against a health IT developer of certified health IT, which includes developers participating in the ONC Health IT Certification Program. Thus, an individual or entity that meets the definition of health IT developer of certified health IT could be subject to CMPs, termination of certification or other action under the ONC Health IT Certification Program review process, or both. 85 FR 25789, May 1, 2020.

In addition to coordination with ONC, section 3022(b)(3) of the PHSA provides the option for OIG to refer instances of information blocking to OCR when a consultation regarding the health privacy and security rules promulgated under section 264(c) of HIPAA will resolve such information blocking claims. Depending on the facts and circumstances of an information blocking claim, OIG will exercise this statutory discretion as appropriate to refer persons to consult with OCR to resolve information blocking claims. There is no set of facts or circumstances that will always be referred to OCR. OIG will work with OCR to determine which claims should be referred to OCR under the new authorities found in section 3022(b)(3) of the PHSA. In addition to section 3022(b)(3), OIG may request technical assistance from OCR during an information blocking investigation. OIG may also refer to OCR claims of information blocking that would be better resolved under OCR's HIPAA authorities.

Specific to anti-competitive conduct, we note that section 3022(d) of the PHSA includes specific options for ONC

and OIG to coordinate with the Federal Trade Commission (FTC) related to an information blocking claim. Under section 3022(d)(1) of the PHSA, ONC may share information related to claims of information blocking or investigations by OIG with the FTC for purposes of such investigation. We will coordinate closely with ONC to identify claims and investigations or patterns of claims and investigations that may warrant referral to the FTC.

We further note that following our investigation and the imposition of CMPs, our coordination with ONC, OCR, or other agencies as relevant may continue as part of an appeal of the imposition of CMPs by OIG. Upon the issuance of a notice of proposed determination for a CMP in accordance with 42 CFR 1003.1500, the actor may appeal the proposed determination for a CMP in accordance with the appeal procedures set forth in 42 CFR part 1005. As noted in 42 CFR 1005.2(a), a party sanctioned under any criteria in 42 CFR part 1003 may request a hearing before an administrative law judge (ALJ). 42 CFR 1005.2. The facts of the matter under appeal will determine the specific agencies with which we may coordinate.

We also anticipate coordinating with other HHS agencies to avoid duplicate penalties. Section 3022(d)(4) of the PHSA requires that the Secretary, to the extent possible, ensure that penalties do not duplicate penalty structures that would otherwise apply to information blocking and the type of individual or entity involved as of the day before the enactment of the Cures Act, December 13, 2016. Depending on the facts and circumstances, OIG might also consult or coordinate with a range of other agencies that might have relevant information or be able to provide technical assistance, including the Centers for Medicare and Medicare Services (CMS), other HHS agencies, FTC, or others. We discuss what enforcement coordination may look like in section III.D of the preamble.

*C. Anticipated Enforcement Approach*

Some commenters expressed interest in understanding OIG's enforcement approach, including: (1) whether OIG would include alternative actions, in lieu of the imposition of CMPs, such as providing actors subject to CMPs with additional education or corrective action plans; (2) whether OIG's approach to information blocking investigations would include investigating potential non-compliance with the requirements of CMS's Promoting Interoperability Program for eligible hospitals and critical access hospitals (CAHs) and Merit-based Incentive Payment System (MIPS) promoting interoperability performance category for clinicians; (3) whether actors may be subject to False Claims Act (FCA) liability for engaging in conduct that constitutes information blocking; and (4) whether OIG plans to create a self-disclosure protocol (SDP).

At this point, we do not anticipate using alternatives to CMPs as described by the commenters. OIG will have an SDP to resolve CMP liability and allow for lower penalties. As we gain more experience investigating and imposing CMPs for information blocking, we may further consider alternative enforcement approaches. HHS or OIG may also consider issuance of compliance guidance or other educational materials on the topic of information blocking.

OIG's historical position in its administrative enforcement under the CMPL is that the Federal health care programs are best protected when persons who engage in fraudulent or other improper conduct are assessed a financial sanction. This remedial purpose is at the core of OIG's administrative enforcement authorities.

The PHSA and existing regulatory structures provide options for ONC and OCR to conduct individualized education and corrective action plans when an actor has committed information blocking, and OIG may refer matters to ONC or OCR for such actions. For example, OIG may refer an allegation to OCR for consultation regarding the health privacy and security rules or for OCR to address under its HIPAA authorities. Similarly, OIG may refer an allegation to ONC to address under its direct review authority, under which ONC could impose a corrective action plan. ONC also stated in the ONC Final Rule that ONC's and OIG's respective authorities are independent and that either office may exercise its authority at any time. 85 FR 25789, May 1, 2020. Thus, OIG's enforcement action will only include a CMP, while ONC could purse a separate enforcement action within its authority, which could include a corrective action plan.

As noted above, this rulemaking does not address OIG investigations of potential information blocking by healthcare providers. HHS is developing a separate notice of proposed rulemaking to establish appropriate disincentives for healthcare providers as described in the Unified Agenda at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=0955-AA05.* However, in response to commenters' inquiry we clarify that OIG does not intend to use its authority to investigate information blocking under section 3022(b)(1) of the PHSA to investigate potential non-compliance with CMS programmatic requirements, including those under the Promoting Interoperability Program for eligible hospitals and CAHs and MIPS promoting interoperability performance category for clinicians, that are distinct from the information blocking provisions of the PHSA. If investigations into alleged information blocking suggest a health care provider may be out of compliance with CMS programmatic requirements, OIG may refer such matters to CMS.

Similarly, conduct that constitutes information blocking could create false claims liability for an actor. For example, by engaging in conduct that constitutes information blocking, a health IT developer of certified health IT may have falsified attestations made to ONC as part of the ONC Health IT Certification Program. By falsifying its attestation, the health IT developer of certified health IT may cause health care providers to file false attestations under MIPS. Such a fact-specific determination would be assessed in coordination with OIG's law enforcement partners, including the Department of Justice.

Information blocking is newly regulated conduct, and OIG has not created an SDP specifically for information blocking; however, after the publication of this rule, OIG will add an information blocking SDP, including an online submission form, and other processes, to OIG's existing SDP located at *https://oig.hhs.gov/compliance/self-disclosure-info/.*

We understand many stakeholders may not be familiar with OIG's current SDP and provide the following information regarding the forthcoming information blocking SDP and self-disclosure process. The information blocking SDP will provide actors with a framework and mechanism for evaluating, disclosing, coordinating, and resolving CMP liability for conduct that constitutes information blocking. When posted on our website, OIG's SDP will explain: (1) eligibility criteria, (2) manner and format, (3) required contents of a submission, and (4) expected resolution of the matter. The information blocking SDP will be available only to those actors seeking to resolve potential CMP liability.

We recognize that whether to disclose potential information blocking violations to OIG is a significant decision; however, the significant benefits to disclosing potential information blocking violations to OIG should make that decision easier. First,

actors accepted by OIG into the SDP who cooperate with OIG during the self-disclosure process will pay lower damages than would normally be required in resolving a government-initiated investigation. Second, through our experience with OIG's existing SDP, we know that self-disclosure provides the opportunity for an actor to avoid costs and disruptions associated with government-directed investigations and civil or administrative litigation. Finally, OIG created the original SDP to provide a consistent, specific, and detailed process that can be relied upon by all participants, and we are similarly committed to working with actors that use the SDP in good faith to disclose information blocking conduct and cooperate with OIG's review and resolution process.

We reiterate that self-disclosing conduct is for an actor to resolve its own potential liability under the CMP for information blocking. It would not resolve any liability an actor may have under other applicable law, such as under HIPAA or under the ONC Certification Program. Actors should not self-disclose to seek opinions from OIG as to whether an individual or entity meets the definitions of a ''health IT developer of certified health IT'' or ''health information network or health information exchange'' in 45 CFR 171.102 or whether conduct constitutes information blocking under section 3022(a) of the PHSA and corresponding implementing regulations. Actors seeking to inform OIG about another individual's conduct should use the ONC portal or the OIG hotline.

As mentioned above, OIG will provide additional information on our website regarding the SDP for information blocking after publication of this final rule. However, before such information is posted, OIG will accept self-disclosure of information blocking conduct. We refer actors to section IV.A.5 of the preamble that describes how we will evaluate disclosure of violations and cooperation with investigations.

Specifically, it is a mitigating circumstance under the factors at 42 CFR 1003.140(a)(2) for an actor to take appropriate and timely corrective action in response to a violation. Timely corrective action includes disclosing information blocking violations to OIG and fully cooperating with OIG's review and resolution of such disclosure.

*D. Advisory Opinions*

Some commenters requested that OIG develop an advisory opinion process for individuals and entities to obtain advisory opinions on whether specified conduct constitutes information blocking for which OIG may impose a CMP. Pursuant to section 1128D(b) of the SSA, HHS, through OIG, publishes advisory opinions regarding the application of the Federal anti-kickback statute and the associated safe harbor provisions, as well as specified administrative sanction authorities, to proposed or existing arrangements. Section 1128D(b) specifies the matters subject to advisory opinions under that authority. The CMP for information blocking is not one of the administrative sanction authorities specified by section 1128D(b) of the SSA.

Furthermore, the Cures Act did not establish an advisory opinion process with regard to the application of OIG's information blocking-related administrative enforcement authorities. At present, OIG has no plans to develop and establish an advisory opinion process regarding the application of the CMP for information blocking. The Justification of Estimates to the Appropriations Committee for the President's fiscal year (FY) 2024 budget included a legislative proposal to provide HHS the authority to issue advisory opinions on information blocking practices.

## IV. Summary of Final Rule Provisions, Public Comments, and OIG Response

*A. The CMP for Information Blocking*

As a general matter, commenters were supportive of OIG's proposed information blocking rules but sought more information and guidance from both ONC and OIG. Commenters suggested that the effective date for the CMP for information blocking rules be delayed as a result of the ongoing public health emergency (PHE) due to SARS–CoV–2, which causes COVID–19, and the requests for additional guidance from ONC and OIG. Many commenters sought clarification on the ONC Final Rule, such as whether an individual or entity falls within the category of actors that OIG would subject to CMPs for information blocking. Many commenters requested that OIG, either in this final rule or through guidance, further elaborate on and provide examples of how OIG will determine violations and CMP amounts. We have considered these comments carefully in developing the final rule, as described in more detail in responses to comments.

1. Information Blocking CMP Regulatory Authority & CMP Process

We proposed to add the CMP for information blocking to our existing CMP regulations at 42 CFR part 1003 and to apply the existing procedural and appeal rights at 42 CFR parts 1003 and 1005 to the CMP for information blocking. We solicited comment on the proposed application of the existing CMP procedures and appeal process in parts 1003 and 1005 to the CMP for information blocking. Commenters were generally in favor of incorporating the CMP for information blocking into these sections and applying the existing appeal processes set forth at 42 CFR part 1005. In this rule, we finalize the addition of the CMP for information blocking to 42 CFR part 1003 and the application of parts 1003 and 1005 to the CMP for information blocking as proposed without modification.

We also proposed to add the authority for OIG's imposition of CMPs for information blocking (section 3022 of the PHSA, 42 U.S.C. 300jj–52) to the list of statutory CMP provisions that appears in 42 CFR 1003.100. We received no comment on this proposed change and finalize the rule as proposed without modification.

*Comment:* One commenter believed that the application of 42 CFR 1005.7 to the CMP for information blocking was unworkable in its current form. The commenter believed that the discovery process under 42 CFR 1005.7 as currently written was inconsistent with the Cures Act's intent for ONC, OCR, and OIG to consult, refer, and coordinate in the investigation and enforcement of investigation blocking. The commenter further stated that, consistent with the prior OIG final rule, Amendments to the OIG Exclusion and CMP Authorities Resulting From Public Law 100–93, 57 FR 3325, January 29, 1992, OIG would only be required to produce documents in its possession and not documents in the possession of other branches or divisions of HHS. The commenter further believed 42 CFR 1005.7 as written would prohibit individuals and entities that appeal the imposition of CMPs for information blocking from obtaining relevant documentary evidence maintained in ONC's possession. The commenter also believed that OIG could abuse the discovery process by refusing to take ''possession'' of documents in ONC's care, custody, or control in an effort to avoid producing them. The commenter further believed that, as ONC would not be covered by the discovery rule at 42 CFR 1005.7, ONC would not be subject to any document preservation requirement that would increase the potential for the spoliation or destruction of evidence.

*Response:* We did not propose revising—and this final rule does not make revisions to—42 CFR 1005.7. The

CMP for information blocking appeals will be subject to discovery rules in 42 CFR 1005.7 because the Cures Act requires OIG to follow existing CMP procedures. Section 3022(b)(2)(C) of the PHSA requires the CMP for information blocking to follow procedures of section 1128A of the SSA, and 42 CFR part 1005 implements those procedures. Therefore, applying the procedures at 42 CFR part 1005 to CMP for information blocking appeals is consistent with the Cures Act.

We appreciate that the CMP appeals process and the discovery provided therein may be new for many actors subject to CMPs for information blocking, and we further elaborate below.

Whenever we propose to impose CMPs for information blocking, the actor will have the opportunity to appeal the CMPs. That appeal will be heard by an administrative law judge (ALJ) and governed by the procedures set forth in 42 CFR part 1005. The regulation at 42 CFR 1005.7 addresses discovery and allows each party to request that the other party produce nonprivileged documents that are relevant and material to the issues before the ALJ for inspection and copying. If the other party objects to producing the requested documents, the party requesting the documents can ask the ALJ to compel discovery.

The discovery regulations that will apply to appeals of CMPs for information blocking are the same regulations that have applied to existing CMPL administrative litigation. These regulations and this process have been approved by administrative tribunals and Federal courts. We provide limited discovery in our CMP cases even though it is not required in administrative proceedings at all. 57 FR 3298, January 29, 1992. The regulation at 42 CFR 1005.7 limits discovery to the exchange of material and relevant documents to avoid the time-consuming discovery fights that can affect civil litigation. Additionally, the vast bulk of material and relevant evidence (*i.e.,* evidence relating to whether the actor committed information blocking) will come from the actor whose conduct is at issue and not the government.

In addition to the specific discovery rules in 42 CFR 1005.7, there are other provisions in 42 CFR part 1005 that ensure transparency and fairness in an appeal. For example, 42 CFR 1005.8 calls for the parties to exchange witness lists, copies of prior written statements of proposed witnesses, and copies of proposed hearing exhibits. If OIG proposed to use documents or testimony from ONC or other government agencies as evidence in support of the imposition of CMPs, those exhibits and statements would be made available under 42 CFR 1005.8.

Regarding the commenter's specific concern that 42 CFR 1005.7 is not consistent with the coordination with ONC and OCR suggested by the Cures Act, we do not agree. The Cures Act provides OIG the discretionary authority to coordinate or consult with ONC and OCR, as necessary. For example, under section 3022(b)(3)(A) of the PHSA, OIG ''may refer'' instances of information blocking to OCR if we determine that consulting with OCR may resolve an information blocking claim. While not required, we expect that nearly all information blocking investigations will be done in coordination with ONC. This close coordination with another HHS agency is not unique to information blocking or the Cures Act. Many of our CMP cases involve similarly close coordination with CMS, for example. There is nothing unique to the Cures Act that would necessitate a change from our current discovery procedures.

We do not agree with the commenter's concerns about spoliation or destruction of documents in ONC's possession. ONC would not be a party to discovery in a CMP for information blocking matter, so the concept of spoliation—at least as the term is used in civil litigation—would be inapplicable. Regardless, as a part of the Federal Government ONC is subject to regulations and policies governing document maintenance and retention, including those promulgated by the National Archives and Records Administration.

*Comment:* Some commenters expressed interest in more information about documentation and record retention requirements. They wanted to understand how to demonstrate compliance with an information blocking exception.

*Response:* We did not propose and are not finalizing a record retention requirement specific to the CMP for information blocking. Furthermore, this final rule does not provide additional guidance regarding which documents are required to demonstrate compliance with an ONC exception for information blocking because that is outside the scope of this rule and OIG's authority. OIG will consider any documentation provided by an actor during an investigation to evaluate whether a practice constitutes information blocking.

OIG has 6 years from the date an actor committed a practice that constitutes information blocking to impose a CMP. Section 3022(b)(2)(C) of the PHSA requires that the CMP for information blocking follow the procedures under section 1128A of the SSA, and section 1128A(c)(1) requires that an action for CMPs must be initiated within 6 years from the date the violation occurred.

Even though pursuant to section 1128A of the SSA OIG may commence an action to impose CMPs up to 6 years after the date of a violation, an actor may want to maintain information for additional time beyond 6 years. Actors in a CMP enforcement action bear the burden of proof for affirmative defenses and mitigating circumstances by a preponderance of the evidence. 42 CFR 1005.15(b)(1).

How an actor meets that burden may depend, in part, on records or documentation they maintain. For example, a party may choose to maintain documents demonstrating they meet a specific exception in the information blocking regulations in 45 CFR part 171.

Furthermore, the ONC Final Rule did not establish record retention requirements for actors to maintain documents relating to an exception for a specified period of time. Although ONC did not set record retention duration requirements, ONC explained that many exceptions with documentation conditions are related to other existing regulatory requirements that have document retention standards. For example, the Security Exception at 45 CFR 171.203 is closely aligned to the HIPAA Security Rule, which has a six-year documentation retention requirement in 45 CFR 164.316. 85 FR 25819, May 1, 2020.

We also note that the ONC Final Rule established records and information retention requirements for health IT developers of certified health IT as part of the ONC Health IT Certification Program. The Maintenance of Certification requirement at 45 CFR 170.402(b) generally requires a health IT developer participating in the ONC Health IT Certification Program to retain all records and information necessary to demonstrate initial and ongoing compliance with the requirements of the ONC Health IT Certification Program for a period of 10 years beginning from the date of certification.

2. Effective Date

We proposed two alternative effective dates for the CMP for information blocking. The first proposal proposed an effective date of 60 days from the date of the publication of the final rule. OIG recognized that information blocking is newly regulated conduct and that individuals and entities would require time to take steps to achieve compliance with the ONC Final Rule. The second

proposal proposed that we would set a specific date when OIG's CMP regulations would become effective. OIG specifically proposed an effective date of October 1, 2020, but also noted that we were considering effective dates sooner or later than October 1, 2020. Most of the comments submitted in response to the proposed rule expressed a preference for one of the two proposed approaches. Commenters preferred having a date certain, but no specific effective date was the clear preferred approach by a majority of those who preferred a date certain. Commenters also made several recommendations for alternative approaches.

We are finalizing an effective date for the CMP for information blocking of September 1, 2023.

*Comment:* Most commenters suggested that OIG adopt a date certain and specifically align the effective date of its CMP for information blocking with the effective dates for the ONC Final Rule and the CMS Interoperability and Patient Access Final Rule (CMS Final Rule) (85 FR 25510, May 1, 2020). Some commenters stated that having a single effective date/enforcement date for all three rules would be beneficial for preparing for compliance with these rules. Some proposed specific, alternative effective dates to allow individuals and entities time to come into compliance. Others did not propose specific effective dates, but proposed an extended period of time between the publication of the final rule and the start of enforcement to permit additional time for ONC to issue additional guidance, for ONC to provide education and outreach, and for OIG to take into consideration the PHE. Some believed that enforcement should begin 3 months after publication of OIG's final rule while several commenters believed the appropriate amount of time was 6 months after publication of this rule. A few commenters suggested that the appropriate amount of time was 1 year or 2 years after publication of this rule. Some commenters supported the proposal for an effective date of the CMP for information blocking to be 60 days after publication of the final rule. The commenters who supported this proposal believed that 60 days after publication provided sufficient time for actors to review and respond to any items that OIG was to outline in its final rule and provide sufficient flexibility and assistance to actors seeking to comply.

*Response:* Having considered the comments, we are finalizing our proposal for an effective date for the CMP for information blocking at 42 CFR 1003.1400, 1003.1410, and 1003.420 as September 1, 2023. We believe this effective date responds to requests for such a delay. It also addresses commenters' concerns about having time to obtain additional guidance and come into compliance, particularly given the amount of time between the publication of the proposed rule and this final rule. In addition, the selection of this effective date aligns with the goals stated in the proposed rule of providing individuals and entities sufficient time to finalize their ongoing efforts to comply with the ONC information blocking regulations and putting the industry on notice of when penalties will apply to information blocking conduct. This effective date is consistent with the requests of commenters who supported a date certain because those commenters largely sought a specific date to have additional time for compliance efforts. This effective date achieves that goal based on the time between the proposed rule and this rule, which is longer than most specific dates proposed by commenters.

As commenters shared with us in responses to the proposed rule, the PHE has significantly affected the United States, patients, health care providers, and the many individuals and entities that support health care operations. Actors that could be subject to the CMP for information blocking have been responding to COVID–19 on many fronts including addressing information technology-related requirements related to COVID–19, such as reporting data to multiple government agencies. All of this has increased demands on health IT developers of certified health IT, HIEs, and HINs. Recognizing these unprecedented circumstances, the effective date for the CMP for information blocking is reasonable and aligns with the goals stated in the proposed rule. Furthermore, OIG will not impose a CMP on information blocking conduct occurring before the effective date of this final rule.

We reiterate that the effective date of the CMP for information blocking only applies to those actors defined at 45 CFR 171.102 as health IT developers of certified health IT, HINs, and HIEs. We note that the CMP for information blocking does not apply to health care providers except to the extent such health care providers meet the definition of a health IT developer of certified health IT or an HIN/HIE. We discuss in section IV.A.3 of the preamble of this final rule how we evaluate whether health care providers may meet the health IT developer of certified health IT or an HIN/HIE.

3. Basis for Civil Money Penalties for Information Blocking

OIG proposed a basis for the CMP for information blocking at 42 CFR 1003.1400. In setting forth the basis for the CMP in the proposed rule, we proposed that we may impose a CMP against any individual or entity as defined in 45 CFR 171.103(b) that commits information blocking, as defined in 45 CFR part 171. We also proposed that OIG's enforcement would rely on the regulatory definitions set forth by ONC in the ONC Final Rule. Commenters agreed with OIG's proposed approach but requested clarification as to how OIG would interpret the definitions set forth in 45 CFR 171.103(a)(2).

We note that since the publication of the proposed rule, ONC has published the ONC interim final rule (IFR) (85 FR 70064, November 4, 2020) that clarified that 45 CFR 171.103(a)(2) refers to health IT developers of certified health IT rather than health information technology developers.

In this final rule, we finalize 42 CFR 1003.1400 as proposed with a technical correction that incorporates 45 CFR 171.103(a)(2) instead of 45 CFR 171.103(b) and a slight language change to reflect our intent.

*Comment:* One commenter noted that the regulatory text of our proposed § 1003.1400 should have cited 45 CFR 171.103(a)(2) instead of § 171.103(b) when referring to those individuals or entities subject to civil money penalties.

*Response:* We agree with the commenter that the correct citation is 45 CFR 171.103(a)(2) and are making this technical correction at 42 CFR 1003.1400. Our intent, as expressed in the proposed rule, was to incorporate ONC's definition of ''information blocking,'' which matches the statutory language in section 3022(a)(1) of the PHSA. This final rule corrects the technical citation error in the proposed rule and is not a substantive change.

We further note that we have changed the language ''as defined in'' to ''as set forth in'' consistent with our intent to incorporate ONC's information blocking regulations in 45 CFR part 171. The regulation at 45 CFR part 171 includes general provisions, including definitions, relevant to the information blocking regulations, as well as the ''exceptions'' to the definition of information blocking. We believe this language change from ''as defined in'' to ''as set forth in'' better reflects our intent to incorporate all of ONC's information blocking regulations into the OIG CMP regulations.

*Comment:* Commenters requested clarification as to whether they meet the definition of HIN/HIE. Some commenters requested clarification on whether they would meet the definition of HIN/HIE under specific facts, such as by using ONC-certified application programming interface (API) technology as a health care provider, or by engaging in specific processes as a health plan. Some commenters requested clarification as to whether certain types of entities met the definition of HIN/HIE, specifically asking whether a public health institution combating COVID–19, clinical data registries, public health agencies, or a health plan would ever be considered an HIN/HIE. Other commenters requested clarification and examples of when a health care provider would meet the definition of HIN/HIE and be subject to CMPs rather than disincentives. Some commenters suggested that a health care provider or payer should never be considered an HIN/HIE for purposes of the final rule.

*Response:* OIG will use the definitions in ONC regulations at 45 CFR 171.102 and any guidance issued by ONC when evaluating whether an individual or entity meets the definition of HIN/HIE. Such determinations are individualized and highly dependent on the facts and circumstances presented. Because the ONC definition of HIE/HIN is a functional definition that does not specifically include or exclude any particular individuals or entities, OIG cannot establish in this final rule whether specific individuals or entities or categories of individuals or entities would meet the definition of HIN/HIE as some commenters requested. OIG investigations of information blocking will include gathering facts necessary to assess whether a specific individual or entity meets a definition of health IT developer of certified health IT or HIE/HIN. Furthermore, we proposed following the definitions promulgated in the ONC Final Rule, which are now found at 45 CFR 171.102, and which do not exempt specific types of individuals or entities from the definition of an HIN/HIE that could commit information blocking. Accordingly, we decline to exempt specific types of individuals or entities, including providers or payers, in this final rule.

The ONC regulations define an HIN/HIE as an individual or entity that determines, controls, or has the discretion to administer any requirement, policy, or agreement that permits, enables, or requires the use of any technology or services for access, exchange, or use of EHI: (1) among more than two unaffiliated individuals or entities (other than the individual or entity to which this definition might apply) that are enabled to exchange with each other; and (2) that is for a treatment, payment, or health care operations purpose, as such terms are defined in 45 CFR 164.501 regardless of whether such individuals or entities are subject to the requirements of 45 CFR parts 160 and 164. 45 CFR 171.102. When determining whether an individual or entity meets the definition of an HIN/HIE, we may consult with ONC.

In making a fact-specific assessment of whether an individual or entity meets the definition of an HIN/HIE in 45 CFR 171.102, we would assess whether the individual or entity determines, controls, or has the discretion to administer any requirement, policy, or agreement that permits, enables, or requires the use of any technology or services for access, exchange, or use of EHI among two or more unaffiliated entities (other than the individual or entity that is the subject of the allegation) that are enabled to exchange with each other for a treatment, payment, or health care operations purpose as such terms are defined in 45 CFR 164.501. As stated in the ONC Final Rule, the definition of HIN/HIE in 45 CFR 171.102 does not cover bilateral exchanges in which an intermediary is simply performing a service on behalf of one entity in providing EHI to another entity or multiple entities and no actual exchange is taking place among all entities. 85 FR 25802, May 1, 2020. The ONC Final Rule also states that for the two unaffiliated individuals or entities besides the HIE/HIN to be enabled, the parties must have the ability and the discretion to exchange with each other under the policies, agreements, technology, and/or services. 85 FR 25802, May 1, 2020. Based on the ONC Final Rule and depending on the specific facts and circumstances, public health institutions, clinical data registries, public health agencies, health plans, and health care providers could meet the definition of an HIN/HIE. As part of our assessment of whether a health care provider or other entity is an HIN/HIE that could be subject to CMPs for information blocking, OIG anticipates engaging with the health care provider or other entity to better understand its functions and to offer the provider an opportunity to explain why it is not an HIN/HIE. We note further that should the definitions in 45 CFR part 171 change in the future, we would continue to look to applicable definitions in 45 CFR part 171 when determining whether an individual or entity was an HIN/HIE at the time of the conduct.

*Comment:* One commenter noted that the definition of HIN/HIE could apply to individuals serving on HIN governance and advisory committees and requested clarification about whether OIG would direct enforcement against an individual serving on an advisory board for an entity that qualifies as an HIN. The commenter noted that HIEs and HINs rely upon their governance and advisory committees and that individuals subject to enforcement may not want to provide their perspectives or participate on these committees.

*Response:* While we believe it is unlikely that an individual serving on an HIN/HIE governance and advisory committee would be subject to information blocking enforcement, such individuals could be subject to enforcement if, based on the specific facts, they meet the definition of HIN/HIE and have engaged in information blocking with the requisite intent. To provide transparency on how OIG would assess an allegation involving an individual described by the commenter, we provide the following explanation.

Consistent with section 3022(b)(2)(A) of the PHSA, individuals or entities subject to the CMP for information blocking must fall within a definition in 45 CFR 171.102 that describes one of the categories of actors that are subject to the CMP under section 3022(b)(2)(A) (*i.e.,* developers, networks and exchanges). First, we emphasize that to determine whether an individual on an advisory board met the definition of an HIN/HIE, we would assess the specific facts and circumstances in the case. In assessing whether an individual met the definition of HIN/HIE, OIG would consider the advisory board's purpose and authority to determine, control, or have discretion to administer any requirement policy, or agreement. OIG would also consider the individual's role, the individual's authority, and whether the individual determines, controls, or has the discretion to administer any requirement, policy, or agreement as a member of the advisory board. An individual or entity that does not determine, administer, or have discretion to administer a policy, requirement, or agreement would not meet the definition of an HIN/HIE. For example, the mere act of serving on an advisory board would not mean an individual is an HIN/HIE.

Second, to impose CMPs against an individual, OIG would have to demonstrate that the individual committed an act of information blocking, which includes a requisite intent. Assuming the individual on the

advisory board met the definition of an HIN/HIE, OIG would examine whether the individual engaged in a practice that constituted information blocking. We would analyze the specific practice engaged in by the individual to determine CMP liability. This is consistent with section 3022(a)(6) of the PHSA, which states that information blocking with respect to an individual or entity shall not include an act or practice other than an act or practice committed by such individual or entity. Also consistent with the statute and the implementing regulations in 45 CFR 171.103(a)(2), we would determine whether the individual knew or should have known that the practice in which the individual engaged was likely to interfere with the access, exchange, or use of EHI.

OIG maintains discretion in evaluating what claims to investigate and when to impose CMPs. OIG is not required to—and does not expect to be able to—investigate every allegation it receives. Similarly, OIG may decide it is appropriate to impose CMPs on an entity but not on both an entity and an individual for the same conduct.

*Comment:* One commenter requested guidance on whether a health care provider would ever be viewed as a health IT developer of certified health IT. The commenter specifically asked whether a health care provider that sublicensed certified health IT to an unaffiliated provider could be subject to CMPs.

*Response:* A health care provider may meet the definition of a health IT developer of certified health IT in § 171.102, depending on the specific facts and circumstances. This regulatory definition excludes from its scope a health care provider that self-develops health IT for its own use. If any other individual or entity, including a health care provider, develops or offers one or more health IT modules certified under the ONC Health IT Certification Program, then they may meet the definition of health IT developer of certified health IT. If an individual or entity meets the definition of health IT developer of certified health IT and engages in conduct constituting information blocking, then that individual or entity could be subject to CMPs.

Regarding the commenter's specific question, section 3022(b)(1)(A) of the PHSA authorizes OIG to investigate claims of information blocking against any ''other entity offering certified health information technology,'' and the definition of a health IT developer of certified health IT at 45 CFR 171.102 includes an individual or entity that ''offers health information technology.'' ONC further clarified in the ONC Final Rule its policy goal to hold all entities that could, as a developer or offeror, engage in information blocking accountable for their practices that are within the definition of information blocking in 45 CFR 171.103. ONC expressly considered comments to exclude from the definition those entities that only offer technology, rather than modify, configure, or develop it, and declined to do so. 85 FR 25798–99, May 1, 2020. OIG would assess whether a provider that sublicenses technology to an unaffiliated entity meets the definition of a health IT developer of certified health IT at 45 CFR 171.102 based on the specific facts and circumstances.

ONC specifically exempted health care providers that self-develop health IT for their own use from the definition of ''health IT developer of certified health IT.'' The ONC Final Rule clarifies that health care providers that self-develop health IT for their own use refers to health care providers that are the primary users of the health IT and are responsible for its certification status. 85 FR 25799, May 1, 2020. The ONC Final Rule states that ONC interprets ''a health care provider that self-develops health IT for its own use'' to mean that a health care provider does not offer the self-developed health IT to other entities on a commercial basis or otherwise. 85 FR 25799, May 1, 2020. The ONC Final Rule clarifies that a self-developer is not an offeror if it issues login credentials to a licensed health care professional in an independent practice that allow the use of a hospital's electronic health records (EHRs) to furnish and document care to patients in the hospital. 85 FR 25799, May 1, 2020. Whether an individual or entity ''offers health information technology'' requires a fact-specific inquiry, and we expect to consult with ONC in determining whether an individual or entity meets this definition.

As part of any investigation, OIG will need to evaluate whether an individual or entity meets the definition of health IT developer of certified health IT or health information exchange or network. If OIG determines this definition is met and conduct meets the definition of information blocking, OIG may impose CMPs.

*Comment:* One commenter asked whether a parent company could be subject to CMPs for information blocking based on the conduct of a subsidiary.

*Response:* Whether information blocking on the part of a subsidiary is attributable to the parent entity depends on the specific facts and circumstances.

Specifically, if a subsidiary acts as the agent of the parent, the parent may be subject to CMPs for the act of the subsidiary if the subsidiary commits information blocking within the scope of agency. Section 3022(b)(2)(C) of the PHSA states that the provisions of section 1128A of the SSA shall apply to a CMP for information blocking. Section 1128A(l) of the SSA states that a principal is liable for penalties, assessments, and exclusion for the acts of the principal's agent acting within the scope of agency.

There may be other instances when information blocking by a subsidiary may create CMP liability for the parent. We note that nothing in the statute or ONC Final Rule precludes such liability, and the ONC Final Rule provides that a health IT developer of certified health IT includes not only the entity that is legally responsible for the certification status of the health IT but could also include any subsidiaries or successors, depending on the specific facts and circumstances of a particular case. 85 FR 25800, May 1, 2020. At this time, we do not have sufficient experience or evidence to delineate specific circumstances where a parent might be liable for information blocking by its subsidiary. We would make any determinations based on the specific facts and circumstances presented.

*Comment:* One commenter believed that EHR vendors may limit the access of third-party vendors to data, data stores, databases, and endpoints that store data that are not part of the United States Core Data for Interoperability (USCDI).[1] Specifically, the commenter was concerned that an EHR vendor may grant a health care provider access to a database and then deny a third-party vendor the same access. The commenter suggested OIG monitor and penalize EHR vendors that restrict access to data not represented in the USCDI.

*Response:* Whether a practice constitutes information blocking depends on the specific facts and circumstances. First, the practice must involve EHI as defined in ONC's information blocking regulations. On and after October 6, 2022, EHI for purposes of the information blocking definition in 45 CFR 171.103(a) is not limited to the information identified by data elements represented in the USCDI standard adopted in 45 CFR 170.213, and practices that interfere with access,

[1] USCDI is a standardized set of health data classes and constituent data elements for nationwide, interoperable health information exchange.

exchange, or use of any information falling within the definition of EHI in 45 CFR 171.102 may constitute information blocking.

However, even after October 6, 2022, the definition of EHI still excludes certain types of data that an actor may have. For example, EHI does not include psychotherapy notes as defined in 45 CFR 164.501. Therefore, the specific facts and circumstances will determine whether the data that is the subject of a claim of information blocking constitutes EHI.

Second, the practice must constitute information blocking and the individual or entity must have had the requisite intent. We will assess whether the practice is likely to interfere with the access, exchange, or use of EHI, and whether the practice was required by law or met one of the information blocking exceptions. For example, in assessing an allegation similar to the commenter's fact pattern, we may assess whether the health IT developer of certified health IT provided the EHI to the health care provider and the third-party vendor using an alternative manner specified by the third-party vendor consistent with the Content & Manner Exception in 45 CFR 171.301.

*Comment:* One commenter encouraged OIG to impose CMPs for information blocking on health IT developers of certified health IT with transfer of liability provisions in their contracts. The commenter noted that small and mid-size organizational health care providers are often presented with service contracts that have undesirable terms on a ''take it or leave it'' basis because they may have only one health IT developer available or lack the market share (*i.e.,* leverage) necessary to negotiate out of the undesirable terms.

*Response:* OIG's information blocking regulations establish the basis for imposing CMPs for information blocking, which is whether the conduct constitutes information blocking as defined in 45 CFR 171.103. The ONC Final Rule established that a variety of contractual provisions could interfere with the access, exchange, and use of EHI and thus implicate the information blocking provision. For example, ONC explained that a contract may implicate the information blocking provision if it includes unconscionable terms for the access, exchange, or use of EHI, or licensing of an interoperability element that could include, but is not limited to, agreeing to indemnify the actor for acts beyond standard practice, such as gross negligence on the part of the actor. ONC explained further that such terms may be problematic with regard to information blocking in situations involving unequal bargaining power relating to accessing, exchanging, and using EHI. 85 FR 25812, May 1, 2020. We will consult with ONC as necessary to inform our determinations as to whether specific service contracts, provisions, and related practices that transfer liability implicate the information blocking provision.

*Comment:* One commenter stated that the CMS Final Rule requires State Medicaid agencies to make claims with a service date on or after January 1, 2016, available to a beneficiary or a beneficiary's personal representative. But the rule did not specify how long these claims had to be made available. The commenter asked whether the purging of those claims would subject State Medicaid agencies to information blocking penalties.

*Response:* OIG does not intend to use its authority to investigate information blocking under section 3022(b)(1) of the PHSA to investigate compliance under CMS program requirements. If an investigation uncovers conduct that suggests non-compliance with CMS program requirements, OIG may refer such matters to CMS.

4. Definition of Violation

OIG proposed that a violation be defined as a practice, as defined at 45 CFR 171.102, that constitutes information blocking, as defined at 45 CFR part 171. We have finalized the definition of violation as proposed with a slight modification at 42 CFR 1003.1410(a).

*Comment:* Many commenters expressed support for our proposed definition of ''violation'' and the incorporation of ONC's definition of ''practice.'' Commenters requested that we provide additional clarity and guidance as to the distinction between a single violation and multiple violations. Other commenters stated that we should provide more specific criteria for identifying a single violation as opposed to multiple violations. Some commenters requested additional clarity as to whether a practice involving multiple patient records would constitute multiple violations.

*Response:* As finalized in this rule, a violation is a practice, as defined in 45 CFR 171.102, that constitutes information blocking, as set forth in 45 CFR part 171. We note that we have changed the language from ''as defined in'' to ''as set forth in,'' consistent with our intent to incorporate all of ONC's regulations. Whether a practice constitutes a violation depends on the specific facts and circumstances. We did not propose, and therefore this rule does not finalize, specific criteria that we would use to identify single or multiple violations because we do not have enough information or experience with information blocking enforcement to allow us to establish a set of criteria that could apply uniformly to all information blocking allegations. As we gain more experience in assessing allegations, conducting information blocking investigations, and imposing CMPs, we may identify patterns or data that allow us to develop guidance with more specific criteria.

In response to commenters' requests, we are providing below hypothetical examples illustrating how we would determine whether information blocking practices constitute single or multiple violations. The examples set out in the proposed rule at 85 FR 22986–87 remain applicable. But, we clarify that the examples provided in the proposed rule should be understood as involving health IT developers of certified health IT, since health IT developers that do not meet the regulatory definition of health IT developers of certified health IT would not be subject to CMPs. We emphasize that the examples in this preamble and in the preamble to the proposed rule are illustrative, fact-dependent, and not exhaustive. We further note that while our examples discuss the use of health information technology certified under the ONC Certification Program, an individual or entity that meets the definition of a health IT developer of certified health IT or HIE/HIN may engage in conduct that constitutes information blocking relating to health IT certified under the ONC Certification Program, health IT not certified under the ONC Certification Program, or a combination of both.

The following hypothetical examples of conduct assume that the facts meet all the elements of the information blocking definition—including the requisite level of statutory intent.

- A health IT developer (D1) connects to an API supplied by health IT developer of certified health IT (D2). D2's API has been certified to 45 CFR 170.315(g)(10) (standardized API for patient and population services) of the ONC Certification Program and is subject to the ONC Condition of Certification requirements at 45 CFR 170.404 (certified API technology). A health care provider using D1's health IT makes a single request to receive EHI for a single patient via D2's certified API technology. D2 denies this request. OIG would consider this a single violation by D2 affecting a single patient. The violation would consist of D2's denial of

the request to exchange EHI to the provider through D2's certified API.

- A health care provider using technology from a health IT developer (D1) makes a single request to receive EHI for 10 patients through the certified API technology of a health IT developer of health IT (D2). D2 takes a single action to prevent the provider from receiving any patients' information via the API. OIG would consider this as a single violation affecting multiple patients. This is a single violation as D2 took a single action to deny all requests from the provider. The number of patients affected by the violation would be considered when determining the amount of the CMP.
- A health care provider using health IT supplied by a health IT developer (D1) makes multiple, separate requests to receive EHI for several patients via certified API technology supplied by a health IT developer of certified health IT (D2). Each request is for EHI for one or more patients. D2 denies each individual request but does not set up the system to deny all requests made by the health care provider through D2's certified API technology. Thus, D2 is taking separate actions to block individual requests. OIG would consider this conduct to consist of multiple violations affecting multiple patient records. Each denial would be considered a separate violation. The number of patients affected by each violation would be considered in determining the amount of the penalty per violation. We note that for purposes of this example, each denial by D2 constitutes a separate act and thus a separate violation. Thus, if the health care provider using D1's health IT made one request for one patient's EHI, a second request for three patients' EHI, and a third request for five patients' EHI, there would be three separate violations but the penalties may vary due to the number of patients affected by each violation. The action or actions taken by D2 in response to the health care provider's requests provide the basis for assessing whether a practice constitutes a single or multiple violations.
- A health care provider using health IT supplied by a health IT developer (D1) makes multiple requests to receive EHI for a single patient via certified API technology supplied by a health IT developer of certified health IT (D2). But D2 has updated its system to deny all requests made by anyone using D1's technology. Thus, none of the requests by the provider using D1's health IT result in the provider receiving any EHI and D2 always denies requests based on the system change. OIG would consider this practice a single violation. The violation in this case is the singular action to update the system to always deny EHI to anyone requesting to receive the EHI via D1 or D1's health IT. The result of this violation is that all of the requests are denied; however, each individual denial does not constitute a violation. The number of patients affected by D2's denial may constitute an aggravating circumstance resulting in an increased penalty.
- A health IT developer of certified health IT enters into a software license agreement with a health care provider that requires that the health care provider pay a fee for the express purpose of permitting the health care provider to export patients' EHI via the capability certified according to 45 CFR 170.315(b)(10) for switching health IT systems. When the health care provider requests the electronic export, the health IT developer of certified health IT charges the health care provider the fee. We note that the Fees Exception in 45 CFR 171.302 excludes fees charged for an export using functionality certified according to 45 CFR 170.315(b)(10) for purposes of switching health IT. OIG would consider this conduct to include two violations. The first violation would be inclusion of the contract provision (fee) that is likely to interfere with, prevent, or materially discourage access, exchange, or use of EHI. The second violation would be charging the health care provider the fee. Charging the fee in this case constitutes a separate action, and therefore a separate violation from the inclusion of the fee in the software license agreement.

We emphasize that information blocking only requires engaging in a practice that is likely to interfere with, prohibit, or materially discourage the access, exchange, or use of EHI. Information blocking does not require that the practice actually interferes with, prohibits, or materially discourages the access, exchange, or use of EHI.

*Comment:* One commenter expressed concern that the example in the proposed rule concerning the health IT developer vetting a third-party application might cause health IT developers to forgo necessary security and privacy vetting of applications due to fear of potentially committing an information blocking violation.

*Response:* In the preamble to the proposed rule, we provided an example where a health IT developer requires vetting of third-party applications before the applications can access the health IT developer's product, but the health IT developer denies applications based on the functionality of the application and not for a privacy or security concern. 85 FR 22987. We note that the ONC Final Rule contained a discussion of vetting, and we agree with the commenter that our example in the preamble to the proposed rule at 85 FR 22987 could benefit from additional explanation.

Before clarifying our example, we provide some of the discussion of ''vetting'' from the ONC Final Rule. First, we note that ''vetting'' in this context is intended to mean a determination regarding whether the application posed a security risk to the health IT developer of certified health IT's software. Second, pursuant to the ONC Final Rule, a vetting process applied in a discriminatory or unreasonable manner could implicate the information blocking provision. 85 FR 25814–17, May 1, 2020. Third, the ONC Final Rule states that for certified API technology (*e.g.,* a Health IT Module certified to § 170.315(g)(10), which includes the use of OAuth2 among other security requirements (see, *e.g.,* 85 FR 25741) in addition to its focus on ''read-only''/responses to requests for EHI to be transmitted, there should be few, if any, security concerns about the risks posed by patient-facing apps to the disclosing actor's health IT systems (because the apps would only be permitted to receive EHI at the patient's decision). Thus, for third-party applications chosen by individuals to facilitate their access to their EHI held by actors, there would generally not be a need for ''vetting'' on security grounds and such vetting actions would be an interference. 85 FR 25815, May 1, 2020. Fourth, actors, such as health care providers, have the ability to conduct whatever ''vetting'' they deem necessary of entities (*e.g.,* app developers) that would be their business associates under HIPAA before granting access and use of EHI to the entities. In this regard, covered entities must conduct necessary vetting in order to comply with the HIPAA Security Rule. 85 FR 25815, May 1, 2020.

With this in mind, we clarify the example as follows. A health IT developer of certified health IT requires vetting of third-party applications to determine whether the applications pose a security risk before the applications are permitted to interface or integrate with the health IT developer of certified health IT's product, which contains EHI. The health IT developer of certified health IT does not apply this vetting process to third party applications selected and authorized by a patient or provider to receive EHI from ''certified API technology,'' as defined as 45 CFR 170.404(c). The health IT developer of certified health IT does not

apply this vetting to patients or API Information Sources, as defined at 45 CFR 170.404(c), which are only receiving EHI through a standardized API. And, the health IT developer of certified health IT does not engage the third-party applications as a business associate or business associate subcontractor. The health IT developer of certified health IT uses vetting to deny EHI access to third-party applications that compete with one of the developer's applications. The health IT developer of certified health IT then denies third-party applications solely on the basis that they compete with one of the developer's applications. Each denial based on the competitive nature of the third-party application is considered a separate violation, as it is a separate act or omission.

If an actor, such as a health IT developer of certified health IT, identifies specific security risks posed by a third-party application, the actor may address those risks consistent with the Security Exception at 45 CFR 171.203 to ensure its practices are not considered information blocking.

*Comment:* One commenter requested that OIG consider compliance with privacy and security standards as an important factor when evaluating what constitutes a violation.

*Response:* Both section 3022(a)(1)(A) of PHSA and 45 CFR 171.103(a)(1) exempt from the definition of information blocking practices required by law. Therefore, if a practice is required by privacy or security laws, it does not constitute information blocking. 85 FR 25846, May 1, 2020. However, privacy and security standards that are not required by law (such as trade best practices or voluntary industry standards) would not be exempt from the definition of information blocking, unless an exception applies. When investigating an allegation, we may coordinate with other agencies to understand whether the practice was required under applicable privacy and security laws.

Additionally, ONC established separate Privacy and Security Exceptions at 45 CFR 171.202 and 171.203. If a practice meets all conditions of an exception at all relevant times, then the practice would not be considered information blocking. When investigating an allegation, OIG will assess whether a practice meets an exception.

*Comment:* Several commenters requested that OIG clarify its view on when the enactment of a policy constitutes information blocking. Commenters requested clarity on whether OIG would view the enactment of a policy that constitutes information blocking as a single violation or multiple violations. Some commenters suggested that consistent and repetitive implementation of a policy should be considered a single violation, regardless of the number of times the policy was applied. Another commenter suggested that we should approach violations and penalties as OCR did in its HIPAA Administrative Simplification Enforcement Final Rule, 71 FR 8390, February 16, 2006, specifically that we should consider a pattern or practice of information blocking to be more violations than a single instance emanating from the same conduct or type of conduct.

*Response:* We will treat the enactment of a policy that is likely to interfere with, prevent, or materially discourage as one violation. But each enforcement of the policy will constitute another, separate violation. If the creation or existence of the policy alone is what determined the number of violations, and not the number of times the policy was enforced, large organizations with many customers or significant market share would be able to enact policies—regardless of whether they have been written or formalized—and engage in nationwide conduct constituting information blocking against multiple individuals or entities knowing that the maximum penalty would be the statutory maximum of $1 million. A practice is defined as an act or omission by an actor. 45 CFR 171.102. Given that our definition of violation incorporates the word ''practice'' and expressly refers to ONC's definition of practice, the number of violations is connected to the number of discrete acts engaged in by the actor and will depend on the specific facts and circumstances.

5. Determinations Regarding the Penalty Amounts

We proposed to add new 42 CFR 1003.1420 that would codify the statutory factors that OIG must consider when imposing CMPs for committing information blocking. Section 3022(b)(2)(A) of the PHSA mandates that in determining the amount of a CMP for information blocking, OIG must consider factors such as the nature and extent of the information blocking and the harm resulting from such information blocking including, where applicable, the number of patients affected, the number of providers affected, and the number of days the information blocking persisted. The proposed regulatory text included these statutory factors. Given the novel nature of information blocking investigations and enforcement, we recognized in the preamble to the proposed rule that we have limited experience to inform the proposal of additional aggravating and mitigating circumstances to adjust the CMP penalties. Thus, we proposed only to implement the statutory factors described above. We also solicited comment on any additional factors that we should consider for the final rule. We received several comments on proposed factors and a number of recommendations to implement other factors.

We are finalizing 42 CFR 1003.1420 as proposed with a modification to the regulatory text at 42 CFR 1003.1420(a), which is the factor for ''nature and extent of the information blocking.'' For this factor, we have added to the regulatory text the specific facts that section 3022(b)(2)(A) of the PHSA directs us to take into account where applicable: the number of patients affected (42 CFR 1003.1420(a)(1)), number of providers affected (42 CFR 1003.1420(a)(2)), and the number of days the information blocking persisted (42 CFR 1003.1420(a)(3)). In the preamble of the proposed rule, we explained our intent was to specifically implement the exact statutory factors in section 3022(b)(2)(A). 85 FR 22987, April 24, 2020.

*Comment:* Some commenters requested that OIG consider additional aggravating and mitigating factors when determining the penalty amount it will impose. Commenters suggested considering characteristics of the actor, including an actor's size, market share, whether the actor faced systemic barriers to interoperability, whether the actor took corrective action prior to imposition of a penalty, and the actor's compliance, specifically the actor's history of compliance with the information blocking rules, the robustness of an actor's compliance program, and whether the actor made good faith efforts to seek ONC/OIG guidance. Some commenters suggested considering the consequences of the conduct, such as whether the information blocking resulted in patient harm and the severity of that harm, and whether the information blocking impacted another actor's ability to access information (*i.e.,* interfered with a provider's ability to deliver patient care). Some commenters suggested looking at the specific conduct at issue, specifically whether the information blocking involved a single violation or multiple violations, whether an actor had specific intent to engage in information blocking, whether the actor had control and the extent of that control over the EHI, and whether there were contributory practices by others.

Some commenters suggested that OIG consider mitigating factors beyond an actor's control, such as the effects of natural disasters and public health emergencies (such as the PHE caused by the COVID–19 pandemic) on health care delivery and data exchange. Furthermore, commenters also suggested that practices that exacerbate the negative impact of natural disasters and public health emergencies be considered an aggravating factor. Some commenters suggested that OIG should consider adopting factors based on factors used by OCR in assessing HIPAA CMPs. Some commenters recommended that OIG consider instances of an actor self-disclosing information blocking conduct as a mitigating factor.

*Response:* We thank commenters for the recommendations of additional aggravating and mitigating factors that OIG should consider. We may consider implementing additional, specific factors in the future via notice and comment rulemaking as we gain more experience in enforcing the CMP for information blocking. At this time, however, we are finalizing the statutory factors listed in section 3022(b)(2)(A) of the PHSA as we proposed, with the modification to the proposed factor for ''nature and extent of the information blocking'' described above.

While we are not adopting additional aggravating and mitigating factors specific to information blocking, we observe that the existing, general factors we must consider under the CMPL will apply to the CMP for information blocking and may address many of the commenters' concerns. The PHSA requires that the provisions of section 1128A of the SSA (other than subsection (a) and (b) of such section) apply to a CMP for information blocking in the same manner as such provisions apply to a CMP or proceeding under section 1128A(a) of the Act. Section 1128A(d) of the SSA requires that OIG, when determining the amount or scope of any assessment, penalty or exclusion imposed under subsection (a), take into account ''(1) the nature of claims and the circumstances under which they were presented, (2) the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims, and (3) such other matters as justice may require.'' 42 U.S.C. 1320a–7a(d). These broad general factors apply to the CMP for information blocking set forth in the PHSA as they do under section 1128A(a) of the SSA. They encompass some of the mitigating or aggravating factors recommended by commenters.

The existing regulatory framework for OIG's CMPs requires that we apply the aggravating and mitigating factors in 42 CFR 1003.140 to the CMP for information blocking determinations in a manner consistent with section 1128A.

As we set forth in the OIG Medicare and State Health Care Programs: Fraud and Abuse Revisions to the Office of Inspector General's Civil Monetary Penalty Rules Final Rule (Revisions Rule), we consider the financial condition of an actor after we evaluate the facts and circumstances of conduct and weigh aggravating and mitigating factors to determine an appropriate penalty and assessment amount. 81 FR 88334, December 7, 2016. Once OIG proposes a penalty amount, the individual or entity may request that OIG consider its ability to pay the proposed amount under procedures discussed in the Revisions Rule at 81 FR 88338.

In addition to the general factors in section 1128A, section 3022(b)(2)(A) of the PHSA specifies a non-exhaustive list of factors that we must consider when imposing CMPs for information blocking. In the proposed rule, we proposed incorporating the PHSA's specific information blocking factors into our existing regulations at new § 1003.1420 of title 42. This new section complements the existing section at 42 CFR 1003.140.

We recognize that the statutory factors enumerated in the PHSA may overlap with the general statutory and regulatory factors for all CMPs in section 1128A of the SSA and in 42 CFR 1003.140. For example, we recognize that ''the nature and circumstances of the violation,'' 42 CFR 1003.140(a)(1), is a similar factor to the ''nature and extent of the information blocking'' and that, consequently, there may be a fact pattern that implicates both factors. We would not apply both or ''double count'' these factors when determining the penalty. We would make a holistic consideration of all aggravating factors when determining the amount of any penalty; this approach would take into account the similarity of the factors.

Many of the commenters' suggested factors, such as whether the information blocking resulted in patient harm and the severity of that harm, whether the actor had specific intent to engage in information blocking, and whether there was one violation or multiple violations, are already encapsulated by the general factors in 42 CFR 1003.140 or the specific information blocking factors in 42 CFR 1003.1410 finalized by this rule. We provide the following examples to illustrate how the issues raised by commenters may be considered when we assess penalty amounts using the two sets of factors at 42 CFR 1003.140 or 1003.1420.

For example, to assess the ''nature and circumstances'' in 42 CFR 1003.140 and ''nature and extent'' of the information blocking in 42 CFR 1003.1420, we will consider the factual nature, circumstances, and extent of the information blocking conduct. Depending on the specific facts and circumstances, these factors may include whether the practice actually interfered with the access, exchange, or use of EHI; the number of violations; whether an actor took corrective action; whether an actor faced systemic barriers to interoperability; to what extent the actor had control over the EHI; the actor's size; and the market share.

Similarly, the general factor in 42 CFR 1003.140 relating to degree of culpability would allow us to consider the commenters' suggested factors relating to whether an actor had actual knowledge or whether an actor had specific intent to engage in information blocking.

Additionally, to assess the ''harm'' factor in 42 CFR 1003.1420, we will consider whether any harm—including physical or financial harm—occurred and evaluate the severity and extent of the harm. In accordance with the statutory language, we will consider the number of patients affected, number of providers affected, and the duration of the information blocking conduct. We recognize that the primary factors set forth at § 1003.140 may also contemplate harm. (For example, in the Revisions Rule, we stated that our consideration of the ''nature and circumstances'' would include ''whether patients were or could have been harmed.'' 81 FR 88337, December 7, 2016.)

With respect to consideration of self-disclosure of information blocking conduct, it is a mitigating circumstance under the general factors at 42 CFR 1003.140(a)(2) for an actor to take appropriate and timely corrective action in response to a violation. Relevant corrective action must include disclosing the violation to OIG through the SDP and fully cooperating with OIG's review and resolution of such disclosure. As discussed in section III.C of the preamble, OIG does not currently have an SDP for information blocking and plans on creating a specific SDP for information blocking after publication of this rule.

We are also not adding factors related to the circumstances surrounding the commission of the act, such as a factor that evaluates whether there were contributory practices by others or an intervening natural disaster. In some

instances, these factors are subsumed in existing general factors. Moreover, section 3022(a)(6) of the PHSA states that ''information blocking, with respect to an individual or entity, shall not include an act or practice other than an act or practice committed by such individual or entity.'' Information blocking, as to health IT developers of certified health IT, HIEs, and HINs, is a practice that an actor ''knows'' or ''should know'' is likely to interfere with, prevent, or materially discourage the access, exchange, or use of EHI. For example, in the circumstance of an intervening natural disaster that prevents an actor from responding to requests for data, the actor may not have the requisite level of intent. In such a situation, it is unlikely that there would be a sufficient basis to pursue CMPs for information blocking against the actor, and consideration of the factors relating to determination of the amount of any penalty would not be necessary.

Finally, we note that the modification to 42 CFR 1003.1420(a) finalized in this final rule adds three specific facts OIG must consider where applicable (number of patients affected, number of providers, and number of days the information blocking persisted). This modification aligns the factors at § 1003.1420(a) more precisely with the language of the PHSA. As we stated in the proposed rule, section 3022(b)(2)(A) of the PHSA mandates the consideration of the nature and extent of the information blocking and harm resulting from such information blocking including, where applicable, the number of patients affected, the number of providers affected, and the number of days the information blocking persisted. We intended the language of our proposed rule to reflect these statutory factors. 85 FR 22987, April 24, 2020. These factors may also address several of the commenters' concerns related to consideration of impact on patients and providers.

*Comment:* Some commenters suggested an additional mitigating factor of whether an actor was acting in accordance with another Federal law, State law, or court order limiting or prescribing certain behaviors.

*Response:* Section 3022(a)(1)(A) of the PHSA and 45 CFR 171.103(a)(1) explicitly exclude conduct that is required by law from the definition of information blocking. Therefore, if an actor's conduct is required by law, it would not meet the definition of information blocking, and OIG would not have the authority to impose CMPs. In the ONC Final Rule, ONC explained that court orders and binding administrative decisions are considered ''required by law.'' 85 FR 25794, May 1, 2020.

*Comment:* Some commenters sought clarification about how OIG will consider the proposed factors and whether they will be weighted. Some commenters requested additional detail on the range of potential penalty amounts that OIG may issue and the circumstances or thresholds that trigger such penalty amounts. For example, one commenter requested a chart to show how different facts and circumstances would result in different penalty amounts. This commenter also proposed that OIG set a baseline penalty amount to provide guidance on how OIG would set penalties for specific conduct. Some commenters requested clarification on the circumstances and thresholds leading up to the maximum penalty of $1 million. One commenter asked whether penalties assessed would be per organization impacted by the information blocking or per patient impacted by the information blocking.

*Response:* Our goal in setting penalty amounts is for a penalty to be fair, reasonable, and commensurate with the conduct so that wrongdoers are held accountable and future information blocking conduct is deterred. Accordingly, setting penalty amounts necessitates consideration of the particular facts of each case and does not lend itself to one-size-fits-all formulas or thresholds. The amount of each penalty will be determined per violation and will be based on the aggravating and mitigating factors.

Section 3022(b)(2)(A) of the PHSA requires the consideration of the number of providers affected and the number of patients affected when evaluating the nature and extent of the information blocking and the harm resulting from such information blocking. We consider the number of providers affected and number of patients affected under 42 CFR 1003.1420. In evaluating the nature and extent of the violation, we may also consider the number of organizations impacted by the information blocking, in addition to the number of patients and providers affected.[2]

The penalty amount will be based on a case-specific application of each identified aggravating and mitigating factor. Because penalty amounts require case-by-case evaluation, we decline to set a baseline penalty amount, set thresholds, or create a chart as commenters requested. Similarly, in assessing a penalty amount, OIG may weigh the aggravating and mitigating factors at 42 CFR 1003.140 and 1003.1420, but this weighting will not follow a formula. Application of the aggravating and mitigating factors will result in the penalty assessed being fair and reasonable. We would expect that the maximum penalty of $1 million per violation would apply to particularly egregious conduct.

*Comment:* Some commenters had concerns that when considering the number of patients and number of providers affected, OIG would impose lower penalty amounts for information blocking against smaller entities, thereby incentivizing information blocking against smaller entities. Other commenters raised concerns that the inclusion and implementation of the ''number of days'' factor in determining CMP amounts would result in an improperly low penalty amount for conduct that had serious effects but did not last long.

*Response:* Section 3022(b)(2)(A) of the PHSA requires OIG to consider, among other factors, the number of patients affected, the number of providers affected, and the number of days the information blocking persisted. As noted above, OIG's determination of a penalty amount will not rely on a rigid formula for weighing those factors but rather on a case-specific analysis of each identified aggravating and mitigating factor. Nothing in these factors would require OIG to impose a lower CMP amount for information blocking against small entities, even when such entities have fewer patients and providers than larger entities. OIG is mindful that information blocking against small entities can have significant adverse impacts for the entities and their patients and providers. For example, application of the factors at 42 CFR 1003.1420(a) and (b) to the specific facts and circumstances could result in a higher penalty because the information blocking had significant, negative impacts even for short periods of time on an individual or small entities. Moreover, if conduct results in significant harm, including lasting harm to patients, OIG would consider such harm as a potential aggravating factor when determining the appropriate penalty amount.

*Comment:* Some commenters requested clarification about what OIG considers to be ''harm resulting from'' information blocking. Some commenters suggested OIG should interpret ''harm'' to mean physical harm to a patient's

[2] We could consider the number of organizations under the ''nature and circumstances of the violation'' factor at 42 CFR 1003.140 or the ''nature and extent of information blocking'' at 42 CFR 1003.1420. As we discuss elsewhere in this section IV.A.5 of the preamble, the factors set forth at 42 CFR 1003.140 may overlap at 42 CFR 1003.1420, but we would not double count them.

health and well-being and suggested that OIG also consider financial harm that patients, providers, or third-party actors suffer as a result of information blocking. Other commenters raised concerns that intentional information blockers will be allowed to get away with ''near misses'' if OIG does not consider both the potential and actual harm resulting from information blocking as aggravating factors.

*Response:* In the proposed rule, we stated that section 3022(b)(2)(A) of the PHSA mandates that OIG must take into consideration factors such as the nature and extent of the information blocking and the harm resulting from such information blocking including, where applicable, the number of patients affected, the number of providers affected, and the number of days the information blocking persisted in determining the amount of a CMP. 85 FR 22987, April 24, 2020. We proposed incorporating these factors at 42 CFR 1003.1420, and noted that these factors were like factors found in other sections of part 1003. We did not propose a definition of ''harm'' in the proposed rule. We solicited comment on this factor and other potential factors we should consider.

In response to commenters' suggestions regarding the types of harm covered by § 1003.1420(b), we agree that ''harm'' should cover both physical and financial harm. Nothing in section 3022(b)(2)(B) of the PHSA indicates that harm should be limited to only one type or a specific type of harm. We are not finalizing a definition of the word harm. We intend to interpret harm in accordance with its plain meaning, ensuring that we can consider a range of harms that may result from information blocking conduct. As we gain more experience investigating and imposing CMPs for information blocking, we may add additional factors related to specific types of harm through rulemaking.

We appreciate the concern regarding intentional information blockers that might get away with ''near misses.'' We do not believe this would be the case. The definition of information blocking applies to conduct that is ''likely'' to interfere with the access, exchange, or use of EHI, thus capturing conduct with a potential to cause harm. With respect to determination of a penalty amount after information blocking is established, as noted above OIG will consider a range of aggravating factors and would not consider ''resulting in harm'' in isolation.

6. Additional Comments

*Comment:* One commenter noted that the proposed rule stated investigated parties may incur some costs in response to an OIG investigation or enforcement action and encouraged OIG not to impose CMPs unless OIG determined the party committed information blocking. The commenter also asked how investigative fees are calculated in the instance that investigated parties incur costs in response to an OIG investigation or enforcement action.

*Response:* OIG will impose CMPs where appropriate and does not separately charge costs to investigated parties as the comment contemplates. OIG also does not reimburse investigated parties for costs. We included estimated costs for investigated parties or subjects in the proposed rule as part of our Regulatory Impact Analysis (RIA). The costs described in the RIA only estimate the potential economic impact of the proposed rule, which includes costs that a subject being investigated may incur. For example, a party may incur costs in preparing documents in response to a subpoena or hiring an attorney to represent them during an investigation.

*B. CMPs, Assessments, and Exclusions for Fraud or False Claims or Similar Conduct Related to Grants, Contracts, and Other Agreements*

The Cures Act amendments to the CMPL authorize the Secretary to impose penalties, assessments, and exclusions for a variety of fraudulent and other improper conduct related to HHS grants, contracts, and other agreements. 42 U.S.C. 1320a–7a(o)–(s). In the proposed rule, we proposed to incorporate this authority into 42 CFR parts 1003 and 1005, which is the existing regulatory framework for the imposition and appeal of OIG penalties, assessments, and exclusions. We received comments related to this authority on only three topics: (1) the proposed definition of ''other agreement'' in 42 CFR 1003.110; (2) the proposed aggravating and mitigating factors in 42 CFR 1003.720 that will be used by OIG to determine the severity of the penalties, assessments, and exclusions it imposes; and (3) OIG enforcement priorities. We received no comments on the definitions we proposed to add to 42 CFR 1003.110 except ''other agreement'' as noted above, and are finalizing those definitions accordingly. We received no comments on 42 CFR 1003.710, which identifies the maximum penalties and assessments OIG may impose for fraud and other improper conduct involving HHS grants, contracts, and other agreements. We also received no comments on changes to 42 CFR 1003.130, 1003.1550, and 1003.1580, which relate to the calculation and collection of assessments imposed under this part and the use of statistical sampling. We finalize 42 CFR 1003.130, 1003.710, 1003.1550, and 1003.1580 as proposed without modification accordingly. We received no comments on 42 CFR 1003.700, which sets forth the bases for OIG's imposition of sanctions for fraud and other improper conduct related to grants, contracts, and other agreements, but are modifying 42 CFR 1003.700(a)(5) for clarity by adding a citation to the existing regulatory definition of ''failure to grant timely access'' at 42 CFR 1003.200(b)(10). We proposed, and are finalizing, that the changes to 42 CFR 1003.110, 1003.130, 1003.700, 1003.710, 1003.720, 1003.1550, and 1003.1580 will be effective 30 days from the publication date of the final rule.

1. Definition of ''Other Agreement''

In the proposed rule, we proposed adopting at 42 CFR 1003.110 the statutory definition of ''other agreement'' that would apply to CMPs brought under 42 CFR 1003.700. This definition includes but is not limited to a cooperative agreement, scholarship, fellowship, loan, subsidy, payment for a specified use, donation agreement, award, or subaward (regardless of whether one or more of the persons entering into the agreement is a contractor or subcontractor). 42 U.S.C. 1320a–7a(q)(3). We noted in the proposed rule that this definition is broad and identifies a nonexclusive list of arrangements that could constitute ''other agreements'' under the statute. We stated that when OIG investigates potential misconduct and decides whether to impose sanctions, it will evaluate matters on a case-by-case basis to determine whether the funding arrangement at issue constitutes an ''other agreement'' under the statute and whether the conduct at issue violates the statute. We are finalizing the definition of ''other agreement'' as proposed in 42 CFR 1003.110, without modification.

*Comment:* Several commenters requested that OIG provide more detail on which arrangements could constitute ''other agreements'' under the regulation. For example, one commenter asked OIG to provide additional clarity on how OIG will determine which ''other agreements'' fall within the meaning of the statute. Another commenter asked OIG to provide specific examples of scenarios involving ''other agreements'' where it would apply its CMPL authority.

*Response:* The statutory definition of ''other agreement,'' which has been

incorporated verbatim into 42 CFR 1003.110, is broad and defines ''other agreement'' to include (but not be limited to) a ''cooperative agreement, scholarship, fellowship, loan, subsidy, payment for a specified use, donation agreement, award, or subaward (regardless of whether one or more of the persons entering into the agreement is a contractor or subcontractor).'' It is not possible to identify with specificity all the various types of agreements that may fall under the definition of ''other agreement.'' The nine examples of ''other agreement'' identified in the statute along with the text of 42 U.S.C. 1320a–7a(o)–(s) demonstrate that Congress intended ''other agreement'' to be read broadly to include, for example, not only those direct agreements between the Secretary and recipients of HHS funding but also agreements between recipients of HHS funding and subrecipients such as subcontractors and subawardees. The definition of ''specified claim,'' for example, includes those requests for payment submitted by a subawardee to an HHS awardee that is receiving funding directly from the Secretary. 42 U.S.C. 1320a–7a(r). In addition, 42 U.S.C. 1320a–7a(o)(2) permits OIG to impose sanctions upon an entity that, among other things, creates false documents that are required to be submitted in order to indirectly receive funds from the Secretary. Any person that receives HHS funding directly or indirectly through an agreement is potentially subject to liability under the CMPL if they engage in any of the improper conduct identified in the regulation including but not limited to making misrepresentations in applications for the funding, presenting false or fraudulent specified claims related to the funding, and creating false records related to the funding.

2. Factors in Mitigation and Aggravation

The regulation at 42 CFR 1003.720 of the proposed rule proposed factors for OIG to consider in mitigation and aggravation when determining the appropriate penalty, assessment, and period of exclusion to impose upon persons who engage in fraud and other improper conduct related to HHS grants, contracts, and other agreements. In 42 CFR 1003.720(a), for example, we proposed that OIG would consider identifying as a mitigating factor a circumstance in which the amount of funds involved with the improper conduct was less than $5,000. Then, in 42 CFR 1003.720(b), we proposed considering as an aggravating factor a circumstance in which the amount of funds involved was more than $50,000. We are finalizing 42 CFR 1003.720 as proposed without modification.

*Comment:* One commenter suggested that the proposed monetary thresholds created in 42 CFR 1003.720(a) and (b) of $5,000 and $50,000 are too low and need to be adjusted upwards because they will lead to overly harsh determinations for CMPL violations related to grants, contracts, and other agreements that involve what the commenter characterized as small amounts of HHS funding. The commenter suggested that OIG consider it a mitigating factor in 42 CFR 1003.720(a) if the amount of funds involved with the improper conduct was less than $50,000 and consider it an aggravating factor in 42 CFR 1003.720(b) if the amount of funds involved with the improper conduct was more than $250,000.

*Response:* We are not accepting the commenter's suggestion to upwardly adjust the monetary thresholds proposed in 42 CFR 1003.720(a) and (b). The thresholds proposed in 42 CFR 1003.720(a) and (b) are the same thresholds that exist under 42 CFR 1003.220 related to damages sustained by HHS for fraud and similar conduct related to the Federal health care programs. OIG believes it is important for 42 CFR 1003.720 and 1003.220 to be consistent because both provide guidelines for OIG to evaluate the same factor and relate to damages sustained by HHS programs as a result of fraud or similar conduct.

*Comment:* Two commenters requested that OIG consider as a mitigating circumstance in an action for failure to grant timely access to OIG under 42 CFR 1003.700(a)(5) whether a party acted in good faith in attempting to comply with OIG's request for timely access in matters involving HHS grants, contracts, or other agreements. The commenters both pointed to challenges surrounding the current COVID–19 pandemic as an example of a circumstance in which a party might act in good faith in attempting to comply with OIG's request for access but might be unable to comply with it.

*Response:* We are not adopting this suggestion. Existing mitigating factors in 42 CFR 1003.140 that apply to all CMPs in 42 CFR part 1003 address commenters' request to assess whether the party acted in good faith as a mitigating factor. As finalized, section 1003.720 identifies factors in mitigation that OIG should consider when imposing sanctions and states that those factors should be read in conjunction with the factors listed in 42 CFR 1003.140. Section 1003.140 requires OIG to consider in mitigation ''the degree of culpability'' of the person against whom a sanction is imposed (42 CFR 1003.140(a)(2)), ''the nature and circumstances of the violation'' (42 CFR 1003.140(a)(1)), and ''such other matters as justice may require'' (42 CFR 1003.140(a)(5)). Under these existing mitigating factors, we would account for a party's good faith in attempting to comply with an OIG timely access request consistent with 42 CFR 1003.140(a)(1), (2), and (5). Therefore, it is unnecessary to explicitly add good faith as a mitigating factor to 42 CFR 1003.720.

3. OIG Enforcement Regarding Grants, Contracts, and Other Agreements

The regulation at 42 CFR 1003.700 identifies the grounds for OIG's imposition of penalties, assessments, and exclusions for fraud and other improper conduct related to HHS grants, contracts, and other agreements, and sets forth the levels of intent required to violate each offense. One commenter asked that OIG only exercise its discretion to impose sanctions when it finds bad intent or other truly abusive, egregious, and intentional wrongdoing. We are not adopting this suggestion and are finalizing 42 CFR 1003.700 as proposed with modification only to 42 CFR 1003.700(a)(5) as discussed below.

*Comment:* One commenter noted that many HHS grants, contracts, and other agreements are complex and require specific and detailed information from and actions by parties applying for the funds. The commenter also noted that regulatory requirements sometimes change, especially in times of a PHE such as the PHE for COVID–19, and that complying with shifting requirements can be difficult. The commenter asked that OIG take into consideration these complexities, ambiguities, and shifting requirements when exercising its discretion in enforcing the CMPs and that it do so only when the facts demonstrate bad intent or other truly abusive, egregious, and intentional wrongdoing by the parties applying for or receiving HHS funds.

*Response:* The CMPL authorizes the imposition of penalties, assessments, and exclusions for a variety of fraudulent and other improper conduct related to HHS grants, contracts, and other agreements, and sets forth the levels of intent required to violate each of the offenses it creates. 42 U.S.C. 1320a–7a(o). In determining whether to impose sanctions and the severity of those sanctions, OIG will consider all of the relevant facts and circumstances surrounding an allegation of wrongdoing in light of the factors identified in the CMPL (42 U.S.C.

1320a–7a(d)) and the regulation. 42 CFR 1003.140 and 1003.720. Depending on the facts and circumstances of any particular case, it may be appropriate for OIG to consider the difficulties raised by the commenter, including those related to the PHE for COVID–19, in determining whether a person has violated the CMPL and, if so, the severity of the sanction OIG proposes to impose.

4. Modification to 42 CFR 1003.700(a)(5)

The regulation at 42 CFR 1003.700(a)(5) incorporates into part 1003 OIG's statutory authority under 42 U.S.C. 1320a–7a(o)(5) to impose CMPs, assessments, and exclusions for the failure to grant timely access to OIG for the purpose of audits, investigations, evaluations, or other statutory functions of OIG in matters involving grants, contracts, or other agreements. We stated in the proposed rule at 85 FR 22982 that 42 U.S.C. 1320a–7a(o)(5) largely mirrors the statutory language that has for many years given OIG the authority to impose sanctions for the failure to grant timely access to OIG related to health care claims. Furthermore, we stated at 85 FR 22980 of the proposed rule that it was our intent to incorporate into OIG's existing CMP regulations the new CMP authorities related to fraud and other misconduct involving HHS grants, contracts, and other agreements. However, our proposed regulatory text at 42 CFR 1003.700(a)(5) omitted a citation to the existing regulatory definition of ''failure to grant timely access'' that is located at § 1003.200(b)(10), in a section of part 1003 that relates to fraud involving Federal health care claims. Consistent with our intent to incorporate into part 1003 our authority to impose sanctions for failure to grant timely access related to grants, contracts, and other agreements, our view that this authority mirrors the authority OIG has had for many years related to health care claims and, for clarity, we are finalizing 42 CFR 1003.700(a)(5) with a cross-reference to the existing definition of ''failure to grant timely access'' to make clear that the definition of that term at 42 CFR 1003.200(b)(10) is applicable to actions under 42 CFR 1003.700(a)(5).

*C. The Bipartisan Budget Act of 2018*

The BBA of 2018 amended the CMPL to increase certain CMP amounts contained in 42 U.S.C. 1320a–7a(a) and (b). The BBA 2018 increased maximum civil money penalties in section 1128A(a) of the SSA (42 U.S.C. 1320a–7a) from $10,000 to $20,000; from $15,000 to $30,000; and from $50,000 to $100,000. The BBA 2018 increased maximum civil money penalties in section 1128A(b) of the SSA from $2,000 to $5,000 in paragraph (1), from $2,000 to $5,000 in paragraph (2), and from $5,000 to $10,000 in paragraph (3)(A)(i). This statutory increase in CMP amounts is effective for acts committed after the date of enactment, February 9, 2018. In the proposed rule, we proposed increasing the civil money penalties in accordance with the BBA 2018. Specifically, for conformity with the CMPL as amended by the BBA 2018, we proposed to revise the civil money penalties contained at 42 CFR 1003.210, 1003.310, and 1003.1010.

The BBA 2018 increased penalty maximums for conduct that occurred after February 9, 2018. Accordingly, for each of the provisions below, we proposed language increasing the maximum penalty for conduct that occurred after February 9, 2018, and maintaining the pre-BBA 2018 penalty maximums for conduct that occurred on or before that date. The penalty amounts for conduct that occurred after February 9, 2018, in proposed 42 CFR 1003.210 were as follows: $20,000 for paragraphs (a)(1), (3), (4), and (8); $30,000 for paragraphs (a)(2) and (9); $100,000 for paragraphs (a)(6) and (7); and $10,000 for paragraph (a)(10)(i). Similarly, we proposed to increase the penalty maximum for conduct that occurred after February 9, 2018, at 42 CFR 1003.310(a)(3) to $100,000, and at 42 CFR 1003.1010(a) to $20,000. We received no comments on this proposal and we are finalizing the penalty amounts as proposed without modification, effective August 2, 2023 as required by the Administrative Procedure Act (APA).

*E. Additional Changes to Part 1003*

We proposed to change the cross-reference in 42 1003.140(c)(3) to correct a scrivener's error from a prior rulemaking on December 7, 2018. 81 FR 88354. We proposed to add a new paragraph (d)(5) to 42 CFR 1003.140 stating that the penalty amounts in part 1003 are adjusted annually for inflation and eliminating the footnotes 1 through 12 in part 1003 to simplify those sections. We received no comments on these proposed changes, and we are finalizing them with a correction to a typographical error in the regulatory text in the citation to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410) effective August 2, 2023.

*F. Changes to 42 CFR Part 1005*

The procedures set forth in part 1005 govern the appeal of CMPs, assessments, and exclusions in all cases for which OIG has been delegated authority to impose those sanctions including cases involving grants, contracts, and other agreements, and information blocking. As such, we proposed deleting the phrase ''under Medicare or the State health care programs'' from the definitions of ''civil money penalty cases'' and ''exclusion cases'' at 42 CFR 1005.1 to correctly define those terms as applying to all cases for which OIG has been delegated authority to apply CMPs, assessments, and exclusions not only to those cases involving Medicare or the State health care programs. We received no comments regarding this change and are finalizing it as proposed, without modification, in 42 CFR 1005.1, effective August 2, 2023.

**IV. Regulatory Impact Statement**

We have examined the impact of this final rule as required by Executive Order 12866, the Regulatory Flexibility Act (RFA) of 1980, the Unfunded Mandates Reform Act of 1995, and Executive Order 13132.

*A. Executive Order No. 12866*

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulations are necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). A regulatory impact analysis must be prepared for major rules with significant effects per section 3(f)(1) of Executive Order 12866 (*i.e.,* $200 million or more in any given year). This is not a major rule as defined at 5 U.S.C. 804(2); it is not significant per section 3(f)(1) because it does not reach that economic threshold. The vast majority of Federal health care programs would be minimally impacted from an economic perspective, if at all, by these proposals.

This final rule would enact new statutory enforcement provisions, including new CMP authorities. The regulatory changes implement provisions of the Cures Act and BBA 2018 into 42 CFR parts 1003 and 1005. We believe that the likely aggregate economic effect of these regulations would be significantly less than $100 million.

The expected benefits of the regulation are deterring conduct that negatively affects the integrity of HHS grants, contracts, and other agreements and potentially enhanced statutory compliance by HHS grantees, contractors, and other parties. It also will deter information blocking conduct

that interferes with effective health information exchange and negatively impacts many important aspects of health and health care. We refer readers to the impact analysis of the benefits of prohibiting and deterring information blocking in section XII.C.2.a.(4.2) of the ONC Final Rule, 85 FR 25906, May 1, 2020.

We anticipate that OIG will incur some costs associated with investigation and enforcement of the statutes underlying these penalty provisions. The Consolidated Appropriations Act, 2022 appropriates to OIG funding necessary for carrying out information blocking activities. Public Law 117–103, March 15, 2022. Additionally, investigated parties may incur some costs in response to an OIG investigation or enforcement action. Absent information about the frequency of prohibited conduct, we are unable to determine precisely the potential costs of this regulation.

Civil money penalties and assessments, if any, would be considered transfers. However, we are unable to reliably estimate potential penalty and assessment amounts because enforcement action will depend on the facts and circumstances of individual cases, some conduct subject to enforcement will be newly regulated, and some cases may result in settlement. We did not receive any comments on potential impacts of the rulemaking.

*B. Regulatory Flexibility Act*

The RFA and the Small Business Regulatory Enforcement and Fairness Act of 1996, which amended the RFA, require agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and Government agencies.

The Department considers a rule to have a significant impact on a substantial number of small entities if it has an impact of more than 3 percent of revenue for more than 5 percent of affected small entities. This final rule should not have a significant impact on the operations of a substantial number of small entities, as these changes would not impose any new requirement on any party. These changes largely enact existing regulatory authority. In addition, we expect that increases in the maximum penalty finalized here will only have an impact in a small number of cases. As a result, we have concluded that this final rule likely will not have a significant impact on a substantial number of small entities and that a regulatory flexibility analysis is not required for this rulemaking.

In addition, section 1102(b) of the SSA (42 U.S.C. 1302) requires us to prepare a regulatory impact analysis if a rule under Titles XVIII or XIX or section B of Title XI of the SSA may have a significant impact on the operations of a substantial number of small rural hospitals. We have concluded that this final rule should not have a significant impact on the operations of a substantial number of small rural hospitals because these changes would not impose any requirement on any party and small rural hospitals are not subject to CMPs for information blocking under this final rule. Therefore, a regulatory impact analysis under section 1102(b) is not required for this rulemaking.

*C. Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditures in any one year by State, local, or Tribal governments in the aggregate, or by the private sector, of $100 million, adjusted annually for inflation. We believe that there are no significant costs associated with these revisions that would impose any mandates on State, local, or Tribal governments or the private sector that would result in an expenditure of $158 million (after adjustment for inflation) or more in any given year and that a full analysis under the Unfunded Mandates Reform Act is not necessary.

*D. Executive Order 13132*

Executive Order 13132, Federalism, establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirements or costs on State and local governments, preempts State law, or otherwise has federalism implications. In reviewing this rule under the threshold criteria of Executive Order 13132, we have determined that this final rule would not significantly affect the rights, roles, and responsibilities of State or local governments. Nothing in this final rule imposes substantial direct requirements or costs on State and local governments, preempts State law, or otherwise has federalism implications. We are not aware of any State laws or regulations that are contradicted or impeded by any of the provisions in this final rule.

The Secretary is authorized by 42 U.S.C. 1320a–7a(o), which we enact in the regulation at 42 CFR 1003.700, to impose CMPs and assessments against individuals and entities that engage in fraud and other improper conduct against specified State agencies that administer or supervise the administration of grants, contracts, and other agreements funded in whole or in part by the Secretary. Additionally, 42 U.S.C. 1320a–7a(f)(4) directs that these CMPs and assessments be deposited into the Treasury of the United States. Amounts collected under this authority could not be used to compensate a State for damages it incurs due to improper conduct related to grants, contracts, or other agreements funded by the Secretary that are administered or supervised by specified State agencies.

However, neither 42 U.S.C. 1320a–7a nor this final rule preclude or impede any State's authority to pursue actions against entities and individuals that defraud or otherwise engage in improper conduct related to grants, contracts, or other agreements funded by the Secretary that are administered or supervised by specified State agencies. For this reason, the Secretary's authority related to specified State agencies 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.

Based on OIG's prior approach to enforcement that involves State programs and agencies, we also anticipate coordinating closely with the relevant State authorities, which would provide States notice about the improper conduct and the opportunity to pursue action under the State authority.

## V. Paperwork Reduction Act

These changes to parts 1003 and 1005 impose no new reporting requirements or collections of information. Therefore, a Paperwork Reduction Act review is not required.

## List of Subjects

*42 CFR Part 1003*

Contracts, Fraud, Grant programs—health, Information blocking, Penalties.

*42 CFR Part 1005*

Administrative practice and procedure.

For the reasons stated in the preamble, the Office of Inspector General, Department of Health and Human Services, amends 42 CFR chapter V, subchapter B, as follows:

## PART 1003—CIVIL MONEY PENALTIES, ASSESSMENTS AND EXCLUSIONS

■ 1. Revise the authority citation for part 1003 to read as follows:

**Authority:** 42 U.S.C. 262a, 300jj–52, 1302, 1320a–7, 1320a–7a, 1320b–10, 1395u(j), 1395u(k), 1395cc(j), 1395w–141(i)(3), 1395dd(d)(1), 1395mm, 1395nn(g), 1395ss(d), 1396b(m), 11131(c), and 11137(b)(2).

■ 2. Amend § 1003.100 by:
■ a. Revising paragraph (a); and
■ b. In paragraph (b)(1), adding ''(CMPs)'' following ''civil money penalties'' and a semicolon following ''this part''.

The revision reads as follows:

### § 1003.100 Basis and purpose.

(a) *Basis.* This part implements sections 1128(c), 1128A, 1140, 1819(b)(3)(B), 1819(g)(2)(A), 1857(g)(2)(A), 1860D–12(b)(3)(E), 1860D–31(i)(3), 1862(b)(3)(C), 1867(d)(1), 1876(i)(6), 1877(g), 1882(d), 1891(c)(1); 1903(m)(5), 1919(b)(3)(B), 1919(g)(2)(A), 1927(b)(3)(B), 1927(b)(3)(C), and 1929(i)(3) of the Social Security Act; sections 421(c) and 427(b)(2) of Public Law 99–660; section 201(i) of Public Law 107–188 (42 U.S.C. 1320a–7(c), 1320a–7a, 1320b–10, 1395i–3(b)(3)(B), 1395i–3(g)(2)(A), 1395w–27(g)(2)(A), 1395w–112(b)(3)(E), 1395w–141(i)(3), 1395y(b)(3)(B), 1395dd(d)(1), 1395mm(i)(6), 1395nn(g), 1395ss(d), 1395bbb(c)(1), 1396b(m)(5), 1396r(b)(3)(B), 1396r(g)(2)(A), 1396r–8(b)(3)(B), 1396r–8(b)(3)(C), 1396t(i)(3), 11131(c), 11137(b)(2), and 262a(i)); and section 3022 of the Public Health Service Act (42 U.S.C. 300jj–52).

* * * * *

■ 3. Amend § 1003.110 by:
■ a. Adding the definitions of ''Department,'' ''Obligation,'' ''Other agreement,'' and ''Program beneficiary'' in alphabetical order;
■ b. Revising the definition of ''Reasonable request;'' and
■ c. Adding the definitions of ''Recipient,'' ''Specified claim,'' and ''Specified State agency'' in alphabetical order.

The revision and additions read as follows:

### § 1003.110 Definitions.

* * * * *

*Department* means the Department of Health and Human Services.

* * * * *

*Obligation* for the purposes of § 1003.700 means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship for a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

*Other agreement* for the purposes of § 1003.700 includes a cooperative agreement, scholarship, fellowship, loan, subsidy, payment for a specified use, donation agreement, award, or subaward (regardless of whether one or more of the persons entering into the agreement is a contractor or subcontractor).

* * * * *

*Program beneficiary* means—in the case of a grant, contract, or other agreement designed to accomplish the objective of awarding or otherwise furnishing benefits or assistance to individuals and for which the Secretary provides funding—an individual who applies for or who receives such benefits or assistance from such grant, contract, or other agreement. Such term does not include—with respect to such grant, contract, or other agreement—an officer, employee, or agent of a person or entity that receives such grant or that enters into such contract or other agreement.

*Reasonable request* with respect to §§ 1003.200(b)(10) and 1003.700(a)(5) means a written request signed by a designated representative of the OIG and made by a properly identified agent of the OIG during reasonable business hours. The request will include:

(1) A statement of the authority for the request;

(2) The person's rights in responding to the request;

(3) The definition of ''reasonable request'' and ''failure to grant timely access'' under this part;

(4) The deadline by which the OIG requests access; and

(5) The amount of the civil money penalty or assessment that could be imposed and the effective date, length, and scope and effect of the exclusion that would be imposed for failure to comply with the request, and the earliest date that a request for reinstatement would be considered.

*Recipient* for the purposes of § 1003.700 means any person (excluding a program beneficiary as defined in this section) directly or indirectly receiving money or property under a grant, contract, or other agreement funded in whole or in part by the Secretary, including a subrecipient or subcontractor.

* * * * *

*Specified claim* means any application, request, or demand under a grant, contract, or other agreement for money or property, whether or not the United States or a specified State agency has title to the money or property, that is not a claim (as defined in this section) and that:

(1) Is presented or caused to be presented to an officer, employee, or agent of the Department or agency thereof, or of any specified State agency; or

(2) Is made to a contractor, grantee, or other recipient if the money or property is to be spent or used on the Department's behalf or to advance a Department program or interest, and if the Department:

(i) Provides or has provided any portion of the money or property requested or demanded; or

(ii) Will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

*Specified State agency* means an agency of a State government established or designated to administer or supervise the administration of a grant, contract, or other agreement funded in whole or in part by the Secretary.

* * * * *

■ 4. Revise § 1003.130 to read as follows:

### § 1003.130 Assessments.

The assessment in this part is in lieu of damages sustained by the Department, a State agency, or a specified State agency because of the violation.

■ 5. Amend § 1003.140 by:
■ a. In paragraph (c)(3), removing the phrase ''(as defined by paragraph (e)(2) of this section)'' and adding the phrase ''(as defined by paragraph (d)(2) of this section)'' in its place.
■ b. Adding paragraph (d)(5).

The addition reads as follows:

### § 1003.140 Determinations regarding the amount of penalties and assessments and the period of exclusion.

* * * * *

(d) * * *

(5) The penalty amounts in this part are updated annually, as adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (section 701 of Pub. L. 114–74). Annually adjusted amounts are published at 45 CFR part 102.

■ 6. Amend § 1003.210 by revising paragraphs (a)(1) through (4) and (6) through (9), (a)(10) introductory text, and (a)(10)(i) to read as follows:

### § 1003.210 Amount of penalties and assessments.

(a) * * *

(1) Except as provided in this section, the OIG may impose a penalty of not more than $10,000 for conduct that occurred on or before February 9, 2018, and not more than $20,000 for conduct that occurred after February 9, 2018, for each individual violation that is subject to a determination under this subpart.

(2) The OIG may impose a penalty of not more than $15,000 for conduct that occurred on or before February 9, 2018, and not more than $30,000 for conduct that occurred after February 9, 2018, for each person with respect to whom a determination was made that false or misleading information was given under § 1003.200(b)(2).

(3) The OIG may impose a penalty of not more than $10,000 for conduct that occurred on or before February 9, 2018, and not more than $20,000 for conduct that occurred after February 9, 2018, per day for each day that the prohibited relationship described in § 1003.200(b)(3) occurs.

(4) For each individual violation of § 1003.200(b)(4), the OIG may impose a penalty of not more than $10,000 for conduct that occurred on or before February 9, 2018, and not more than $20,000 for conduct that occurred after February 9, 2018, for each separately billable or non-separately-billable item or service provided, furnished, ordered, or prescribed by an excluded individual or entity.

* * * * *

(6) The OIG may impose a penalty of not more than $50,000 for conduct that occurred on or before February 9, 2018, and not more than $100,000 for conduct that occurred after February 9, 2018, for each false statement, omission, or misrepresentation of a material fact in violation of § 1003.200(b)(7).

(7) The OIG may impose a penalty of not more than $50,000 for conduct that occurred on or before February 9, 2018, and not more than $100,000 for conduct that occurred after February 9, 2018, for each false record or statement in violation of § 1003.200(b)(9).

(8) The OIG may impose a penalty of not more than $10,000 for conduct that occurred on or before February 9, 2018, and not more than $20,000 for conduct that occurred after February 9, 2018, for each item or service related to an overpayment that is not reported and returned in accordance with section 1128J(d) of the Act in violation of § 1003.200(b)(8).

(9) The OIG may impose a penalty of not more than $15,000 for conduct that occurred on or before February 9, 2018, and not more than $30,000 for conduct that occurred after February 9, 2018, for each day of failure to grant timely access in violation of § 1003.200(b)(10).

(10) For each false certification in violation of § 1003.200(c), the OIG may impose a penalty of not more than the greater of:

(i) $5,000 for conduct that occurred on or before February 9, 2018, and $10,000 for conduct that occurred after February 9, 2018; or

* * * * *

■ 7. Amend § 1003.310 by revising paragraph (a)(3) to read as follows:

**§ 1003.310 Amount of penalties and assessments.**

(a) * * *

(3) $50,000 for conduct that occurred on or before February 9, 2018, and $100,000 for conduct that occurred after February 9, 2018, for each offer, payment, solicitation, or receipt of remuneration that is subject to a determination under § 1003.300(d).

* * * * *

■ 8. Add subpart G (consisting of §§ 1003.700, 1003.710, and 1003.720) to read as follows:

## Subpart G—CMPs, Assessments, and Exclusions for Fraud or False Claims or Similar Conduct Related to Grants, Contracts, and Other Agreements

Sec.



**§ 1003.700 Basis for civil money penalties, assessments, and exclusions.**

The OIG may impose a penalty, assessment, and an exclusion against any person including an organization, agency, or other entity, but excluding a program beneficiary (as defined in § 1003.110), that, with respect to a grant, contract, or other agreement for which the Secretary provides funding:

(a) Knowingly presents or causes to be presented a specified claim (as defined in § 1003.110) under such grant, contract, or other agreement that the person knows or should know is false or fraudulent;

(b) Knowingly makes, uses, or causes to be made or used, any false statement, omission, or misrepresentation of a material fact in any application, proposal, bid, progress report, or other document that is required to be submitted in order to directly or indirectly receive or retain funds provided in whole or in part by such Secretary pursuant to such grant, contract, or other agreement;

(c) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent specified claim under such grant, contract, or other agreement;

(d) Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation (as defined in § 1003.110) to pay or transmit funds or property to such Secretary with respect to such grant, contract, or other agreement, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit funds or property to such Secretary with respect to such grant, contract, or other agreement; or

(e) Fails to grant timely access (as defined in § 1003.200(b)(10)), upon reasonable request (as defined in § 1003.110), to the Inspector General of the Department, for the purpose of audits, investigations, evaluations, or other statutory functions of such Inspector General in matters involving such grants, contracts, or other agreements.

**§ 1003.710 Amount of penalties and assessments.**

(a) *Penalties.* (1) In cases under § 1003.700(a)(1), the OIG may impose a penalty of not more than $10,000 for each specified claim.

(2) In cases under § 1003.700(a)(2), the OIG may impose a penalty of not more than $50,000 for each false statement, omission, or misrepresentation of a material fact.

(3) In cases under § 1003.700(a)(3), the OIG may impose a penalty of not more than $50,000 for each false record or statement.

(4) In cases under § 1003.700(a)(4), the OIG may impose a penalty of not more than $50,000 for each false record or statement or not more than $10,000 for each day that the person knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay.

(5) In cases under § 1003.700(a)(5), the OIG may impose a penalty of not more than $15,000 for each day of the failure described in § 1003.700(a)(5).

(b) *Assessments.* (1) In cases under § 1003.700(a)(1) and (3), such a person shall be subject to an assessment of not more than three times the amount claimed in the specified claim described in § 1003.700(a)(1) and (3) in lieu of damages sustained by the United States or a specified State agency because of such specified claim.

(2) In cases under § 1003.700(a)(2) and (4), such a person shall be subject to an assessment of not more than three times the total amount of the funds described in § 1003.700(a)(2) and (4), respectively (or, in the case of an obligation to transmit property to the Secretary described in § 1003.700(a)(4), of the

value of the property described in § 1003.700(a)(4)) in lieu of damages sustained by the United States or a specified State agency because of such case.

**§ 1003.720 Determinations regarding the amount of penalties and assessments and period of exclusion.**

In considering the factors listed in § 1003.140:

(a) It should be considered a mitigating circumstance if all the violations included in the action brought under this part were of the same type and occurred within a short period of time, there were few such violations, and the total amount claimed or requested related to the violations was less than $5,000.

(b) Aggravating circumstances include but are not limited to:

(1) The violations were of several types or occurred over a lengthy period of time;

(2) There were many such violations (or the nature and circumstances indicate a pattern of false or fraudulent specified claims, requests for payment, or a pattern of violations);

(3) The amount requested or claimed or related to the violations was $50,000 or more; or

(4) The violation resulted, or could have resulted, in physical harm to any individual.

**§ 1003.1010 [Amended]**

■ 9. Amend § 1003.1010 in paragraph (a) by removing the figure ''$10,000'' and adding in its place the phrase ''$10,000 for conduct that occurred on or before February 9, 2018, and $20,000 for conduct that occurred after February 9, 2018,''.

■ 10. Effective September 1, 2023, add subpart N (consisting of §§ 1003.1400, 1003.1410, and 1003.1420) to read as follows:

## Subpart N—CMPs for Information Blocking

Sec.



**§ 1003.1400 Basis for civil money penalties.**

The OIG may impose a civil money penalty against any individual or entity described in 45 CFR 171.103(a)(2) that commits information blocking, as set forth in 45 CFR part 171.

**§ 1003.1410 Amount of penalties.**

The OIG may impose a penalty of not more than $1,000,000 per violation.

(a) For this subpart, *violation* means a practice, as defined in 45 CFR 171.102, that constitutes information blocking, as set forth in 45 CFR part 171.

(b) [Reserved]

**§ 1003.1420 Determinations regarding the amount of penalties.**

In considering the factors listed in § 1003.140, the OIG shall take into account:

(a) The nature and extent of the information blocking including where applicable:

(1) The number of patients affected;

(2) The number of providers affected; and

(3) The number of days the information blocking persisted; and

(b) The harm resulting from such information blocking including where applicable:

(1) The number of patients affected;

(2) The number of providers affected; and

(3) The number of days the information blocking persisted.

**§ 1003.1550 [Amended]**

■ 11. Amend § 1003.1550 in paragraph (b) by removing the phrase ''where the claim'' and adding the phrase ''where the claim or specified claim'' in its place.

■ 12. Amend § 1003.1580 by revising paragraph (a) to read as follows:

**§ 1003.1580 Statistical sampling.**

(a) In meeting the burden of proof in § 1005.15 of this chapter, the OIG may introduce the results of a statistical sampling study as evidence of the number and amount of claims, specified claims, and/or requests for payment, as described in this part, that were presented, or caused to be presented, by the respondent. Such a statistical sampling study, if based upon an appropriate sampling and computed by valid statistical methods, shall constitute prima facie evidence of the number and amount of claims, specified claims, or requests for payment, as described in this part.

* * * * *

**§§ 1003.210, 1003.310, 1003.410, 1003.510, 1003.610, 1003.810, 1003.910, 1003.1010, 1003.110, 1003.1210, and 1003.1310 [Amended]**

■ 13. In addition to the amendments set forth above, in 42 CFR part 1003, amend each section referenced in the first column of the following table by removing the footnote referenced in the second column.

| Section | Footnote |
|---|---|
| 1003.210(a) heading | 1 |
| 1003.310(a) heading | 2 |
| 1003.410(a) heading | 3 |
| 1003.410(b)(2) | 4 |
| 1003.510 introductory text | 5 |
| 1003.610(a) introductory text | 6 |
| 1003.810 introductory text | 7 |
| 1003.910 | 8 |
| 1003.1010 introductory text | 9 |
| 1003.1110 introductory text | 10 |
| 1003.1210 introductory text | 11 |
| 1003.1310 | 12 |

## PART 1005—APPEALS OF EXCLUSIONS, CIVIL MONEY PENALTIES AND ASSESSMENTS

■ 14. The authority citation for part 1005 continues to read as follows:

**Authority:** 42 U.S.C. 405(a), 405(b), 1302, 1320a–7, 1320a–7a and 1320c–5.

■ 15. Amend § 1005.1 by revising the definitions of ''Civil money penalty cases'' and ''Exclusion cases'' to read as follows:

**§ 1005.1 Definitions.**

*Civil money penalty cases* refers to all proceedings arising under any of the statutory bases for which the OIG has been delegated authority to impose civil money penalties (CMPs).

* * * * *

*Exclusion cases* refers to all proceedings arising under any of the statutory bases for which the OIG has been delegated authority to impose exclusions.

* * * * *

Dated: June 26, 2023.

**Xavier Becerra,**

*Secretary.*

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Part III

## Securities and Exchange Commission

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule To Modify Certain Connectivity and Port Fees; Notice

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97814; File No. SR–MIAX–2023–25]**

## Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule To Modify Certain Connectivity and Port Fees

June 27, 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 June 16, 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.

### 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 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 bifurcated 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 the 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] On

[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.miaxglobal.com/alert/2022/08/12/miax-options-and-miax-pearl-options-announce-planned-network-changes-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 Options 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).

February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (SR–MIAX–2023–08) (the ''Second Proposal'').[13] On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (SR–MIAX–2023–18) (the ''Third Proposal'').[14] On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with this further revised proposal (SR–MIAX–2023–25).[15]

The Exchange previously included a cost analysis in the Initial, Second, and Third Proposals. 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 [16] (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, Second, and Third Proposals, the fees themselves have not changed since the Initial, Second, or Third Proposals 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* [17] 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.[18] 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.[19] 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'').[20] 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.'' [21] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[22] 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.'' [23] 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.[24] 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.'' [25] 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.'' [26] 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.'' [27]

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission's SIFMA Decision in *NASDAQ Stock*

[13] *See* Securities Exchange Act Release No. 97081 (March 8, 2023), 88 FR 15782 (March 14, 2023) (SR–MIAX–2023–08).

[14] *See* Securities Exchange Act Release No. 97419 (May 2, 2023), 88 FR 29777 (May 8, 2023) (SR–MIAX–2023–18).

[15] The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently, information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange has provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff's information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition.

[16] The term ''MIAX Emerald'' means MIAX Emerald, LLC. *See* Exchange Rule 100.

[17] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[18] *Id.*

[19] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[20] *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).

[21] *Id.* at page 2.

[22] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[23] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[24] *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).

[25] 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'').

[26] *Id.*

[27] *Id.*

*Market, LLC* v. *SEC*[28] and remanded for further proceedings consistent with its opinion.[29] 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.'' [30] 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.[31] 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.*'' [32] 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.[33]

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.'' [34] 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'').[35] 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 [36] 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.[37] 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.[38] By impeding any

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[28] *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.

[29] *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.*

[30] *Id.* at *2; *see also id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[31] *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'').

[32] *Id.*

[33] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[34] *See supra* note 29, at page 2.

[35] 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.*

[36] 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.

[37] *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).

[38] The Exchange has filed, and subsequently withdrawn, various forms of this proposed fee change numerous times since August 2021 with

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 [39] and $80,383,000 for 2021.[40] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020 [41] and $22,843,000 for 2021.[42] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020 [43] and $44,800,000 for 2021.[44] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020 [45] and $30,687,000 for 2021.[46] 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.[47] 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.'' [48]

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,[49] 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 . . .'',[50] 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. For example, the Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[51] 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 [52] 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

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.

[39] 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.*

[40] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[41] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[42] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[43] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[44] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[45] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[46] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[47] 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.*

[48] *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.

[49] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[50] *See supra* note 25, at note 1.

[51] *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).

[52] 15 U.S.C. 78f(b)(4).

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,[53] 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; [54] 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.[55]

* * * * *

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 Options. This change is an operational necessity due to ever-increasing capacity constraints and to accommodate anticipated access needs for Members and other market participants.[56] This proposal: (i) sets forth the applicable fees for the bifurcated 10Gb ULL network; (ii) removes provisions in the Fee Schedule that provide for a shared 10Gb ULL network; and (iii) specifies that market participants may continue to connect to both the Exchange and MIAX Pearl Options via the 1Gb network.

The Exchange bifurcated the Exchange and MIAX Pearl Options 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.[57] Upon bifurcation of the 10Gb ULL network, subscribers need to purchase separate connections to the Exchange and MIAX Pearl Options at the applicable rate. The Exchange's proposed amended rate for 10Gb ULL connectivity is described below. Prior to the bifurcation of the 10Gb ULL networks, subscribers to 10Gb ULL connectivity would be able to connect to both the Exchange and MIAX Pearl Options 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 [58] 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 Options. 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'').[59] 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 Options.

The Exchange proposes to make the following changes to reflect the bifurcated 10Gb ULL network for the Exchange and MIAX Pearl Options. 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 Options 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.

[53] 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.

[54] 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.*

[55] 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.

[56] *See supra* note 9.

[57] *Id.*

[58] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[59] 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.miaxglobal.com/markets/us-options/miax-options/fees* (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.'').

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 [60] and two (2) Limited Service MEI Ports [61] per matching engine [62] 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. This fee was unchanged since 2016.[63]

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 [64] in accordance with its fair access requirements under Section 6(b)(5) of the Act.[65]

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 May 2023 trading results, the Exchange handles more than 12.3 billion quotes on an average day, and more than 271 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generated more than 156 billion quotes (and more than 7 billion quotes on an average day), and Market Makers who utilized only the two free Limited Service MEI Ports generated approximately 78 billion quotes (and approximately 3.5 billion quotes on an average day). Also for May 2023, Market Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 1.3 billion quotes per day and Market Makers who utilized 5–6 Limited Service MEI Ports submitted an average of 356 million quotes on an average day. In May 2023, the Exchange did not have any Market Makers that utilized only 3–4 Limited Service MEI 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. 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.[66] 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

[60] 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.

[61] 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.

[62] 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.

[63] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[64] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[65] *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.

[66] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

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,[67] 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[68] in general, and furthers the objectives of Section 6(b)(4) of the Act[69] 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[70] 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[71] and the Staff Guidance,[72] 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.''[73] 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.''[74] 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.''[75]

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).[76] 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

[67] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[68] 15 U.S.C. 78f(b).

[69] 15 U.S.C. 78f(b)(4).

[70] 15 U.S.C. 78f(b)(5).

[71] *See supra* note 24.

[72] *See supra* note 25.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *See* Securities Exchange Act Release No. 68415 (December 12, 2012), 77 FR 74905 (December 18, 2012) (SR–MIAX–2012–01).

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.[77]

Later in 2013, as the Exchange's market share increased,[78] the Exchange adopted a nominal $10 fee for each additional Limited Service MEI Port.[79] The Exchange last increased the fees for its 10Gb ULL fiber connections from $9,300 to $10,000 per month on January 1, 2021.[80] 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'. . . .'' [81]

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.'' [82]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [83] 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.'' [84] 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.'' [85] 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.'' [86]

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 with a reasonable 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 connectivity or port 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 6.60% for the month of May 2023).[87] | 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. |

[77] *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).

[78] The Exchange experienced a monthly average equity options trading volume of 1.87% for the month of November 2013. *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*

[79] *See* Securities Exchange Act Release No. 70903 (November 20, 2013), 78 FR 70615 (November 26, 2013) (SR–MIAX–2013–52).

[80] *See* Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02).

[81] *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)).

[82] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[83] *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.'').

[84] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[85] *Id.*

[86] *See supra* note 25.

| Exchange | Type of connection or port | Monthly fee (per connection or per port) |
|---|---|---|
| NASDAQ[88] (equity options market share of 6.59% for the month of May 2023).[89] | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port[90] | *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'')[91] (equity options market share of 6.18% for the month of May 2023).[92] | 10Gb Ultra fiber connection | $15,000 per connection. |
| | SQF Port | $1,100 per port. |
| NYSE American LLC (''NYSE American'')[93] (equity options market share of 7.34% for the month of May 2023).[94] | 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'')[95] (equity options market share of 2.00% for the month of May 2023).[96] | 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 Options, experienced a decrease in membership as the result of similar fees proposed herein. One MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023, as a direct result of the proposed connectivity and port fee changes proposed by MIAX Pearl Options.

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.[97] 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.[98]

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.[99] 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 Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options (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.[100] If the Exchange is

[87] *See supra* note 78.

[88] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[89] *See supra* note 78.

[90] Similar to the Exchange's MEI Ports, SQF ports are primarily utilized by Market Makers.

[91] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.

[92] *See supra* note 78.

[93] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[94] *See supra* note 78.

[95] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.

[96] *See supra* note 78.

[97] 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.''

[98] Service Bureaus may obtain ports on behalf of Members.

[99] *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.

[100] *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), *available at*

not at the national best bid or offer (''NBBO''),[101] 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.[102]

With respect to the submission of orders, Members may also choose not to purchase any connection 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,[103] or request sponsored access [104] through a member of an exchange in order to submit a trade directly to an options exchange.[105] 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).[106] 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.[107] 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 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 Options Market Maker terminated their MIAX Pearl Options 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 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 Options when MIAX Pearl commenced operations as a national securities exchange on February 7, 2017.[108] The Exchange and MIAX Pearl Options 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 Options 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 allowed 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 Options 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

*https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.*

[101] *See* Exchange Rule 100.

[102] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[103] 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.

[104] 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.

[105] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[106] *See, e.g.,* Nasdaq Price List—U.S. Direct Connection and Extranet Fees, *available at,* U.S. Direct-Extranet Connection (*nasdaqtrader.com*); *and* Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR–NASDAQ–2015–002); *and* 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR–NASDAQ–2017–114).

[107] 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.

[108] *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).

10Gb ULL network,[109] the connectivity needs of Members and market participants has increased every year since the launch of MIAX Pearl Options and the operations of the Exchange and MIAX Pearl Options 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 Options' 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 Options' Systems and networks to be able to continue to meet ongoing and future 10Gb ULL connectivity and access demands.[110]

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 Options 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 Options. 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 Options had their own dedicated 10Gb ULL networks. Separation of the Exchange and MIAX Pearl Options 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 Options 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 Pearl Options. 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 Options 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.[111] 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 six (6) overall 10Gb ULL connectivity subscriptions across the Exchange and MIAX Pearl Options. This immaterial increase in overall connections reflects 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 Options, or choose 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 an exchange 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 and port services, the Exchange is especially diligent in

[109] *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).

[110] 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.

[111] *See supra* note 9.

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,[112] and Rule 19b–4 thereunder,[113] with respect to the types of information exchanges should provide when filing fee changes, and Section 6(b) of the Act,[114] which requires, among other things, that exchange fees be reasonable and equitably allocated,[115] not designed to permit unfair discrimination,[116] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[117] 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.[118] 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) [119] going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of $13,500 per month for each physical 10Gb ULL connection and to remove language providing for a shared 10Gb ULL network between the Exchange and MIAX Pearl Options. 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'').[120] 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 for each cost driver as part of its 2023 budget review process. The 2023 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior management, department heads, and the Finance Team. Each department head is required to send a ''bottom up'' budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and 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, simple only or simple and complex markets, auction functionality, etc.), which may impact message traffic, individual system architectures that impact platform size,[121] 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. All of these factors result in different allocation percentages among the Exchange and its affiliated markets, *i.e.,* the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange's parent company currently owns and operates four separate and distinct marketplaces, the Exchange must determine the costs associated with each actual market—as opposed to the Exchange's parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, the Exchange's parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers, due to the unique factors of each marketplace as described above. This allocation methodology also ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, *e.g.,* connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to

[112] 15 U.S.C. 78s(b)(1).

[113] 17 CFR 240.19b–4.

[114] 15 U.S.C. 78f(b).

[115] 15 U.S.C. 78f(b)(4).

[116] 15 U.S.C. 78f(b)(5).

[117] 15 U.S.C. 78f(b)(8).

[118] *See supra* note 25.

[119] 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.

[120] 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.

[121] 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.

each of the cost drivers set forth below. 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 to 10Gb connectivity), with smaller allocations to additional Limited Service MEI Ports (7.2%), and the remainder to the provision of other connectivity, other ports, transaction execution, membership services and market data services (32.3%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This 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 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, which was again recently further refined, 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 and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity and port 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 aggregate monthly cost to provide 10Gb ULL connectivity and Limited Service MEI Port services, including both physical 10Gb connections and Limited Service MEI Ports, is $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 each cost driver (*e.g.,* as set forth below, the Exchange allocated approximately 25.6% of its overall Human Resources cost to offering physical connectivity).

| Cost drivers | Allocated annual cost [122] | Allocated monthly cost [123] | % Of all |
|---|---|---|---|
| Human Resources | $3,867,297 | $322,275 | 25 |
| Connectivity (external fees, cabling, switches, etc.) | 70,163 | 5,847 | 60.6 |
| Internet Services and 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. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange and are independent of the

[122] The Annual Cost includes figures rounded to the nearest dollar.

[123] 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.

costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

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 weighted average of 42% of each employee's time from the above group assigned to the Exchange based on the above-described allocation methodology. 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, sales, membership, and finance personnel), for which the Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who 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 (excluding employees at non-options/equities exchange subsidiaries of Miami International Holdings, Inc. (''MIH''), the holding company of the Exchange and its affiliated markets), 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 each market's individual Human Resources expense. Then, 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.[124] This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management, of which the Exchange allocated 42% of each of their employee's time assigned to the Exchange, as stated above. The Exchange notes that senior level executives' time was only allocated to the Human Resources costs to the extent that 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 (External Fees, Cabling, Switches, etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity cost driver 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 providers for connectivity to the entire U.S. options industry, 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 providers to connect to other national securities exchanges and the Options Price Reporting Authority (''OPRA''). 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 provided by 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 provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of internet Services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (*e.g.,* re-pricing of orders to avoid locked or crossed markets and trading collars). Since external market data from other exchanges is consumed at the Exchange's matching engine level, (to which 10Gb ULL connectivity provides access) in order to validate orders before additional orders enter the matching engine or are executed, the Exchange believes it is reasonable to allocate a small amount of such costs to 10Gb ULL connectivity.

The Exchange relies on various content service providers for data feeds for the entire U.S. options industry, as well as content for critical components of the network that are necessary to provide and maintain its System Networks and access to its System

[124] The Exchange notes that while 12.9 full time equivalents (''FTEs'') were allocated in this filing to the Exchange and a similar number of FTEs in a similar filing by the Exchange's affiliate, MIAX Emerald (11.7 FTEs), the overall cost percentage allocated for each differs due to the individual level of compensation for each employee assigned to work on projects for the exchanges.

Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes content service providers to receive market data from OPRA, 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. 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 receive market data and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2023 budget process differ among the Exchange and its affiliated markets for the internet Services and External Market Data cost driver, even though but for MIAX Emerald, the allocation percentages are generally consistent across markets (*e.g.,* MIAX Emerald, MIAX, MIAX Pearl Options and MIAX Pearl Equities allocated 84.8%, 73.3%, 73.3% and 72.5%, respectively, to the same cost driver). This is because: (i) a different percentage of the overall internet Services and External Market Data cost driver was allocated to MIAX Emerald and its affiliated markets due to the factors set forth under the first step of the 2023 budget review process described above (unique technical architecture, market structure, and business requirements of each marketplace); and (ii) MIAX Emerald itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its systems. The Exchange notes while the percentage MIAX Emerald allocated to the internet Services and External Market Data cost driver is greater than the Exchange and its other affiliated markets, the overall dollar amount allocated to the Exchange under the initial step of the 2023 budget process is lower than its affiliated markets. However, the Exchange believes that this is not, in dollar amounts, a significant difference. This is because the total dollar amount of expense covered by this cost driver is relatively small compared to other cost drivers and is due to nuances in exchange architecture that require different initial allocation amount under the first step of the 2023 budget process described above. Thus, non-significant differences in percentage allocation amounts in a smaller cost driver create the appearance of a significant difference, even though the actual difference in dollar amounts is small. For instance, despite the difference in cost allocation percentages for the internet Services and External Market Data cost driver across the Exchange and MIAX Emerald, the actual dollar amount difference is approximately only $4,000 per month, a non-significant amount.

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 by market 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.

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.[125]

Depreciation

All physical assets, software, and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and 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. The Exchange also included in the Depreciation cost driver certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity 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 10Gb ULL connectivity. As noted above, the Exchange allocated 61.6% of its allocated depreciation costs to providing physical 10Gb ULL 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. For example, the percentages the Exchange and its affiliate, MIAX Emerald, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are nearly identical. However, the Exchange's dollar amount is greater than that of MIAX Emerald by approximately $32,000 per month due to two factors: first, the Exchange has undergone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware that software that is subject to depreciation. Second, the Exchange maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of the Exchange's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

[125] This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl (the options and equities markets), 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. This expense also differs in dollar amount among the Exchange, MIAX Pearl (options and equities), and MIAX Emerald because each market may maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall physical connectivity costs because 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. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also included in the Exchange's general shared expense cost driver.[126] 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 Center, as described above), Limited Service MEI Ports do not require as many broad or indirect resources as other core services.

* * * * *

Approximate Cost per 10Gb ULL Connection per Month

After determining the approximate allocated monthly cost related to 10Gb connectivity, 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. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, *i.e.,* actual number of 10Gb ULL connections.

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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 MEI 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 | Allocated annual cost [127] | Allocated monthly cost [128] | % Of all |
|---|---|---|---|
| Human Resources | $898,480 | $74,873 | 5.8 |
| Connectivity (external fees, cabling, switches, etc.) | 4,435 | 370 | 3.8 |
| Internet Services and 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 |

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

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 allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Limited Service MEI Ports.[129] This includes personnel from the following Exchange departments that are predominately involved in providing Limited Service

[126] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

[127] *See supra* note 122 (describing rounding of Annual Costs).

[128] *See supra* note 123 (describing rounding of Monthly Costs based on Annual Costs).

[129] The Exchange notes that while 3.0 FTEs were allocated in this filing to the Exchange and a similar number of FTEs in a similar filing by the Exchange's affiliate, MIAX Emerald (2.5 FTEs), the overall cost percentage allocated for each differs due to the individual level of compensation for each employee assigned to work on projects for the exchanges.

MEI Ports: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing and maintaining Limited Service MEI Ports. 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 (External Fees, Cabling, Switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Limited Service MEI Ports, the Exchange also includes a portion of its costs related to 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 includes external market data costs towards the provision of Limited Service MEI Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (*e.g.,* halted securities).[130] Thus, since market data from other exchanges is consumed at the Exchange's 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.

The Exchange notes that the allocation for the internet Services and External Market Data cost driver is greater than that of its affiliate, MIAX Pearl Options, as MIAX allocated 7.2% of its internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For March 2023, MIAX Market Makers utilized 1,782 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,028 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for March 2023, MIAX Pearl Options Members utilized only 432 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Limited Service MEI Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Limited Service MEI Ports (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).

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.

The Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX allocated 7.2% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For March 2023, MIAX Market Makers utilized 1,782 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,028 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for March 2023, MIAX Pearl Options Members utilized only 432 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Depreciation

The vast majority of the software the Exchange uses to provide Limited Service MEI Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Limited Service MEI Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time. All hardware and software, 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. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange because such software is related to the provision of Limited Service MEI Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Limited Service MEI Ports.

The Exchange 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

[130] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity.

contribution to the depreciated cost. For example, the Exchange notes that the percentages it and its affiliate, MIAX Emerald, allocated to the depreciation cost driver for Limited Service MEI Ports differ by only 2.6%. However, the Exchange's approximate dollar amount is greater than that of MIAX Emerald by approximately $10,000 per month. This is due to two primary factors. First, the Exchange has under gone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware that software that is subject to depreciation. Second, the Exchange maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of the Exchange's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

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 Center, 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.

Lastly, the Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX allocated 9.8% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.6% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For March 2023, MIAX Market Makers utilized 1,782 Limited Service MEI Ports and MIAX Emerald Market Makers utilized 1,028 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for March 2023, MIAX Pearl Options Members utilized only 432 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.[131]

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Approximate Cost per Limited Service MEI Port per Month

The total monthly cost allocated to Limited Service MEI Ports 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.

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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 10Gb ULL and 1Gb ULL connectivity 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 and port 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

[131] The Exchange allocated a slightly lower amount (9.8%) of this cost as compared to MIAX Emerald (10.3%). This is not a significant difference. However, both allocations resulted in an identical cost amount of $0.8 million, despite the Exchange having a higher number of Limited Service MEI Ports. MIAX Emerald was allocated a higher cost per Limited Service MEI Port due to the additional resources and expenditures associated with maintaining its recently enhanced low latency network.

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 actual costs may be higher or lower. 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 may 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 [132]

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 and port 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 will equal $12,034,554. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $15,066,000. The Exchange believes this represents a modest profit of 20% when compared to the cost of providing 10Gb ULL connectivity services, which could decrease over time.[133]

The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services will equal $2,157,178. Based on current Limited Service MEI Port services usage, the Exchange would generate annual revenue of approximately $3,300,600. The Exchange believes this would result in an estimated profit margin of 35% after calculating the cost of providing Limited Service MEI Port services, which profit margin could decrease over time.[134] The Exchange notes that the cost to provide Limited Service MEI Ports is higher than the cost for the Exchange's affiliate, MIAX Pearl Options, to provide Full Service MEO Ports due to the substantially higher number of Limited Service MEI Ports used by Exchange Members. For example, MIAX Market Makers are currently allocated 1,782 Limited Service MEI Ports compared to only 432 Full Service MEO Ports (Bulk and

[132] For purposes of calculating revenue for 10Gb ULL connectivity, the Exchange used revenues for February 2023, the first full month for which it provided dedicated 10Gb ULL connectivity to the Exchange and ceased operating a shared 10Gb ULL network with MIAX Pearl Options.

[133] Assuming the U.S. inflation rate continues at its current rate, the Exchange believes that the projected profit margins in this proposal will decrease; however, the Exchange cannot predict with any certainty whether the U.S. inflation rate will continue at its current rate or its impact on the Exchange's future profits or losses. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited June 13, 2023).

[134] *Id.*

Single combined) allocated to MIAX Pearl Options members.

Based on the above discussion, the Exchange believes that even if the Exchange earns the above revenue or incrementally more or less, the proposed fees are fair and reasonable because they will not result in pricing that deviates from that of other exchanges or a 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 also notes that this the resultant profit margin differs slightly from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and operations costs, as described in the cost allocation methodology above; different technical architecture (*e.g.,* the number of matching engines per exchange, *i.e.,* the Exchange maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines); and different maturity phase of the Exchange and its affiliated markets (*i.e.,* start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection ($13,500 per month for the Exchange vs. $15,000 per month for Nasdaq).[135] NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees ($13,500 for the Exchange vs. $22,000 per month for NYSE American).[136] Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (*i.e.,* more subscribers to 10Gb ULL connectivity on the Exchange than its affiliated markets or vice versa).

* * * * *

The Exchange has operated at a cumulative net annual loss since it launched operations in 2012.[137] This is due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as low latency 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 does not believe that it should now be penalized for seeking to raise its fees as it now needs to upgrade its technology and absorb increased costs. 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 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 connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), 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—or seeking to earn—supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

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 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 that result from sharing costs across multiple platforms. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with 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 Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive 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. Further, if Commission Staff

[135] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[136] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[137] 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.*

is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined 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, as is reflected in the proposal, the Exchange continuously and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost 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 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.[138] 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, as noted above for 10Gb ULL connectivity, Market Makers who take the maximum amount of Limited Service MEI Ports account for greater than 99% of message traffic over the network, while Market Makers with fewer Limited Service MEI Ports account for 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 May 2023 trading results, the Exchange handles more than 12.3 billion quotes on an average day, and more than 271 billion quotes over the entire month. Of that total, Market Makers with the maximum amount of Limited Service MEI Ports generated more than 156 billion quotes (and more than 7 billion quotes on an average day), and Market Makers who utilized only the two free Limited Service MEI Ports generated approximately 78 billion quotes (and approximately 3.5 billion quotes on an average day). Also for May 2023, Market Makers who utilized 7 to 9 Limited Service MEI ports submitted an average of 1.3 billion quotes per day and Market Makers who utilized 5–6 Limited Service MEI Ports submitted an average of 356 million quotes on an average day. In May 2023, the Exchange did not have any Market Makers that utilized only 3–4 Limited Service MEI 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 during anticipated peak market conditions. The need to support 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.[139] 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

[138] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[139] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

send the least amount of orders and messages over those connections.

Meanwhile, the Exchange proposes incrementally higher fees for those that purchase additional Limited Service MEI Ports because those with the greatest number of Limited Service MEI Ports generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange. The firms that purchase numerous Limited Service MEI Ports do so for competitive reasons and based on their business needs, which include a desire to access the market more quickly using the lowest latency connections. These firms are generally engaged in sending liquidity removing orders to the Exchange and may require more connections as they compete to access resting liquidity.

Consider the following example: a Member has just sent numerous messages and/or orders over one of their Limited Service MEI Ports that are now in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book. That Member may choose to send that order over another Limited Service MEI Port it maintains with less message traffic to help ensure that their liquidity taking order accesses the Exchange more quickly because that connection's queue is shorter.

In addition, Members frequently add and drop connections mid-month to determine which connections have the least latency (and engage in the same practice with Limited Service MEI Ports). This results in increased costs to the Exchange to frequently make changes in the data center (or its network) and provide the additional technical and personnel support necessary to satisfy these requests. Given the difference in network utilization and technical support provided, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Makers who utilize 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, because the network is largely designed and maintained to specifically handle the message rate, capacity 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 and maintain 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.[140] Thus, as the number of connections a Market Maker has increases, the related demand on Exchange resources also increases. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Limited Service MEI Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2012 [141] 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 Options Market Maker terminated their MIAX Pearl Options membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAX Pearl Options.[142]

[140] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[141] *See supra* note 137.

[142] 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

Continued

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.

Lastly, the Exchange does not believe its proposal to implement incrementally higher fees for those that purchase more Limited Service MEI Ports will place certain market participants at a relative disadvantage to other market participants because those with the greatest number of Limited Service MEI Ports tend generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange, resulting in greater demands and additional burdens on Exchange resources (as described above). The firms that purchase numerous Limited Service MEI Ports do so for competitive reasons and choose to utilize numerous connections based on their business needs, which include a desire to attempt to access the market quicker using the lowest latency connections. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more connections to competitively access resting liquidity. All firms purchase the amount of Limited Service MEI Ports they require based on their own business decisions and similarly situated firms are subject to the same fees.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change and price increase will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As this is a fee increase, arguably if set too high, this fee would make it easier for other exchanges to compete with the Exchange. Only if this were a substantial fee decrease could this be considered a form of predatory pricing. In contrast, the Exchange believes that, without this fee increase, we are potentially at a competitive disadvantage to certain other exchanges that have in place higher fees for similar services. As we have noted, the Exchange believes that connectivity fees can be used to foster more competitive transaction pricing and additional infrastructure investment and there are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. 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 and would not impose any burden on competition. This is a technology driven change designed to meet customer needs. The proposed fees would assist the Exchange in recovering costs related to providing dedicated 10Gb connectivity to the Exchange while enabling it to continue to meet current and anticipated demands for connectivity by its Members and other market participants. Separating its 10Gb network from MIAX Pearl Options enables 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 structured to enable the Exchange to bifurcate its 10Gb ULL network shared with MIAX Pearl Options 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 its access and connectivity fees, including port fees.[143] 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 as the affiliated exchanges offer substantially similar connectivity and functionality and are on the same platform that Cboe migrated to.[144] Cboe 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.'' [145] The Exchange concurs with the following statement by CBOE,

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

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 supra* note 77. 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.

[143] *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.

[144] *Id.* at 71676.

[145] *Id.*

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.[146]

The Cboe proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[147] 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.[148] 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.'' [149] 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.[150]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[151] 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.[152]

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.[153] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[154] 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.[155] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[156] BZX,[157] and Cboe EDGA Exchange, Inc.[158]

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, one comment letter on the Second Proposal, and one comment letter on the Third Proposal, all from the same commenter.[159] In their letters, 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 letters, the Exchange believes those issues are not germane to this proposal

[146] *Id.* at 71676.

[147] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *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'').

[152] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011).

[153] *Id.* at 18426.

[154] *Id.*

[155] *Id.*

[156] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[157] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[158] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeEDGA–2022–004).

[159] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP (''SIG''), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, *and* letters from Gerald D. O'Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023 and May 24, 2023.

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,[160] and Rule 19b–4(f)(2)[161] 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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–MIAX–2023–25 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–2023–25. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–MIAX–2023–25 and should be submitted on or before July 24, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[162]

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2023–13999 Filed 6–30–23; 8:45 am]

**BILLING CODE 8011–01–P**

[160] 15 U.S.C. 78s(b)(3)(A)(ii).

[161] 17 CFR 240.19b–4(f)(2).

[162] 17 CFR 200.30–3(a)(12).

# Reader Aids

**Federal Register**

Vol. 88, No. 126

Monday, July 3, 2023

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## FEDERAL REGISTER PAGES AND DATE, JULY

42587–42868..... 3

## CFR PARTS AFFECTED DURING JULY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

**10 CFR**

72.....42587

**Proposed Rules:**

35.....42654

**13 CFR**

128.....42592

134.....42592

**14 CFR**

39 (8 documents).....42593, 42598, 42600, 42602, 42604, 42606, 42609, 42611

71.....42614

**Proposed Rules:**

71.....42659

**15 CFR**

713.....42615

**33 CFR**

165 (2 documents).....42619

**40 CFR**

52 (2 documents).....42621, 42640

**42 CFR**

1003.....42820

1005.....42820

**50 CFR**

17.....42642

660.....42652

**Proposed Rules:**

17.....42661

## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at *https://www.archives.gov/federal-register/laws/current.html*.

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**S. 467/P.L. 118–7**
Changing Age-Determined Eligibility To Student Incentive Payments Act (June 30, 2023; 137 Stat. 52)

**Last List June 16, 2023**

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When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

| DATE OF FR PUBLICATION | 15 DAYS AFTER PUBLICATION | 21 DAYS AFTER PUBLICATION | 30 DAYS AFTER PUBLICATION | 35 DAYS AFTER PUBLICATION | 45 DAYS AFTER PUBLICATION | 60 DAYS AFTER PUBLICATION | 90 DAYS AFTER PUBLICATION |
|---|---|---|---|---|---|---|---|
| July 3 | Jul 18 | Jul 24 | Aug 2 | Aug 7 | Aug 17 | Sep 1 | Oct 2 |
| July 5 | Jul 20 | Jul 26 | Aug 4 | Aug 9 | Aug 21 | Sep 5 | Oct 3 |
| July 6 | Jul 21 | Jul 27 | Aug 7 | Aug 10 | Aug 21 | Sep 5 | Oct 4 |
| July 7 | Jul 24 | Jul 28 | Aug 7 | Aug 11 | Aug 21 | Sep 5 | Oct 5 |
| July 10 | Jul 25 | Jul 31 | Aug 9 | Aug 14 | Aug 24 | Sep 8 | Oct 10 |
| July 11 | Jul 26 | Aug 1 | Aug 10 | Aug 15 | Aug 25 | Sep 11 | Oct 10 |
| July 12 | Jul 27 | Aug 2 | Aug 11 | Aug 16 | Aug 28 | Sep 11 | Oct 10 |
| July 13 | Jul 28 | Aug 3 | Aug 14 | Aug 17 | Aug 28 | Sep 11 | Oct 11 |
| July 14 | Jul 31 | Aug 4 | Aug 14 | Aug 18 | Aug 28 | Sep 12 | Oct 12 |
| July 17 | Aug 1 | Aug 7 | Aug 16 | Aug 21 | Aug 31 | Sep 15 | Oct 16 |
| July 18 | Aug 2 | Aug 8 | Aug 17 | Aug 22 | Sep 1 | Sep 18 | Oct 16 |
| July 19 | Aug 3 | Aug 9 | Aug 18 | Aug 23 | Sep 5 | Sep 18 | Oct 17 |
| July 20 | Aug 4 | Aug 10 | Aug 21 | Aug 24 | Sep 5 | Sep 18 | Oct 18 |
| July 21 | Aug 7 | Aug 11 | Aug 21 | Aug 25 | Sep 5 | Sep 19 | Oct 19 |
| July 24 | Aug 8 | Aug 14 | Aug 23 | Aug 28 | Sep 7 | Sep 22 | Oct 23 |
| July 25 | Aug 9 | Aug 15 | Aug 24 | Aug 29 | Sep 8 | Sep 25 | Oct 23 |
| July 26 | Aug 10 | Aug 16 | Aug 25 | Aug 30 | Sep 11 | Sep 25 | Oct 24 |
| July 27 | Aug 11 | Aug 17 | Aug 28 | Aug 31 | Sep 11 | Sep 25 | Oct 25 |
| July 28 | Aug 14 | Aug 18 | Aug 28 | Sep 1 | Sep 11 | Sep 26 | Oct 26 |
| July 31 | Aug 15 | Aug 21 | Aug 30 | Sep 5 | Sep 14 | Sep 29 | Oct 30 |