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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 232, 239, 270, and 274

[Release No. 33–11238A; 34–98438A; IC–35000A; File No. S7–16–22]

RIN 3235–AM72

Investment Company Names; Correction

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; correction.

SUMMARY: This document makes a technical correction to the preamble accompanying amendments to the rule under the Investment Company Act of 1940 that addresses certain broad categories of investment company names that are likely to mislead investors about an investment company's investments and risks, as adopted in Release No. IC–35000 (September 20, 2023), which was published in the **Federal Register** on October 11, 2023.

DATES: Effective December 11, 2023.

FOR FURTHER INFORMATION CONTACT: Mykaila DeLesDernier, Senior Counsel; Amanda Wagner, Senior Special Counsel; or Brian McLaughlin Johnson, Assistant Director, at (202) 551–6792, Investment Company Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: We are making a technical amendment to correct the preamble to Release No. IC–35000. Specifically, in FR doc. 2023–20793, which was published in the **Federal Register** on October 11, 2023, at 88 FR 70436, the following corrections are made:

1. On page 70476, in the second column, revising the first sentence of the first full paragraph to read as follows: ''The compliance date for the final amendments is December 11, 2025, for larger entities, and June 11, 2026, for smaller entities.'' [434]

2. On page 70493, in the first column, first full paragraph, revising the second to last sentence of that paragraph to read as follows: ''The compliance periods for the rules mentioned by commenters, the Shareholder Reports Final Rule and the Money Market Funds Final Rule,[598] culminate in approximately July–October 2024 while the compliance dates for the final rule are December 11, 2025, for larger entities, and June 11, 2026, for smaller entities.''

Dated: October 24, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–23778 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

22 CFR Part 171

[Public Notice 12246]

RIN 1400–AE00

Public Access to Information; Correction

AGENCY: Department of State.

ACTION: Final rule; correction.

SUMMARY: The Department of State (the Department) is correcting a final rule that appeared in the **Federal Register** on October 18, 2023. The document contained several formatting errors in one of the sections, which could cause confusion when the rule goes into effect on November 17, 2023.

DATES: Effective on November 17, 2023.

FOR FURTHER INFORMATION CONTACT: Alice Kottmyer, Office of the Legal Adviser, *kottmyeram@state.gov,* 202–647–2199.

SUPPLEMENTARY INFORMATION: Effective November 17, 2023, in FR Doc. 2023–22380 in 88 FR 71740 in the **Federal Register** of Wednesday, October 18, 2023, the following corrections are made:

■ 1. On page 71745, beginning in the third column, in § 171.16, paragraph (a) is corrected to read as follows:

§ 171.16 Fees to be charged

(a) *In general.* The Department will charge fees for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: commercial use requesters, non-commercial scientific or educational institutions or news media requesters, and all other requesters.

* * * * *

■ 2. On page 71746, in § 171.16 in paragraph (b), beginning in the first column, remove the definition of ''Charging fees''.

■ 3. On page 71746, in § 171.16 in paragraph (b), in the second column, in the definition of ''Non-commercial scientific institution,'' remove the words ''paragraph (b)(1) of''.

■ 4. On page 71746, in § 171.16 in paragraph (b), in the third column, after the definition of ''Search'', remove paragraphs (i) through (iii) and add paragraphs (c) introductory text and (c)(1) to read as follows:

§ 171.16 Fees to be charged

* * * * *

(c) *Charging fees.* In responding to FOIA requests, the Department will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (j) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, the Department should not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, non-commercial scientific institutions, or representatives of the news media are not subject to search fees. Search fees shall be charged for all other requesters, subject to the restrictions of paragraph (j) of this section. The Department may properly charge for time spent searching even if responsive records are not located, or if records are determined to be entirely exempt from disclosure.

(ii) For each hour spent by personnel searching for requested records, the fees shall be as stated at the following website: *foia.state.gov/Request/Guide.aspx* (section VII, ''Fees'') and *www.stateoig.gov/foiafees* for OIG requested records.

(iii) For requests that require the retrieval of records stored by the Department at a Federal records center operated by the National Archives and Records Administration (NARA), the

Department will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

* * * * *

Kevin E. Bryant,

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

[FR Doc. 2023–23501 Filed 10–26–23; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0818]

RIN 1625–AA00

Safety Zone; Vessel Launch, San Diego Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters in the vicinity of General Dynamics NASSCO shipyard in San Diego Bay, San Diego, CA, during the launch of the USNS Robert Kennedy. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards associated with the launching and subsequent berthing of the USNS Robert Kennedy. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Sector San Diego.

DATES: This rule is effective from 7:30 a.m. on October 28, 2023, through 10:30 a.m. on October 28, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0818 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Lieutenant Junior Grade Shelley Turner, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone 619–278–7656, email *MarineEventsSD@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. It is impracticable to publish an NPRM because we must establish this safety zone by October 28, 2023, to ensure the safety of response personnel and mariners associated with the launching of the USNS Robert Kennedy.

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 this rule is needed to protect mariners, commercial and recreational waterway users, and the USNS Robert Kennedy from dangers associated with the launching and berthing of the USNS Robert Kennedy on October 28, 2023.

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 San Diego (COTP) has determined that potential hazards associated with launching of the USNS Robert Kennedy on October 28, 2023, will be a safety concern for anyone in the vicinity of the General Dynamics NASSCO shipyard, San Diego Bay, San Diego, CA. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the USNS Robert Kennedy is being launched.

IV. Discussion of the Rule

This rule establishes a safety zone from 7:30 a.m. until 10:30 a.m. on October 28, 2023. The safety zone will be in the vicinity of General Dynamics NASSCO shipyard in San Diego Bay, San Diego, CA. The safety zone will cover all navigable waters, from surface to sea bottom, of the San Diego Bay, CA, created by connecting the following points: beginning at 32°41.39′ N, 117°08.66′ W (Point A); thence running southwesterly to 32°41.24′ N, 117°09.05′ W (Point B); thence running southeasterly to 32°41.05′ N, 117°08.73′ W (Point C); thence running northeasterly to 32°41.20′ N, 117°08.34′ W (Point D); thence running northwesterly to the beginning point. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the USNS Robert Kennedy is being launched. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

To seek permission to enter, hail Coast Guard Sector San Diego on VHF–FM Channel 16 or call the 24-hour Command Center at (619) 278–7000. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative. *A designated representative* means a Coast Guard coxswain or petty officer designated by or assisting the Captain of the Port Sector San Diego (COTP) in the enforcement of the safety zone.

The COTP or a designated representative will inform the public through Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate for the enforcement times and dates for the safety zone.

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 section 3(f) of 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 limited duration of the safety zone. This safety zone impacts a small, designated area of the San Diego Bay for a very

limited period during the weekend when vessel traffic is normally low. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek 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 safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting three hours that will prohibit entry within certain navigable waters of San Diego Bay, San Diego, CA in the vicinity of the General Dynamics NASSCO shipyard. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T11–136 to read as follows:

§ 165.T11–136 Safety Zone; Vessel Launch, San Diego Bay, San Diego, CA.

(a) *Location.* The following area is a safety zone: All waters of San Diego Bay, from surface to bottom, encompassed by a line connecting the following points beginning at 32°41.39′ N, 117°08.66′ W (Point A); thence running southwesterly to 32°41.24′ N, 117°09.05′ W (Point B); thence running southeasterly to 32°41.05′ N, 117°08.73′ W (Point C); thence running northeasterly to 32°41.20′ N, 117°08.34′ W (Point D); thence running northwesterly to the beginning point.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector San Diego (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's

representative by VHF Channel 16. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

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

Dated: October 24, 2023.

J.W. Spitler,

Captain, U.S. Coast Guard, Captain of the Port Sector San Diego.

[FR Doc. 2023–23865 Filed 10–26–23; 8:45 am]

BILLING CODE 9110–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MB Docket No. 11–43; FCC 23–82; FR ID 181039]

Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) expands its audio description requirements by phasing them in for an additional 10 designated market areas (DMAs) each year until all DMAs are included. This action is based on a finding that the costs of expanding the audio description regulations to DMAs 101 through 210 are reasonable for program owners, providers, and distributors.

DATES: Effective November 27, 2023.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Diana Sokolow, *Diana.Sokolow@fcc.gov,* of the Policy Division, Media Bureau, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Report and Order, FCC 23–82, adopted and released on October 17, 2023. The full test of this document will be available at *https://docs.fcc.gov/public/attachments/FCC-23-82A1.pdf* and via ECFS at *https://www.fcc.gov/ecfs/.* Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), 1–844–4–FCC–ASL (1–844–432–2275) (videophone).

Synopsis

1. In this Second Report and Order (Order), we expand our audio description requirements by phasing them in for an additional 10 designated market areas (DMAs) each year until all DMAs are included. Such an expansion will help ensure that a greater number of individuals who are blind or visually impaired can be connected, informed, and entertained by television programming. Consistent with the requirements of the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), we find that the costs of expanding the audio description regulations to DMAs 101 through 210 are reasonable for program owners, providers, and distributors. No commenters oppose this action.

2. Audio description makes video programming [1] more accessible to individuals who are blind or visually impaired through ''[t]he insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.'' [2] To access audio description, consumers generally switch from the main program audio to the secondary audio stream on which audio description is typically provided. In 2011, pursuant to section 202 of the CVAA, the Commission adopted rules requiring certain television broadcast stations and multichannel video programming distributors (MVPDs) to provide audio description for a portion of the video programming that they offer to consumers. The current audio description rules require certain commercial television broadcast stations to provide 50 hours of audio-described programming per calendar quarter during prime time or on children's programming, as well as an additional 37.5 hours of audio-described programming per calendar quarter at any time between 6 a.m. and 11:59 p.m.[3] The commercial television broadcast stations that are subject to this requirement are those that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC) and are located in the top television markets.[4]

3. The *2011 Audio Description Order* applied the audio description requirements to certain television broadcast stations in DMAs 1 through 60.[5] Pursuant to the requirements of the CVAA, the Commission submitted a report to Congress (the Second Report) to assess, among other topics, ''the potential costs to program owners, providers, and distributors in [DMAs] outside of the top 60 of creating [audio-described] programming'' and ''the need for additional described programming in [DMAs] outside the top 60.'' [6] The Media Bureau submitted the Second Report to Congress in October 2019, describing the consumer desire for application of the audio description rules outside the top 60 DMAs but stating that commenters did not offer ''detailed or conclusive information'' as to the costs of such an expansion or a station's ability to bear those costs. It thus deferred issuing a determination

[1] ''Video programming'' refers to programming provided by, or generally considered comparable to programming provided by, a television broadcast station but does not include consumer-generated media.

[2] 47 CFR 79.3(a)(3).

[3] 47 CFR 79.3(b)(1). The rules also require ''[t]elevision broadcast stations that are affiliated or otherwise associated with any television network [to] pass through audio description when the network provides audio description and the broadcast station has the technical capability necessary to pass through the audio description, unless it is using the technology used to provide audio description for another purpose related to the programming that would conflict with providing the audio description.'' *Id.* 79.3(b)(3). In addition, MVPD systems that serve 50,000 or more subscribers must provide 50 hours of audio description per calendar quarter during prime time or on children's programming, as well as an additional 37.5 hours of audio description per calendar quarter at any time between 6 a.m. and 11:59 p.m., on each of the top five national nonbroadcast networks that they carry on those systems. *Id.* 79.3(b)(4). The rules also require MVPD systems of any size to pass through audio description provided by a broadcast station or nonbroadcast network, if the channel on which the MVPD distributes the station or programming has the technical capability necessary to do so and if that technology is not being used for another purpose related to the programming. *Id.* 79.3(b)(5)(i)–(ii).

[4] *Id.* 79.3(b)(1).

[5] *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010,* 76 FR 55585, para. 16 (Sept. 8, 2011) (''The rules extend the requirement . . . to major network affiliates in the 60 largest markets beginning on July 1, 2015.'') (*2011 Audio Description Order*).

[6] 47 U.S.C. 613(f)(4)(C)(iii)(IV), (VII). In the *2020 Audio Description Order,* the Commission modernized the terminology in its rules by replacing the term ''video description'' with the ''more common and widely understood'' term ''audio description.'' *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010,* 85 FR 76480, paras. 14–15 (Nov. 30, 2020) (*2020 Audio Description Order*). When discussing items that use the prior terminology, we have updated the terminology accordingly.

regarding whether any costs associated with the expansion would be reasonable, explaining that, ''[s]hould the Commission seek to expand the [audio] description requirements to DMAs outside the top 60, it will need to utilize the information contained in this Second Report, and any further information available to it at the time, to determine that 'the costs of implementing the [audio] description regulations to program owners, providers, and distributors in those additional markets are reasonable.' '' [7]

4. The CVAA provides the Commission with authority ''to phase in the [audio] description regulations for up to an additional 10 [DMAs] each year,'' ''based upon the findings, conclusions, and recommendations contained in the [Second Report],'' ''(I) if the costs of implementing the [audio] description regulations to program owners, providers, and distributors in those additional markets are reasonable, as determined by the Commission; and (II) except that the Commission may grant waivers to entities in specific [DMAs] where it deems appropriate.'' [8] Exercising this authority, the Commission adopted a phased expansion of the audio description rules, finding that the costs of the expansion to DMAs 61 through 100 are reasonable for program owners, providers, and distributors.[9] The audio description requirements extended to DMAs 61 through 70 on January 1, 2021, to DMAs 71 through 80 on January 1, 2022, and to DMAs 81 through 90 on January 1, 2023. The requirements will extend to DMAs 91 through 100 on January 1, 2024. Thus far, the timetable for the phased expansion has been successful, with no requests for relief under either the rule governing exemptions due to economic burden or the more general waiver rule.

5. The *2020 Audio Description Order* also indicated that the Commission would consider in 2023 whether to continue expanding the audio description requirements to an additional 10 DMAs per year, after assessing the reasonableness of the associated costs. The Commission explained that deferring a determination on the application of the audio description rules beyond DMA 100 ''will best enable us to consider the unique circumstances that may be applicable'' to the smallest markets, and provides ''the additional benefit of . . . any additional information gleaned from [the] practical experience'' of expansion beyond DMA 60. To foster this determination, in March 2023 the Commission proposed to continue expanding the audio description requirements through a phased schedule applicable to DMAs 101 through 210.[10] The *2023 Audio Description FNPRM* elicited four comments and two replies, all of which supported the Commission's proposal.

6. We adopt the proposal contained in the *2023 Audio Description FNPRM* to continue phasing in the audio description requirements for an additional 10 DMAs each year until all 210 DMAs are covered. Commenters unanimously support the expansion of the Commission's audio description rules to all remaining DMAs. As stated above, the CVAA provides the Commission with authority for this phase-in, ''based upon the findings, conclusions, and recommendations contained in the [Second Report],'' ''(I) if the costs of implementing the [audio] description regulations to program owners, providers, and distributors in those additional markets are reasonable, as determined by the Commission; and (II) except that the Commission may grant waivers to entities in specific [DMAs] where it deems appropriate.'' [11]

7. The record demonstrates that the costs of implementing the audio description regulations in markets 101 through 210 are reasonable. Commenters did not specify the current costs of adding description to television programming. However, the Commission previously found that such costs held steady between 2017 and 2019, indicating that they were at a level the Commission previously deemed ''minimal,'' and no commenter reported that costs have increased or objected to the proposal on the basis that it would impose an unreasonable cost. We expect that the costs of extending the audio description requirements to all remaining market areas should be minimal. This is because covered broadcasters already are required to have the equipment and infrastructure necessary to deliver a secondary audio stream for purposes of the emergency information requirements, without exception for technical capability or market size. Further, network affiliates in all DMAs are already required to pass through the audio description they receive via a network feed, which will mitigate any costs associated with the rule expansion.[12] For all of these reasons, we conclude that the costs of expanding the audio description regulations to DMAs 101 through 210 are reasonable. To the extent a broadcaster finds itself in an unusual situation that makes the costs of compliance unreasonable, it may avail itself of the exemption procedures discussed below.[13] However, based on our expertise and the record compiled in this proceeding, we expect such instances to be exceedingly rare.

8. The significant benefits of expanding the audio description requirements to DMAs 101 through 210, when weighed against the minimal costs, further support expansion to these markets. The Second Report indicated that consumers desired an expansion of the audio description requirements outside the top 60 DMAs, and we believe that consumers will benefit from an expansion even in the smallest DMAs. In fact, there may be even greater benefits to applying the audio description rules to smaller DMAs, given American Foundation for the Blind's (AFB) assertion that ''there is evidence that less urbanized communities experience higher rates of disability, including blindness.'' AFB explains that the expansion should also benefit video programming providers, whose programming and advertising

[7] Second Report (*quoting* 47 U.S.C. 613(f)(4)(C)(iv)(I)).

[8] 47 U.S.C. 613(f)(4)(C)(iv).

[9] The Commission's audio description rules define a ''video programming distributor'' as ''[a]ny television broadcast station licensed by the Commission and any [MVPD], and any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.'' 47 CFR 79.3(a)(5). The rules also define a ''video programming provider'' as ''[a]ny video programming distributor and any other entity that provides video programming that is intended for distribution to residential households including, but not limited to, broadcast or nonbroadcast television networks and the owners of such programming.'' *Id.* 79.3(a)(2). The Commission's audio description rules do not separately define the term ''owner.''

[10] *Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010,* 88 FR 18505 (Mar. 29, 2023) (*2023 Audio Description FNPRM*).

[11] 47 U.S.C. 613(f)(4)(C)(iv).

[12] In addition, as stated in the *2020 Audio Description Order,* the Media Bureau's first report to Congress on audio description ''concluded that the costs of complying with the audio description requirements were consistent with industry's expectations at the time the rules were adopted and had not impeded industry's ability to comply, and the record for the Second Report did not alter that conclusion.''

[13] As with the 2020 expansion, comments on the *2023 Audio Description FNPRM* did not provide detailed analysis of the current costs of audio description, or the costs that entities in the additional DMAs might face as a result of the proposed expansion. Nonetheless, as explained herein, we believe that like 2020, the current record provides sufficient information to determine, as required under the CVAA, that the costs of implementing the audio description regulations to program owners, providers, and distributors in the additional markets are ''reasonable.'' We note that commenters did not provide any information that undermines our conclusion regarding the reasonableness of costs.

will reach additional consumers. When the Commission previously expanded the audio description requirements to DMAs 61 through 100, the record indicated there would also be benefits for consumers who are not blind or visually impaired, such as consumers with other sensory or cognitive impairments, individuals learning the language, and those who listen to video programming while multitasking. We believe the same would be true with regard to expanding to DMAs 101 through 210. Although commenters did not provide specific data on the amount of audio-described programming currently available in DMAs 101 through 210—including comparing that data to the amount that would be available if the Commission were to expand the audio description requirements to such DMAs—it is clear that expanding the audio description requirements to these additional markets will benefit a significant number of consumers.

9. We adopt the proposal in *2023 Audio Description FNPRM* to continue the phase-in with DMAs 101 through 110 on January 1, 2025, extending to 10 additional DMAs per year until the phase-in concludes with DMAs 201 through 210 on January 1, 2035, consistent with the expansion allowable under the CVAA.[14] The Commission sought comment on whether it should consider phasing in the audio description requirements to a smaller subset of DMAs, or to a smaller number of DMAs per year. ACB explains that adopting an even slower expansion ''would increase the equity gap experienced by residents of smaller communities, which are often rural and/or at an economic disadvantage.'' The record does not contain any support for a slower phase-in, and thus we adopt the proposed timeline contained in the *2023 Audio Description FNPRM,* which we expect will provide covered broadcasters with ample time to comply.

10. We also adopt the proposal contained in the *2023 Audio Description FNPRM* to base the extension to additional DMAs on an updated Nielsen determination of market rankings. We find that using updated Nielsen data will facilitate the efficient roll out of audio description obligations to all remaining DMAs, and will be consistent with the Commission's prior expansion of the rules from the top 25 markets to the top 60 markets and from the top 60 markets to the top 100 markets. The audio description rules currently utilize DMA rankings ''as determined by The Nielsen Company as of January 1, 2020.'' [15] The revised rules will utilize DMA rankings ''as determined by The Nielsen Company as of January 1, 2023.'' Under existing rules, the audio description requirements apply to the top 90 DMAs as of January 1, 2023, and they will next extend to DMAs 91 through 100 on January 1, 2024. We note that utilizing updated Nielsen market rankings will affect two DMAs that are in the top 90 DMAs utilizing the Nielsen figures as of January 1, 2020, that will fall within the later deadline for DMAs 91 through 100 utilizing the Nielsen figures as of January 1, 2023.[16] Conversely, there are two DMAs that are within the later deadline for DMAs 91 through 100 utilizing the Nielsen figures as of January 1, 2020, that will fall within the earlier deadline for DMAs 81 through 90 utilizing the Nielsen figures as of January 1, 2023.[17] ACB is the only commenter that addresses application of updated Nielsen figures, and it indicates that it ''feels strongly that regardless of the most recent data, once audio description has been required of a DMA, that mandate should not change, even if the market's ranking does.'' To avoid any consumer confusion, and given that ACB's request is unopposed, we find that stations that are currently subject to the deadline for DMAs 81 through 90 (January 1, 2023), but will become subject to the deadline for DMAs 91 through 100 (January 1, 2024) once the new rule takes effect, must continue complying with the audio description requirements during any gap between the effective date of the new rules and the January 1, 2024 application of the rules to DMAs 91 through 100.[18] In other words, stations that are already subject to the rules should continue their provision of this service, regardless of a change in their DMA status, in order to prevent disruption during the gap period to consumers who have come to rely on audio description. Consistent with the approach in the *2020 Audio Description Order,* we expect stations in a DMA that was not in the top 90 markets as of January 1, 2020, but is in the top 90 markets as of January 1, 2023, to come into compliance with the audio description rules by the compliance deadline for DMAs 91 through 100.[19]

11. Finally, we affirm the tentative conclusion in the *2023 Audio Description FNPRM* that ''sections 79.3(d) and 1.3 provide a sufficient mechanism for entities seeking relief from any expansion of the audio description rules to additional DMAs.'' ACA Connects—America's Communications Association states that its support for the proposed expansion of the audio description requirements is conditioned upon the Commission adopting its proposals regarding exemption petitions and waivers. According to ACA Connects, ''the costs of compliance with the audio description rules may be most difficult to absorb by small MVPDs and/or MVPDs operating in the smallest market areas,'' and thus, such entities may need relief in the form of either an exemption due to economic burden or a waiver for a different reason.[20] We find that the

[14] The CVAA does not permit the Commission to expand the audio description requirements to more than an additional 10 DMAs per year. We recognize, however, American Council of the Blind (ACB) and AFB's assertions that to the extent broadcasters voluntarily pass through audio description at an earlier date, doing so would benefit consumers. The National Association of Broadcasters (NAB) has responded that it ''will heed the disability community's requests to encourage television stations in markets outside the top 100 DMAs to implement audio description earlier than the FCC may require in accordance with the CVAA.'' Accordingly, while we adopt the phase-in schedule as proposed and consistent with the CVAA, we encourage television stations in markets outside the top 100 DMAs to implement audio description earlier to the extent they are able to do so.

[15] 47 CFR 79.3(b)(1).

[16] The two DMAs are (1) Paducah-Cape Girardeau-Harrisburg (moved from DMA 84 to DMA 92) and (2) Cedar Rapids-Waterloo-Iowa City and Dubuque (moved from DMA 90 to DMA 93).

[17] The two DMAs are (1) Chattanooga (moved from DMA 92 to DMA 84) and (2) Charleston, SC (moved from DMA 91 to DMA 88).

[18] We find that this approach is necessary here, whereas it was not utilized in the *2020 Audio Description Order,* because of the earlier timing of the adoption of this Order (October 17, 2023 as compared to October 27, 2020), pursuant to which there may be a slightly longer time period between the effective date of the new rules and the next compliance deadline of January 1, 2024.

[19] We note that this January 1, 2024 compliance deadline is the date on which such stations already would have expected to become subject to the requirements, had we not adopted the use of updated Nielsen figures, so there should be no difficulty with complying.

[20] While today we expand the number of broadcasters subject to the audio description requirements, we recognize that our action also impacts MVPDs, given that MVPDs of any size ''[m]ust pass through audio description on each broadcast station they carry, when the broadcast station provides audio description, and the channel on which the MVPD distributes the programming of the broadcast station has the technical capability necessary to pass through the audio description, unless it is using the technology used to provide audio description for another purpose related to the programming that would conflict with providing the audio description.'' 47 CFR 79.3(b)(5)(i). We find that the costs of the expansion for impacted MVPDs are reasonable. MVPDs in the expanded markets that serve 50,000 or more subscribers are already subject to the separate audio description requirements that apply directly to MVPDs. We expect that even small MVPDs in small markets already have the capability to provide audio description via a secondary audio stream, because video programming distributors and providers

existing exemption and waiver procedures will be sufficient to address this concern. Specifically, section 79.3 of the Commission's rules governs petitions for exemption due to economic burden, and section 1.3 governs waivers of the Commission's rules generally. Under section 79.3(d), a video programming provider [21] may petition the Commission for a full or partial exemption from the audio description requirements upon a showing that they are economically burdensome.[22] The CVAA provides that if an expansion of the audio description rules to additional DMAs occurs, ''the Commission may grant waivers to entities in specific [DMAs] where it deems appropriate.'' [23] While section 79.3(d) applies to instances in which an entity seeks to demonstrate that the extension to additional DMAs is economically burdensome, the CVAA specifically references waivers as a means of relief, which differs from the exemptions available under section 79.3(d). Hence, if an entity impacted by the extension believes it needs relief for some reason other than economic burden, it may seek a waiver under section 1.3.[24]

12. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to the Second Report and Order. In summary, the Second Report and Order expands the audio description requirements by phasing them in for an additional 10 designated market areas (DMAs) each year until all DMAs are included. The action is authorized pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and section 713 of the Communications Act of 1934, as amended, 47 U.S.C. 613. The types of small entities that may be affected by the action fall within the following categories: Television Broadcasting, Wired Telecommunications Carriers, Cable and Other Subscription Programming, Cable Companies and Systems (Rate Regulation), Cable System Operators (Telecom Act Standard), and Direct Broadcast Satellite (DBS) Service.

13. The projected reporting, recordkeeping, and other compliance requirements include phasing in the audio description requirements for an additional 10 DMAs each year, beginning with DMAs 101 through 110 on January 1, 2025 and continuing until all 210 DMAs are covered, which will be on January 1, 2035. The substance of the audio description requirements will not change, but rather, this will be an expansion of the DMAs in which broadcast television stations in those additional markets are required to comply with the requirements. The extension to additional DMAs will be based on an updated Nielsen determination, with the revised rules applying to the relevant DMAs as determined by the Nielsen company as of January 1, 2023. There are two DMAs that are in the top 90 DMAs utilizing the Nielsen figures as of January 1, 2020, that will fall within the later deadline for DMAs 91 through 100 utilizing the Nielsen figures as of January 1, 2023.[25] To avoid any consumer confusion, stations in those DMAs must continue complying with the audio description requirements during any gap between the effective date of the new rules and the January 1, 2024 application of the rules to DMAs 91 through 100.

14. The Chief Counsel for Advocacy of the Small Business Administration (SBA) did not file any comments in response to the proposed rules in this proceeding.

15. The Commission considered alternatives and adopted certain proposals that will minimize the impact of the rules on small entities. First, by continuing the phase-in by extending the requirements to an additional 10 DMAs per year, the Commission will ensure that the smallest DMAs have the longest timeframe for compliance. In the *2023 Audio Description FNPRM,* the Commission sought comment on whether it should phase in a smaller subset of DMAs, and whether the Commission should consider expanding to a smaller number of DMAs each year, such as five. While either such alternate approach could have mitigated the costs of the expansion, no commenter supports the alternate approaches, and one commenter expresses concern that a slower expansion would increase the equity gap that exists in smaller communities. Second, to the extent any entity in DMAs 101 through 210 finds that it is unable to comply with the expansion due to economic burden, it may file a petition for an exemption due to economic burden in accordance with section 79.3(d). Stations and MVPDs, including small entities, that need relief for some reason other than an economic burden may also request a waiver under section 1.3. We conclude that sections 79.3(d) and 1.3 provide a sufficient mechanism for entities, including smaller entities, seeking relief from the expansion of the audio description rules to additional DMAs.

16. *Paperwork Reduction Act.* The Second Report and Order does not contain new or substantively revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501–3520).[26] In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). This document may contain

already are required to have the equipment and infrastructure necessary to deliver a secondary audio stream for purposes of the emergency information requirements, without exception for technical capability or market size. ACA Connects states that there are ''some practical limitations'' even where the audio description rules already apply, including ''the amount of programming encoded with audio description'' and ''the availability of a secondary audio programming (SAP) channel to carry the audio description.'' ACA Connects acknowledges that MVPDs are making progress in this area ''as they replace legacy equipment and as the industry finds new solutions to facilitate distribution of multiple audio streams.'' In the rare instance that an MVPD in the expanded markets finds that it is unable to comply with the requirements by the time the relevant market is subject to the applicable phased compliance deadline, we agree with ACA Connects that the existing exemption and waiver procedures will suffice.

[21] The term ''video programming provider'' includes MVPDs.

[22] The term ''economically burdensome'' means imposing significant difficulty or expense, and the Commission considers the following factors in determining whether the requirements for audio description would be economically burdensome: (i) the nature and cost of providing audio description of the programming; (ii) the impact on the operation of the video programming provider; (iii) the financial resources of the video programming provider; and (iv) the type of operations of the video programming provider. In addition, the Commission considers any other factors the petitioner deems relevant to the determination and any available alternative that might constitute a reasonable substitute for the audio description requirements, and it evaluates economic burden with regard to the individual outlet. In the First Report, the Bureau stated its belief ''that the ability to seek an exemption on the basis of economic burden should alleviate the potential for undue cost burdens on covered entities, particularly when the rules go into effect for broadcast stations in television markets ranked 26 through 60 in 2015.'' We support this finding.

[23] 47 U.S.C. 613(f)(4)(C)(iv)(II).

[24] We note that commenters raise additional issues that are outside the scope of this Order and thus not addressed here. Such proposals include the availability of customer service agents with knowledge of audio description, the idea of ''encourag[ing] entities to support the success of the expansion by informing viewers of the new availability of audio description and how to access it,'' and a requested increase in the amount of audio-described content. *See* ACB Comments at 3; AFB Comments at 4; Arona Rosegold Reply; *2020 Audio Description Order.*

[25] The two DMAs are (1) Paducah-Cape Girardeau-Harrisburg (moved from DMA 84 to DMA 92) and (2) Cedar Rapids-Waterloo-Iowa City and Dubuque (moved from DMA 90 to DMA 93).

[26] The Commission will file a non-substantive modification to the information collection that contains § 79.3 (OMB 3060–1148), to clarify that the audio description requirements have been extended to DMAs 101 through 210.

non-substantive modifications to approved information collection(s). Any such modifications will be submitted to OMB for review pursuant to OMB's non-substantive modification process.

17. *Ordering Clauses.* Accordingly, *it is ordered* that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Public Law 111–260, 124 Stat. 2751, and the authority contained in Section 713 of the Communications Act of 1934, as amended, 47 U.S.C. 613, this Second Report and Order *is hereby adopted.*

18. *It is further ordered* that part 79 of the Commission's rules, 47 CFR part 79, *is amended* as set forth in the Final Rules below, and such rule amendments shall be effective thirty (30) days after the date of publication in the **Federal Register**. The amendments to part 79 may contain non-substantive modifications to information collection requirements that will be submitted to the Office of Management and Budget for approval.

19. *It is further ordered* that the Commission's Office of the Secretary, Reference Information Center, *shall send* a copy of this Second Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

20. *It is further ordered* that the Commission *shall send* a copy of this Second Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 79

Communications equipment, Television broadcasters.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 79 to read as follows:

PART 79—ACCESSIBILITY OF VIDEO PROGRAMMING

■ 1. The authority citation for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 544a, 613, 617.

■ 2. Amend § 79.3 by revising paragraph (b)(1) to read as follows:

§ 79.3 Audio description of video programming.

* * * * *

(b) * * *

(1) Commercial television broadcast stations that are affiliated with one of the top four commercial television broadcast networks (ABC, CBS, Fox, and NBC), and that are licensed to a community located in the top 90 DMAs, as determined by The Nielsen Company as of January 1, 2023, must provide 50 hours of audio description per calendar quarter, either during prime time or on children's programming, and 37.5 additional hours of audio description per calendar quarter between 6 a.m. and 11:59 p.m. local time, on each programming stream on which they carry one of the top four commercial television broadcast networks. If a previously unaffiliated station in one of these markets becomes affiliated with one of these networks, it must begin compliance with these requirements no later than three months after the affiliation agreement is finalized. On January 1, 2024, and on January 1 each year thereafter until January 1, 2035, the requirements of this paragraph (b)(1) shall extend to the next 10 largest DMAs as determined by The Nielsen Company as of January 1, 2023, as follows: On January 1, 2024, the requirements shall extend to DMAs 91 through 100; on January 1, 2025, the requirements shall extend to DMAs 101 through 110; on January 1, 2026, the requirements shall extend to DMAs 111 through 120; on January 1, 2027, the requirements shall extend to DMAs 121 through 130; on January 1, 2028, the requirements shall extend to DMAs 131 through 140; on January 1, 2029, the requirements shall extend to DMAs 141 through 150; on January 1, 2030, the requirements shall extend to DMAs 151 through 160; on January 1, 2031, the requirements shall extend to DMAs 161 through 170; on January 1, 2032, the requirements shall extend to DMAs 171 through 180; on January 1, 2033, the requirements shall extend to DMAs 181 through 190; on January 1, 2034, the requirements shall extend to DMAs 191 through 200; and on January 1, 2035, the requirements shall extend to DMAs 201 through 210;

* * * * *

[FR Doc. 2023–23760 Filed 10–26–23; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 88, No. 207
Friday, October 27, 2023

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 984

[Doc. No. AMS–SC–23–0030]

Walnuts Grown in California; Decreased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the California Walnut Board (Board) to decrease the assessment rate established for the 2023–2024 and subsequent marketing years. The proposed assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by November 27, 2023 to be assured consideration.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments can be sent to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237. Comments can also be submitted to the Docket Clerk electronically by Email: *MarketingOrderComment@usda.gov* or via the internet at: *https://www.regulations.gov.* Comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments submitted in response to this proposed rule will be included in the record, will be made available to the public, and can be viewed at: *https://www.regulations.gov.* Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

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

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–8085, or Email: *Richard.Lower@usda.gov.*

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Agreement and Order No. 984, both as amended (7 CFR part 984), regulating the handling of walnuts grown in California. Part 984 (referred to as the ''Order'') is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.'' The Board locally administers the Order and is comprised of growers and handlers of California walnuts operating within the area of production, and a public member.

The Agricultural Marketing Service (AMS) is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 supplements and reaffirms Executive Orders 12866 and 13563 and directs agencies to conduct proactive outreach to engage interested and affected parties through a variety of means, such as through field offices, and alternative platforms and media. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Orders 12866, 13563, and 14094 review.

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

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, California walnut handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate would be applicable to all assessable California walnuts for the 2023–2024 marketing year, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the U.S. Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposed rule would decrease the assessment rate for California walnuts handled under the Order from $0.0125 per inshell pound, the rate that was initially established for the 2023–2024 and subsequent marketing years, to $0.011 per inshell pound.

Section 984.68 authorizes the Board, with the approval of AMS, to formulate an annual budget of expenses and collect assessments from handlers to

administer the program. The members of the Board are familiar with the Board's needs and with the costs of goods and services in their local area and are able to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting, and all directly affected persons have an opportunity to participate and provide input.

On September 21, 2021, at the request of the Board, AMS issued a temporary moratorium on the enforcement of the Order's grading and assessment requirements as the Board considered multiple amendments to modify the Federal marketing order for California walnuts through the formal rulemaking process. On April 19 and 20, 2022, AMS held a public hearing on the proposed amendments, including a recommendation by the Board to establish an assessment rate of $0.0125 per inshell pound of walnuts. The Board recommended the assessment rate of $0.0125 per inshell pound to ensure the Board would have the ability to collect assessments to generate funds needed to sustain Board activities and programs moving forward. The Board determined $0.0125 as appropriate given the available data at that time and with the understanding that a rate change may be necessary if updated market data indicates such an adjustment is necessary after the completion of the formal rulemaking. The formal rulemaking was completed when a final rule was published in the **Federal Register** on August 21, 2023 (88 FR 56745), and effective September 20, 2023, an assessment rate of $0.0125 per inshell pound of walnuts was established.

Prior to the publication of the final rule, the Board met on June 9, 2023, and unanimously recommended 2023–2024 marketing year expenditures of $16,811,250 and agreed to amend the 2023–2024 marketing year assessment rate to $0.011 per inshell pound of California walnuts handled. By comparison, the 2022–2023 budgeted expenditures were $5,275,000 and the 2021–2022 budgeted expenditures were $18,892,500.

Assessments are applied uniformly on all handlers, and some of the costs may be passed on to growers. The assessment rate of $0.0125 per inshell pound of walnuts along with non-assessment revenue is sufficient to cover the upcoming marketing year's budgeted expenditures; however, during Board meetings, industry members expressed that the cost of production is greater than grower revenue and that growers are struggling. The Board then deliberated on a rate that would provide a cost relief for handlers while balancing the Board's assessment income with budgeted expenses for the 2023–24 and subsequent marketing years.

The Board ultimately recommended decreasing the assessment rate to $0.011 per inshell pound. The proposed assessment rate of $0.011 per inshell pound is $0.0015 lower than the rate established by the August 21, 2023, final rule, with an effective date of September 20, 2023. The Board believes the decreased assessment rate would balance assessment income with budgeted expenditures and provide some financial relief to walnut growers after industry members expressed concern over the increasing cost of production as outpacing grower revenue, leading to tighter operating margins.

For the past two years, the Board has operated using available financial reserves to meet its expenses. The Board expects to enter the 2023–2024 marketing year with a reserve balance of approximately $10,043,811, which is within the maximum permitted under § 984.69 of the Order of approximately two marketing years' budgeted expenses. The Board projects handler receipts of 700,000 tons (1.4 billion pounds) of assessable California walnuts for the 2023–2024 marketing year, which is the same quantity that was projected for the 2022–2023 marketing year.

The major expenditures recommended by the Board for the 2023–2024 marketing year include $10,588,750 for domestic marketing; $2,472,500 for employee expenses; $1,700,000 for production research; $725,000 for grades and standards activities; $585,000 for industry crop/acreage reporting; $350,000 for office expenses; and $390,000 for other operating expenses. For comparison, there were no Board-authorized expenses for domestic marketing for the 2022–2023 marketing year due to the moratorium. Instead, the Board authorized reserve funding during the 2022–2023 marketing year for budgeted expenses, which included $1,894,000 for employee expenses; $1,700,000 for production research; $725,000 for grades and standard activities; $184,000 for industry crop/acreage reporting; $282,000 for office expenses; and $284,000 for operating expenses.

The Board derived the recommended assessment rate by considering anticipated expenses, the estimated volume of assessable walnuts, and the amount of funds available in the authorized reserve. The expected 700,000 tons (1.4 billion pounds) of California walnuts from the 2023–2024 marketing year crop would generate $15,400,000 in assessment revenue at the proposed assessment rate (1.4 billion pounds multiplied by the $0.011 assessment rate). The remaining $1,411,250 needed to cover budgeted expenditures would come from an approved administrative services agreement with the California Walnut Commission, which shares staff and office expenses with the Board. The income generated from assessments, along with non-assessment revenue, should be sufficient to meet the Board's estimated program expenditures of $16,811,250.

Prior to arriving at this budget and assessment rate recommendation, the Board considered information from various sources, such as the Board's Executive Committee. The Board discussed various alternatives to its recommended action, including maintaining the current assessment rate of $0.0125 per inshell pound of assessable walnuts and decreasing the assessment rate by a different amount. However, the Board determined that the recommended assessment rate would be necessary to effectively achieve the Board's goals of covering budgeted expenses for the 2023–2024 marketing year and maintaining adequate funds in its financial reserve while providing a cost relief to handlers which may be passed on to growers.

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

Although this assessment rate would be in effect for an indefinite period, the Board will continue to meet prior to or during each marketing year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Board meetings are available from the Board or AMS. Board meetings are open to the public and interested persons may express their views at these meetings. AMS would evaluate Board recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Board's 2023–2024 marketing year budget, and those for subsequent marketing years, will be reviewed and, as appropriate, approved by AMS.

Initial Regulatory Flexibility Analysis

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

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

There are approximately 4,500 walnut growers in the production area and 80 handlers subject to regulation under the Order. Small agricultural growers of California walnuts are defined by the Small Business Administration (SBA) as those having annual receipts of less than $3,750,000, and small agricultural service firms are defined as those whose annual receipts are less than $34,000,000 (13 CFR 121.201).

Data from USDA's National Agricultural Statistics Service (NASS), indicate a three-year average value of utilized walnut production of $1.069 billion for the most recent seasons for which data is available (2019–2020 through 2021–2022 marketing years). Dividing that figure by the number of walnut growers (4,400) yields an average annual crop value per grower of approximately $243,045. This figure is well below the SBA small agricultural producer threshold of $3,750,000 in annual sales. Assuming a normal distribution, this provides evidence that a large majority of walnut growers would likely be considered small agricultural producers according to the SBA definition. Additionally, data from NASS's 2017 Agricultural Census show that 86 percent of California farms growing walnuts at the time had walnut sales of less than $1 million.

Based on information from the Board, approximately 70 percent of California's walnut handlers shipped assessable walnuts valued under $34 million during the 2022–2023 marketing year and would, therefore, be considered small handlers according to the SBA definition. In light of the foregoing, it is reasonable to conclude that a substantial majority of both walnut growers and handlers would be considered small business entities according to current SBA definitions.

This proposed rule would decrease the assessment rate collected from handlers for the 2023–2024 and subsequent marketing years from $0.0125 to $0.011 per inshell pound of California walnuts. Authority for this action can be found under § 984.68 of the Order. The Board unanimously recommended 2023–2024 marketing year expenditures of $16,811,250 and an assessment rate of $0.011 per inshell pound of California walnuts. The proposed assessment rate of $0.011 is $0.0015 lower than the current rate. The Board expects the industry to handle 700,000 tons (1.4 billion pounds) of California walnuts during the 2023–2024 marketing year. Thus, the $0.011 per inshell pound assessment rate should provide $15,400,000 in assessment income (1.4 billion pounds multiplied by $0.011). The Board also expects to receive $1,411,250 from an administrative services agreement with the California Walnut Commission. Income derived from these sources should be adequate to meet budgeted expenditures for the 2023–2024 marketing year.

The major expenditures recommended by the Board for the 2023–2024 marketing year include $10,588,750 for domestic marketing, $2,472,500 for employee expenses, $1,700,000 for production research, $725,000 for grades and standards activities, $585,000 for industry crop/acreage reporting, $350,000 for office expenses, and $390,000 for other operating expenses. For comparison, there were no Board-authorized expenses for domestic marketing for the 2022–2023 marketing year while assessment collection was temporarily suspended. The other 2022–2023 marketing year budgeted expenses were $1,894,000, $1,700,000, $725,000, $184,000, $282,000, and $284,000 respectively.

The Board recommended decreasing the assessment rate in order to provide relief to California walnut growers while still generating adequate income to cover all of the Board's budgeted expenses for the 2023–2024 marketing year. Prior to arriving at this budget and assessment rate recommendation, the Board considered information from various sources and discussed various alternatives to its recommended action. These include maintaining the current assessment rate of $0.0125 per inshell pound of assessable walnuts and decreasing the assessment rate by a different amount. However, the Board determined that the recommended assessment rate would be necessary to effectively achieve the Board's goals of covering budgeted expenses for the 2023–2024 marketing year and maintaining adequate funds in its financial reserve. This action would maintain the Board's reserve balance at a level that the Board believes is appropriate and is compliant with the provisions of the Order.

Based upon information from NASS, the grower price reported for walnuts in the 2021 crop year was $1,410 per ton ($0.71 per pound). To determine the estimated assessment revenue as a percentage of the total grower revenue, we calculate the assessment rate ($0.011 per inshell pound) divided by the grower price ($0.71 per pound) and multiply that number by 100. Therefore, estimated assessment revenue as a percentage of total grower revenue for the 2023–2024 marketing year would be about 1.5 percent.

This proposed action would decrease the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to growers. However, these costs are expected to be offset by the benefits derived by the operation of the Order.

The Board's meetings are widely publicized throughout the production area. The California walnut industry and all interested persons are invited to attend the meetings and participate in Board deliberations on all issues. Like all Board meetings, the June 9, 2023, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this action on small businesses.

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

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

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide decreased opportunities for citizen

access to Government information and services, and for other purposes.

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

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

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

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

List of Subjects in 7 CFR Part 984

Marketing agreements, Reporting and recordkeeping requirements, Walnuts.

For the reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 984 as follows:

PART 984—WALNUTS GROWN IN CALIFORNIA

■ 1. The authority citation for 7 CFR part 984 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Section 984.347 is revised to read as follows:

§ 984.347 Assessment rate.

On and after September 1, 2023, an assessment rate of $0.011 per inshell pound is established for California walnuts.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–23729 Filed 10–26–23; 8:45 am]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 35

[NRC–2018–0297]

RIN 3150–AK80

Rubidium-82 Generators, Emerging Technologies, and Other Medical Use of Byproduct Material; Extension of Comment Period

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory basis; extension of comment period.

SUMMARY: On July 3, 2023, the U.S. Nuclear Regulatory Commission (NRC) solicited comments on the regulatory basis for the planned rulemaking on ''Rubidium-82 Generators, Emerging Technologies, and Other Medical Use of Byproduct Material.'' The public comment period was originally scheduled to close on October 31, 2023. The NRC has decided to extend the public comment period to allow more time for members of the public to develop and submit their comments.

DATES: The due date of comments requested in the document published on July 3, 2023 (88 FR 42654) is extended. Comments should be filed no later than December 15, 2023. Comments received after this date will be considered, if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *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.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. eastern time, Federal workdays; telephone: 301–415–1677.

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: Andrew Carrera, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–1078, email: *Andrew.Carrera@nrc.gov;* and Maryann Ayoade, Office of Nuclear Material Safety and Safeguards, 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, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *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 1–800–397–4209 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, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

On July 3, 2023, the NRC solicited comments on the regulatory basis for a planned rulemaking on ''Rubidium-82 Generators, Emerging Technologies, and Other Medical Use of Byproduct Material.'' The public comment period was originally scheduled to close on October 31, 2023. By letter dated October 19, 2023 (ADAMS Accession No. ML23292A176), the Mercurie Consulting, LLC; American Association of Physicist in Medicine; American College of Radiology; American Society of Radiation Oncology; and Society of Nuclear Medicine and Medical Imaging requested that the NRC extend the comment period by 45 days. The NRC has decided to grant this request and extend the public comment period on this document until December 15, 2023, to allow more time for members of the public to submit their comments.

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.

Dated: October 23, 2023.

For the Nuclear Regulatory Commission.

Catherine E. Kanatas,

Acting Deputy Director, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023–23701 Filed 10–26–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

[NRC–2023–0171]

Draft Regulatory Guide: Physical Security Event Notifications, Reports, and Records

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft Regulatory Guide (DG), DG–5080, ''Physical Security Event Notifications, Reports, and Records.'' This DG–5080 is a limited-scope proposed Revision 3 of Regulatory Guide (RG) 5.62 of the same name. This DG provides an approach acceptable to the NRC staff for licensees to use for reporting and recording of security events and conditions adverse to security under NRC regulations, ''Physical Protection of Plants and Materials.''

DATES: Submit comments by December 11, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0171. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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

FOR FURTHER INFORMATION CONTACT: Phil Brochman, Office of Nuclear Security and Incident Response, telephone: 301–287–3691; email: *Phil.Brochman@nrc.gov,* or Stanley Gardocki, Office of Nuclear Regulatory Research, telephone: 301–415–1067; email: *Stanley.Gardocki@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–2023–0171 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–2023–0171.
- *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.* DG–5080, ''Physical Security Event Notifications, Reports, and Records,'' and its associated regulatory analysis are available in ADAMS under Accession No. ML23198A191 and ML23200A284, respectively.
- *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 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), 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–2023–0171 in your comment submission.

The NRC cautions you not to include identifying or contact information that

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

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

II. Additional Information

The NRC is issuing for public comment a DG in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The DG, entitled ''Physical Security Event Notifications, Reports, and Records,'' is temporarily identified by its task number, DG–5080.

Proposed Revision 3 to RG 5.62 is being revised on a limited-scope basis to provide additional guidance on physical security event notifications, written follow-up reports, and recordkeeping of security events and other conditions adverse to security. These new and updated requirements are part of the NRC's final rule, entitled ''Enhanced Weapons, Firearms Background Checks, and Security Event Notifications'' (hereafter the Enhanced Weapons rule), that was published in the **Federal Register** on March 14, 2023 (88 FR 15864). These provisions are found in the NRC's regulations under § 73.1200 of title 10 of the *Code of Federal Regulations,* specifically, 10 CFR 73.1205, and 10 CFR 73.1210.

Following the publication of the final rule and RG 5.62, the NRC staff conducted several pre-implementation workshops with licensees. The NRC staff also participated in industry-led forums and symposiums in May and June 2023. In these meetings industry raised questions about RG 5.62 and identified potential inconsistencies and areas where additional clarification would be beneficial to licensees to implement the Enhanced Weapons rule effectively and efficiently. The NRC staff has reviewed the issues raised by industry and agrees that further clarification, revision, and supplementation of the guidance contained in RG 5.62 will be of value. Accordingly, the NRC staff is proposing to conduct limited-scope revisions to RG 5.62 to address these issues, including providing notice and opportunity for public comment on the proposed revisions.

To assist with stakeholder review of the limited scope changes to DG–5080, staff notes the following changes have been proposed:

Section B, ''Discussion'' Topics

- ''Reason for Revision''—updated to reflect rationale for changes to the RG.
- ''Establishment of a Communications Channel with the NRC''—updated to clarify agency requirements for establishing a communications channel with the NRC.

Section C, ''Staff Regulatory Guidance''

- Position 2.1, ''Malevolent Intent Considerations''—added to clarify the use of malevolent intent as a screening consideration for evaluating whether an event is reportable or recordable.
- Position 2.2, ''Credible Bomb Threat Considerations''—added to separately clarify the distinctions in reporting expectations for bomb threats.
- Position 7.1, ''15-Minute Facility Notifications,'' example 4—clarified the location of concern regarding the discovery of unauthorized explosives or incendiary materials that would trigger a 15-minute event notification.
- Position 8.1, ''1-Hour Facility Notifications,'' example 8—clarified a licensee's potential use of malevolent intent as a screening factor for determining reportability under this event. Also, clarified threshold for theft or diversion event notification.
- Position 9.1, ''4-Hour Facility Notifications,'' example 3, paragraph 3 and Note—clarified how the term ''time of discovery'' applies to the timeliness requirements in reporting under this event.
- Position 9.1, ''4-Hour Facility Notification,'' example 3, paragraph 5—addressed potential duplications of notifications under this event.
- Position 18.2, ''Recordable Events and Conditions Regarding Decreases in Effectiveness,'' example 6—addition of controlled access area to existing example.
- Position 18.2, ''Recordable Events and Conditions Regarding Decreases in Effectiveness,'' example 9—added example regarding the actual or attempted introduction of contraband where a licensee assessed that no malevolent intent was present.

The staff is also issuing for public comment a regulatory analysis (ADAMS Accession No. ML23200A284). The staff developed a regulatory analysis to assess the value of issuing or revising an RG, as well as alternative courses of action.

As noted in the **Federal Register** on December 9, 2022 (87 FR 75671), this document is being published in the ''Proposed Rules'' section of the **Federal Register** to comply with publication requirements under 1 CFR chapter I.

III. Backfitting, Forward Fitting, and Issue Finality

Issuance of DG–5080 as a final RG would not constitute backfitting as that term is defined in 10 CFR 50.109, ''Backfitting,'' 10 CFR 70.76, ''Backfitting,'' or 10 CFR 72.62, ''Backfitting''; and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests,'' to affect the issue finality of an approval issued under 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants;'' or constitutes forward fitting as that term is defined and described in MD 8.4 because reporting requirements are not included within the scope of the NRC's backfitting or issue finality rules or forward fitting policy.

IV. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC's public website at *https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html.* Suggestions will be considered in future updates and enhancements to the ''Regulatory Guide'' series.

Dated: October 24, 2023.

For the Nuclear Regulatory Commission

Stephen M. Wyman,

Acting Chief, Regulatory Guide and Programs Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2023–23794 Filed 10–26–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

[NRC–2023–0173]

Draft Regulatory Guide: Suspicious Activity Reports

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft Regulatory Guide (DG), DG–5082, ''Suspicious Activity Reports.'' This DG–5082 is proposed Revision 1 of Regulatory Guide (RG) 5.87 of the same name. This DG provides an approach acceptable to the NRC staff for licensees to use for reporting suspicious activity under NRC regulations, ''Physical Protection of Plants and Materials,'' to local law enforcement, the Federal Bureau of Investigation, the NRC, and the Federal Aviation Administration.

DATES: Submit comments by December 11, 2023. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0173. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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

FOR FURTHER INFORMATION CONTACT: Phil Brochman, Office of Nuclear Security and Incident Response, telephone: 301–287–3691; email: *Phil.Brochman@nrc.gov,* or Stanley Gardocki, Office of Nuclear Regulatory Research, telephone: 301–415–1067; email: *Stanley.Gardocki@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–2023–0173 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–2023–0173.
- *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.* DG–5082, ''Suspicious Activity Reports under 10 CFR part 73,'' and its associated regulatory analysis are available in ADAMS under Accession No. ML23198A151 and ML23200A284, respectively.
- *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 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), 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–2023–0173 in your comment submission.

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

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

II. Additional Information

The NRC is issuing for public comment a DG in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The DG, entitled ''Suspicious Activity Reports Under 10 CFR part 73,'' is temporarily identified by its task number, DG–5082.

Proposed Revision 1 to RG 5.87 is being revised on a limited-scope basis to provide additional guidance on suspicious activity reporting. These new requirements are part of the NRC's final rule, titled ''Enhanced Weapons, Firearms Background Checks, and Security Event Notifications'' (hereafter the Enhanced Weapons rule), that was published in the **Federal Register** on March 14, 2023 (88 FR 15864). These provisions are found in the NRC's regulations under section 73.1215 of title 10 of the *Code of Federal Regulations* (10 CFR).

The NRC has determined that licensees' timely submission of suspicious activity reports to the NRC and to law enforcement is an important part of the U.S. government's efforts to disrupt or dissuade malevolent acts against the nation's critical infrastructure. Despite the increasingly fluid and unpredictable nature of the threat environment, some elements of terrorist tactics, techniques, and procedures remain constant. For example, attack planning and preparation generally proceed through several predictable stages, including intelligence gathering and pre-attack surveillance. Reporting suspicious activities that could be indicative of preoperational surveillance or reconnaissance efforts, challenges to security systems and protocols, or elicitation of non-public information related to security or emergency

response programs, offer law enforcement and security personnel the greatest opportunity to disrupt or dissuade acts of terrorism before they occur. Additionally, licensees' timely submission of suspicious activity reports to the NRC supports one of the agency's primary mission essential functions of threat assessment for licensed facilities, materials, and shipping activities.

Following the publication of the final rule and RG 5.87, the NRC staff conducted several pre-implementation workshops with licensees. The NRC staff also participated in industry-led forums and symposiums in May and June 2023. In these meetings industry raised questions about RG 5.87 and identified potential inconsistencies and areas where additional clarification would be beneficial to licensees to implement the Enhanced Weapons rule effectively and efficiently. The NRC staff has reviewed the issues raised by industry and agrees that further clarification, revision, and supplementation of the guidance contained in RG 5.87 will be of value. Accordingly, the NRC staff is proposing to conduct limited-scope revisions to RG 5.87 to address these issues, including providing notice and opportunity for public comment on the proposed revisions.

To assist with stakeholder review of the limited scope changes to DG–5082, staff notes the following changes have been proposed:

Section B, ''Discussion'' Topics

- ''Reason for Issuance''—updated to clarify rationale for RG changes.
- ''Reporting Timeliness and Order of Precedence,'' item number 4 and Note—updated to clarify Federal Aviation Administration (FAA) facility.
- ''Reporting Timeliness and Order of Precedence,'' paragraphs 2–5—updated to clarify FAA reporting requirements.

Section C, ''Staff Regulatory Guidance''

- Position 5.2, ''Challenges to Licensee's Security Systems and Procedures—Facilities,'' paragraph 3—clarifies exceptions to the reporting requirements.

Appendix A, ''Suspicious Aviation-Related Activities''

- A–2.1, ''Coordination with the FAA, paragraph 2''—modified expectations regarding licensee's ongoing awareness of Notice to Airman advisories.
- A–3, ''Assessing Potentially Suspicious Aviation-Related Activity''—modified the applicable FAA facility to be notified of suspicious aviation-related activity.

The staff is also issuing for public comment a regulatory analysis (ADAMS Accession No. ML23200A284). The staff developed a regulatory analysis to assess the value of issuing or revising an RG as well as alternative courses of action.

As noted in the **Federal Register** on December 9, 2022 (87 FR 75671), this document is being published in the ''Proposed Rules'' section of the **Federal Register** to comply with publication requirements under 1 CFR chapter I.

III. Backfitting, Forward Fitting, and Issue Finality

Issuance of DG–5082 as a final RG would not constitute backfitting as that term is defined in 10 CFR 50.109, ''Backfitting,'' 10 CFR 70.76, ''Backfitting,'' or 10 CFR 72.62, ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests,'' nor does the NRC staff intend to use the guidance to affect the issue finality of an approval under 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' The staff also does not intend to use the guidance to support NRC staff actions in a manner that constitutes forward fitting as that term is defined and described in MD 8.4 because reporting requirements are not included within the scope of the NRC's backfitting or issue finality rules or forward fitting policy.

IV. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC's public website at *https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html.* Suggestions will be considered in future updates and enhancements to the ''Regulatory Guide'' series.

Dated: October 24, 2023.

For the Nuclear Regulatory Commission.

Stephen M. Wyman,

Acting Chief, Regulatory Guide and Programs, Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2023–23796 Filed 10–26–23; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 3, 6, 32

[Docket ID OCC–2023–0008]

RIN 1557–AE78

FEDERAL RESERVE SYSTEM

12 CFR Parts 208, 217, 225, 238, 252

[Docket No. R–1813]

RIN 7100–AG64

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 324

RIN 3064–AF29

Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity; Extension of Comment Period

AGENCY: Office of the Comptroller of the Currency, Treasury; the Board of Governors of the Federal Reserve System; and the Federal Deposit Insurance Corporation.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On September 18, 2023, the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) (collectively, the agencies) published in the **Federal Register** a proposal to substantially revise the capital requirements applicable to large banking organizations and to banking organizations with significant trading activity. The agencies have determined that an extension of the comment period until January 16, 2024, is appropriate.

DATES: Comments must be received by January 16, 2024.

ADDRESSES: Comments should be directed to:

OCC: Commenters are encouraged to submit comments through the Federal eRulemaking Portal. Please use the title ''Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov:*

Go to *https://regulations.gov/.* Enter ''Docket ID OCC–2023–0008'' in the

Search Box and click ''Search.'' Public comments can be submitted via the ''Comment'' box below the displayed document information or by clicking on the document title and then clicking the ''Comment'' box on the top-left side of the screen. For help with submitting effective comments, please click on ''Commenter's Checklist.'' For assistance with the *Regulations.gov* site, please call 1–866–498–2945 (toll free) Monday–Friday, 9 a.m.–5 p.m. ET, or email *regulationshelpdesk@gsa.gov.*

- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2023–0008'' in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this action by the following method:

- *Viewing Comments Electronically—Regulations.gov:*

Go to *https://regulations.gov/.* Enter ''Docket ID OCC–2023–0008'' in the Search Box and click ''Search.'' Click on the ''Dockets'' tab and then the document's title. After clicking the document's title, click the ''Browse All Comments'' tab. Comments can be viewed and filtered by clicking on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Comments Results'' options on the left side of the screen. Supporting materials can be viewed by clicking on the ''Browse Documents'' tab. Click on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Results'' options on the left side of the screen checking the ''Supporting & Related Material'' checkbox. For assistance with the *Regulations.gov* site, please call 1–866–498–2945 (toll free) Monday–Friday, 9 a.m.–5 p.m. ET, or email *regulationshelpdesk@gsa.gov.*

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Board: You may submit comments, identified by Docket No. R–1813, RIN 7100–AG64 by any of the following methods:

Agency website: https://www.federalreserve.gov. Follow the instructions for submitting comments at *https://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

Email: regs.comments@federalreserve.gov. Include the docket number and RIN in the subject line of the message.

Fax: (202) 452–3819 or (202) 452–3102.

Mail: Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

In general, all public comments will be made available on the Board's website at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, and will not be modified to remove confidential, contact or any identifiable information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St. NW, Washington, DC 20551, between 9 a.m. and 5 p.m. during Federal business weekdays.

FDIC: The FDIC encourages interested parties to submit written comments. Please include your name, affiliation, address, email address, and telephone number(s) in your comment. You may submit comments to the FDIC, identified by RIN 3064–AF29 by any of the following methods:

Agency website: https://www.fdic.gov/resources/regulations/federal-register-publications. Follow instructions for submitting comments on the FDIC's website.

Mail: James P. Sheesley, Assistant Executive Secretary, Attention: Comments/Legal OES (RIN 3064–AF29), Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

Hand Delivered/Courier: Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW, building (located on F Street NW) on business days between 7:00 a.m. and 5:00 p.m.

Email: comments@FDIC.gov. Include the RIN 3064–AF29 on the subject line of the message.

Public Inspection: Comments received, including any personal information provided, may be posted without change to *https://www.fdic.gov/resources/regulations/federal-register-publications.* Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this document will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT:

OCC: Venus Fan, Risk Expert, Benjamin Pegg, Analyst, Andrew Tschirhart, Risk Expert, or Diana Wei, Risk Expert, Capital Policy, (202) 649–6370; Carl Kaminski, Assistant Director, Kevin Korzeniewski, Counsel, Rima Kundnani, Counsel, or Daniel Perez, Counsel, Chief Counsel's Office, (202) 649–5490, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Board: Anna Lee Hewko, Associate Director, (202) 530–6260; Brian Chernoff, Manager, (202) 452–2952; Andrew Willis, Manager, (202) 912–4323; Cecily Boggs, Lead Financial Institution Policy Analyst, (202) 530–6209; Marco Migueis, Principal Economist, (202) 452–6447; Diana Iercosan, Principal Economist, (202) 912–4648; Nadya Zeltser, Senior Financial Institution Policy Analyst, (202) 452–3164; Division of Supervision and Regulation; or Jay Schwarz, Assistant General Counsel, (202) 452–2970; Mark Buresh, Special Counsel, (202) 452–5270; Andrew Hartlage, Special Counsel, (202) 452–6483; Gillian Burgess, Senior Counsel, (202) 736–5564; Jonah Kind, Senior Counsel, (202) 452–2045, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For users of TTY–TRS, please call 711 from any telephone, anywhere in the United States.

FDIC: Benedetto Bosco, Chief Capital Policy Section; Bob Charurat, Corporate

Expert; Irina Leonova, Corporate Expert; Andrew Carayiannis, Chief, Policy and Risk Analytics Section; Brian Cox, Chief, Capital Markets Strategies Section; David Riley, Senior Policy Analyst; Michael Maloney, Senior Policy Analyst; Richard Smith, Capital Markets Policy Analyst; Olga Lionakis, Capital Markets Policy Analyst; Kyle McCormick, Senior Policy Analyst; Keith Bergstresser, Senior Policy Analyst, Capital Markets and Accounting Policy Branch, Division of Risk Management Supervision; Catherine Wood, Counsel; Benjamin Klein, Supervisory Counsel; Anjoly David, Attorney, Legal Division; *regulatorycapital@fdic.gov,* (202) 898–6888; Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: On September 18, 2023, the agencies published in the **Federal Register** a proposal to substantially revise the capital requirements applicable to large banking organizations and to banking organizations with significant trading activity.[1] The notice of proposed rulemaking stated that the comment period would close on November 30, 2023. The agencies have received requests to extend the comment period. An extension of the comment period will provide additional opportunity for the public to consider the proposal and prepare comments, including to address the questions posed by the agencies. Therefore, the agencies are extending the end of the comment period for the proposal from November 30, 2023, to January 16, 2024.

Michael J. Hsu,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority.

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on October 19, 2023.

Debra A. Decker,

Executive Secretary.

[FR Doc. 2023–23671 Filed 10–26–23; 8:45 am]

BILLING CODE 6210–01–P; 4810–33–P; 6714–01–P

[1] 88 FR 64028 (September 18, 2023).

FEDERAL RESERVE SYSTEM

12 CFR Part 217

[Regulation Q; Docket No. R–1814]

RIN 7100–AG65

Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies; Systemic Risk Report (FR Y–15); Extension of Comment Period

AGENCY: The Board of Governors of the Federal Reserve System.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On September 1, 2023, the Board of Governors of the Federal Reserve System (Board) published in the **Federal Register** a proposal to amend the Board's rule that identifies and establishes risk-based capital surcharges for global systemically important bank holding companies. The Board has determined that an extension of the comment period until January 16, 2024, is appropriate.

DATES: Comments must be received by January 16, 2024.

ADDRESSES: You may submit comments, identified by Docket No. R–1814, RIN 7100–AG65 by any of the following methods:

Agency website: https://www.federalreserve.gov. Follow the instructions for submitting comments at *https://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

Email: regs.comments@federalreserve.gov. Include the docket number and RIN in the subject line of the message.

Fax: (202) 452–3819 or (202) 452–3102.

Mail: Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

In general, all public comments will be made available on the Board's website at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, and will not be modified to remove confidential, contact or any identifiable information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St. NW, Washington, DC 20551, between 9 a.m. and 5 p.m. during Federal business weekdays.

FOR FURTHER INFORMATION CONTACT: Anna Lee Hewko, Associate Director, (202) 530–6260; Brian Chernoff, Manager, (202) 452–2952; Jennifer McClean, Senior Financial Institution Policy Analyst II, (202) 785–6033; Division of Supervision and Regulation; or Jay Schwarz, Assistant General Counsel, (202) 452–2970; Mark Buresh, Special Counsel, (202) 452–5270; Jonah Kind, Senior Counsel, (202) 452–2045; David Imhoff, Attorney, (202) 452–2249, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For users of TTY–TRS, please call 711 from any telephone, anywhere in the United States.

SUPPLEMENTARY INFORMATION: On September 1, 2023, the Board published in the **Federal Register** a proposal to amend the Board's rule that identifies and establishes risk-based capital surcharges for global systemically important bank holding companies.[1] An extension of the comment period will provide additional opportunity for the public to consider the proposal and prepare comments, including to address the questions posed by the agencies. Therefore, the Board is extending the end of the comment period for the proposal from November 30, 2023, to January 16, 2024.

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2023–23672 Filed 10–26–23; 8:45 am]

BILLING CODE P

[1] 88 FR 60385 (September 1, 2023).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2135; Project Identifier MCAI–2023–00509–T]

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: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus Canada Limited Partnership Model BD–500–1A10 and

BD–500–1A11 airplanes. This proposed AD was prompted by a report of multiple occurrences of low clearance or fouling between certain wiring harnesses and a hydraulic bracket and structure in the wing trailing edge area that were detected on the production line. This proposed AD would require inspecting certain wiring harnesses for any damage and clearance to adjacent structure and corrective actions, as specified in a Transport Canada AD, which is proposed for incorporation by reference (IBR). This proposed AD would also require an inspection report. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by December 11, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–2135; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For material that is proposed for IBR 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.* You may find this material on the Transport Canada website at *tc.canada.ca/en/aviation.* It is also available at *regulations.gov* under Docket No. FAA–2023–2135.
- 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.

FOR FURTHER INFORMATION CONTACT: Gabriel Kim, 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:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–2135; Project Identifier MCAI–2023–00509–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Gabriel Kim, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 516–228–7300; email: *9-avs-nyaco-cos@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2023–20, dated March 22, 2023 (Transport Canada AD CF–2023–20) (also referred to as the MCAI), to correct an unsafe condition for certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. The MCAI states that multiple occurrences of low clearance or fouling between certain wiring harnesses and a hydraulic bracket and structure in the wing trailing edge area were detected on the production line. These conditions were caused by an inappropriate distribution of slack in the wiring harnesses. Low clearance or fouling between the wiring harnesses and adjacent structure could result in wear of the harnesses leading to electrical arcing. Arcing in the presence of a leak from the hydraulic lines in the area could lead to a fire.

The FAA is proposing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–2135.

Related Service Information Under 1 CFR Part 51

Transport Canada AD CF–2023–20 specifies procedures for inspecting certain wiring harnesses for damage and clearance to adjacent structure and corrective actions. Corrective actions include adjustment of wiring harnesses, replacing damaged braid sleeves, and contacting the manufacturer for repair instructions for worn or damaged harnesses. 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**.

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in Transport Canada AD CF–2023–20 described previously, except for any

differences identified as exceptions in the regulatory text of this proposed AD. This proposed AD would also require an inspection report.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate Transport Canada AD CF–2023–20 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with Transport Canada AD CF–2023–20 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information required by Transport Canada AD CF–2023–20 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–2135 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 157 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 7 work-hours × $85 per hour = Up to $595	$0	Up to $595	Up to $93,415.

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

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to take approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.): Docket No. FAA–2023–2135; Project Identifier MCAI–2023–00509–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by December 11, 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–2023–20, dated March 22, 2023 (Transport Canada AD CF–2023–20).

(d) Subject

Air Transport Association (ATA) of America Code 24, Electrical Power.

(e) Unsafe Condition

This AD was prompted by a report of multiple occurrences of low clearance or fouling between certain wiring harnesses and a hydraulic bracket and structure in the wing trailing edge area that were detected on the production line. The FAA is issuing this AD to address inappropriate distribution of slack in the wiring harness. The unsafe condition, if not addressed, could result in wear of the

harnesses leading to electrical arcing. Arcing in the presence of a leak from the hydraulic lines in the area could lead to a fire.

(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–2023–20.

(h) Exceptions to Transport Canada AD CF–2023–20

(1) Where Transport Canada AD CF–2023–20 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where Transport Canada AD CF–2023–20 refers to hours air time, this AD requires using flight hours.

(3) Where paragraph (A) of Transport Canada AD CF–2023–20 states to ''adjust as required,'' this AD requires that all applicable adjustments must be done before further flight.

(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) 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 that are identified as RC, those procedures must be done to comply with this AD; any procedures that are not identified as RC are recommended. Those procedures 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 identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures identified as RC require approval of an AMOC.

(j) Additional Information

For more information about this AD, contact Gabriel Kim, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 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 (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) Transport Canada AD CF–2023–20, dated March 22, 2023.

(ii) [Reserved]

(3) For Transport Canada AD CF–2023–20, 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.* You may find this Transport Canada AD on the Transport Canada website at *tc.canada.ca/en/aviation.*

(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 October 20, 2023.

Ross Landes,

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

[FR Doc. 2023–23720 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2137; Project Identifier MCAI–2022–01389–T]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes. This proposed AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by December 11, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–2137; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

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

FOR FURTHER INFORMATION CONTACT: Fatin Saumik, 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:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–2137; Project Identifier MCAI–2022–01389–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 516–228–7300; email: *9-avs-nyaco-cos@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

Transport Canada, which is the aviation authority for Canada, has issued Transport Canada AD CF–2022–59, dated October 27, 2022 (Transport Canada AD CF–2022–59) (also referred to after this as the MCAI), to correct an unsafe condition for all De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes. The MCAI states that new or more restrictive airworthiness limitations have been developed.

The FAA is proposing this AD to address new or more restrictive maintenance interval limitations. Failure to adhere to the specified interval limitations may result in reduced structural integrity of the airplane. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–2137.

FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI and service information referenced above. The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed Requirements of This NPRM

This proposed AD would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (*e.g.,* inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (i)(1) of this proposed AD.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 53 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed 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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

De Havilland Aircraft of Canada Limited (Type Certificate Previously Held by Bombardier, Inc.): Docket No. FAA–2023–2137; Project Identifier MCAI–2022–01389–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by December 11, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all De Havilland Aircraft of Canada Limited Model DHC–8–401 and –402 airplanes, certificated in any category.

(d) Subject

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

(e) Reason

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address new or more restrictive maintenance interval limitations. Failure to adhere to the specified interval limitations may result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Maintenance or Inspection Program Revision

Within 60 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in figure 1 to paragraph (g) of this AD. The initial compliance time for doing the task is at the time specified in the initial compliance time column of figure 1 to paragraph (g) of this AD or within 12 months after the effective date of this AD, whichever occurs later.

Figure 1 to Paragraph (g)—AMM Tasks

Effectivity	Initial Compliance Time	Interval Limitation	AMM Task
All	10,000 total flight hours (FH)	10,000 FH	21-31-00-710-801
All	20,000 total FH	20,000 FH	21-31-00-710-803
All	20,000 total FH	20,000 FH	21-31-00-710-804
All	35,000 total FH	35,000 FH	22-11-00-720-803
All	30,000 total FH	30,000 FH	26-20-00-900-801
All	30,000 total FH	30,000 FH	26-20-00-900-802
All	30,000 total FH	30,000 FH	26-20-00-900-805
All	30,000 total FH	30,000 FH	26-20-00-900-807
All	30,000 total FH	30,000 FH	26-20-00-900-803
All	30,000 total FH	30,000 FH	26-20-00-900-804
All	20,000 total FH	20,000 FH	26-20-00-710-801
All	20,000 total FH	20,000 FH	28-21-00-710-801
All	10,000 total FH	10,000 FH	29-12-00-720-803
All	4,950 total FH	4,950 FH	29-12-00-720-805
All	4,950 total FH	4,950 FH	29-12-00-720-802
All	4,950 total FH	4,950 FH	29-12-00-720-804
All	30,000 total FH	30,000 FH	30-11-00-710-802
All	5,280 total FH	5,280 FH	31-41-00-710-802
All	1,760 total FH	1,760 FH	32-11-00-210-802
All	30,000 total FH	30,000 FH	52-24-00-210-802
All	4,400 total FH	4,400 FH	61-20-00-710-802
All	150 total FH	150 FH	77-31-00-710-803

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

(i) Other FAA 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)(2) 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 De Havilland Aircraft of Canada Limited'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–2022–59, dated October 27, 2022, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–2137.

(2) For more information about this AD, contact Fatin Saumik, 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

None.

Issued on October 20, 2023.

Ross Landes,

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

[FR Doc. 2023–23723 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2002; Project Identifier MCAI–2023–00176–E]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede airworthiness directive (AD) 2021–13–07, which applies to all GE Aviation Czech s.r.o. (GEAC) (type certificate previously held by WALTER Engine a.s., Walter a.s., and MOTORLET a.s.) Model M601D–11, M601E–11, M601E–11A, M601E–11AS, M601E–11S, and M601F engines. AD 2021–13–07 requires recalculating the life of critical parts and, depending on the results of the recalculation, replacing these critical parts. AD 2021–13–07 also requires replacing a certain compressor case. Since the FAA issued AD 2021–13–07, the manufacturer published the airworthiness limitations section (ALS) of the existing engine maintenance manual (EMM), which includes the calculations for the life of critical parts addressed by AD 2021–13–07 and prompted this proposed AD. This proposed AD would continue to require the replacement of a certain centrifugal compressor case. This proposed AD would also include an additional part number as an option for the replacement and would limit the applicability of the proposed AD, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this NPRM by December 11, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to regulations.gov. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA–2023–2002; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, 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.* It is also available at *regulations.gov* under Docket No. FAA–2023–2002.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Barbara Caufield, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (781) 238–7146; email: *barbara.caufield@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–2002; Project Identifier MCAI–2023–00176–E'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to regulations.gov, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Barbara Caufield, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590. Any commentary that the

FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2021–13–07, Amendment 39–21612 (86 FR 31601, June 15, 2021) (AD 2021–13–07), for all GEAC Model M601D–11, M601E–11, M601E–11A, M601E–11AS, M601E–11S, and M601F engines. AD 2021–13–07 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued EASA Emergency AD 2021–0125–E, dated May 7, 2021 (EASA Emergency AD 2021–0125–E) to address an unsafe condition identified as the manufacturer finding errors in the ALS of the existing EMM, including errors in the formula to determine the consumed equivalent flight cycles of critical parts and errors with certain part numbers. The manufacturer also determined that the life limit of a certain compressor case installed on Model M601E engines is not listed in the ALS of the applicable EMM.

AD 2021–13–07 requires recalculating the life of critical parts and, depending on the results of the recalculation, replacing critical parts. AD 2021–13–07 also requires replacing a certain compressor case. The FAA issued AD 2021–13–07 to prevent the failure of the engine.

Actions Since AD 2021–13–07 Was Issued

Since the FAA issued AD 2021–13–07, EASA revised EASA Emergency AD 2021–0125–E and issued EASA AD 2021–0125R1, dated January 30, 2023 (EASA AD 2021–0125R1) (referred to after this as the MCAI). The MCAI states that the manufacturer published the ALS, which incorporates certain requirements addressed by EASA Emergency AD 2021–0125–E, and that EASA published EASA AD 2023–0020, dated January 23, 2023 (EASA AD 2023–0020), which requires accomplishment of the actions specified in the ALS. The MCAI limits the applicability to M601E engines with a centrifugal compressor case having part number M601–154.61 installed and removes the requirements that have been incorporated in the ALS. The FAA is addressing the actions specified in the ALS concurrently in a separate AD action.

You may examine the MCAI in the AD docket at regulations.gov under Docket No. FAA–2023–2002.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2021–0125R1, which specifies procedures for replacing the centrifugal compressor case, limits the applicability to certain M601E engines, and removes the requirements that have been incorporated in the ALS.

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**.

FAA's Determination

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 is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the MCAI described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD and the ''Differences Between This Proposed AD and the MCAI.''

Differences Between This Proposed AD and the MCAI

The MCAI applies to GEAC Model M601E engines, and this AD does not because they do not have an FAA type certificate.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and CAAs to use this process. As a result, the FAA proposes to incorporate by reference EASA AD 2021–0125R1 in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2021–0125R1 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions within the compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2021–0125R1. Service information required by the EASA AD for compliance will be available at *regulations.gov* by under Docket No. FAA–2023–2002 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 13 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Recalculate centrifugal compressor case equivalent flight cycles.	1 work-hour × $85 per hour = $85	$0	$85	$1,105
Replace centrifugal compressor case	10 work-hours × $85 per hour = $850	65,000	65,850	856,050

Authority for This Rulemaking

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA

with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive 2021–13–07, Amendment 39–21612 (86 FR 31601, June 15, 2021); and

■ b. Adding the following new airworthiness directive:

GE Aviation Czech s.r.o. (Type Certificate Previously held by WALTER Engines a.s., Walter a.s., and MOTORLET a.s.): Docket No. FAA–2023–2002; Project Identifier MCAI–2023–00176–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by December 11, 2023.

(b) Affected ADs

This AD replaces AD 2021–13–07, Amendment 39–21612 (86 FR 31601, June 15, 2021).

(c) Applicability

This AD applies to GE Aviation Czech s.r.o. (type certificate previously held by WALTER Engines a.s., Walter a.s., and MOTORLET a.s.) Model M601E–11, M601E–11A, M601E–11AS, and M601E–11S engines with a centrifugal compressor case having part number (P/N) M601–154.61 installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section.

(e) Unsafe Condition

This AD was prompted by the manufacturer determining that the life limit of a compressor case having P/N M601–154.61 is not listed in the airworthiness limitations section of the existing engine maintenance manual. The FAA is issuing this AD to prevent the failure of the engine. The unsafe condition, if not addressed, could result in uncontained release of a critical part, damage to the engine, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraph (h) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2021–0125R1, dated January 30, 2023 (EASA AD 2021–0125R1).

(h) Exceptions to EASA AD 2021–0125R1

(1) Where EASA AD 2021–0125R1 refers to May 11, 2021 (the effective date of EASA Emergency AD 2021–0125–E, dated May 7, 2021), this AD requires using June 30, 2021 (the effective date of AD 2021–13–07).

(2) This AD does not adopt the Remarks paragraph of EASA AD 2021–0125R1.

(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, send it to the attention of the person identified in paragraph (j) of this AD and email to *ANE-AD-AMOC@faa.gov.*

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

(j) Additional Information

For more information about this AD, contact Barbara Caufield, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (781) 238–7146; email: *barbara.caufield@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2021–0125R1, dated January 30, 2023.

(ii) [Reserved]

(3) For EASA AD 2021–0125R1, 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 FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locationsoremailfr.inspection@nara.gov.*

Issued on October 19, 2023.

Ross Landes,

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

[FR Doc. 2023–23634 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2005; Project Identifier AD–2022–01523–A]

RIN 2120–AA64

Airworthiness Directives; WACO Classic Aircraft Corporation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain WACO Classic Aircraft Corporation Model 2T–1A–2 airplanes. This proposed AD was prompted by reports of multiple types of cracks at the leading edge former ribs and trailing edge former ribs in the upper wing

center section. This proposed AD would require installing maneuver restriction placards in the front and rear cockpits, inspecting the leading and trailing edge former ribs for cracking, replacing any cracked ribs, modifying the upper wing center section assembly, and removing the maneuver restriction placards after completing the modification. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by December 11, 2023.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–2005; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact WACO Classic Aircraft Corporation, 15955 South Airport Road, Battle Creek, MI 49015; phone: (269) 565–1000; email: *hello@wacoaircraft.com.;* website: *wacoaircraft.com.*
- 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.

FOR FURTHER INFORMATION CONTACT: Tim Eichor, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209; phone: (847) 294–7141; email: *tim.d.eichor@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2023–2005; Project Identifier AD–2022–01523–A'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Tim Eichor, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA received reports of multiple types of cracks after low flight hours on WACO Classic Aircraft Corporation Model 2T–1A–2 airplanes. The cracks were approximately 1 to 1.5 inches long and located in the leading edge former ribs and trailing edge former ribs in the upper wing center section, along the top flange where the ribs attach to the spar. Due to the cracking, the fabric support channels have come close to separating from the trailing edge former ribs. When fabric support channels detach from a rib, they would still be attached to the fabric, but the upper center wing airfoil may not maintain its shape due to the fabric support channels being pulled up by aerodynamic loads, which could lead to unexpected and unknown flight characteristics. The type certificate holder determined that this unsafe condition affects airplane serial numbers 1200 and subsequent with the upper wing center section assembly 30116–100 configuration.

This condition, if not addressed, could result in reduced structural integrity of the airplane and the reduced ability of the flightcrew to maintain the safe flight and landing of the airplane.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed WACO Great Lakes 2T–1A–2 Service Bulletin GL–SB0002, Revision NR, dated July 6, 2023 (WACO SB 2T–1A–2, Revision NR). This service information specifies procedures for inspecting the leading edge former ribs and trailing edge former ribs in the upper wing center section for cracking, replacing any cracked ribs, and modifying the upper wing center section assembly by installing new fabric support channels, saddles, and brackets. Modifying the upper wing center section assembly changes the configuration from the 30116–100 upper wing center section assembly configuration to the 30116–104 upper wing center section assembly configuration. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would require installing maneuver restriction placards in the front and rear cockpits, inspecting the leading and trailing edge former ribs for cracking, replacing any cracked rib, modifying the upper wing center section assembly, and removing the maneuver restriction placards after completing the modification.

Difference Between This Proposed AD and the Service Information

Although section B of the Accomplishment Instructions in WACO SB 2T–1A–2, Revision NR, specifies to record the locations of all identified cracks found on the leading edge former ribs and the trailing edge former ribs

and share this information with WACO Aircraft, this proposed AD would not require those actions.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 19 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Maneuver restriction placard installation/ removal	1 work-hour × $85 per hour = $85	$10	$95	$1,805
Rib inspection	4 work-hours × $85 per hour = $340	0	340	6,460
Upper wing center assembly modification	185 work-hours × $85 per hour = $15,725	4,063	19,788	375,972

The FAA estimates the following costs to do any necessary rib replacement that would be required based on the results of the proposed inspection. The agency has no way of determining the number of airplanes that might need this replacement:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Rib replacement (8 ribs)	16 work-hours × $85 per hour = $1,360 (8 ribs)	$1,032 (8 ribs)	$2,392 (8 ribs)

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Would not affect intrastate aviation in Alaska and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

WACO Classic Aircraft Corporation: Docket No. FAA–2023–2005; Project Identifier AD–2022–01523–A.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by December 11, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to WACO Classic Aircraft Corporation Model 2T–1A–2 airplanes, serial numbers 1200 and subsequent with the 30116–100 upper wing center section assembly configuration, certificated in any category.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by reports of multiple cracks at the leading edge former ribs and trailing edge former ribs in the upper wing center section along the top flange where the ribs attach to the spar after low flight hours. The FAA is issuing this AD to detect and correct cracks in the leading and trailing edge former ribs in the upper wing center section. The unsafe condition, if not addressed, could result in reduced structural integrity of the airplane and the reduced ability of the flightcrew to maintain the safe flight and landing of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Within 30 days after the effective date of this AD, insert maneuver restriction placards on the instrument panel of the front and rear cockpits, and next to the operating placard in the rear cockpit, stating ''NO AEROBATIC MANEUVERS ALLOWED.''

(2) Within 100 hours time-in-service (TIS) or within 12 months after the effective date of this AD, whichever occurs first, accomplish the following:

(i) Inspect the leading edge former ribs and trailing edge former ribs in the upper wing center section for cracking in accordance with section B and before further flight, replace any cracked rib in accordance with section C of the Accomplishment Instructions in WACO Great Lakes 2T–1A–2 Service Bulletin GL–SB0002, Revision NR,

dated July 6, 2023 (WACO SB 2T–1A–2, Revision NR). Although section B of the Accomplishment Instructions in WACO SB 2T–1A–2, Revision NR, specifies to record the locations of all identified cracks found on the leading edge former ribs and the trailing edge former ribs and share this information with WACO Aircraft, this AD does not require those actions.

(ii) Modify the center section to the 30116–104 upper wing center section assembly configuration in accordance with section C of the Accomplishment Instructions in WACO SB 2T–1A–2, Revision NR.

(3) After replacing all cracked ribs and modifying the center section to the 30116–104 upper wing center section assembly configuration, aerobatic maneuvers can resume and the ''NO AEROBATIC MANEUVERS ALLOWED'' maneuver restriction placards can be removed from the front and rear cockpits.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Central Certification 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 Central Certification Branch, send it to the attention of the person identified in paragraph (i) of this AD.

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

(i) Additional Information

For more information about this AD, contact Tim Eichor, Aviation Safety Engineer, FAA, 1801 S Airport Road, Wichita, KS 67209; phone: (847) 294–7141; email: *tim.d.eichor@faa.gov.*

(j) Material Incorporated by Reference

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

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

(i) WACO Great Lakes 2T–1A–2 Service Bulletin GL–SB0002, Revision NR, dated July 6, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact WACO Classic Aircraft Corporation, 15955 South Airport Road, Battle Creek, MI 49015; phone: (269) 565–1000; email: *hello@wacoaircraft.com;* website: *wacoaircraft.com.*

(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 material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations* or email *fr.inspection@nara.gov.*

Issued on October 20, 2023.

Ross Landes,

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

[FR Doc. 2023–23633 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 732, 734, 736, 740, 742, 744, 746, 748, 758, 770, 772, and 774

[Docket No. 231024–0253]

RIN 0694–XC101

Procedures for Access to the Public Briefing on Additional Export Controls on Certain Advanced Computing and Supercomputing Items; and Semiconductor Manufacturing Items

AGENCY: Bureau of Industry and Security, U.S. Department of Commerce.

ACTION: Procedures for accessing a public briefing on regulatory actions.

SUMMARY: On October 25, 2023, the Bureau of Industry and Security (BIS) is publishing in the **Federal Register** two interim final rules, ''Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections'' and ''Export Controls on Semiconductor Manufacturing Items,'' which were both filed for public inspection at the **Federal Register** on October 18, 2023. BIS published an associated final rule, ''Entity List Additions,'' in the **Federal Register** on October 19, 2023. On November 6, 2023, Assistant Secretary for Export Administration Thea D. Rozman Kendler will conduct a public briefing on these two interim final rules and one final rule. This announcement provides details on the procedures for participating in the public briefing.

DATES:

Public briefing: The public briefing call will be held on November 6, 2023. The public briefing call will begin at 3 p.m. Eastern Daylight (EDT) local time and conclude at 5 p.m. EDT. The registration link for attending this event will be posted no later than October 30, 2023.

Deadline for submitting questions for the public briefing: Questions for the briefing must be received no later than November 1, 2023.

ADDRESSES: The registration link for attending this event will be posted on the BIS website at *https://www.bis.doc.gov/index.php/about-bis/newsroom/2082.* This briefing will be virtual; no in-person attendance is available.

Submitting questions: Questions for BIS for the public briefing may be submitted in writing to *BIS_briefingquestions@bis.doc.gov* no later than November 1, 2023. Please tag the questions submitted by adding ''Public Briefing on AC/S and SME IFRs,'' along with a brief description of the question, *e.g.,* 744.23, AI, or SME, in the subject line.

Recording: Within 7 business days after this public briefing is completed, BIS will add a link to a recording, including captioning, of the public briefing to make the recording accessible to people with disabilities.

FOR FURTHER INFORMATION CONTACT: Karen Nies-Vogel, Director, Office of Exporter Services, Bureau of Industry and Security, Department of Commerce, phone: (202) 482–0436, email: *BIS_briefingquestions@bis.doc.gov.* For emails, include ''Public Briefing on AC/S and SME IFRs'' in the subject line.

SUPPLEMENTARY INFORMATION:

Background

On October 7, 2022, BIS released the interim final rule (IFR) ''Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification'' (October 7 IFR) (87 FR 62186), which amended the Export Administration Regulations (EAR) to implement controls on advanced computing integrated circuits (ICs), computer commodities that contain such ICs, and certain semiconductor manufacturing items, and to make other EAR changes to implement appropriate related controls, including on certain ''U.S. person'' activities.

In October 2023, BIS took further regulatory actions to address the national security and foreign policy concerns identified in the October 7 IFR. Specifically, on October 25, 2023, BIS is publishing in the **Federal Register** two interim final rules, ''Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections'' and ''Export Controls on Semiconductor Manufacturing Items,'' which were both filed for public inspection at the **Federal Register** on October 18, 2023. BIS published an

associated final rule, ''Entity List Additions,'' in the **Federal Register** on October 19, 2023 (88 FR 71991).

On November 6, 2023, Assistant Secretary for Export Administration Thea D. Rozman Kendler will conduct a public briefing on these two interim final rules and one final rule. This announcement provides details on the procedures for attending the public briefing call. This public briefing call is part of the BIS outreach efforts that BIS will be conducting for these recent regulatory actions.

Scope of the Briefing and Process for Submitting Questions

The briefing conducted by Assistant Secretary Kendler will address important aspects of the two interim final rules and one final rule.

Note that no public comments will be accepted during the public briefing, which will be held virtually via audio only. Questions for BIS may be submitted in writing to *BIS_briefingquestions@bis.doc.gov* no later than November 1, 2023. Please tag the questions submitted by adding ''Public Briefing on AC/S and SME IFRs,'' along with a brief description of the question, *e.g.,* 744.23, AI, or SME, in the subject line. Such questions will be addressed as time and subject matter permit. Questions that have general applicability may be addressed in frequently asked questions (FAQs) that BIS is developing for these two interim final rules. Questions or comments received for the public briefing will not be considered public comments on the two interim final rules. See the process in the next paragraph for how to submit comments on the two interim final rules.

Process for Submitting Comments on the Two Interim Final Rules

The two interim final rules: ''Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections'' and ''Export Controls on Semiconductor Manufacturing Items,'' will be open for a sixty-day public comment period. Comments must be received by BIS no later than December 18, 2023. See the **ADDRESSES** section of the respective interim final rules for instructions on submitting written comments. BIS encourages interested parties to review the two interim final rules and provide any comments they believe may be warranted.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2023–23810 Filed 10–25–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM23–9–000]

Filing Process and Data Collection for the Electric Quarterly Report

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission or FERC) proposes various changes to current Electric Quarterly Report (EQR) filing requirements, including both the method of collection and the data being collected. The proposed changes are designed to update the data collection, improve data quality, increase market transparency, decrease costs, over time, of preparing the necessary data for submission, and streamline compliance with any future filing requirements. Among other things, the Commission proposes to implement a new collection method for EQR reporting based on the eXtensible Business Reporting Language-Comma-Separated Values standard; amend its regulations to require Regional Transmission Organizations and Independent System Operators to produce reports containing market participant transaction data; and modify or clarify EQR reporting requirements.

DATES: Comments are due December 26, 2023.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through *http://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.

○ *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

○ *For delivery via any other carrier (including courier):* Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

The Comment Procedures Section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

Marina Fishbein (Technical Information), Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6671

Soheila Mansouri (Technical Information), Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6808

Mark Byrd (Legal Information), Office of General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–8071

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

1. Under the Federal Power Act (FPA), the Commission regulates the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. FPA section 205(c) allows the Commission to prescribe rules and regulations under which public utilities shall file with the Commission schedules showing their rates, terms and conditions of jurisdictional service.[1] The Commission has adopted the Electric Quarterly Report (EQR) as the reporting mechanism for public utilities to fulfill their responsibility under FPA section 205(c) to have information relating to their rates, terms and conditions of service available for public inspection in a convenient form and place. The Commission established the EQR in 2002 with the issuance of Order No. 2001.[2] In Order No. 2001, the Commission required public utility Sellers [3] to electronically file EQRs summarizing the contractual rates, terms and conditions in their agreements under 18 CFR part 35 for all jurisdictional services, including market-based rate (MBR) power sales, cost-based rate power sales, and transmission service (Contract Data), and transaction information for short-term and long-term MBR power sales and cost-based rate power sales (Transaction Data). The EQR is an integral part of the Commission's regulatory oversight, including oversight of MBR sales.[4] The Commission requires Sellers with MBR authorization to file EQRs as a condition for retaining that authorization.[5]

2. In 2012, in Order No. 768, the Commission revised the EQR filing requirements and extended the requirement to file EQRs to non-public utilities above a *de minimis* market presence threshold, pursuant to the Commission's authority to facilitate price transparency under FPA section 220.[6] In Order No. 770, the Commission revised the process for filing EQRs and transitioned to an approach whereby EQRs are submitted directly through its website instead of using software provided by the Commission.[7] In 2019, the Commission modernized its filing requirements for certain FERC forms and selected eXtensible Business Reporting Language (XBRL) as the mechanism by which companies would file these forms.[8]

3. Starting in 2020, Commission staff reassessed the current EQR system design and filing requirements to identify potential improvements. As part of the reassessment effort, Commission staff discussed the possible transition of the EQR system to a system that applies the XBRL comma-separated-values (XBRL–CSV) standard to the current data collection methods at the EQR Users Group [9] meeting held on September 23, 2020 (September 2020 EQR Users Group). In addition, in 2021, Commission staff held three technical conferences with EQR filers and data users, in Docket No. AD21–8–000, to discuss other potential changes to the current EQR reporting requirements.[10] Based on comments made by participants during the September 2020 EQR Users Group meeting and the 2021 technical conferences, as well as the Commission's experience with the EQR data collection since its inception, the Commission proposes in this NOPR to update and modernize the EQR data collection by revising the current EQR system design and filing requirements, as discussed below.

II. Summary

4. The Commission proposes to adopt a new system design for EQR reporting based on the XBRL–CSV standard. The Commission also proposes to revise existing EQR reporting requirements and associated fields, as summarized in the Proposed EQR Data Dictionary and the Modified Data Fields Summary.[11]

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[1] Section 205(c) of the FPA, 16 U.S.C. 824d(c), provides:

> Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

[2] *Revised Pub. Util. Filing Requirements,* Order No. 2001, 67 FR 31044 (May 8, 2002), 99 FERC ¶ 61,107, *reh'g denied,* Order No. 2001–A, 100 FERC ¶ 61,074, *reh'g denied,* Order No. 2001–B, 100 FERC ¶ 61,342, *order directing filing,* Order No. 2001–C, 67 FR 79077 (Dec. 27, 2002), 101 FERC ¶ 61,314 (2002), *order directing filing,* Order No. 2001–D, 102 FERC ¶ 61,334, *order refining filing requirements,* Order No. 2001–E, 105 FERC ¶ 61,352 (2003), *order on clarification,* Order No. 2001–F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements,* Order No. 2001–G, 72 FR 56735 (Oct. 4, 2007), 120 FERC ¶ 61,270, *order on reh'g and clarification,* Order No. 2001–H, 73 FR 1876 (Jan. 1, 2008), 121 FERC ¶ 61,289 (2007), *order revising filing requirements,* Order No. 2001–I, 73 FR 65526 (Nov. 4, 2008), 125 FERC ¶ 61,103 (2008).

[3] For purposes of this NOPR, ''Seller'' refers to a public utility that is authorized to make sales as indicated in the company's Commission-approved tariff(s) and required to file the EQR under FPA section 205 or a non-public utility that is required to file the EQR pursuant to FPA section 220. A ''Seller Contact'' refers to the authorized representative who may be contacted about the accuracy of the EQR data for the Seller. An ''Agent'' is an individual designated by the Seller to file the EQR on its behalf.

[4] *See Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.,* Order No. 697, 72 FR 39904 (Jul. 20, 2007), 119 FERC ¶ 61,295, at P 952 (2007) (pointing to EQR filing requirements, among other things, as part of the Commission establishing regulatory oversight over market-based rates). The Ninth Circuit Court of Appeals upheld the Commission's MBR program based on a finding that it relies on a ''system [that] consists of a finding that the applicant lacks market power (or has taken steps to mitigate market power), coupled with strict reporting requirements to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation.'' *See California ex rel. Lockyer* v. *FERC,* 383 F.3d 1006, 1013 (9th Cir. 2004); *see also Mont. Consumer Counsel* v. *FERC,* 659 F.3d 910, 918 (9th Cir. 2011).

[5] *See Refinements to Policies and Procedures for Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. By Pub. Utils.,* Order No. 816, 80 FR 67056 (Oct. 30, 2015), 153 FERC ¶ 61,065 (2015), *order on reh'g,* Order No. 816–A, 81 FR 33375 (May 26, 2016), 155 FERC ¶ 61,188 (2016); *Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. By Pub. Utils.,* Order No. 697, 72 FR 39904 (Jul. 20, 2007), 119 FERC ¶ 61,295, at P 3 (2007), *clarified,* 121 FERC ¶ 61,260 (2007), *order on reh'g,* Order No. 697–A, 73 FR 25832 (May 7, 2008), 123 FERC ¶ 61,055 (2008), *clarified,* 124 FERC ¶ 61,055, *order on reh'g,* Order No. 697–B, 73 FR 79610 (Dec, 30, 2008), 125 FERC ¶ 61,326 (2008), *order on reh'g,* Order No. 697–C, 74 FR 30924 (June 29, 2009), 127 FERC ¶ 61,284 (2009), *order on reh'g,* Order No. 697–D, 75 FR 14342 (Mar. 25, 2010), 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel* v. *FERC,* 659 F.3d 910 (9th Cir. 2011).

[6] *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act,* Order No. 768, 77 FR 61896 (Oct. 11, 2012), 140 FERC ¶ 61,232 (2012), *order on reh'g,* Order No. 768–A, 143 FERC ¶ 61,054 (2013), *order on reh'g,* Order No. 768–B, 150 FERC ¶ 61,075 (2015). As defined in Order No. 768, ''non-public utilities'' are market participants that are not public utilities under section 201(f) of the FPA. *See id.* P 1 n.3. This NOPR also refers to non-public utilities as Sellers. *See supra* n.3.

[7] *Revisions to Elec. Q. Rep. Filing Process,* Order No. 770, 77 FR 71288 (Nov. 30, 2012), 141 FERC ¶ 61,120 (2012).

[8] *Revisions to the Filing Process for Comm'n Forms,* Order No. 859, 84 FR 30620 (June 27, 2019), 167 FERC ¶ 61,241 (2019).

[9] The Commission periodically holds EQR Users Group meetings, which provide a forum for dialogue between Commission staff and EQR users to discuss potential improvements to the EQR program and the EQR filing process.

[10] These technical conferences were held on February 24, 2021, May 19, 2021, and October 14, 2021.

[11] The ''Proposed EQR Data Dictionary'' and the ''Modified Data Fields Summary'' will be available in Docket No. RM23–9–000 in eLibrary and on the Commission's EQR website. *Electric Quarterly Reports,* Fed. Energy Regulatory Comm'n, *https://www.ferc.gov/power-sales-and-markets/electric-quarterly-reports-eqr* (last visited October 5, 2023). The ''Proposed EQR Data Dictionary'' describes the implementation of the collection of data consistent with the proposed reporting requirements described in this NOPR, including specific EQR data field names and their associated characteristics. The ''Modified Data Fields Summary'' serves as a reference guide, which summarizes the proposed modifications to the data fields discussed in this NOPR and compares them to the current requirements. The ''Current EQR Data Dictionary'' refers to the EQR Data Dictionary, Version 3.5, issued November 23, 2020, which is available at: *https://www.ferc.gov/sites/default/files/2020-11/Data_Dictionary_V3_5_Clean.pdf.*

Specifically, the Commission proposes to:

a. Implement a new collection method for EQR reporting based on the XBRL–CSV standard.

b. Amend its regulations to require Regional Transmission Organizations (RTO) and Independent System Operators (ISO) to produce reports containing market participant transaction data in XBRL–CSV format that adhere to the FERC EQR taxonomies, which Sellers can use to prepare their EQR submissions.

c. Amend its regulations to extend the quarterly filing window to four months after the close of the quarter.

d. Provide the option for Sellers to file data on a rolling basis before the close of the quarter.

e. Revise the EQR refiling policy to require refilings when there are material corrections or material omissions to previously filed EQRs for either the prior 20 quarters (*i.e.,* five years) or as far back as the error(s) occurred, depending on which timeframe is shorter.

f. Eliminate the requirement for Sellers to report transmission capacity reassignment information in the EQR.

g. Eliminate the requirement for Sellers to identify the index price publisher(s) to which they report transactions in the EQR.

h. Eliminate the requirement for Sellers to identify which exchange or broker was used to consummate transactions.

i. Improve data quality and transparency by proposing new data fields and clarify the definitions and requirements of certain data fields, including proposing to require Qualifying Facilities (QF) to identify the sales that they make pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA) that are reportable to the EQR.

j. Streamline the EQR filing process by reducing the amount of Identification Data [12] that Sellers must submit each quarter by eliminating certain data when they submit their EQRs.

III. Discussion

A. XBRL–CSV Standard

1. Adoption of New EQR System Based on XBRL–CSV Standard

5. The Commission proposes to adopt a new EQR submission system based on the XBRL–CSV standard. XBRL is an international standard that enables the reporting of comprehensive, consistent, interoperable data that allows industry and other data users to automate submission, extraction, and analysis.[13] XBRL–CSV applies the XBRL standard to the CSV format, the format favored by most Sellers. The Commission believes that adopting the XBRL–CSV standard would preserve the efficiency and simplicity of CSV, while adding the flexibility associated with the XBRL standard. Based on the Commission's experience with XBRL as the standard for filing certain forms, the Commission believes that transitioning the EQR system to the XBRL–CSV standard will make information easier for Sellers to submit and for data users to retrieve, while also decreasing the costs, over time, of preparing the necessary data for submission and complying with future changes to the Commission's filing requirements.

6. One benefit of the proposed XBRL–CSV system is that it would allow Sellers to continue to prepare and review their data in Excel spreadsheet format and then submit their data in CSV format. As noted by participants during the September 2020 EQR Users Group Meeting, many filers use Excel to prepare their EQR data and then convert their file into CSV format prior to submission. However, spreadsheets created in Excel are constrained by a maximum limit of about one million rows of data, a data limitation that applies to Excel, but not to CSV formatted data. This data limit presents a challenge for Sellers with over one million rows of transaction data, which is often the case for large Sellers transacting in RTO/ISO markets. As a result, Sellers whose transaction data exceeds the limits of Excel must first break down their data into multiple, smaller Excel files, ensure that these smaller files are complete and accurate, and then combine those files into one large CSV formatted file prior to submission. By contrast, the proposed new system would allow Sellers to use Excel to prepare multiple, smaller transaction files, which filers could then save as CSV and submit multiple transaction files without needing to combine them into one large transaction file.

7. In addition, the existing EQR system enables Sellers to submit EQRs via three different methods: XML, CSV, and manual data entry through a webform. Transitioning from these three separate submission methods to a single XBRL–CSV method will eliminate the need for the Commission to maintain multiple submission methods. Moreover, the technical capabilities of these three submission methods differ, and the enhancements to the EQR system envisioned in this proceeding cannot be applied to each format.

8. Another benefit of the proposed XBRL–CSV system is that it would save Sellers time in preparing their filings by allowing them to check their EQR submission for most errors in real-time by using the publicly available FERC EQR taxonomies and related documents without first submitting files to the Commission.[14] This would save Sellers time by enabling them to submit files with fewer errors. Under the current system, Sellers often submit files to the Commission multiple times to resolve all errors. Furthermore, the test submission feature and detailed list of errors for both test and non-test submissions available in the current system would continue to be available in the proposed new system.

9. An additional benefit of the proposed XBRL–CSV standard is that, unlike the current database design, the Commission expects the XBRL–CSV standard to allow Sellers to append data to their previously filed EQR data. Appending data involves adding new data to an already submitted and accepted EQR filing, such as adding new rows of data without changing existing rows of data.[15] The proposed append functionality would lead to increased flexibility for Sellers by allowing them to submit new data on a rolling basis throughout the filing window, if they choose to do so. The proposed append functionality aligns with the proposed changes to the EQR filing timeline set forth in Section III.C of this NOPR and the proposal to enable filers to submit EQRs on a rolling basis.

2. FERC Templates Based on XBRL–CSV Standard

10. We expect that some Sellers will choose to implement the proposed XBRL–CSV filing standard by developing their own submission

[12] ''Identification Data'' refers to the information collected in Current EQR Data Dictionary Field Nos. 1–14. The Current EQR Data Dictionary contains identification data necessary to identify the entity required to file the EQR and the individuals or entities completing the EQR filing (Current Field Nos. 1–12, 16, 46, 71 and 72).

[13] A number of Federal agencies require the XBRL standard for filing forms, including the U.S. Securities and Exchange Commission, the Department of Energy, and the Federal Financial Institutions Examination Council.

[14] Taxonomies are files containing relevant business terminology, their meanings, their data types, relationships among terms, and the rules or formulas they must follow. Taxonomies are not permanent documents, but rather are code that describes elements that can be used in other programs and software. *See Revisions to the Filing Process for Comm'n Forms,* Notice of Proposed Rulemaking, 84 FR 1412 (Feb. 4, 2019), 166 FERC ¶ 61,027 (2019).

[15] Appending data differs from updating data because it does not change previously filed rows of data.

system. As an alternative to Sellers developing their own XBRL–CSV submission system, we propose to provide pre-formatted templates for the preparation of EQR submission files (FERC Templates) that would conform with the formatting requirements of the proposed XBRL–CSV system.[16] The proposed FERC Templates may not offer the complete set of filing options that could be developed in an XBRL–CSV submission system created by a Seller or vendor. However, we believe that providing FERC Templates would help reduce the reporting burden for some Sellers, particularly for those reporting transactions occurring outside of RTO/ISO markets. At a minimum, the proposed FERC Templates would preserve the framework of the current CSV-based filing method, which some Sellers use to prepare their EQR submissions.

11. With respect to Sellers reporting transactions within the RTO/ISO markets, we anticipate that the proposed transaction data reports to be prepared by RTOs/ISOs for use by their market participants, as discussed below, would help reduce the burden for Sellers reporting RTO/ISO transactions in the EQR. If the Commission adopts the use of proposed FERC Templates, then the Commission proposes that further technical information on the requirements of the templates would be available during the system design phase and would be made available to interested parties during future technical conference(s) established in this proceeding. Additionally, for those Sellers that only report Identification Data or Identification and Contract Data in the EQR with no changes from the previous quarter, we propose an option that would only require them to confirm that no changes occurred to their EQR from the previous quarter. This proposed option would simplify the EQR filing process for those Sellers that do not report Transaction Data.

3. Process for Developing XBRL–CSV Based EQR System

12. If the XBRL–CSV standard for the EQR system is adopted, the Commission proposes to release draft FERC EQR taxonomies, and related documents, following the issuance of a final rule. Under this proposal, interested parties, including industry members, vendors, and the public would be able to review and propose revisions to the draft taxonomies and related documents, which Commission staff would review prior to convening a staff-led technical conference(s). After the technical conference(s), the Commission anticipates it will issue an order adopting the FERC EQR taxonomies and other related documents, and establishing an implementation schedule.

13. The Commission also proposes that, after the XBRL–CSV system launches, the Commission will migrate previously filed EQR data from the third quarter of 2013 [17] through the quarter preceding the launch of the new XBRL–CSV system into the new system. Although the historical data would be migrated, the public would still have access to historical data in the format in which it was originally submitted. If the Commission implements the proposed new system, the Commission proposes to discontinue the three existing EQR submission methods. As a result, if Sellers need to refile data that was previously filed using one of the current methods, such refilings would need to be made in XBRL–CSV. This migration of historical data into the new XBRL–CSV format would assist Sellers if they need to make a refiling by allowing them to download the data they previously submitted in the old system in an XBRL–CSV format and make changes to it as needed, rather than rekeying the entire submission.

4. Process for Making Future Changes

14. The Commission proposes that notice of future minor or non-material changes to the Proposed EQR Data Dictionary, FERC EQR taxonomies and related documents will be posted on the Commission's website. This proposal is consistent with § 35.10b of the Commission's regulations, which requires EQRs to ''be prepared in conformance with the Commission's guidance on the FERC website,'' [18] and the process set forth for updating the Current EQR Data Dictionary.[19] Any significant future changes to the EQR Data Dictionary, FERC EQR taxonomies, related code or associated documentation would be proposed in a Commission order or rulemaking, which would provide an opportunity for comment.[20]

B. RTO/ISO Sales Data and Transaction Data Reports

15. The Commission proposes to require all RTOs/ISOs to produce EQR transaction data reports for their market participants based on the settlement data generated by the RTO/ISO. The proposed EQR transaction data reports would reflect Sellers' transactions within the relevant RTO/ISO market in which the RTO/ISO is the counterparty. Under this proposal, the Commission would require RTOs/ISOs to conform the transaction data reports to the EQR filing requirements, including formatting the reports using the FERC EQR taxonomies in the XBRL–CSV standard, and making the data reports available to Sellers. The Commission believes this proposal would help Sellers to prepare and submit their EQR transaction data by reducing the amount of manual data manipulation necessary before submitting transaction data in EQRs.

16. Under this proposal, the Commission would direct its staff to work with RTOs/ISOs to help ensure that RTO/ISO settlement billing elements are appropriately mapped to the standard set of EQR products and definitions.[21] Subsequently, the Commission may direct its staff to collaborate with the RTOs/ISOs and interested parties via technical conference(s) or in other similar forums to conform the various mapped RTO/ISO market products to the FERC EQR taxonomies that RTOs/ISOs can use to prepare transaction data reports for use by Sellers.

17. The Commission believes that the proposed directive for RTOs/ISOs to produce and make available transaction data reports for Sellers will increase data standardization of RTO/ISO transactions reported in the EQR, particularly for Sellers transacting across multiple markets. The Commission also believes that enabling Sellers to use RTO/ISO transaction data reports that adhere to the FERC EQR taxonomies to prepare their EQRs will promote greater consistency and accuracy in EQR data. More consistent

[16] The proposal to make pre-formatted templates available to Sellers as an option for preparing their EQR submissions is based on our current understanding of how the EQR XBRL–CSV system and taxonomies could be designed. However, the Commission may adopt another solution to assist filers in preparing their EQR submissions based on comments in this proceeding and/or the outcome of the XBRL–CSV system design phase.

[17] The current process for filing EQRs, as set forth in Order No. 770, applies to filings beginning in the third quarter of 2013. *See* Order No. 770, 141 FERC ¶ 61,120 at P 1.

[18] 18 CFR 35.10b.

[19] *See Filing Requirements for Elec. Util. Serv. Agreements,* 155 FERC ¶ 61,280, at P 5, *order on reh'g,* 157 FERC ¶ 61,180, at PP 40–43 (2016). The same process is used for updating the MBR Data Dictionary implemented through Order No. 860. *See Data Collection for Analytics and Surveillance and Market-Based Rate Purposes,* Order No. 860, 168 FERC ¶ 61,039 at P 209 (2019).

[20] *See Filing Requirements for Elec. Util. Serv. Agreements,* 155 FERC ¶ 61,280, at P 5, *order on reh'g,* 157 FERC ¶ 61,180 at PP 40–43.

[21] The discussions about mapping settlement data may necessitate changes to existing EQR products or definitions, such as creating a new ''Product Name'' to better capture information in the EQR related to a new RTO/ISO market product.

and accurate data would improve the Commission's and the public's ability to conduct analyses across different markets and detect potential exercises of market power and manipulation.

C. Extended Filing Timeline

18. To promote greater data accuracy, while reducing the number of necessary refilings due to resettled prices, the Commission proposes to revise the current quarterly filing window. The Commission proposes to extend the current filing window, which ends one month after the close of the quarter, to end four months after the close of the filing quarter.

19. The proposal in this NOPR to extend the current filing window to four months after the end of the filing quarter will allow filers more time to prepare their initial EQR filings and incorporate a more complete and accurate set of RTO/ISO meter-corrected data into their submissions. For example, some Sellers receive their finalized RTO/ISO settlement data too late in the quarter, or after the end of the quarter, to incorporate into their EQR under the current filing window. These Sellers must, therefore, make multiple EQR filings for each quarter. This proposed change would reduce the number of refilings that such Sellers must undertake.

20. As proposed in this NOPR, EQR submissions would need to adhere to the following schedule:

- First quarter filings would be due July 31, rather than April 30.
- Second quarter filings would be due October 31, rather than July 31.
- Third quarter filings would be due January 31, rather than October 31.
- Fourth quarter filings would be due April 30, rather than January 31.

Furthermore, the Commission proposes to allow Sellers to file data beginning any time during the quarter, or during the four-month filing period after the close of the quarter, instead of requiring Sellers to wait until the filing quarter ends. Allowing submissions to be appended to a previously submitted EQR on a rolling basis would be a new option available to any Seller that desires to file EQRs before the close of the filing window.[22] Sellers could still choose to submit the full EQR for the entirety of the quarter by the filing deadlines identified above. If a Seller cannot submit its EQR by the filing deadlines listed above, the Seller must submit an extension request to the Commission before the filing deadline.[23]

21. As mentioned previously, appending data involves adding new rows of data to an already accepted EQR filing. In contrast, if already submitted and accepted rows of data need to be corrected, the entire file will need to be resubmitted, consistent with the current system requirements.

D. Refiling Policy

22. The Commission's current EQR refiling policy requires that any additions or changes to an EQR filing must be made by the end of the following quarter, when the filer is expected to have the best available new data.[24] Thereafter, Sellers need to file material changes through a refiling. In the case of a material change to one or more transactions due to resettlements, the Commission allows Sellers to refile changes to the underlying transaction(s) through the use of a transaction labeled ''Billing Adjustment.'' [25] The Commission proposes to revise its current policy to require EQR refilings only if the Seller determines that there are material corrections or material omissions from its previously filed EQR(s).

23. The current twelve-quarter timeline for refilings stems from Commission staff's analysis of the Commission's rules conducted pursuant to Executive Order 13579.[26] As part of this effort, Commission staff analyzed EQR reporting requirements and identified as inefficient the requirement for companies to correct all previously filed EQRs if there was an inaccuracy in one or more previously filed EQRs. The Plan stated that correcting errors on all affected prior EQRs was not particularly useful and imposed a growing burden on filers, and therefore, Commission staff directed filers to correct the most recent twelve quarters (three years of data), if there was an inaccuracy in one or more of a company's previously filed EQRs, with a note placed in the EQR stating that other EQR filings may also contain the error.[27]

24. Based on the Commission's review of the EQR data, the Commission proposes to revise the existing twelve-quarter refiling policy. The Commission proposes to require refilings when there are material corrections or material omissions to previously filed EQRs for either the prior 20 quarters (five years of data) or as far back as the error(s) occurred, depending on which timeframe is shorter, beginning from the time a Seller identifies a material data error or material data omission. The proposed 20-quarter refiling timeline would be consistent with the five-year record retention requirement for MBR sellers under § 35.41(d) of the Commission's regulations.[28] In conjunction with the record retention requirement, extending the refiling requirement up to 20 quarters will offer more complete data to conduct more robust analyses than requiring only up to 12 quarters of data.

25. The Commission also proposes to apply the 20-quarter refiling policy to unauthorized sales where, for example, a Seller makes wholesale sales without prior Commission authorization under FPA section 205 and then must file or refile EQRs to report those sales. The omission of information in the EQR related to any sales without prior Commission authorization would be considered material and would need to be reported in the EQR for either the prior 20 quarters (*i.e.,* five years), or as far back as the unauthorized sales occurred, depending on which timeframe is shorter.[29]

26. Furthermore, the Commission proposes a new ''Notes'' data field in the Proposed EQR Data Dictionary, with a definition of: ''For any late EQR filing submitted after the close of the filing window, the Seller must provide the date an extension request was filed with the Commission or the reason(s) for the tardy submission. For any EQR refiling made after the close of the filing window, the Seller must provide the reason(s) for the refiling.'' The proposed ''Notes'' field is required regardless of how the refiling is submitted, whether through an append feature or through

[22] Although EQR data would be available for download after a submission is accepted, data for a particular quarter would not be considered complete until the filing window closes, as filers may continue to append data up until the filing window closes.

[23] *See* 18 CFR 385.2008, 385.212.

[24] *See* Order No. 2001–E, 105 FERC ¶ 61,352 at PP 9–10.

[25] *See id.;* Order No. 2001–G, 120 FERC ¶ 61,270 at PP 33–34; *see also* Order No. 768, 140 FERC ¶ 61,232 at P 84. As discussed below, the Commission proposes in this NOPR to eliminate the option of ''Billing Adjustment'' under Class Name.

[26] On July 11, 2011, the President issued Executive Order 13579, requesting that independent regulatory agencies issue plans for periodic retrospective analysis of their regulations to identify regulations that may need to be modified, streamlined, expanded, or repealed to achieve the agency's regulatory objective. The Commission issued its plan on November 8, 2011. *See Plan for Retrospective Analysis of Existing Rules,* Docket No. AD12–6–000 (Nov. 8, 2011) (Plan).

[27] *See* Plan at 4; *see also 2012 Biennial Staff Memo Concerning Retrospective Analysis of Existing Rules,* Docket No. AD12–6–000, at 8 (Oct. 18, 2012); *Implementation Guidance of Executive Order 13579—Entering Notes to Corrected EQR Filings, https://www.ferc.gov/sites/default/files/2020-05/implement-guide.pdf.*

[28] 18 CFR 35.41(d).

[29] The EQR refiling policy with respect to reporting unauthorized sales would not affect the Commission's ability to order refunds for such sales, which may extend beyond 20 quarters.

the replacement of any previous submission(s) for the quarter.

27. For refilings where a Seller makes corrections to fix material errors or material omissions in previously submitted EQRs and those errors or omissions extend beyond 20 quarters from the time the error or omission was discovered, the Seller must include, for every quarter and year for which filings are corrected, the following information: (1) the date the errors or omissions were discovered; (2) a description of the corrections; (3) the quarter(s) and year(s) in which the corrections were made; and (4) the quarter(s) and year(s) that may contain data that was not corrected.

28. The purpose of these proposed modifications is to make information available to the Commission and the public about why a Seller has filed its EQR late or why it has refiled its EQR after the filing window closed, and to strengthen the current requirement for Sellers to submit EQRs in a timely manner. The Commission believes that, given the proposed extended filing timeline, there should be significantly fewer tardy EQR submissions.

IV. Modification of Reporting Requirements

A. Elimination of Certain Data Fields and Associated Characteristics

29. The Commission proposes to eliminate the ''BA-Billing Adjustment'' reporting option under ''Class Name'' (Current Field No. 59), as discussed below. In addition, the Commission proposes to eliminate the requirement for transmission providers to report transmission capacity reassignment information in the EQR and the capacity reassignment-related data collected under ''Product Type Name'' (Current Field No. 30), as discussed in Section IV.A.2.

30. The Commission further proposes to cease collecting data related to whether Sellers report their transactions to index price publisher(s) and, if so, which index price publisher(s) and, if applicable, which types of transactions are reported. We propose to eliminate the data fields associated with collecting this data, as discussed below, including: ''Transactions Reported to Index Price Publishers'' (Current Field No. 13), ''Filer Unique Identifier'' (Current Field No. 71), ''Seller Company Name'' (Current Field No. 72), ''Index Price Publisher(s) to Which Sales Transactions Have Been Reported'' (Current Field No. 73), and ''Transactions Reported'' (Current Field No. 74), as explained further in Section IV.A.3 of this NOPR. Furthermore, the Commission proposes to cease collecting data related to ''Exchange/Brokerage Service'' (Current Field No. 54).

31. The Commission also proposes that the data associated with the following data fields would no longer be reported in the EQR, because it is available in other Commission systems: Agent Identification Data (Current Field Nos. 2–12), and Seller Identification Data (''Contact Title'' (Current Field No. 5), ''Contact Address'' (Current Field No. 6), ''Contact City'' (Current Field No. 7), ''Contact State'' (Current Field No. 8), ''Contact Zip'' (Current Field No. 9), and ''Contact Country Name'' (Current Field No. 10). The proposal to eliminate these data fields is discussed in Section IV.B. Finally, the Commission proposes to eliminate the data field ''Actual Termination Date'' (Current Field No. 24), as discussed in Section IV.B.

1. BA-Billing Adjustments

32. With respect to refilings due to billing adjustments, the EQR currently offers Sellers a ''BA-Billing Adjustment'' option under the ''Class Name'' data field to reflect material billing adjustments to previously filed EQRs instead of submitting a full EQR refiling.[30] The Commission proposes to eliminate the ''BA-Billing Adjustment'' option (Current Field No. 59). In Order No. 2001–G, the Commission explained that the ''Billing Adjustment'' is an option allowing filers to reflect material price changes long after the settled prices were considered final, but should not be used to correct an inaccurate filing.[31] However, the use of the ''BA-Billing Adjustment'' option under the ''Class Name'' data field reflects aggregated transaction data. This aggregated data does not enable data users to identify the individual transactions affected by the billing adjustment and, therefore, provides little useful information. In addition, the proposed extension to the filing timeline, discussed above, should reduce the need for Sellers to refile EQRs to reflect material price changes due to resettlements. For these reasons, we propose to delete the option ''BA-Billing Adjustment'' from ''Class Name'' (Current Field No. 59) and require Sellers to reflect material billing adjustments through a refiling.

2. Transmission Capacity Reassignment Data

33. The Commission proposes to eliminate the Order No. 890[32] requirement that transmission providers report transmission capacity reassignment information in the EQR. In addition, the Commission seeks comment on whether the transmission capacity reassignment data reported in the EQR is helpful to the public and, if so, whether there may be a better way for the public to access such data rather than through the EQR.

34. In Order No. 888, the Commission permitted reassignments of point-to-point transmission capacity to be made in accordance with the terms and conditions of the transmission provider's Open Access Transmission Tariff (OATT), subject to a cost-based price cap.[33] In Order No. 890, the Commission lifted the price cap and permitted resellers of point-to-point transmission capacity to charge market-based rates.[34] The Commission found that market forces, combined with the requirements of the *pro forma* OATT, as modified in Order No. 890, would limit the ability of resellers to exert market power. To enhance its oversight and monitoring activities, the Commission required all reassignments of transmission capacity to be conducted through or otherwise posted on the transmission provider's Open Access Same-Time Information System (OASIS) on or before the date the reassigned service commenced. In addition, the Commission required the execution of a service agreement by the assignee of transmission capacity prior to the date on which the reassigned service commenced.[35]

35. In addition to OASIS posting requirements, the Commission required

[30] *See* Order No. 2001–E, 105 FERC ¶ 61,352 at PP 9–10.

[31] Order No. 2001–G, 120 FERC ¶ 61,270 at P 34.

[32] *Preventing Undue Discrimination & Preference in Transmission Serv.,* Order No. 890, 72 FR 12266 (Mar. 15, 2007),118 FERC ¶ 61,119, *order on reh'g,* Order No. 890–A, 73 FR 2984 (Jan. 16, 2008), 121 FERC ¶ 61,297 (2007), *order on reh'g,* Order No. 890–B, 123 FERC ¶ 61,299 (2008), *order on reh'g,* Order No. 890–C, 126 FERC ¶ 61,228, *order on clarification,* Order No. 890–D, 129 FERC ¶ 61,126 (2009).

[33] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.,* Order No. 888, 61 FR 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g,* Order No. 888–A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Grp.* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York* v. *FERC,* 535 U.S. 1 (2002).

[34] Order No. 890, 118 FERC ¶ 61,119 at PP 808–18.

[35] *Id.* PP 815–16.

transmission providers to summarize data related to capacity reassignment agreements and the reassignments under them in the EQR so that the data would be readily accessible to the Commission and the public.[36] However, because the EQR could not fully reflect information about transmission capacity reassignments in the Transaction Data, the Commission set forth unique reporting conventions whereby individual reassignments are reported in the Contract Data of the EQR.[37]

36. In Order No. 890–A, the Commission granted rehearing to limit the period during which reassignments could occur above the price cap to a two-year study period and directed Commission staff to prepare a report.[38] Commission staff released its report in April 2010, finding that the secondary market had grown substantially and resale prices reflected fundamentals rather than the exercise of market power.[39] In Order No. 739, the Commission permanently lifted the price cap for sales of reassigned transmission capacity.[40]

37. We propose to eliminate the requirement to include capacity reassignments in the EQR because the relevant information is available to transmission customers on OASIS, including the quantity, receipt and delivery points, and the begin and end dates and times of the reassignments. Moreover, since the issuance of Order Nos. 890 and 739, the Commission has gained access to other transmission-related data, which Commission staff can use to monitor the competitiveness of transmission markets. For example, in 2013, the Commission gained non-public access through Open Access Technology International (OATI) [41] to the electronic tags used to schedule transmission of electric power interchange transactions in the wholesale markets, pursuant to Order No. 771.[42] Additionally, in 2019, the Commission received non-public access to transmission reservation data through a contract with OATI.

38. The Commission believes its access to transmission-related data from sources other than the EQR, including OASIS and OATI, provides sufficient information to monitor the secondary transmission market for the potential exercise of market power. Accordingly, the Commission proposes to eliminate the requirement for transmission providers to report transmission capacity reassignment data in the EQR and the capacity reassignment-related data collected under ''Product Type Name'' (Current Field No. 30) in the Current EQR Data Dictionary. However, we recognize that OASIS data, while available to transmission customers, may not be available to the public. We therefore seek comment on whether transmission capacity reassignment data is helpful to the public and, if so, whether there may be a better way for the public to access such data rather than through the EQR.

3. Reporting of Index Price Publisher Information

39. The Commission proposes to eliminate the requirement for Sellers to identify in the EQR the index price publisher(s) to which they report transactions.[43] Specifically, a Seller must indicate in the Identification Data of the EQR whether it has reported its sales transactions to an index price publisher by selecting ''Yes'' or ''No'' in Current Field No. 13. If a Seller selects ''Yes,'' then it must identify the specific index price publisher(s) and, if applicable, the type(s) of transactions it reported in Current Field Nos. 73 and 74 in the Index Reporting Data of the EQR.[44] The Commission determined that this information would provide the Commission and the public with greater transparency into market forces affecting those index prices and the level of companies' sales used to calculate index prices.[45] The Commission stated that this information would help further its understanding of how index prices are formed and improve its ability to monitor price formation in wholesale markets and potential exercises of market power and manipulation.[46]

40. In the years following the implementation of the requirement for Sellers to identify index price publisher information in the EQR, Commission staff has found that this information provides limited transparency into the formation of electric index prices because it is not reported on a transactional basis. Moreover, since the issuance of Order No. 768, the Commission has gained greater transparency into electric price indices through its access to transactional data from Intercontinental Exchange Inc. (ICE). Therefore, the Commission proposes to update and streamline the EQR data collection by eliminating this reporting requirement, reflected in Appendix G, and the associated data fields in the Current EQR Data Dictionary (*i.e.,* Current Field Nos. 13 and 71–74), as shown in the Modified Data Fields Summary. We recognize that eliminating this index price publisher information from the EQR would make it unavailable to the public; therefore, we seek comment on whether this information is helpful to the public, and if so, how this data is used.

4. Reporting of Exchange and Broker Information

41. The Commission proposes to eliminate the requirement, set forth in Order No. 768, for Sellers to report in the EQR whether they use an exchange or broker to consummate a transaction.[47] If Sellers use an exchange, they must select the specific exchange from a Commission-provided list, and if they use a broker, they select the term ''BROKER'' from the list. The Commission explained in Order No. 768 that exchanges and brokers routinely publish index prices composed of wholesale sale transactions that were consummated on their exchange or through their brokerage services, and those index prices are used by market participants in contracting for sales in the physical electricity market and as a settlement price associated with financial products.[48] The Commission determined that adding transparency as to how these indices are created would enable the Commission and the public to better understand how these indices arrive at their published prices.[49]

42. In the years since the implementation of this reporting requirement, the Commission has gained greater transparency into exchanges through its access to transactional data from ICE. In addition, Commission staff has found that

[36] *Id.* P 817; *see also* Order No. 890–A, 121 FERC ¶ 61,297 at P 410.

[37] *See Notice Providing Guidance on the Filing of Info. on Transmission Capacity Reassignments in Elec. Q. Rep.,* 124 FERC ¶ 61,244 (2008).

[38] Order No. 890–A, 121 FERC ¶ 61,297 at P 390.

[39] FERC Staff, *Staff Finding on Capacity Reassignment* (2010), *https://www.ferc.gov/sites/default/files/2020-05/04-15-10-capacity-reassignment.pdf.*

[40] *Promoting a Competitive Mkt. for Capacity Reassignment,* Order No. 739, 75 FR 58293 (Sept. 24, 2010), 132 FERC ¶ 61,238 (2010).

[41] OATI is a company that specializes in offering software solutions to the energy industry in North America.

[42] *Availability of E-Tag Info. to Comm'n Staff,* Order No. 771, 141 FERC ¶ 61,235 (2012).

[43] 18 CFR 35.41(c); Order No. 768, 140 FERC ¶ 61,232 at PP 128–29.

[44] To the extent a Seller identifies only the name of a particular index price publisher without specifying the types of transactions reported to that index price publisher, the Commission expects that the Seller is reporting all its trades to that index price publisher. Order No. 768, 140 FERC ¶ 61,232 at P 129.

[45] *Id.* P 128.

[46] *Id.*

[47] *Id.* PP 137–41.

[48] *Id.* P 137.

[49] *Id.*

indicating in the EQR whether a broker was used to consummate or effectuate a transaction does not provide much transparency into how indices are created. Therefore, the Commission proposes to update and streamline the EQR data collection by eliminating this requirement and deleting Appendix H and the associated Current Field No. 54 from the Current EQR Data Dictionary. We recognize that eliminating this exchange and broker information from the EQR would make it unavailable to the public; therefore, we seek comment on whether this information is helpful to the public, and if so, how this data is used.

B. Modifications to Identification, Contract, Transaction Data Reporting Requirements, and Index Reporting Data

43. The current EQR system collects information in data fields classified as Identification, Contract, associated Transaction Data, and Index Reporting Data. The following proposals include proposed new data fields and modifications to existing data fields. These proposals are designed to update and streamline the data collection, improve data quality, and increase market transparency. A summary of proposed changes to the EQR reporting requirements is provided in the Modified Data Fields Summary.

1. Company Name (Current Field Nos. 2, 16 and 46)

44. The Commission proposes to modify this field name from ''Company Name'' to ''Seller'' to reflect the name of the entity that is making sales.

45. The Commission also proposes to clarify the definition of ''Company Name'' (Current Field Nos. 2, 16 and 46) for the ''Seller'' reporting option to: ''The name of the public utility that is authorized to make sales as indicated in the company's FERC tariff(s) under section 205 of the Federal Power Act or the name of the non-public utility that is required to file the EQR under section 220 of the Federal Power Act.'' The current ''Company Name'' definition for the ''Seller'' reporting option (Current Field No. 2) is: ''The name of the company that is authorized to make sales as indicated in the company's FERC tariff(s) or that is required to file the EQR under section 220 of the Federal Power Act.'' The ''Seller Company Name'' in Current Field Nos. 16 and 46 is defined as: ''The name of the company that is authorized to make sales as indicated in the company's FERC tariff(s) or that is required to file the EQR under section 220 of the Federal Power Act. This name must match the name provided as a Seller's 'Company Name' in Field Number 2 of the ID Data (Seller Data).'' The proposed change to the definition described above would apply to the Identification, Contract and Transaction Data of the EQR. The need for Sellers to report the Seller name more than once may be modified based on future system design and reporting capabilities. In addition, the Commission proposes to collect information on Seller name changes and associated effective dates in the new EQR system, and make this information available to the public. Furthermore, the Commission proposes to remove the character limit for the Seller for these fields.

46. The Commission also proposes to cease collecting the ''Company Name'' reporting option for ''Agent'' (Current Field No. 2), which is currently defined as: ''The name of the entity completing the EQR filing. The Agent's Company Name need not be the name of the company under Commission jurisdiction.'' Because the legal obligation for complying with the EQR filing requirements rests with the Seller, not the Agent, the Commission proposes to no longer collect the Agent's Company Name in the Identification Data of the EQR.

2. Company Identifier (Current Field No. 3)

47. The Commission proposes to change this data field name from ''Company Identifier'' to ''Seller CID.'' [50] The current definition of Company Identifier ''Seller'' (CID) is: ''The Company Identifier (CID) obtained through the Commission's Company Registration system.'' The current definition for the Agent reporting option is: ''The CID or Delegate Identifier (DID) [51] obtained through the Commission's Company Registration system.'' Because the legal obligation for complying with the EQR filing requirements rests with the Seller, not the Agent, the Commission proposes to no longer collect the Agent's CID/DID in the Identification Data of the EQR. The Commission proposes no changes to how information about the Seller CID is collected in this data field. Thus, the proposed value description for the ''Seller CID'' would continue to be ''A 6-digit integer preceded by the letter 'C.'''

3. Contact Name (Current Field No. 4)

48. The Commission proposes to modify this data field name from ''Contact Name'' to ''Seller Contact.'' The Commission proposes to modify the definition of ''Contact Name'' (Current Field No. 4) to: ''The Seller's authorized representative who may be contacted about the accuracy of the EQR data for the Seller,'' from the current definition of: ''The name of the contact for the company authorized to make sales as indicated in the company's FERC tariff(s) or that is required to file the EQR under section 220 of the Federal Power Act.'' This person would serve as a point of contact for the Seller for questions related to the EQR data. Because the legal obligation for complying with the EQR filing requirements rests with the Seller, not the Agent, the Commission proposes to no longer collect the Agent's name in the Identification Data of the EQR.

49. With respect to the proposed ''Seller Contact,'' the Commission proposes that the person must be registered as an Account Manager in the Commission's Company Registration system for the specific Seller.[52] The proposed new requirement for the ''Seller Contact'' to be registered as an Account Manager in the Company Registration system will ensure that the individual listed in the EQR as the ''Seller Contact'' has been designated by the Seller to serve in this capacity. All Account Managers registered in the Company Registration system are responsible for maintaining the accuracy of their Company Registration accounts. Even when an Agent files an EQR on a Seller's behalf, the legal obligation for complying with the EQR filing requirements rests with the Seller and any inaccuracies are the Seller's responsibility.[53]

4. Contact Title and Address (Current Field Nos. 5–10)

50. The Commission proposes to cease collecting the following Identification Data: ''Contact Title'' (Current Field No. 5), ''Contact Address'' (Current Field No. 6), ''Contact City'' (Current Field No. 7), ''Contact State'' (Current Field No. 8), ''Contact Zip'' (Current Field No. 9), and

[50] A Company Identifier, or CID, is an identification number assigned to a company that is required under the Commission's regulations to submit an electronic filing using a Company Identifier.

[51] A Delegate Identifier, or DID, is an identification number for a third-party company, such as a law firm or electronic vendor, that makes filings on behalf of the company required to make an electronic filing using a Company Identifier.

[52] An Account Manager is the eRegistered individual to whom the filing company has granted control over its Company Registration account and who is designated to make the company's electronic filings. An Account Manager can designate eRegistered individuals as Agents that make filings on the company's behalf.

[53] *See* Order No. 770, 141 FERC ¶ 61,120 at P 2.

''Contact Country Name'' (Current Field No. 10). The Commission believes that this information is no longer necessary for EQR reporting purposes and instead proposes to continue to collect only the Seller's phone number and email, as discussed below.

5. Contact Phone (Current Field No. 11)

51. The Commission proposes to modify this field name from ''Contact Phone'' to ''Seller Contact Phone.'' The Commission proposes to modify the definition of this field to: ''The eRegistered phone number of the Seller Contact,'' from the current definition: ''Phone number of contact identified in Field Number 4.'' The purpose of the proposed modification is to remove reference to Field No. 4, and to incorporate the proposed new field name, ''Seller Contact,'' as discussed above. Also, the proposed definition specifies that the phone number must conform with the phone number in the Commission's eRegistration database for the ''Seller Contact.'' All individuals registered in the eRegistration system are responsible for the accuracy of their eRegistration accounts. The current definition of this field allows for the reporting of Agent's and Company's contact phone numbers. Because the legal obligation for complying with the EQR filing requirements rests with the Seller, not the Agent, the Commission proposes to no longer collect the Agent's phone number in the Identification Data of the EQR.

6. Contact Email (Current Field No. 12)

52. The Commission proposes to modify the name of this field from ''Contact Email'' to ''Seller Contact Email'' and modify the definition to: ''The eRegistered email of the Seller Contact.'' The current definition is: ''Email address of contact identified in Field Number 4.'' The purpose of the proposed modification is to remove reference to Field No. 4, and to incorporate the proposed new field name ''Seller Contact.'' The current definition allows for the reporting of the Agent Contact's Email and the Company Contact's Email. Because the legal obligation for complying with the EQR filing requirements rests with the Seller, not the Agent, the Commission proposes to no longer collect the Agent's email address in the Identification Data of the EQR.

7. Filing Quarter (Current Field No. 14)

53. The Commission proposes to modify the ''Filing Quarter'' (Current Field No. 14) field to contain a numerical value, one through four, and to modify the definition to: ''A one digit reference number to indicate the quarter of the filing. '1' = First Quarter; '2' = Second Quarter; '3' = Third Quarter; and '4' = Fourth Quarter.'' The current definition of ''Filing Quarter'' is: ''A six digit reference number used by the EQR system to indicate the quarter and year of the filing. The first 4 numbers represent the year (*e.g.,* 2007). The last 2 numbers represent the last month of the quarter (*e.g.,* 03=1st quarter; 06=2nd quarter, 09=3rd quarter, 12= 4th quarter).'' Because the Commission proposes to provide Sellers with the flexibility to submit their filings on a rolling basis and submit data for less than one full quarter during a filing period, the current numerical reference to the quarter may create confusion for Sellers. Instead, under the modified definition, Sellers would refer to the quarter number for which their data is being submitted.

8. Filing Year (Proposed New Field)

54. The Commission proposes to create ''Filing Year,'' a separate data field for the filing period year, which is included in Current Field No. 14. The proposed definition for this new data field is: ''A four-digit reference number to indicate the year of the filing.'' The reporting value would be in ''YYYY'' format.[54] The current definition for ''Filing Quarter'' (Current Field No. 14), as discussed above, includes a six-digit reference number in the ''YYYYMM'' format, where the last two numbers represent the last month of the quarter and the first four numbers represent the year (*e.g.,* 2007). By separating the ''Filing Year'' from the ''Filing Quarter'' into separate data fields, the proposal would provide greater clarity for Sellers submitting EQR data on a rolling basis.

9. Customer Is RTO/ISO (Proposed New Field) and Customer Company Name (Current Field Nos. 17 and 47)

55. The Commission proposes to add a new data field, ''Customer is RTO/ISO,'' with proposed values of ''Y'' or ''N.'' The proposed definition is: ''Sellers should indicate whether the Customer is an RTO/ISO. If the Customer is an RTO/ISO, Sellers should indicate the name in 'Customer Company Name,' as identified in the Commission's Company Registration system, and as provided on the Commission's website.'' The new field would require Sellers to identify whether the customer is an RTO or ISO and select the name from a list that would be provided by the Commission.

56. The current definition of ''Customer Company Name'' (Current Field Nos. 17 and 47) is ''The name of the purchaser of contract products and services.'' The Commission proposes to modify this definition to: ''The name of the purchaser of contract products and services. If the purchaser is an RTO/ISO, then use the RTO/ISO name from the list of allowable entries. If the purchaser is not an RTO/ISO and is associated with a CID, then use the spelling of the name reflected in the Commission's Company Registration system. If the purchaser is not an RTO/ISO and is not associated with a CID, then use the spelling of the purchaser's name reflected in the Commission-generated Identifier (GID), if applicable.''

57. Using the Customer Company Name that is associated with the company's CID, or if a CID is not available, with the name associated with the company's GID, will promote consistency in the spelling of Customer Company Names across filers and help reduce instances where a single entity is reported with multiple names. Greater consistency in the Customer Company Names would improve analyses that use EQR data.[55]

10. Contract Affiliate (Current Field No. 18)

58. The Commission proposes to modify the definition of ''Contract Affiliate'' to: ''The Customer is an affiliate as defined under 18 CFR 35.36(a)(9).'' The current Contract Affiliate definition in the EQR is based on the definition of affiliate used in the Standards of Conduct for Transmission Providers under § 358.3 of the Commission's regulations.[56] However, the Commission believes that the definition of ''Contract Affiliate,'' as used in the EQR, should conform with the definition of affiliate in § 35.36(a)(9) of the Commission's regulations, which applies to MBR Sellers.[57]

[54] This proposed data format, as well as the other data formats proposed in this NOPR, may change based on the outcome of the XBRL–CSV system design phase.

[55] The Commission requires companies to obtain a CID number in order to make certain filings with the Commission. CID listings are available at *https://www.ferc.gov/media/ferc-cid-listing.* The Commission requires GID numbers to identify any reportable entity that must be referenced in an MBR submission, provided that the reportable entity does not already have a CID or a Legal Entity Identifier. GID listings are available at *https://mbrweb.ferc.gov/search/search.*

[56] 18 CFR 358.3.

[57] The Commission's regulations define an MBR Seller as any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act. 18 CFR 35.36(a)(1).

11. FERC Tariff Reference (Current Field Nos. 19 and 48)

59. The Commission proposes to modify the definition of ''FERC Tariff Reference'' to: ''The FERC Tariff Reference cites the document that specifies the terms and conditions under which a Seller is authorized to make transmission sales, power sales or sales of related jurisdictional services at cost-based rates or at market-based rates. The FERC Tariff Reference is not a docket number. If the sales are market-based, the tariff that is specified in the Commission order granting the Seller market-based rate authority must be listed. If the sales are cost-based, the Seller must specify the FERC-approved tariff or rate schedule under which the sales are made. If a non-public utility (NPU) Seller has a FERC-approved reciprocity transmission tariff, then the NPU should enter the tariff title of the reciprocity tariff. Sellers should report the FERC Tariff Reference in a manner consistent with the tariff, rate schedule or service agreement reported in the eTariff system. If an NPU does not have a FERC Tariff Reference, the Seller should enter 'NPU.' Qualifying Facilities making sales pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA) should enter 'PURPA' in this field.'' The proposed definition differs from the current definition by requiring QFs to identify sales made pursuant to PURPA, thereby helping data users to identify such sales in the EQR. In addition, the proposed XBRL–CSV system would accommodate longer tariff references that exceed the current 60-character limit for this data field.

12. Contract Service Agreement ID (Current Field Nos. 20 and 49)

60. The Commission proposes to modify the ''Contract Service Agreement ID'' definition to: ''A unique identifier assigned by the Seller to each service agreement that can be used by the Seller to provide the agreement to the Commission, if requested. The Contract Service Agreement ID should seldom change throughout the life of the contract.'' The current definition of ''Contract Service Agreement ID'' states that the identifier may be the number assigned by the Commission for service agreements filed and accepted by the Commission or it may be generated as part of an internal identification system. The Seller may continue to choose an identifier that corresponds to the number assigned by the Commission for the service agreements; however, the proposed new definition clarifies that the ''Contract Service Agreement ID'' is generated by the Seller, not by the Commission.

13. Contract Execution Date (Current Field No. 21) and Contract Effective Date (Proposed New Field)

61. The Commission proposes to modify the ''Contract Execution Date'' definition to: ''The date the contract is signed. If the parties signed on different dates, then report the most recent date signed. If there is no signed contract, then report the date upon which the parties made the legally binding agreement on the price of a transaction.'' The current definition of ''Contract Execution Date'' is ''The date the contract was signed. If the parties signed on different dates, use the most recent date signed.'' This data field would continue to be required for all contracts. In addition, the Commission proposes to continue requiring filers to begin reporting Contract and Transaction Data in the EQR after service commences under an agreement.[58]

62. The Commission also proposes a new data field, ''Contract Effective Date,'' with a reporting value in YYYYMMDD format, defined as: ''If the contract was filed for Commission acceptance, enter the effective date granted by the Commission. If the contract was filed for Commission acceptance, but the effective date is not yet known, then enter the requested effective date. If the contract was not filed with the Commission for acceptance, then the field may be left blank.'' This proposed data field would clarify whether a contract was previously filed at the Commission for acceptance, and if so, the effective date granted by the Commission or requested by the filer, as applicable. Many contracts reported in the EQR have not been previously filed with the Commission because they are conforming or MBR agreements.[59] This proposal would enable EQR data users to determine which agreements have been filed for prior Commission acceptance and can, therefore, also be accessed through the Commission's eLibrary system.

14. Commencement Date of Contract Terms (Current Field No. 22)

63. The Commission proposes to modify the ''Commencement Date of Contract Terms'' to: ''The date the terms of the contract reported in 'Contract Affiliate,' 'Contract Termination Date,' 'Extension Provision Description,' 'Class Name,' 'Term Name,' 'Increment Name,' 'Increment Peaking Name,' 'Product Type,' 'Product Name,' 'Quantity,' 'Units,' 'Rate,' 'Rate Minimum,' 'Rate Maximum,' 'Rate Units,' 'Point of Receipt Balancing Authority Area,' 'Point of Receipt Specific Location,' 'Point of Delivery Balancing Authority Area,' 'Point of Delivery Specific Location,' 'Begin Date,' and 'End Date' became effective. If there are one or more amendments to these terms in one quarter, report the effective date of the most recent amendment. If the contract or the most recent reported amendment does not have an effective date, the date when service began pursuant to the contract or most recent reported amendment may be used.''

64. The current definition of ''Commencement Date of Contract Terms'' is: ''The date the terms of the contract reported in fields 18, 23 and 25 through 44 (as defined in the data dictionary) became effective. If those terms became effective on multiple dates (*i.e.,* due to one or more amendments), the date to be reported in this field is the date the most recent amendment became effective. If the contract or the most recent reported amendment does not have an effective date, the date when service began pursuant to the contract or most recent reported amendment may be used. If the terms reported in fields 18, 23 and 25 through 44 have not been amended since January 1, 2009, the initial date the contract became effective (or absent an effective date the initial date when service began) may be used.''

65. The proposed new definition includes several changes to the current definition of ''Commencement Date of Contract Terms'' to better capture the effective date of changes to significant terms of a contract. ''Rate Description'' (Current Field No. 37) would no longer be included in the list of data fields specified in the definition because it is a free-form text field; therefore, any change in the number of characters in this field would necessitate modifying the ''Commencement Date of Contract Terms.''

15. Contract Termination Date (Current Field No. 23)

66. The Commission proposes to modify the definition for Contract

[58] *See* Order No. 2001, 99 FERC ¶ 61,107 at P 216 (''the requirement to file contract and transaction data begins with the first Electric Quarterly Report filed after service commences under an agreement, and continues until the Electric Quarterly Report filed after the agreement expires or by order of the Commission.'')

[59] Service agreements that conform to the form of service agreement that is part of a public utility's approved tariff and any MBR service agreement pursuant to a tariff are not previously filed with the Commission for acceptance, but they are reported in the EQR. *See* 18 CFR 35.1(g).

Termination Date as follows: ''The termination date specified in the contract. This field may only be left blank if the agreement is an evergreen or master agreement, and the termination date is therefore not specified. If the actual termination date differs from the termination date specified in the contract, then it must be listed in this field.'' The ''Contract Termination Date'' field is currently defined as: ''The date that the contract expires.'' The modified definition clarifies that the reported termination date may be the date specified in the contract or the date the contract terminates, once the date is known, even if that date differs from the date specified in the contract. If a contract amendment triggers a change in the termination date specified in the contract, then that amended date serves as the new ''Contract Termination Date.'' Under the proposed new definition, the Commission would require only the most recent contract termination date to be reported. As a result, the Commission proposes to delete the ''Actual Termination Date'' field (Current Field No. 24), which is currently defined as ''The date the contract actually terminates.'' The purpose of the proposed new definition is to record whether a contract is still active, and if it will terminate, the date of termination. Accordingly, the ''Contract Termination Date'' may not be left blank unless Sellers also select the Term Name ''Evergreen or Master Agreement,'' which is a new reporting option for current Field No. 27, as discussed below.

16. Class Name (Current Field No. 26)

67. The Commission proposes to add a new reporting option ''Firm and Non-Firm (''FNF'')'' to ''Class Name'' (Current Field No. 26) in the Contract Data of the EQR. The proposed modification would allow more accurate reporting when energy is sold under a contract on both a firm and non-firm basis, and thereby reduce instances where energy is reported under a contract with the ''Class Name'' of ''N/A.'' The proposed definition of ''Firm and Non-Firm'' is: ''For an energy sale, a service or product that is ''Firm'' (not interruptible for economic reasons) and ''Non-Firm'' (where delivery or receipt of the energy may be interrupted, without liability on the part of either the buyer or seller).'' Because energy sales cannot be accurately classified as both firm and non-firm at a transactional level, the new ''Class Name'' ''Firm and Non-Firm'' would not be an available option in the Transaction Data of the EQR.

17. Term Name (Current Field No. 27)

68. The Commission proposes to modify the definition of ''Term Name'' in the Contract Data to incorporate a new reporting option for ''Evergreen or Master Agreement.'' The proposed definition would be ''The duration of a contract. Contracts with durations of one year or greater are long-term. Contracts with durations less than one year are short-term. Contracts without a specified termination date are evergreen or master agreements.'' The current definition of ''Term Name'' is: ''Contracts with durations of one year or greater are long-term. Contracts with shorter durations are short-term,'' and current reporting options include: ''Long-Term,'' ''Short-Term,'' and ''N/A.'' The ''Evergreen or Master Agreement'' reporting option would only be available in the Contract Data under ''Term Name.''

18. Increment Peaking Name (Current Field No. 29)

69. The Commission proposes to modify, in the Contract Data of the EQR, the definition of the reporting option ''N/A—Not Applicable'' in ''Increment Peaking Name'' (Current Field No. 29). The proposed definition is: ''The product described does not have constraints on which hours it may be sold, or the increment peaking name is not specified in the contract.'' Currently, the ''N/A—Not Applicable'' option specifies that it can only be used when the increment peaking name is not specified in the contract. The proposed modification would expand the conditions under which ''N/A—Not Applicable'' can be reported to include when the product has no constraints on the hours during which it may be sold.

70. The Commission also proposes to modify the definition of ''FP—Full Period'' in the Contract Data to: ''The product described may be sold during those hours designated as on-peak and off-peak, or during a combination of hours designated as on-peak and off-peak at the point of delivery.'' The current definition of ''FP—Full Period'' is: ''The product described may be sold during those hours designated as on-peak and off-peak, at the point of delivery.'' The proposed modification clarifies that Sellers can report contracts that allow for transactions to span any combination of peak and off-peak hours. The remaining reporting options and definitions under ''Increment Peaking Name'' (*i.e.,* ''Off-Peak,'' and ''Peak'') would remain unchanged. Additionally, the reporting requirements and options for ''Increment Peaking Name'' (Current Field No. 62) in the Transaction Data of the EQR would remain unchanged.

19. Product Type Name (Current Field No. 30)

71. The Commission proposes to rename Current Field No. 30 from ''Product Type Name'' to ''Product Type'' to distinguish this data field more easily from the ''Product Name'' field. Product Type would more accurately capture the reporting options available for this field, including ''CB—Cost-Based,'' ''MB—Market-Based,'' ''T—Transmission,'' and ''NPU—Non-Public Utility,'' and would better align the reporting options with the content in reportable contracts.

72. The Commission proposes to modify the definition for ''CB—Cost-Based'' to: ''The product is sold under a FERC-approved cost-based rate,'' from the current definition: ''Energy, capacity or ancillary services sold under a FERC-approved cost-based rate tariff.'' For example, reactive power and black start services sold under a cost-based rate schedule would be reported using the ''Product Type Name'' ''CB—Cost-Based.''

73. The Commission proposes to modify the definition for ''MB—Market-Based'' to: ''The product is sold under a FERC-approved market-based rate.'' The current definition of ''MB—Market-Based'' is: ''Energy, capacity or ancillary services sold under the seller's FERC-approved market-based rate tariff.''

74. The Commission proposes to modify the definition for the ''T—Transmission'' reporting option to: ''The product is sold under a FERC-approved transmission tariff or rate schedule.'' The current definition of ''T—Transmission'' is: ''The product is sold under a FERC-approved transmission tariff.'' The proposed new definition would broaden the types of agreements allowed to include any rate schedule under which transmission may be sold.

75. The Commission proposes to add a new ''Product Type,'' ''QF—Qualifying Facility'' to be defined as: ''The product is sold by a Qualifying Facility under the Public Utility Regulatory Policies Act of 1978 (PURPA).'' The proposed addition of this new ''Product Type'' ''QF—Qualifying Facility'' would more clearly identify reportable sales made by QFs under PURPA. Currently, QFs can make sales at avoided cost rates under PURPA or at market-based rates under an MBR tariff. To the extent a QF is making sales at avoided cost rates under PURPA, it would use the new reporting option of ''QF—Qualifying Facility.'' If the QF is making sales under a Commission-approved MBR tariff, it would use the

''MB—Market-Based'' ''Product Type'' designation. The definition for ''NPU—Non-Public Utility'' remains unchanged. Finally, the Commission proposes to remove the reporting options associated with ''Capacity Reassignment'' data, as discussed in Section IV.A.2 of this NOPR.

76. The Commission proposes to modify the definition of ''Other'' to ''The product cannot be characterized by the other Product Types,'' to reflect the new field name ''Product Type.''

20. Product Name (Current Field Nos. 31 and 63, and Appendix A)

77. The Commission proposes to modify the following requirements related to ''Product Names'' associated with Current Field Nos. 31 and 63, and found in Appendix A of the Current EQR Data Dictionary: ''Direct Assignment Facilities Charge,'' ''Emergency Energy,'' ''Grandfathered Bundled,'' ''Network,'' and ''Other.''

21. Direct Assignment Facilities Charge

78. The Commission proposes to modify the definition of ''Direct Assignment Facilities Charge'' to: ''Charges for facilities or portions of facilities that are constructed or used for the sole use/benefit of a particular transmission customer.'' This ''Product Name'' would only be used for reporting in the Contract section of the EQR and would not apply to reporting in the Transaction section. The new Direct Assignment Facilities Charge definition would be modified slightly to conform with the definition of this term in the pro forma Open Access Transmission Tariff (section 1.11, Direct Assignment Facilities).[60]

22. Emergency Energy

79. The Commission proposes to require that transactions associated with Emergency Energy contracts be reported in the Transaction Data of the EQR under the Product Name ''Emergency Energy.'' ''Emergency Energy'' transactions would include transactions made under a reserve sharing agreement. Currently, ''Emergency Energy'' is reported only in the Contract Data of the EQR and is defined as ''Contractual provisions to supply energy or capacity to another entity during critical situations.'' We propose to align the definition for Emergency Energy in both the Contract and Transaction Data to: ''Energy or capacity provided to another entity during critical situations.''

23. Grandfathered Bundled

80. The Commission proposes to modify the definition of ''Grandfathered Bundled'' in Appendix A accompanying the Current EQR Data Dictionary to: ''Services provided for bundled transmission, ancillary services and/or energy under contracts effective prior to Order No. 888's OATTs.'' The proposed change would replace ''and'' with ''and/or'' in order to clarify that this data field should capture information about grandfathered bundled sales regardless of which services are bundled and sold under the contract.

24. Network

81. The Commission proposes to modify the Product Name ''Network'' to ''Network Integration Transmission Service Agreement,'' as shown in the Proposed EQR Data Dictionary, to conform with the generally recognized naming convention for this type of agreement.

25. Other

82. The Commission proposes to modify the definition of Product Name ''Other'' to ''The Product Name cannot be characterized by any other Product Name,'' as shown in the Proposed EQR Data Dictionary. This proposal would ensure that this reporting option is used only when the other remaining ''Product Name'' options do not apply.

26. Proposed New Product Names: Ramping, Energy Imbalance Market (EIM), Renewable Energy Credit (REC), and Bundled

83. The Commission proposes to add new Product Names: ''Ramping,'' ''Energy Imbalance Market (EIM),'' ''Renewable Energy Credit (REC),'' and ''Bundled.'' These proposed new reporting options for ''Product Name'' would apply to both the Contract and Transaction Data of the EQR. Furthermore, the Commission proposes to add new Product Names, as necessary, to enable accurate reporting of new market products as they emerge.

27. Ramping

84. The Commission proposes to add ''Ramping'' as a new reporting option under ''Product Name,'' with a proposed definition of: ''The ability to change the output of real power from a generating unit per some unit of time.'' The new reporting option allows the EQR to more accurately capture the ramping-related products offered within RTO/ISO markets. Because Sellers are currently reporting ramping-related products using the Product Name ''Other,'' we believe that adding ''Ramping'' as a new ''Product Name'' would enhance transparency by enabling filers to delineate this product.

28. Energy Imbalance Market

85. The Commission proposes to add a new Product Name ''Energy Imbalance Market,'' with the following definition: ''Product sold in a Commission-approved energy imbalance market for the purpose of balancing real-time supply and demand.'' The new reporting option would allow the EQR to capture information related to the Energy Imbalance Market products more accurately.

29. Renewable Energy Credit (REC)

86. The Commission proposes to add a new Product Name, ''Renewable Energy Credit (REC),'' to the list of allowable entries for Product Names with a proposed definition of: ''The sale of renewable energy credits (REC), bundled with another product such as Energy. RECs are created and issued by a state, which certifies that electric energy was generated pursuant to certain requirements and standards. If the REC is priced separately from the Energy price, then Sellers should report 'REC' and 'Energy' separately in the 'Product Name' field. If the 'REC' and 'Energy' prices are not separated, then Sellers should use the 'Bundled' reporting option in the 'Product Name' field, and specify 'REC' and 'Energy' in the 'Product Name Description' field.''[61] Because Sellers are currently reporting bundled REC sales using the Product Name ''Other,'' adding ''Renewable Energy Credit (REC)'' as a new ''Product Name'' would enhance transparency by enabling Sellers to delineate bundled REC sales, *i.e.,* sales where the RECs are sold with their associated energy.

30. Bundled

87. The Commission proposes to add ''Bundled'' as a new ''Product Name'' with the proposed definition of: ''Services provided for two or more products, including transmission, energy, ancillary services, and/or Renewable Energy Credits. If the bundled components of the sale are priced separately, the components should be reported separately in the Transaction Data of the EQR.'' The addition of the Product Name ''Bundled'' would provide greater transparency by enabling Sellers to specify what products are being

[60] *See* current Pro Forma OATT at *https://www.ferc.gov/sites/default/files/2020-05/pro-forma-OATT.pdf.*

[61] An unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within the Commission's jurisdiction and, therefore, would not be reportable in the EQR. *See WSPP Inc.,* 139 FERC ¶ 61,061 (2012).

bundled. If ''Bundled'' is selected, then the Product Names must relate to transmission, energy, ancillary services, and/or Renewable Energy Credits, and may not include the reporting option ''Other.''

31. Product Name Description (Proposed New Field)

88. The proposed new data field, ''Product Name Description,'' would be defined as: ''A description of the product(s) if selecting 'Other' as the 'Product Name,' or two or more of the 'Bundled' services from among the list of allowable Product Names.'' If ''Other'' is selected in the ''Product Name'' field, Sellers would be required to describe the product in ''Product Name Description.'' If ''Bundled'' is selected, then the Seller would identify the services being provided from the list of allowable Product Names and report the product names in the ''Product Name Description'' data field. Currently, if ''Other'' is selected from Appendix A, Sellers are required to describe the product(s) in the ''Rate Description'' data field. The proposed new data field, ''Product Name Description,'' provides the Seller a specific field to describe which product(s) is reported as ''Other'' or ''Bundled.''

32. Booked Out Power

89. The Commission proposes to retain the current definition of ''Booked Out Power'' in the EQR as ''Energy or capacity contractually committed bilaterally for delivery but not actually delivered due to some offsetting or countervailing trade (Transaction only).'' Participants at the September 2020 EQR Users Group meeting noted that some filers use the term ''book outs'' to refer not only to transactions where there was a lack of physical delivery due to offsetting or countervailing trades, but also to transactions where the lack of physical delivery results in liquidated damages payments negotiated among the parties.

90. The Commission proposes to clarify that Sellers should continue to report transactions as ''Booked Out Power'' in the EQR when there is a lack of physical delivery of power resulting from offsetting or countervailing trades between the parties. Such transactions constitute wholesale energy sales between a buyer and seller to account for the difference in the original volume of power to be delivered and the final delivered volume. As such, ''Booked Out Power'' transactions are useful for conducting price formation analyses. In contrast, there are no offsetting or countervailing trades when a seller fails to deliver power due to, for example, a transmission curtailment. In such cases, there is no wholesale energy sale between a buyer and seller to account for the difference in the original volume and final delivered volume. Rather, the non-delivery results in liquidated damages payments to compensate for the undelivered power. Liquidated damages payments differ from a rate negotiated among parties for a wholesale energy sale that would provide useful price formation information. For this reason, the Commission proposes to clarify that liquidated damages payments should not be reported as ''Booked Out Power'' and, more generally, that filers should not report liquidated damages payments in the EQR.

33. Rate Description (Current Field No. 37)

91. The Commission proposes to modify the definition of ''Rate Description'' to: ''Text description of rate. If the rate is currently available on eTariff or eLibrary, or successors of these systems, a citation of the FERC Accession Number and the relevant FERC tariff, including page number or section label may be included instead of providing the entire rate algorithm. If the rate is not available on eTariff or eLibrary, or successors of these systems, include the rate algorithm, if rate is calculated in the contract, including bases and methods of calculations, and a detailed citation to the contract.''

92. The current definition of ''Rate Description'' is: ''Text description of rate. If the rate is currently available on the FERC website, a citation of the FERC Accession Number and the relevant FERC tariff including page number or section may be included instead of providing the entire rate algorithm. If the rate is not available on the FERC website, include the rate algorithm, if rate is calculated. If the algorithm would exceed the 300-character field limit, it may be provided in a descriptive summary (including bases and methods of calculations) with a detailed citation of the relevant FERC tariff including page number and section.'' The proposed definition reflects updated references to eTariff and eLibrary (and possible future successors to these systems). Additionally, this definition has been updated to include the concept of section labels, which pertains to tariffs that have been submitted through eTariff. Finally, the Commission proposes to remove the character limit to allow for a detailed ''Rate Description.''

93. The Commission proposes that, if a Seller reports ''0'' for ''Rate,'' ''Rate Minimum,'' or ''Rate Maximum'' and then leaves two of these data fields blank, or if a Seller reports ''0'' for all these rate-related data fields, then the Seller must report a ''Rate Description.'' The Commission proposes to continue requiring Sellers to report information in at least one of the four rate-related fields, *i.e.,* ''Rate'' (Current Field No. 34), ''Rate Minimum'' (Current Field No. 35), ''Rate Maximum'' (Current Field No. 36), or ''Rate Description'' (Current Field No. 37). Additionally, if the ''Rate,'' ''Rate Minimum,'' and ''Rate Maximum'' are not specified in the contract, then the Seller should leave these data fields blank and describe the rate in the ''Rate Description.'' This proposed requirement would clarify the rate components of a contract, particularly in the absence of rate specifications in a contract, and help ensure that rates are reported with sufficient specificity.

34. Rate Units (Current Field Nos. 38, 66 and Appendix F)

94. The Commission proposes to add three new reporting options for ''Rate Units'': ''mills/kWh'' to reflect the units specified in certain contracts; ''MW/min'' to reflect units for reporting ramping; and ''MW/0.1 Hz'' as a reporting option for reporting frequency response.

35. Point of Receipt Balancing Authority (PORBA) (Current Field No. 39)

95. The Commission proposes to update the name ''Point of Receipt Balancing Authority (PORBA)'' to ''Point of Receipt Balancing Authority Area (PORBAA).'' The Commission also proposes to modify the definition to: ''The registered Balancing Authority Area where the jurisdictional transmission or transmission-related product is received, if designated in the contract. The Balancing Authority Area will be identified with the abbreviation used in OASIS applications. If receipt occurs at a trading hub, then report the standardized hub name from the list of allowable names.''

96. The current definition of PORBA is: ''The registered Balancing Authority (formerly called NERC Control Area) where service begins for a transmission or transmission-related jurisdictional sale. The 'Balancing Authority Area' will be identified with the abbreviation used in OASIS applications. If receipt occurs at a trading hub, the term 'Hub' should be used.'' [62]

[62] The Commission provides a list of acceptable Balancing Authority Areas (BAA) on the Commission's website. The list is compiled from registered BAAs in OASIS and updated (if needed) quarterly.

97. The Commission's proposed definition clarifies the reporting requirements for the modified PORBAA data field by replacing the reference to ''where service begins'' with ''where [the] product is received.'' The proposed modification further reflects that a contract may have multiple transmission-related products sold pursuant to its terms and conditions. Finally, the proposed definition replaces ''NERC Control Area'' with ''Balancing Authority Area'' to reflect current NERC nomenclature.

36. Point of Receipt Specific Location (PORSL) (Current Field No. 40)

98. The Commission proposes to modify the definition of ''Point of Receipt Specific Location (PORSL)'' to: ''The specific location at which the jurisdictional transmission or transmission-related product is received if designated in the contract. If more than one point of receipt is listed in the contract, a description of the collection of points may be used. 'Multiple' is acceptable if the contract contains more than one Point of Receipt Specific Location.'' The current definition of PORSL is: ''The specific location at which the product is received if designated in the contract. If receipt occurs at a trading hub, a standardized hub name must be used. If more points of receipt are listed in the contract than can fit into the 50-character space, a description of the collection of points may be used. 'Various,' alone, is unacceptable unless the contract itself uses that terminology.'' The proposed XBRL–CSV system would allow the elimination of the current 50-character space limitation, which would provide filers more space to list multiple PORSLs, if specified in the contract. We further propose to remove the requirement to report the standardized hub name in this field because this information, if applicable, would already be captured in the modified PORBAA field (Current Field No. 39).

99. Additionally, the Commission proposes to modify the reporting of PORSL to apply only to jurisdictional transmission or transmission-related products, if specified in the contract. In particular, PORSL would only be required if the Product Names are: Interconnection Agreement, Negotiated-Rate Transmission, Network Integration Transmission Service Agreement (currently referred to as Network), Network Operating Agreement, or Point-to-Point Agreement.

37. Point of Delivery Balancing Authority (PODBA) (Current Field No. 41)

100. The Commission proposes to update the data field ''Point of Delivery Balancing Authority (PODBA)'' to ''Point of Delivery Balancing Authority Area (PODBAA)'' in the Contract Data.

101. The Commission proposes to modify the definition of PODBA in the Contract Data to: ''The registered Balancing Authority Area where a jurisdictional product is delivered and/or service ends for a transmission or transmission-related jurisdictional product. The Balancing Authority will be identified with the abbreviation used in OASIS applications. If delivery occurs at the interconnection of two Balancing Authority Areas, the Balancing Authority Area that the product is entering should be used. If delivery occurs at a trading hub, then report the standardized hub name from the list of allowable names.''

102. The current definition of PODBA in the Contract Data is: ''The registered Balancing Authority (formerly called NERC Control Area) where a jurisdictional product is delivered and/or service ends for a transmission or transmission-related jurisdictional sale. The Balancing Authority will be identified with the abbreviation used in OASIS applications. If delivery occurs at the interconnection of two control areas, the control area that the product is entering should be used. If delivery occurs at a trading hub, the term 'Hub' should be used.'' The Commission proposes to change the word ''sale'' to ''product,'' consistent with the focus on reporting information about the sale of discrete products in the EQR. Additionally, the Commission proposes to replace ''NERC Control Area'' with ''Balancing Authority Area'' to reflect current NERC nomenclature. The standardized list of allowable hub names will continue to be available on the Commission's website.

38. Point of Delivery Specific Location (PODSL) (Current Field No. 42)

103. Similar to the proposed modification for PORSL, discussed above, the Commission proposes to collect PODSL in the Contract Data (Current Field No. 42) for jurisdictional transmission or transmission-related products, if the contract specifies a PODSL. The Commission therefore proposes to modify the definition of PODSL in the Contract Data to: ''The specific location at which the jurisdictional transmission or transmission-related product is delivered if designated in the contract.'' The current definition of PODSL in the Contract Data of the EQR is: ''The specific location at which the product is delivered if designated in the contract. If receipt occurs at a trading hub, a standardized hub name must be used.''

39. Begin Date (Current Field No. 43)

104. The Commission proposes to modify the definition of ''Begin Date'' to: ''First date for the sale of the product at the rate specified.'' The current definition of ''Begin Date'' includes the hours and minutes for the sale, timing components which do not apply to products listed in the Contract Data. We propose to modify the format of this data field to YYYYMMDD.

40. End Date (Current Field No. 44)

105. The Commission proposes to modify the definition of ''End Date'' to: ''Last date for the sale of the product at the rate specified.'' The current definition includes the hours and minutes, timing components which do not apply to products listed in the Contract Data. We propose to modify the format of this data field to YYYYMMDD.

41. Transaction Unique Identifier (Current Field No. 50)

106. The Commission proposes to modify the data field name from ''Transaction Unique Identifier'' to ''Transaction Identifier'' and also proposes to change the definition to: ''A reference number assigned by the Seller for each transaction or multiple related products in a transaction.'' The current definition of ''Transaction Unique Identifier'' is: ''Unique reference number assigned by the Seller for each transaction.'' The proposed Transaction Identifier is a filer-selected designation that relates multiple records of data to a single transaction, and may therefore be used multiple times if needed. For example, if a sale includes capacity and energy, the Transaction Identifier would be the same for both records of data. The Transaction Identifier is assigned by the Seller, and can contain information about the type of product being sold. Sellers have the option to report multiple related products in one transaction using the same identifier in order to demonstrate which products/transactions are linked with each other.

42. Transaction Begin Date (Current Field No. 51)

107. The Commission proposes to modify the current definition of ''Transaction Begin Date'' to ''First date and time the product is sold at the specified price'' from ''First date and time the product is sold during the

quarter.'' The new definition seeks to clarify that when a change in price occurs for a particular product during the quarter in which it is sold, each price change must be listed as a separate line item in the EQR and the transactions should not be aggregated.

43. Transaction End Date (Current Field No. 52)

108. The Commission proposes to modify the current definition of ''Transaction End Date'' to ''Last date and time the product is sold at the specified price,'' from ''Last date and time the product is sold during the quarter.'' As with the proposed change to the definition of ''Transaction Begin Date'' (Current Field No. 51), this proposed change would clarify that each price change must be listed as a separate line item in the EQR and transactions should not be aggregated.

44. Trade Date (Current Field No. 53)

109. The Commission proposes to modify the definition of ''Trade Date'' to: ''The date upon which the parties made the legally binding agreement on the price of a transaction. If the 'Trade Date' cannot be identified, then report the 'Execution Date' in the 'Trade Date' data field.'' The current definition of ''Trade Date'' is: ''The date upon which the parties made the legally binding agreement on the price of a transaction.'' Currently, ''Trade Date'' is required only for transactions associated with a contract executed on or after July 1, 2013.[63] The Commission proposes to remove the July 1, 2013 date limitation and require a ''Trade Date'' to be reported for all transactions, including those associated with a contract executed prior to July 1, 2013. Removing the current date limitation and enabling the collection of information about trade date or transactions, regardless of when parties executed the relevant contract, would result in more complete and consistent transactional information. If the ''Trade Date'' cannot be determined, particularly in the case of older contracts, then filers should report the ''Contract Execution Date'' as the ''Trade Date.''

45. Exchange/Brokerage Service (Current Field No. 54)

110. The Commission proposes to cease collecting Exchange/Brokerage Service data (Current Field No. 54), as explained in Section IV.A.4 of this NOPR.

46. Type of Rate (Current Field No. 55)

111. The Commission proposes to modify the definition of the reporting option, ''Electric Index,'' in the ''Type of Rate'' data field to: ''A calculation of a rate based upon an index or a formula that contains an electric index component. An electric index includes an index published by an index publisher, such as ICE and the Chicago Mercantile Exchange Group (CME), or a price published by an RTO/ISO (*e.g.,* PJM West or Illinois Hub). If the transaction uses an electric-based index in any way, either as a base price or as a means to determine a basis, report as electric index.'' The purpose of this modification is to provide clarity for filers regarding reporting requirements. In addition, as with reporting ''Trade Date,'' ''Standardized Price'' and ''Standardized Quantity,'' ''Type of Rate'' data is currently required only for transactions associated with a contract executed on or after July 1, 2013.[64] The Commission proposes to remove the July 1, 2013 date limitation and require a ''Type of Rate'' to be reported for all transactions, including those associated with a contract executed prior to July 1, 2013. Removing the current date limitation and enabling the collection of information about the type of rate for transactions, regardless of when parties executed the relevant contract, would result in more complete and consistent transactional information.

47. Time Zone (Current Field No. 56)

112. The Commission proposes to modify the definition of ''Time Zone'' to: ''The time zone where the transaction takes place'' from the current definition of: ''The time zone in which the sale was made.'' Sellers may continue to report the ''Time Zone'' based on the delivery point or where the trade occurs because some Sellers may capture trades in their reporting systems based on the time zone associated with the delivery point of a trade and other Sellers may capture trades based on the time zone associated with where the Seller's trading offices are located. Additionally, the use of the term ''transaction'' instead of ''sale'' is more consistent with other reported Transaction Data in the EQR.

48. Point of Delivery Balancing Authority (PODBA) (Current Field No. 57)

113. Similar to the proposed modification to the ''Point of Delivery Balancing Authority (PODBA)'' field name in the Contract Data (Field No. 41), the Commission proposes to update this data field name to ''Point of Delivery Balancing Authority Area (PODBAA).'' The Commission proposes to modify the definition of ''PODBA'' in the Transaction Data (Current Field No. 57) to: ''The registered Balancing Authority Area abbreviation used in OASIS applications. If delivery occurs at a trading hub, then report the standardized hub name from the list of allowable names.'' As explained for Current Field Nos. 39 and 41, this definition reflects current NERC nomenclature. The Commission also proposes to remove the reference to NERC Control Area in the definition. The current definition of ''PODBA'' in the Transaction Data is: ''The registered Balancing Authority (formerly called NERC Control Area) abbreviation used in OASIS applications.''

49. Point of Delivery Specific Location (PODSL) (Current Field No. 58)

114. The Commission proposes to modify the definition of PODSL in the Transaction Data (Current Field No. 58) to ''The specific location at which the product is delivered. If delivery occurs at a trading hub, then the specific location is not required.'' The current definition of PODSL in the Transaction Data of the EQR is: ''The specific location at which the product is delivered. If receipt occurs at a trading hub, a standardized hub name must be used.'' We propose to remove the requirement to report the hub name in this field because this information, if applicable, would already be captured in the modified PODBAA field (Current Field No. 57) in the Transaction Data.

50. Class Name (Current Field No. 59)

115. The Commission proposes to eliminate the reporting option ''BA-Billing Adjustment'' in the ''Class Name'' field in the Transaction Data, as discussed in Section IV.A.1 of this NOPR. The other reporting options for ''Class Name,'' ''F—Firm,'' ''NF—Non-firm,'' ''UP—Unit Power Sale,'' and ''N/A—Not Applicable'' would remain unchanged.

51. Term Name (Current Field No. 60)

116. The Commission proposes to modify the definition of ''Term Name'' in the Transactions Section of the EQR to: ''Transactions with durations of one year or greater are long-term.

[63] *See* Order No. 768–A, 143 FERC ¶ 61,054 at P 44 (where the Commission stated that ''the Trade Date requirement will be applied prospectively so that only the Trade Date for transactions entered into on or after July 1, 2013 and reported in the third quarter of 2013 EQR must be reported.'')

[64] *See* Order No. 768–A, 143 FERC ¶ 61,054 at P 47.

Transactions with shorter durations are short-term.'' The current definition of ''Term Name'' (Current Field No. 60) in the Transaction Data of the EQR is: ''Power sales transactions with durations of one year or greater are long-term. Transactions with shorter durations are short-term.'' The proposed definition removes the words ''Power sales'' to conform with other EQR data fields.

52. Transaction Quantity, Transaction Price (Current Field Nos. 64–65)

117. The current EQR system imposes a limit of four and six characters, respectively, after a decimal point for ''Transaction Quantity'' (Current Field No. 64) and ''Price'' (Current Field No. 65). The Commission proposes to increase the decimal limit to ten decimal places to allow Sellers to report very small quantities and allow more complete accounting of transactional data.

53. Standardized Quantity (Current Field No. 67)

118. The Commission proposes to modify the definition of ''Standardized Quantity'' to: ''For Product Names Energy, Capacity, and Booked Out Power only. Specify the quantity in MWh if the product is Energy or Booked Out Power and specify the quantity in MW-month if the product is Capacity.''

119. The current definition of ''Standardized Quantity'' is: ''For product names energy, capacity, and booked out power only. Specify the quantity in MWh if the product is energy or booked out power and specify the quantity in MW-month if the product is capacity or booked out power.'' The Commission proposes to remove the phrase ''or booked out power'' used at the end of the current definition to ensure that Booked Out Power transactions are reported in MWh and not MW-month, which should only be used for Capacity transactions.

120. As with reporting ''Trade Date,'' ''Type of Rate,'' and ''Standardized Price,'' ''Standardized Quantity'' data is currently required only for transactions associated with a contract executed on or after July 1, 2013.[65] The Commission proposes to remove the July 1, 2013 date limitation and require a ''Standardized Quantity'' to be reported for all transactions. Removing the current date limitation and enabling the collection of information about standardized quantities for transactions, regardless of when parties executed the relevant contract, would result in more complete and consistent transactional information. The Commission also proposes to increase the four-decimal limit to ten decimal places for ''Standardized Quantity'' to allow Sellers to report very small quantities and allow more complete accounting of transactional data.

54. Standardized Price (Current Field No. 68)

121. The Commission proposes to modify the definition of ''Standardized Price'' to: ''For Product Names Energy, Capacity, and Booked Out Power only. Specify the price in $/MWh if the product is Energy or Booked Out Power and specify the price in $/MW-month if the product is capacity.'' The current definition of ''Standardized Price'' is: ''For product names energy, capacity, and booked out power only. Specify the price in $/MWh if the product is energy or booked out power and specify the price in $/MW-month if the product is capacity or booked out power.'' The Commission proposes to remove the phrase ''or booked out power'' used at the end of the current definition to ensure that Booked Out Power transactions are reported in $/MWh and not $/MW-month, which should only be used for Capacity transactions.

122. As with ''Trade Date,'' ''Type of Rate,'' and ''Standardized Quantity,'' the Commission proposes to remove the July 1, 2013 date limitation and require a ''Standardized Price'' to be reported for all transactions. ''Standardized Price'' data is currently required only for transactions associated with a contract executed on or after July 1, 2013.[66] Removing the current date limitation and enabling the collection of information about standardized prices for transactions, regardless of when parties executed the relevant contract, would result in more complete and consistent transactional information.

123. The Commission also proposes to increase the six-decimal limit to ten decimal places for ''Standardized Price'' to allow Sellers to report very small quantities and allow more complete accounting of transactional data.

V. Proposed Continued Collection of Current Data Fields

124. Under this NOPR, the requirements for reporting information related to the following data fields would remain unchanged:[67]

- ''Extension Provision Description'' (Current Field No. 25)
- ''Increment Name'' (Current Field Nos. 28 and 61)
- ''Quantity'' (Current Field No. 32) (in the Contract Data only)
- ''Units'' (Current Field No. 33) (in the Contract Data only)
- ''Rate'' (Current Field No. 34)
- ''Rate Minimum'' (Current Field No. 35)
- ''Rate Maximum'' (Current Field No. 36)
- ''Increment Peaking Name'' (Current Field No. 62) (in the Transaction Data only)
- ''Transaction Quantity'' (Current Field No. 64) *
- ''Price'' (Current Field No. 65) *
- ''Total Transmission Charge'' (Current Field No. 69)
- ''Total Transaction Charge'' (Current Field No. 70)

VI. Fields Dependent on Future System Design

125. Possible revisions to certain system-generated data fields, including ''Filer Unique Identifier'' (Current Field No. 1),[68] ''Contract Unique ID'' (Current Field No. 15), and ''Transaction Unique ID'' (Current Field No. 45), depend on the outcome of the system design phase for XBRL–CSV. Therefore, any proposed changes to these current data fields are not set forth in this NOPR. The proposed reporting requirements and definitions for these data fields would be issued after publication of the FERC EQR taxonomies and interested parties would be able to provide comments.

VII. Information Collection Statement

126. The collection of information contained in this proposed rule is being submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d). We solicit comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. Specifically, the Commission asks that any proposed burden or cost estimates submitted by commenters be supported by sufficient detail to understand how the proposed estimates are generated. Respondents subject to the filing requirements of this proposed rule will not be penalized for failing to respond to these collections of information

[65] *See id.* P 50.

[66] *See id.*

[67] The ''*'' designates data fields with increases in decimal limits, but no other modifications.

[68] As discussed above, the Commission proposes to delete ''Filer Unique Identifier'' (Current Field No. 71) in connection with the current requirement for a Seller to identify whether its transactions were reported to index price publishers.

unless the collections of information display a valid OMB control number.

127. The proposed rule will affect entities required to file an EQR and RTOs/ISOs. The estimated hourly cost is based on FERC's 2022 Commission-wide average salary cost (salary plus benefits) of $91.00/hour. The Commission staff believes the FERC full-time equivalent (FTE) average cost for wages plus benefits is representative of the corresponding cost for the industry respondents.

128. The revisions proposed in this NOPR would: (a) implement a new collection method based on the XBRL–CSV standard; (b) require RTOs and ISOs to produce reports containing market participant transaction data in XBRL–CSV format that adhere to the FERC EQR taxonomies; and (c) make substantive changes to eliminate or modify the information collected in the EQR. The information collected in the EQR is required to be submitted quarterly to the Commission under existing regulations and reporting requirements adopted under the FPA. Compliance with the changes proposed in this NOPR would be mandatory. We estimate that affected respondents would incur the following burden and other costs.[69]

TABLE NO. 1—CHANGES IN BURDEN FOR THE DATA COLLECTED DUE TO MODIFICATION OF DATA FIELDS AND ASSOCIATED REQUIREMENTS

No.	Formula	Incremental burden category	Currently approved	Updated total for the data collected in the EQR	Difference between currently approved and updated total
(a)		Number of Respondents[70]	2,929	3,111	182
(b)		Annual Number of Responses per Respondent.	4	4	0
(c)	(a)(b) = (c)	Total Annual Number of Responses.	11,716	12,444	728
(d)		Average Burden Hours per Response[71].	18.1	20.3	2.2
(e)		Hourly Cost per Response[72]	$87	$91	$4
(f)	(b)(d) = (f)	Total Annual Burden Hours per Respondent[73].	72.4	81.2	8.8
(g)	(d)(e) = (g)	Total Burden Cost per Response	$1,575	$1,847	$272
(h)	(b)(g) = (h)	Total Annual Burden Cost per Respondent.	$6,300	$7,389	$1,089
(i)	(a)(f) = (i)	Total Annual Burden Hours for All Respondents.	212,060	252,613	40,553
(j)	(e)(i) = (j)	Total Annual Burden Cost for All Respondents.	$18,449,220	$22,987,783	$4,538,563

129. The compliance burden estimate for the proposed substantive changes to the information collected in the EQR are reflected as changes to previously approved estimates submitted to OMB for the EQR (FERC–920 (OMB Control No. 1902–0255)), as shown in Table No. 1 in the Column labeled Currently Approved. We estimate that the number of respondents has increased to 3,111 based on normal industry fluctuations.[74] The estimated burden increase of 2.2 hours per response to comply with the modification of data fields and associated requirements, as shown in Table No. 1, Row (d), results in a new total Average Burden Hours per Response of 20.3 hours. The Annual Burden Cost per Respondent for complying with the proposed modifications to the EQR reporting requirements would increase by $1,600, bringing the total estimated Annual Burden Cost per Respondent to $7,389 (Table No. 1, Row (h)).

[69] Burden is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 CFR 1320.3.

[70] The Number of Respondents of 2,929 is based on the OMB inventory of respondents, current as of the issuance of this NOPR.

[71] The estimated increase in Average Burden Hours per Response is 2.2 hours, where the estimated Year 1 hours are 3.6, Year 2 hours are 2, and Year 3 hours is 1 ((3.6 + 2 + 1)/3 = 2.2 hours).

[72] The estimated hourly cost is based on FERC's 2022 Commission-wide average salary cost (salary plus benefits) of $91.00/hour. The Commission staff believes the FERC FTE average cost for wages plus benefits is representative of the corresponding cost for the industry respondents. Therefore, we are updating the hourly pay rate of $87 used in the 2021 OMB renewal of the EQR collection to reflect the cost of $91.00/hour.

[73] The formulas shown in Table No. 1 apply solely to the Columns labeled Currently Approved and Updated Total for the Data Collected in the EQR.

[74] The estimated number of respondents is based on the 2022 Q3 EQR submissions.

TABLE NO. 2—ONE-TIME FORMATTING SUBMISSION IN XBRL–CSV FOR FIRST QUARTER OF FIRST YEAR, BURDEN ESTIMATE FOR SUBMISSION IN XBRL–CSV

Row No.	Formula	Incremental burden category	Filers using FERC templates for submissions (A)	Filers creating XBRL–CSV submissions (B)	Filers with no change to submission (C)
(a)		Number of Respondents[75]	1,866	778	467
(b)		Number of Responses per Respondent.	1	1	1
(c)	(a)(b) = (c)	Total Number of Responses	1,866	778	467
(d)		Average Burden Hours per Response.	5	20	1
(e)		Hourly Cost per Response	$91	$91	$91
(f)	(b)(d) = (f)	Total Burden Hours per Respondent.	5	20	1
(g)	(d)(e) = (g)	Total Burden Cost per Response	$455	$1,820	$91
(h)	(b)(g) = (h)	Total Burden Cost per Respondent	$455	$1,820	$91
(i)	(a)(f) = (i)	Total 1st Quarter Burden Hours	9,330	15,560	467
(j)	(e)(i) = (j)	Total 1st Quarter Burden Cost	$849,030	$1,415,960	$42,497

TABLE NO. 3—FIRST YEAR, QUARTERS 2, 3 & 4 BURDEN ESTIMATE FOR SUBMISSION IN XBRL–CSV

Row No.	Formula	Burden category	Filers using FERC templates for submissions (A)	Filers creating XBRL–CSV submissions (B)	Filers with no change to submission (C)
(k)		Number of Respondents[76]	1,866	778	467
(l)		Number of Responses per Respondent for Quarters 2, 3, and 4 of First Year.	3	3	3
(m)	(k)(l) = (m)	Total Number of Responses for Quarters 2, 3, and 4 of First Year.	5,598	2,334	1,401
(n)		Average Burden Hours Per Response.	2	3	1
(o)		Hourly Cost Per Response	$91	$91	$91
(p)	(l)(n) = (p)	Total Burden Hours per Respondent.	6	9	3
(q)	(n)(o) = (q)	Total Burden Cost per Response	$182	$273	$91
(r)	(l)(q) = (r)	Total Burden Cost per Respondent	$546	$819	$273
(s)	(k)(p) = (s)	Total Burden Hours for Quarters 2–4 of First Year.	11,196	7,002	1,401
(t)	(k)(r) = (t)	Total Burden Cost for Quarters 2–4 of First Year.	$1,018,836	$637,182	$127,491

[75] For the first filing of Year 1: 60% of Respondents would use the FERC Templates for submissions, 25% would create an XBRL–CSV submission, and 15% would have no change to their submission.

[76] For Year 1, quarters 2 through 4: 60% of Respondents would use the FERC Templates for submissions, 25% would create an XBRL–CSV submission, and 15% would have no change to their submission.

TABLE NO. 4—YEARS 2 & 3 ANNUAL BURDEN ESTIMATE FOR SUBMISSION IN XBRL–CSV

Row No.	Formula	Burden category	Filers using FERC templates for submissions (A)	Filers creating XBRL–CSV submissions (B)	Filers with no change to submission (C)
(u)		Number of Respondents[77]	1,866	778	467
(v)		Annual Number of Responses Per Respondent.	4	4	4
(w)	(u)(v) = (w)	Total Annual Number of Responses.	7,464	3,112	1,868
(x)		Average Burden Hours Per Response.	1	1	0.25
(y)		Hourly Cost Per Response	$91	$91	$91
(z)	(x)(y) = (z)	Total Burden Cost per Response	$91	$91	$23
(D)	(v)(x) = (D)	Total Annual Burden Hours per Respondent.	4	4	1
(E)	(D)(y) = (E)	Total Annual Burden Cost per Respondent.	$364	$364	$91
(F)	(x)(w) = (F)	Total Annual Burden Hours for All Respondents.	7,464	3,112	467
(G)	(F)(y) = (G)	Total Annual Burden Cost for All Respondents.	$679,224	$283,192	$42,497

TABLE NO. 5—SUMMARY OF BURDEN FOR FORMATTING SUBMISSION IN XBRL–CSV FOR YEARS 1 THROUGH 3

Row No.	Formula	Description	Totals
(H)	(iA) + (iB) + (iC) + (sA) + (sB) + (sC) + 2((FA) + (FB) + (FC)) = (H).	Three-Year Total Burden Hours	67,042
(I)	(H)/3 = (I)	Average Burden Hours Per Year (forecast through third year).	22,347
(J)	(H)(yA) = (J)	Three-Year Total Burden Cost	$6,100,822
(K)	(J)/3 = (K)	Average Annual Total Burden Cost (forecast through third year).	$2,033,607

130. The burden estimate related to changing the submission format to XBRL–CSV is shown in Table Nos. 2 through 5. The estimate presents three options, in different time periods, for filers to: (1) submit the EQRs using pre-formatted FERC Templates that adhere to the FERC EQR taxonomies (Column (A) of Table Nos. 2–4); (2) prepare XBRL–CSV submission files that adhere to the FERC EQR taxonomies (Column (B) of Table Nos. 2–4), or (3) submit a response that indicates there was no change from the previous quarter (Column (C) of Table Nos. 3–4). We estimate that 60% of filers would be able to use the FERC Templates and that the burden would decrease over time. For the filers using the FERC Templates, the Total Burden Cost per Respondent for the first quarter of the first year would be $455, and would decrease to $182 on a quarterly basis for quarters 2 through 4 of the first year, and would decrease further to $91 per response for Years 2 and 3. For the filers creating XBRL–CSV submissions, the Total Burden Cost per Respondent would follow a similar downward quarterly trend over time. For the filers that only report Identification Data or Identification and Contract Data, and have no change to the submission from the previous quarter, the Total Burden Cost per Respondent would remain one hour per quarter over Years 1–3. This proposed submission option would simplify the EQR filing process for those Sellers that do not report Transaction Data.

131. As shown in Table No. 4, Row (u), after the first submission in XBRL–CSV, we estimate that 467 Respondents, *i.e.,* 15% of the 3,111 Total Respondents, as shown in Table No. 1, Row (a), would elect to use the proposed new option that would only require filers to confirm that no changes to the EQR occurred from the previous quarter. We estimate that 1,866 Respondents, as shown in Table No. 3, Row (k), *i.e.,* 60% of 3,111 Total Respondents, would continue to use the FERC Templates in the second quarter of Year 1 and beyond. The Average Burden Hours per Respondent for filers creating their own XBRL–CSV submissions (*i.e.,* 778 Respondents),[78] as shown in Table No. 3, Row (k), Column (B), decreases on a quarterly basis from 20 hours in the first quarter of Year 1, to 9 hours for each of the remaining quarters of Year 1, and 4 hours for each quarter in Years 2–3. We anticipate that the Annual Burden Hours per Respondent would decrease further, as these Respondents become more familiar with the new system.

132. As reflected in Table Nos. 2 through 4, we estimate that changing the submission format to XBRL–CSV would result in the following expenses. Filers using FERC Templates would incur a total expense of $1,729 for Years 1

[77] For Years 2 and 3: 60% of Respondents would use the FERC Templates for submissions, 25% would create an XBRL–CSV submission, and 15% would have no change to their submission.

[78] Calculated as 25% of 3,111 Total Respondents, as shown in Table No. 4, Row (u).

through 3.[79] For those filers creating XBRL–CSV submissions, we expect a total expense of $3,367 for the same time period.[80] Finally, for those filers with no changes to their submissions after the initial quarter of Year 1, we expect a total expense of $546 for the same time period.[81]

133. Table Nos. 6 through 8 estimate the burden on RTOs/ISOs to produce and make available transaction data reports that adhere to the FERC EQR taxonomies for use by their market participants in submitting EQRs. Table No. 6 outlines the burden estimate for RTOs/ISOs to implement this proposed requirement in the first year. Specifically, for RTOs/ISOs that currently produce EQR transaction data reports for their market participants, the first year's Total Burden Cost per Respondent to create XBRL–CSV formatted reports, as shown in Row (h), Column (A) of Table No. 6, is estimated to be $6,108. For RTOs/ISOs that do not currently produce EQR transaction data reports for their market participants, the first year's Total Burden Cost per Respondent is estimated to be $24,432, as shown in Row (h), Column (B) of Table No. 6. Table No. 7 reflects the estimated annual costs that RTOs/ISOs would incur in Years 2 and 3 to maintain their systems.

TABLE NO. 6—FIRST YEAR BURDEN ESTIMATE FOR RTO/ISO REPORTS

Row No.	Formula	Burden category	RTOs/ISOs with existing EQR transaction data reports (A)	RTOs/ISOs without existing EQR transaction data reports (B)
(a)		Number of Respondents	5	1
(b)		Response per Respondent to Incorporate New System Requirements.	1	1
(c)	(a)(b) = (c)	Total Number of Responses	5	1
(d)		Average Burden Hours per Response	80	320
(e)		Hourly Cost per Response[82]	$76.35	$76.35
(f)	(d)(e) = (f)	Total Burden Cost per Response	$6,108	$24,432
(g)	(b)(d) = (g)	Total Burden Hours per Respondent	80	320
(h)	(g)(e) = (h)	Total Burden Cost per Respondent	$6,108	$24,432
(i)	(a)(g) = (i)	Total Annual Burden Hours for All Respondents.	400	320
(j)	(i)(e) = (j)	Total Annual Burden Cost	$30,540	$24,432

TABLE NO. 7—ANNUAL BURDEN ESTIMATE FOR RTO/ISO REPORTS, FORECASTED FOR YEARS 2 AND 3

Row No.	Formula	Burden category	All RTO/ISO (E)
(k)		Number of Respondents	6
(l)		Annual Number of Responses per Respondent.	1
(m)	(k)(l) = (m)	Total Number of Responses	6
(n)		Average Burden hours per Response	36
(o)		Hourly Cost per Response	$76.35
(p)	(n)(o) = (p)	Total Burden Cost per Response	$2,749
(q)	(l)(n) = (q)	Total Annual Burden Hours per Respondent.	36
(r)	(q)(o) = (r)	Total Burden Cost per Respondent	$2,749
(s)	(k)(q) = (s)	Total Annual Burden Hours	216
(t)	(o)(s) = (t)	Total Annual Burden Cost	$16,492

[79] $1,729 is the sum total of $455 (Table No. 2, Row (h), Column (A)) + $546 (Table No. 3, Row (r), Column (A)) + ($364*2) (Table No. 4, Row (E), Column (A), where $364 is multiplied by 2 to reflect the Total Annual Burden Cost per Respondent for Years 2 and 3).

[80] $3,367 is the sum total of $1,820 (Table No. 2, Row (h), Column (B)) + $819 (Table No. 3, Row (r), Column (B)) + ($364*2) (Table No. 4, Row (E), Column (B), where $364 is multiplied by 2 to reflect the Total Annual Burden Cost per Respondent for Years 2 and 3).

[81] $546 is the sum total of $91 (Table No. 2, Row (h), Column (C)) + $273 (Table No. 3, Row (r), Column (C)) + ($91*2) (Table No. 4, Row (E), Column (C), where $91 is multiplied by 2 to reflect the Total Annual Burden Cost per Respondent for Years 2 and 3).

[82] The estimated hourly costs (salary plus benefits) are based on Bureau of Labor Statistics information, as of May 2022 (at *http://www.bls.gov/oes/current/naics2_22.htm,* with updated benefits information for March 2022 at *http://www.bls.gov/news.release/ecec.nr0.htm*), for a Computer and Information Analyst (15–1210).

TABLE NO. 8—SUMMARY OF BURDEN FOR ALL RTOS/ISOS FOR YEARS 1 THROUGH 3

Row No.	Formula	Burden category	Totals
(u)	(iA) + (iB) + 2(sE) = (u)	Three-Year Total Burden Hours	1,152
(v)	(v) = (u)/3	Average Burden Hours Per Year	384
(w)	(u)(o) = (w)	Three-Year Total Burden Cost	$87,955
(x)	(x) = (w)/3	Average Annual Total Burden Cost	$29,318

134. The Commission proposes to direct its staff to help Sellers and RTOs/ISOs with the initial implementation of the proposed reporting requirements and filing process by convening staff-led technical conference(s). The conference(s) would be available by webcast.

Title: FERC–920, Electric Quarterly Report (EQR) [OMB No.: 1902–0255].

Action: Proposed new EQR filing system and additional reporting requirements for all filers.

OMB Control No.: 1902–0255.

Respondents: Electric utilities.

Frequency of Responses: Quarterly.

Necessity of the Information: The Commission proposes to implement a new collection method for EQR reporting based on the XBRL–CSV standard; amend its regulations to require Regional Transmission Organizations (RTO) and Independent System Operators (ISO) to produce reports containing market participant transaction data; and modify or clarify EQR reporting requirements.

Internal Review: The Commission has reviewed the proposed changes and has determined that the changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information collection requirements.

135. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, email: *DataClearance@ferc.gov,* phone: (202) 502–8663]. Please send comments concerning the collection of information and the associated burden estimates to the Commission.

VIII. Environmental Analysis

136. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[83] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.[84] The proposed rule is categorically excluded as an electric rate filing submitted by a public utility under sections 205 and 206 of the FPA.[85] Accordingly, no environmental assessment is necessary and none has been prepared in this NOPR.

IX. Regulatory Flexibility Act

137. The Regulatory Flexibility Act of 1980 (RFA)[86] generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to perform this sort of analysis if the proposed activities within the NOPR would not have such an effect.

138. As discussed above, the EQR is required to be filed under FPA sections 205(c) and 220. The NOPR proposes updates to the filing requirements and the method through which respondents submit EQR data to the Commission. The annual cost currently associated with filing the EQR is $6,300 per respondent, which includes preparing the data and submitting it to the Commission. The Commission estimates an increase of $1,089 per respondent to the annual cost of filing EQRs as a result of implementing the proposed modifications to the data fields and associated requirements. In addition, the Commission estimates an increase in the first-year cost for submitting EQRs using XBRL–CSV. The costs for submitting the EQR in XBRL–CSV would be $1,001 per respondent for the 60% of filers that are anticipated to use FERC Templates; $2,639 for the 25% of respondents that are anticipated to create their own XBRL–CSV submission system; and $364 for the remaining 15% of respondents that are anticipated to have no change to their submission during the first year.

139. In Years 2 and 3, the Commission estimates that the XBRL–CSV submission cost would decline to a level of $364 for the respondents that used FERC Templates or created their own systems. For respondents that submit EQRs without changes in Year 1, the annual cost would decline to $91 per respondent. The cost for Year 2 or 3 per respondent would be $1,180, calculated as ($1,089 + $91) if a respondent submits no changes to its data in the proposed system, and $1,453, calculated as ($1,089 + $364) if a respondent uses the FERC Templates or develops its own XBRL–CSV system. For Years 2 and 3, the percentage of respondents selecting each submission option is estimated to remain as stated for Year 1. The Commission estimates that the relatively small increase in EQR filing costs for Years 1 through 3 following the implementation of the proposed modifications would not have a significant economic impact on small entities.

140. In the second quarter of 2022 (Q2 2022), the Commission received 3,058 EQR filings. Among the Sellers were electric utilities and other companies that are required to file the EQR, and therefore are subject to the requirements adopted by this rule. To evaluate if this NOPR will significantly impact small entities, the Commission used a random sample (342 entities) of Q2 2022 filers and researched the number of companies that would be categorized as small as defined by the Small Business Administration (SBA).[87] Since the EQR

[83] *Reguls. Implementing the Nat'l Envt'l Pol'y Act,* Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at 41 FERC ¶ 61,284).

[84] 18 CFR 380.4.

[85] 18 CFR 380.4(a)(15).

[86] 5 U.S.C. 601–612.

[87] The small business size standards are provided in 13 CFR 121.201. In 13 CFR 121.201, the SBA uses the North American Industry Classification System (NAICS) codes. The Commission used the SBA standards for the utilities subsector (221). [NAICS Codes 221111 (Hydroelectric Power Generation), 221112 (Fossil Fuel Electric Power Generation), 221113 (Nuclear Electric Power Generation), 221114 (Solar Electric Power Generation), 221115 (Wind Electric Power Generation), 221116 (Geothermal Electric Power Generation), 221117 (Biomass Electric Power Generation, 221118 (Other Electric Power Generation), 221121 (Electric Bulk Power Transmission Control), 221122 (Electric Power Distribution)]. SBA classifies utilities subsector companies with 250 to 1000 employees as small

Continued

is required by a range of filers, there was also a range in number of employees due to the type of power generation, transmission, or distribution. The employee totals ranged from 250 employees (*e.g.,* solar) to 1,000 employees (*e.g.,* electric power distribution).

141. Using the random sample of 342 filers for Q2 2022, the Commission estimates 143 entities would be considered small as defined by SBA regulations. All of the small entities in our analysis fall under the 1,000 employee threshold, in fact, they fall under the 250-employee threshold or are unknown, in which case, we assume they are small entities. Furthermore, the Commission estimates that 199 entities would surpass the small business threshold according to the SBA standards. Out of the Commission's random sample, approximately 42% of respondents would be considered small and 58%—the majority of respondents—would not be considered small.

142. Given the number of respondents that are categorized as small, the Commission is taking steps to ease the burden of the transition by helping respondents through technical conference(s). This mechanism can be used by all firms that would be required to comply with a final rule in this proceeding and are intended to reduce the transition burden. Additionally, the proposed FERC Templates can be used to reduce the need for a respondent to create their own XBRL–CSV system.

143. The Commission finds that the additional support provided by the technical conference(s) and templates will reduce the economic burden below the threshold of significant.

144. Accordingly, the Commission certifies that the revised requirements set forth in this NOPR will not have a significant economic impact on a substantial number of small entities, and no regulatory flexibility analysis is required.

X. Comment Procedures

145. The Commission invites interested persons to submit comments on the matters and issues proposed in this document to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due December 26, 2023. Comments must refer to Docket No. RM23–9–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

146. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *https://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software must be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

147. Commenters that are not able to file comments electronically may file an original of their comment by USPS mail or by courier-or other delivery services. For submission sent via USPS only, filings should be mailed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submission of filings other than by USPS should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

XI. Document Availability

148. 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*).

149. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

150. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov* to schedule access to view the contents of this document in person during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE, Washington, DC 20426.

businesses depending on more specific industry categories.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By direction of the Commission.

Issued October 19, 2023.

Kimberly D. Bose,

Secretary.

In consideration of the foregoing, the Commission proposes to amend 18 CFR Chapter I, Part 35, as set forth below:

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for Part 35 continues to read as follows:

Authority: 16. U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Amend § 35.10b by revising the introductory text and adding paragraph (d) to read as follows:

§ 35.10b Electric Quarterly Reports.

Each public utility as well as each non-public utility with more than a *de minimis* market presence shall file an updated Electric Quarterly Report with the Commission covering all services it provides pursuant to this part, for each of the four calendar quarters of each year, in accordance with the following schedule: for the period from January 1 through March 31, file by July 31; for the period from April 1 through June 30, file by October 31; for the period July 1 through September 30, file by January 31 of the following year; and for the period October 1 through December 31, file by April 30 of the following year. Electric Quarterly Reports must be prepared in conformance with the Commission's guidance posted on the FERC website (*https://www.ferc.gov*).

* * * * *

(d) Each RTO/ISO must prepare and make available transaction data reports that adhere to the Commission's filing and formatting requirements for use by its market participants in submitting their EQRs.

■ 3. Amend § 35.41 by revising paragraph (c) to read as follows:

§ 35.41 Market behavior rules.

* * * * *

(c) *Price reporting.* To the extent a Seller engages in reporting of transactions to publishers of electric or natural gas price indices, Seller must provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher, by reporting its transactions in a manner consistent with the procedures set forth in the *Policy*

Statement on Natural Gas and Electric Price Indices, issued by the Commission in Docket No. PL03–3–000, and any clarifications thereto. In addition, Seller must adhere to any other standards and requirements for price reporting as the Commission may order.

* * * * *

[FR Doc. 2023–23592 Filed 10–26–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–100908–23]

RIN 1545–BQ54

Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and public hearing; correction.

SUMMARY: This document contains corrections to a notice of proposed rulemaking (REG–100908–23) that was published in the **Federal Register** on August 30, 2023. The notice of proposed rulemaking contains proposed regulations concerning increased credit or deduction amounts available for taxpayers satisfying prevailing wage and registered apprenticeship (collectively, PWA) requirements established by the Inflation Reduction Act of 2022 (IRA).

DATES: Written or electronic comments are still being accepted and must be received by October 30, 2023. The public hearing on these proposed regulations is scheduled to be held on November 21, 2023, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by October 30, 2023.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *https://www.regulations.gov* (indicate IRS and REG–100908–23) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted, whether electronically or on paper, to the IRS's public docket. Send paper submissions to: CC:PA:01:PR (REG–100908–23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning this proposed regulations, the Office of Associate Chief Counsel (Passthroughs & Special Industries) at (202) 317–6853 (not a toll-free number); concerning submissions of comments and or the public hearing, Vivian Hayes at (202) 317–6901 (not a toll-free number) or by email to *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION:

Background

The proposed regulation that is the subject of this correction is under sections 30C, 45, 45L, 45U, 45V, 45Y, 45Z, 48C, 48E, and 179D of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking (REG–100908–23) contains errors that need to be corrected.

Correction of Publication

Accordingly, the notice of proposed rulemaking (REG–100908–23) that is the subject of FR Doc. 2023–18514, published on August 30, 2023, at 88 FR 60018, is corrected to read as follows:

■ 1. On page 60031, the third line from the bottom of the third column is corrected to read ''Participation Requirement, then the penalty''.

■ 2. On page 60334, in the first column, first line of the column is corrected to read ''Exception, or the BOC Exception, then the''.

■ 3. On page 60036, in the third column, the last line of the third full paragraph is corrected to read ''filers, and tax-exempt organizations.''.

■ 4. On page 60036, in the third column, third line from the bottom of the fourth full paragraph is corrected to read ''proposed regulation does not alter any of the DOL''.

■ 5. On page 60037, in the first column, second line from the bottom of the first partial paragraph, the language ''number'' is corrected to read ''Number''.

■ 6. On page 60037, in the first column, seventh line from the top of the second full paragraph is corrected to read ''include third-party disclosures for ''.

■ 7. On page 60037, in the second column, the fourth line of the third full paragraph is corrected to read ''to display the prevailing wage rates ''.

■ 8. On page 60038, in the first column, fifth line from the bottom of the first full paragraph is corrected to read ''prevailing wage and apprenticeship''.

■ 9. On page 60040, in the first column, in the ''Authority:'' paragraph, the third line is corrected to read ''U.S.C. 30C.''.

§ 1.45–7 [Corrected]

■ 10. On page 60043, in the first column, the first line of paragraph (b)(7)(iv), is corrected to read ''construction, alteration, or repair work''.

■ 11. On page 60046, in the first column, the second line from the bottom of paragraph (c)(6)(iii)(C) is corrected to read ''filing the tax return claiming the''.

■ 12. On page 60046, in the second column, the sixth line from the bottom of paragraph (c)(6)(iii)(D), is corrected to read ''filing the tax return claiming the''.

§ 1.45–8 [Corrected]

■ 13. On page 60047, in the third column, the third line from the bottom of paragraph (c)(2), is corrected to read ''apprentice-to-journeyworker ratio of the''.

■ 14. On page 60049, in the first column, tenth line from the bottom of paragraph (e)(2)(ii)(F), is corrected to read ''apprentices that were denied for the 120-''.

§ 1.45–12 [Corrected]

■ 15. On page 60051, in the third column, the second occurrence of paragraph (c)(3) through paragraph (c)(8) is redesignated as paragraphs as (c)(4) through (9).

■ 16. On page 60051, in the third column, the third line from the bottom of newly redesignated paragraph (c)(8) is corrected to read ''apprentice-to-journeyworker ratios''.

■ 17. On page 60052, in the first column, the first line of paragraph (d) introductory text is corrected to read ''employed by the taxpayer, contractor,''.

§ 1.48–13 [Corrected]

■ 18. On page 60053, in the third column, the second line from the bottom of paragraph (c)(1) is corrected to read ''requirements of section 48(a)(10)(A)(ii) at the time such project is''.

Oluwafunmilayo A. Taylor,

Section Chief, Publications and Regulations, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2023–23616 Filed 10–26–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2023–0658]

RIN 1625–AA09

Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to modify the operating schedule that governs the Roosevelt (US1) Bridge, across the Okeechobee Waterway, mile 7.5, at Stuart, FL. This action is necessary to allow the drawbridge to operate on demand as outlined in the Record of Decision for the high-level fixed US1 Roosevelt Bridge which was constructed in 1997. Additionally, with the anticipated increase in railway activity on the adjacent railroad bridge, this proposed modification will allow the bridges to operate in concert. The drawbridge name in the regulation is incorrect and will be changed. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must reach the Coast Guard on or before November 27, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0658 using Federal Decision Making Portal at *https://www.regulations.gov.*

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e- mail Ms. Jennifer Zercher, Bridge Management Specialist, Seventh Coast Guard District; telephone 305–415–6740, email *Jennifer.N.Zercher@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
OMB Office of Management and Budget
NPRM Notice of Proposed Rulemaking (Advance, Supplemental)
§ Section
U.S.C. United States Code
FL Florida
FDOT Florida Department of Transportation

II. Background, Purpose and Legal Basis

The Roosevelt (US1) Bridge, across the OWW, mile 7.5, at Stuart, Florida, is a double-leaf bascule bridge with a 14-foot vertical clearance at mean high water in the closed position. The normal operating schedule for the bridge is found in 33 CFR 117.317(d). Navigation on the waterway is commercial and recreational.

The Coast Guard is proposing to modify the drawbridge operating schedule to allow the drawbridge to operate on demand as outlined in the Record of Decision for the high-level fixed US1 Roosevelt Bridge which was constructed in 1997. Additionally, with the anticipated increase in railway activity on the adjacent railroad bridge, this proposed modification will allow the bridges to operate in concert. The drawbridge name in the regulation, Roosevelt (US1) Bridge, is incorrect and will be permanently changed in the CFR and referred to for the remainder of the NPRM as SR 707 (Dixie Highway) Bridge.

The SR 707 (Dixie Highway) Bridge was included in previously published notices and a general deviation with a request for comments in the **Federal Register**, under docket number USCG–2022–0222. These actions were taken to gather comments on waterway usage and the operation of the Florida East Coast Railroad Bridge and the SR 707 (Dixie Highway) Bridge at Stuart, FL.

On May 3, 2022, the Coast Guard published a Notification of Inquiry entitled, ''Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL'' in the **Federal Register** (87 FR 26145). On June 10, 2022, a Supplemental Notification of Inquiry entitled, ''Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL'' was published in the **Federal Register** (87 FR 35472). We received a total 2358 comments on those publications.

The Coast Guard asked the public if the SR 707 (Dixie Highway) Bridge opening schedule should mirror the operating schedule of the FEC Railroad Bridge. 172 comments were received regarding this question. 97 comments stated the SR 707 (Dixie Highway) Bridge and the FEC Railroad Bridge should have similar coordinated scheduled openings. We have determined that placing the highway bridge on demand will allow the bridges to coordinate openings given the unique operation of the railroad bridge. The difference in navigational clearances requires the railroad bridge to be open for specific lengths of times and when trains are not crossing. The highway bridge is not as restrictive to navigation and does not require a stricter operating schedule. 52 comments stated the highway bridge should operate on demand with the railroad bridge operating the same. Railway operations are dynamic and on demand openings are not sustainable for the rail industry. The anticipated increase in railway activity necessitates this proposed change in the operating schedule for the highway bridge to allow the bridges to operate in concert. Seven comments recommended the highway bridge remain unchanged and the railroad bridge should operate per the highway bridge regulation. The highway bridge no longer requires the published operating schedule since the US1 Roosevelt Bridge was constructed and open to vehicle traffic. Again, railway operations are dynamic and on demand openings are not sustainable for the rail industry. The remaining comments were not considered as the responses included the highway bridge should be permanently removed, the operating schedules should be the same if the railroad bridge was rebuilt at a higher vertical clearance and the operating schedule of either bridge was not known so a response could not be provided.

On June 8, 2023, the Coast Guard published a Temporary Deviation entitled, ''Drawbridge Operation Regulation; Okeechobee Waterway, Stuart, FL'' in the **Federal Register** (88 FR 37470). The comment period ended on August 4, 2023, with 342 comments received.

The comments received were not specific to the SR 707 (Dixie Highway) Bridge but directed toward the operation of the railroad bridge. Given the dynamic and uncertain nature of the operation of the railroad bridge, the SR 707 (Dixie Highway) Bridge has been removed from docket number USCG–2022–0222 to allow separate rulemaking for the highway bridge to operate on demand.

III. Discussion of Proposed Rule

Under this proposed rule, the SR 707 (Dixie Highway) Bridge will open on demand except when the adjacent railroad bridge is in the closed position, the drawbridge need not open. The draw must open immediately upon opening of the railroad bridge to pass all accumulated vessels which request an opening. Vessels that can pass beneath the bridge without an opening may do so at any time.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and

Executive Orders related to rulemaking. Below we summarize our analyses based on these statutes and Executive Orders.

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 proposed rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, *as amended by Executive Order 14094 (Modernizing Regulatory Review*). This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the ability that vessels can transit the bridge on demand and vessels able to pass without an opening may do so at any time.

B. Impact on Small Entities

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

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

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

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed 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. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01, Rev.1, associated implementing instructions, and Environmental Planning Policy COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f). The Coast Guard has 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 proposed rule promulgates the operating regulations or procedures for drawbridges. Normally such actions are categorically excluded from further review, under paragraph L49, of Chapter 3, Table 3–1 of the U.S. Coast Guard Environmental Planning Implementation Procedures.

Neither a Record of Environmental Consideration nor a Memorandum for the Record are required for this rule. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

V. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0658 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If your material cannot be submitted using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you go to the online docket and sign up for email alerts, you will be notified when

comments are posted, or a final rule is published of any posting or updates to the docket.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

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

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; and DHS Delegation No. 00170.1, Revision No.01.3

■ 2. Amend § 117.317 by revising paragraph (d) to read as follows:

§ 117.317 Okeechobee Waterway

* * * * *

(d) The SR 707 (Dixie Highway) Bridge, mile 7.5 at Stuart, shall open on signal; except when the adjacent railroad bridge is in the closed position, the draw need not open. The draw must open immediately upon opening of the railroad bridge to pass all accumulated vessels requesting an opening.

* * * * *

Dated: October 13, 2023.

Douglas M. Schofield,

Rear Admiral, U.S. Coast Guard, Commander, Coast Guard Seventh District.

[FR Doc. 2023–23757 Filed 10–26–23; 8:45 am]

BILLING CODE 9110–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2, 25, 74, 78, 90, 97, and 101

[ET Docket No. 23–120; FCC 23–26; FR ID 181076]

Implementation of the Final Acts of the 2015 World Radio Communication Conference; Correction

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; correction.

SUMMARY: This document corrects the preamble to a proposed rule published in the **Federal Register** of September 29, 2023, concerning implementation of certain allocation decisions from the Final Acts of the World Radiocommunication Conference 2015. The document provided an incorrect comment date and reply comment date.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Jamie Coleman of the Office of Engineering and Technology, Policy and Rules Division, Spectrum Policy Branch, at (202) 418–2705 or *Jamie.Coleman@fcc.gov*.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of September 29, 2023, in FR Doc. 2023–19383, on page 67160, in the third column, correct the **DATES** caption to read:

DATES: Interested parties may file comments on or before November 28, 2023; and reply comments on or before December 28, 2023. All filings must refer to ET Docket No. 23–120.

This is a summary of the Commission's Notice of Proposed Rulemaking (NPRM) in ET Docket No. 23–120; FCC 23–26, adopted on April 18, 2023, and released on April 21, 2023. The full text of this document is available for public inspection online at *https://docs.fcc.gov/public/attachments/FCC-23-26A1.pdf*.

Marlene Dortch,

Secretary.

[FR Doc. 2023–23673 Filed 10–26–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 231023–0250]

RIN 0648–BM60

Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Pacific Coast Groundfish Fishery Management Plan; 2024 Specifications and Management Measures Corrections

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

ACTION: Proposed rule; request for comments.

SUMMARY: This rule proposes to correct 2024 harvest specifications for several species of groundfish where the numerical values were mathematically calculated incorrectly and do not accurately reflect the harvest policy recommendations of the Pacific Fishery Management Council (Council). These harvest specifications are for groundfish caught in the U.S. exclusive economic zone seaward of Washington, Oregon, and California, consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Pacific Coast Groundfish Fishery Management Plan (PCGFMP). This proposed rule would revise harvest limits or allocations that were calculated based on incorrect annual catch limits. This action would implement corrected numerical values that align with the Council's intended harvest policy decisions and considers the most recent fishery information available at the time those policies were recommended.

DATES: Comments must be received no later than November 13, 2023.

ADDRESSES: Submit your comments on the proposed rule identified by NOAA–NMFS–2023–0108, by the following method:

• *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter NOAA–NMFS–2023–0108 in the Search box. Click the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments must be submitted by the above method to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and NMFS will post for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic Access

This rulemaking is accessible via the internet at the Office of the Federal Register website at *https://*

www.federalregister.gov/. Background information and documents including an analysis for the policy decisions underpinning this action (Analysis), which addresses the statutory requirements of the Magnuson-Stevens Act are available from the Council's website at *https://www.pcouncil.org.* The final 2022 Stock Assessment and Fishery Evaluation (SAFE) report for Pacific Coast groundfish, as well as the SAFE reports for previous years, are available from the Council's website at *https://www.pcouncil.org.* The final Environmental Assessment (EA) and Regulatory Impact Review from the 2023–2024 harvest specifications is available from the NMFS website at *https://www.fisheries.noaa.gov/region/west-coast.*

FOR FURTHER INFORMATION CONTACT: Gretchen Hanshew, Fishery Management Specialist, at 206–526–6147 or *gretchen.hanshew@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Chapter 5 of the PCGFMP requires the Council to assess the biological, social, and economic conditions of the Pacific coast groundfish fishery and use this information to develop harvest specifications and management measures at least biennially. The Council's final recommendations for 2024 harvest specifications and management measures for over 120 species and management units were made at its April and June 2022 meetings and published in a proposed rule on October 14, 2022 (87 FR 62676). No public comments regarding the subject harvest specifications and management measures were received, and NMFS published the final rule on December 16, 2022 (87 FR 77007). Hereafter, these proposed and final rules for the 2023–2024 harvest specifications and management measures will be referred to as the ''original'' proposed and final rules. In a small subset (six species or management units) of those harvest specifications and harvest target management measures regulations, the numerical values were miscalculated and are either too high (increasing risk of overfishing) or are too low (increasing risk of not achieving optimum yield). Specific details on the errors and corrected values for each species are discussed below.

The subject harvest policies used to calculate the numerical values (both original and corrected values in this proposed rule) for these harvest specifications and harvest target management measures are not revised from those described in the original proposed and final rules for the 2023–2024 harvest specifications and management measures. However, the correctly calculated values for those policies were not published during the rulemaking process. Therefore, we are seeking comments on the regulation changes in this action. All comments received by the end of the comment period will be considered. These measures are intended to help prevent overfishing, rebuild overfished stocks, achieve optimum yield, and ensure management measures are based on the best scientific information available.

II. Corrections to Harvest Specifications and Harvest Targets

Harvest specifications are numerical values of the harvestable surplus and include overfishing limits (OFLs), the annual biological catch (ABC), and annual catch limits (ACLs). Additional information on harvest specifications and how they are calculated and used for fishery management can be found in the preamble of the original proposed rule. Harvest targets are management measures calculated based on allocations and sharing agreements between fishery sectors and/or states. Harvest targets are calculated based on ACLs. If the ACL numerical values are incorrect, harvest targets will also be incorrect. The OFLs, ABCs, and ACLs in this proposed rule are based on the best available biological data, including projected biomass trends, information on assumed distribution of stock biomass, and technical methods used to calculate stock biomass and apportion that biomass within the allocation structure of the PCGFMP. Mistakes in the calculation and apportionment of harvestable surplus were made early in the harvest specifications process that resulted in incorrect OFLs for a few species. Those mistakes were not caught, and some propagated all the way through ABCs, ACLs, and the setting of management measures like catch sharing and allocations.

In preparing for the development of 2025–26 biennial harvest specifications and management measures during the summer of 2023, calculation errors for the 2023–2024 harvest specifications were discovered. This meant that the numerical values in the regulations in both 2023 and 2024 were not representative of the harvest policies and technical documents for calculating harvest specifications that had been recommended by the Council. As described below, in developing the 2023–2024 harvest specifications, the intent of the Council was to rely on the best scientific information available. The Council and the proposed rule correctly cite the most up to date analytical documents (*e.g.,* the most recent stock assessment information and the 2022 Stock Assessment and Fishery Evaluation (SAFE) document, See **ADDRESSES**). However, numerical values provided in the 2023–2024 harvest specifications were drawn from prior harvest specification cycles, which resulted in calculation errors in the original proposed and final rules. This rulemaking is necessary to reflect the intent of the Council and NMFS in the 2023–2024 harvest specifications and management measures and the descriptions of the harvest specifications in the original proposed rule. This proposed rule would correct the errors for the 2024 harvest specifications, as recommended by the Council at its September 7–14, 2023 meeting.

Due to the timing of being made aware of these mistakes, and because the 2023 fishing season was more than 75 percent complete by the time the Council considered this issue at its September 2023 meeting, we are only proposing corrections for the 2024 fishing season, which begins on January 1, 2024. This action proposes correctly calculated numerical values for 2024 that are representative of the Council-recommended harvest control rules and that incorporate fishery and other scientific information that was inadvertently omitted in the original proposed and final rules. This action would not revise static numerical values deducted from the ACLs, such as set-asides for tribal fisheries or scientific research, except for sablefish north as described below. All other deductions from the ACLs remain the same as those described in the original proposed rule.

The 2022 SAFE document includes a detailed description of the scientific basis for all of the Council Science and Statistical Committee-recommended OFLs proposed in this rule, and is available at the Council's website, *https://www.pcouncil.org.*

For all species described below, revised 2024 OFLs, ABCs, ACLs and fishery harvest guidelines are proposed at table 2a to subpart C, and in some cases other necessary adjustments to numerical harvest target management measures in footnotes to that table are also made. For all species described below, except for sablefish north, revised 2024 trawl or non-trawl allocations are proposed at table 2b to subpart C. Additionally, for all species described below, revised 2024 shorebased IFQ allocations are proposed at § 660.140(d)(1)(ii)(D). Any additional species-specific proposed regulatory

changes are described in species-specific sections below.

A. Canary Rockfish (Sebastes Pinniger)

Canary rockfish are a shelf species that is harvested in both commercial and recreational fisheries. It is an important component of shelf fisheries, and harvests have been well-below the ACLs in recent years. Harvest specifications are calculated for future years by assuming that the entire ACL will be harvested every year from the year the assessment is conducted. The Council routinely conducts catch-only updates to projections of harvest, so that the next harvest specifications cycle can account for under-attainment in recent years, resulting in increased yields. Such a catch-only projection for canary rockfish was conducted in 2021 for the 2023–2024 harvest specifications, but the old and not updated projections from the 2019 analysis were mistakenly carried forward to the 2023–2024 harvest specifications. The OFL, ABC, and ACL values, and the resulting allocations and harvest targets, should have been higher in 2023–2024 than what was implemented by the original final rule.

The July 2022 SAFE document describes how the harvest specifications for 2023 and beyond were intended to be informed by the 2021 catch-only projection. The 2024 OFL of 1,434 mt (3,161,429 lb), and subsequent calculations of ABC, ACL, allocations, and harvest targets, are correctly calculated in this proposed rule (table 1) based on the harvest control rules described in the SAFE document and the original proposed rule. Additionally, updated 2021 projections from the catch-only update were referenced in the SAFE document and are the same as those proposed in this rule. The proposed harvest specifications and the resulting numerical calculations of harvest target management measures for canary rockfish are all based on the best scientific information available and follow the same allocative formulas that were used in the original proposed and final rules and described in the SAFE document.

TABLE 1—PROPOSED CORRECTIONS TO 2024 CANARY ROCKFISH OFL, ABC, ACL, ALLOCATIONS, AND HARVEST GUIDELINES (HGS)

2024 Specification	Original proposed and final rules (mt)	Proposed corrected (mt)
OFL	1,401	1,434
ABC	1,267	1,296
ACL	1,267	1,296
Fishery HG	1,198.1	1,227.4
Trawl (72.3%)	866.2	887.4
Shorebased IFQ	830.22	851.42
Non-trawl (27.7%)	331.9	340.0
Nearshore/non-nearshore HG	119.5	122.4
Washington Recreational HG	40.8	41.8
Oregon Recreational HG	61.4	62.9
California Recreational HG	110.2	112.9

B. Darkblotched Rockfish (Sebastes Crameri)

Darkblotched rockfish is a healthy slope species predominantly harvested in commercial fisheries. Like canary rockfish, darkblotched rockfish is an important component for groundfish fisheries and harvest has been below the ACL in recent years. As is the case with canary rockfish, a catch-only projection update for darkblotched rockfish was conducted in 2021 to increase yields in 2023–2024 but the update was mistakenly not used in calculating the numerical values of the 2023–2024 harvest specifications that were implemented through notice and comment rulemaking. The numerical values of the OFL, ABC, ACL, and resulting allocations and harvest targets implemented through the original proposed and final rules were too low.

The July 2022 SAFE document describes how the darkblotched rockfish harvest specifications for 2023 and beyond were intended to be informed by the 2021 catch-only projection. Numerical values in this proposed rule are based on the 2021 projections from the catch-only update, as recommended by the Council. This rule proposes a 2024 OFL of 857 mt (1,889,000 lb), and subsequent calculations of ABC, ACL, and allocations and harvest targets (table 2), which were calculated using the harvest control rules described in the SAFE document and the proposed rule for the 2023–2024 harvest specifications and management measures. Therefore, the proposed harvest specifications and the resulting numerical calculations of harvest target management measures for darkblotched rockfish are all based on the best scientific information available and follow the same allocative formulas that were used in the original proposed and final rules and described in the SAFE document.

TABLE 2—PROPOSED CORRECTIONS TO 2024 DARKBLOTCHED ROCKFISH OFL, ABC, ACL, ALLOCATIONS, AND HARVEST GUIDELINES (HGS)

2024 Specification	Original proposed and final rules (mt)	Proposed corrected (mt)
OFL	822	857
ABC	751	782
ACL	750	782
Fishery HG	726.2	758.7
Trawl (72.3%)	689.9	720.8
Shorebased IFQ	613.53	644.34

TABLE 2—PROPOSED CORRECTIONS TO 2024 DARKBLOTCHED ROCKFISH OFL, ABC, ACL, ALLOCATIONS, AND HARVEST GUIDELINES (HGS)—Continued

2024 Specification	Original proposed and final rules (mt)	Proposed corrected (mt)
Non-trawl (27.7%)	36.3	37.9

C. Sablefish (Anoplopoma Fimbria)

Sablefish is assessed coastwide but has formal, long-term allocations in the area north of 36° N latitude (lat.). Therefore, ACLs for that geography must be calculated to carry out the north of 36° N lat. allocations prescribed in the PCGFMP. The Council adopted a methodology that is described in footnote z to table 2a of subpart C, where the 5-year rolling average of proportional biomass north and south of 36° N lat. from fishery-independent survey data will be used to apportion coastwide ACLs. Due to an error, the ACL apportionment north and south of 36° N lat. percentages were not updated with the most recent years' survey information in the development of the 2023–2024 harvest specifications. This resulted in the northern ACL being too high and the southern ACL being too low in the original proposed and final rules.

The apportionment percentages of the ACLs north and south that were published in the original proposed and final rules were not consistent with the adopted, described methodology in those same **Federal Register** documents. The erroneous percentages of 78.4 percent apportioned north of 36° N lat. and 21.6 percent apportioned south of 36° N lat. were used to calculate ACLs. These percentages used 2014–2018 survey data instead of 2015–2019 survey data, which was the most up to date 5-year rolling average that was available at the time. Using the described methodology of ''the rolling 5-year average estimated swept area biomass from the NMFS NWFSC trawl survey'', the correct percentages that should have been used are 77.9 percent apportioned north of 36° N lat. and 22.1 percent apportioned south of 36° N lat. (table 3).

Consistent with the intent of the Council and NMFS, and as described in the original proposed rule, this proposed rule applies that apportionment, which decreases the 2024 sablefish north of 36° N lat. ACL by 50 mt (110,231 lb) to 7,730 mt (17,042,000 lb) and increases the 2024 sablefish south of 36° N lat. ACL by 50 mt (110,231 lb) to 2,193 mt (2,850,577 lb) in table 2a to subpart C. Accordingly, the formal allocation and sharing percentages north of 36° N lat. would be applied reducing numerical values stemming from the corrected north ACL (table 4) and regulations would be updated with reduced values in tables 2c to subpart C and § 660.140(d)(1)(ii)(D). Further calculations within the limited entry fixed gear sector include tier limit calculations shown in (table 5) and found at § 660.231(b)(3)(i). Additionally, the 10 percent tribal share is recalculated based on the new ACL and is proposed to decrease by 5 mt (11,023 lb) to 773 mt (1,704,000 lbs) at § 660.50(f)(2)(ii).

Likewise, subsequent breakdowns of numerical harvest targets in regulations for sablefish south of 36° N lat. that stem from ACLs would be increased as shown in table 6 and at table 2b to subpart C, and at § 660.140(d)(1)(ii)(D). All changes are proportional to the increase and decrease in the respective sablefish ACLs and do not require, or result in changes to, harvest sharing agreements described in the original proposed and final rules for the 2023–2024 harvest specifications and management measures and supporting analyses.

TABLE 3—PERCENTAGE OF BIOMASS USED TO APPORTION SABLEFISH ACLS TO TWO AREAS PER FIVE-YEAR ROLLING AVERAGE IN THE INITIAL RULEMAKING (2014–2018) AND IN THIS PROPOSED RULE (2015–2019)

Area	Apportionment (2014–2018) (%)	Apportionment (2015–2019) (%)
North of 36° N lat	78.4	77.9
South of 36° N lat	21.6	22.1

TABLE 4—PROPOSED REVISIONS TO 2024 SABLEFISH NORTH OF 36° N LAT. ACL, SHARES, ALLOCATIONS, AND HARVEST GUIDELINES (HGS) FOR TABLE 2c TO SUBPART C

Specification, allocations, etc.	Original proposed and final rules (mt)	Proposed corrected (mt)
ACL	7,780	7,730
Tribal Share [a]	778 (764.8)	773 (759.9)
Commercial HG	6,964	6,919
Limited Entry (LE) HG	6,309	6,269
Open Access HG	[b] 665 (655)	650
LE Trawl	3,659	3,636
Shorebased IFQ [c]	3,559.56	3,535.91
All Fixed Gear	2,650	2,633
Primary	2,252	2,238
Daily Trip Limit (DTL)	397	395

[a] The tribal allocation is further reduced by 1.7 percent for discard mortality, shown in parentheses.

[b] Open Access HG is 9.4 percent of the Commercial HG, which should have been 655 mt (shown in parentheses), but 665 mt is what was in the original proposed and final rules.

[c] Allocations to the Shorebased IFQ Program are rounded to the nearest metric ton in table 2c to subpart C but are carried to two decimal places at table 1 to paragraph (d)(1)(ii)(D) in § 660.140.

TABLE 5—PROPOSED REVISIONS TO 2024 SABLEFISH SOUTH OF 36° N LAT. ACL AND HARVEST GUIDELINES (HGS) FOR TABLE 2a AND 2b TO SUBPART C

Specification, allocations, etc.	Original proposed and final rules (lbs)	Proposed corrected (lbs)
ACL	2,143	2,193
Fishery HG	2,115.6	2,165.6
Trawl Allocation	888.6	909.6
Non-trawl Allocation	1,227	1,256

TABLE 6—PROPOSED REVISIONS TO 2024 SABLEFISH NORTH OF 36° N LAT. TIER LIMITS AT § 660.231(b)(3)(i)

Tier	Original proposed and final rules (lbs)	Proposed corrected (lbs)
One (1)	66,805	66,377
Two (2)	30,366	30,171
Three (3)	17,352	17,241

D. Squarespot Rockfish (Sebastes Hopkinsi) and Minor Shelf Rockfish South of 40°10′ N Lat.

Squarespot rockfish is a dwarf species occurring off the coast of California that is not targeted in commercial or recreational fisheries and is managed as part of a group of minor shelf species. The 2021 data-moderate assessment found squarespot rockfish to be just below the management target; therefore default harvest control rules employ a precautionary reduction, per the PCGFMP framework, to decrease the harvest specifications and recover the stock to target population size. The squarespot rockfish harvest specifications contribute, along with several other species, to the minor shelf rockfish complex harvest specifications south of 40°10′ N lat. (hereafter ''south''); therefore, there are no harvest specifications specific to squarespot rockfish in the regulations and none are described in detail in the original proposed rule. However, the original proposed rule and the SAFE document do describe how harvest specifications for 2023–2024 were based on the results of the 2021 squarespot rockfish stock assessment. The 2021 squarespot rockfish stock assessment underwent scientific review, per the Council's operating procedures, and was endorsed by NMFS and the Council's scientific and statistical committee as the best scientific information available upon which to base harvest specifications.

It was recently discovered that an error occurred and 2023–2024 harvest specification contributions for squarespot rockfish were not updated with new numbers based on the 2021 stock assessment. This resulted in squarespot rockfish contributions to the minor shelf rockfish complex south harvest specifications, which were implemented in the original proposed and final rules, that were too high and were not calculated based on the best scientific information available. Squarespot rockfish harvest specifications contributions being too high means that the minor shelf rockfish complex south harvest specifications and all subsequent harvest targets were also too high. For example, the squarespot rockfish ACL contribution was 4.8 mt too high, which resulted in the complex ACL also being 4.8 mt too high.

This rulemaking would reduce the minor shelf rockfish complex south harvest specifications, including an ACL reduction of 4.8 mt (10,582 lb) to 1,463 mt (3,225,363 lb), by calculating the complex harvest specifications with the correct OFL, ABC, and ACL squarespot rockfish contributions found in the 2021 assessment (table 7). The minor shelf rockfish south harvest specifications shown in table 8 and in regulations at table 2a to subpart C for OFL, ABC, and ACL would be reduced to 1,833 mt (4,041,073 lb), 1,464 mt (3,227,568 lb), and 1,464 mt (3,227,568 lb), respectively. The minor shelf rockfish south fishery harvest guideline would also be reduced by 4.8 mt and subsequent trawl and non-trawl allocations would also be proportionally reduced in both table 2a and table 2b to subpart C. Due to the reduction of the trawl allocation, the allocation to the Shorebased IFQ Program at § 660.140(d)(1)(ii)(D) is proportionally reduced based on previously established formulas in the PCGFMP. The revised harvest specifications and the resulting numerical calculations of harvest target management measures are all based on the best scientific information available and follow the same allocative formulas that were used in the original proposed and final rules and described in the SAFE document.

TABLE 7—PROPOSED CHANGE IN 2024 SQUARESPOT ROCKFISH OFL, ABC, AND ACL CONTRIBUTIONS TO THE MINOR SHELF ROCKFISH SOUTH COMPLEX HARVEST SPECIFICATIONS

2024 Harvest specification	Original proposed and final rules (mt)	Proposed corrected (mt)
OFL	11.1	6.0
ABC	9.6	5.2

TABLE 7—PROPOSED CHANGE IN 2024 SQUARESPOT ROCKFISH OFL, ABC, AND ACL CONTRIBUTIONS TO THE MINOR SHELF ROCKFISH SOUTH COMPLEX HARVEST SPECIFICATIONS—Continued

2024 Harvest specification	Original proposed and final rules (mt)	Proposed corrected (mt)
ACL	9.6	4.8

TABLE 8—2024 MINOR SHELF ROCKFISH SOUTH OFL, ABC AND ACL, AND HARVEST TARGET MANAGEMENT MEASURES, WITH CORRECTED SQUARESPOT ROCKFISH CONTRIBUTIONS

2024 Harvest specification	Original proposed and final rules (mt)	Proposed corrected (mt)
OFL	1,838	1,833
ABC	1,469	1,464
ACL	1,469	1,464
Fishery HG	1,336.2	1,331.4
Trawl (12.2%)	163.0	162.43
IFQ	163	162.4
Non-trawl (87.8%)	1,173.2	1,169.0

E. Yelloweye Rockfish (S. Ruberrimus)

Yelloweye rockfish is the only species in the PCGFMP currently managed under a rebuilding plan. Additional details for the harvest specifications and management measures of this species are described in the original proposed rule in the section ''Stocks in Rebuilding Plans.'' The 2023–2024 yelloweye rockfish harvest specifications are described in the proposed rule, as well as in the July 2022 SAFE document, as being consistent with the rebuilding plan in regulations at § 660.40(a). However, the numerical values for the 2023 and 2024 OFLs, ABCs, and ACLs that were recommended by the Council and implemented by NMFS were miscalculated, in part, due to erroneous application of time-varying sigma values (table 9). Time-varying sigma values are part of default harvest control rules implemented in the PCGFMP such that the decrease from the OFL to the ABC increases each year, creating a larger and larger scientific uncertainty buffer as a stock assessment ages. The error resulted in OFLs, all the subsequent harvest specifications, and all the harvest sharing agreements that are calculated from the ACLs, being too high in 2023 and 2024 as implemented in the original final rule.

The Council considered updated estimates of yelloweye rockfish harvest at its September 9–14, 2023 meeting. Estimated harvest of yelloweye rockfish through the end of 2023 of 34.4 mt (75,839 lbs) is expected to be below the correct, lower 2023 ACL of 53.3 mt (117,506 lbs). There does not appear to be a conservation concern in meeting rebuilding plan parameters in 2023 despite harvest specifications that are mistakenly too high.

The proposed 2024 yelloweye rockfish ACL in this rule of 53.3 mt (table 10) is a 19 percent reduction from the 2024 ACL in the original proposed and final rule but is consistent with the numerical value presented for 2024 in projections in the yelloweye rockfish rebuilding analysis published in January 2018. Therefore, the harvest specifications in this proposed rule are based on the rebuilding plan, and corresponding proportional reductions to harvest targets are implementing the harvest policies and management measures recommended by the Council for 2024.

Tables 9 and 10 show the proposed revisions to the harvest specifications and harvest targets for yelloweye rockfish for 2024.

TABLE 9—INCORRECT 2024 HARVEST SPECIFICATIONS FOR YELLOWEYE ROCKFISH IMPLEMENTED BY THE 2023–2024 SPECIFICATIONS AND MANAGEMENT MEASURES PROPOSED AND FINAL RULES

	OFL (mt)	ABC (mt)	ACL (mt)	HG (mt)	ACT (mt)
All sectors	123	103	66	55.3	.....
Non-trawl	.....	.....	.....	50.9	39.9
Non-Nearshore	.....	.....	.....	10.7	8.4
Nearshore	.....	.....	.....	.....	.....
Washington Recreational	.....	.....	.....	13.2	10.4
Oregon Recreational	.....	.....	.....	11.7	9.2
California Recreational	.....	.....	.....	15.3	12.0
Trawl/Shorebased IFQ [a]	.....	.....	.....	4.42	.....

[a] The trawl allocation is in regulations to one decimal place. Allocations to the Shorebased IFQ Program are 100 percent of the trawl allocation but carried to two decimal places at table 1 to paragraph (d)(1)(ii)(D) in § 660.140.

TABLE 10—PROPOSED 2024 HARVEST SPECIFICATIONS FOR YELLOWEYE ROCKFISH, BASED ON THE REBUILDING PLAN

	OFL (mt)	ABC (mt)	ACL (mt)	HG (mt)	ACT (mt)
All sectors	91.2	75.9	53.3	42.6	.....
Non-trawl	.....	.....	.....	39.2	30.7
Non-Nearshore & Nearshore	.....	.....	.....	8.2	6.4
Washington Recreational	.....	.....	.....	10.0	7.9
Oregon Recreational	.....	.....	.....	9.1	7.2
California Recreational	.....	.....	.....	11.8	9.3
Trawl/Shorebased IFQ	.....	.....	.....	3.41	.....

F. Yellowtail Rockfish (S. Flavidus) North of 40°10′ N Lat.

Yellowtail rockfish are a healthy shelf species that is commonly caught in both commercial and recreational fisheries throughout its range, and commonly occur with canary rockfish and widow rockfishes. Despite its popularity in commercial and recreational fisheries, its association with those formerly rebuilding species has kept catch well below ACLs for over a decade, with slight increases in recent years as those co-occurring species are rebuilt and as access to waters where yellowtail rockfish are common has increased.

Harvest specifications and management measures pertinent to yellowtail rockfish north of 40°10′ N lat. (hereafter ''north'') were not described in detail in the original proposed and final rules for the 2023–2024 harvest specifications and management measures because no changes to harvest control rules or management measures were proposed for this species. The species was last assessed in 2017, and harvest specifications for 2023–2024 were intended to be calculated based on the 2017 stock assessment. In August 2023, it was discovered that all harvest specifications for yellowtail rockfish north from 2019 through 2024 have been calculated incorrectly, such that the harvest specification numerical values, and all subsequent harvest target calculations based on those ACLs, were not accurately calculated based on the 2017 assessment. The harvest specifications that were recommended by the Council and implemented by NMFS in recent years were therefore too high.

The proposed 2024 yellowtail rockfish north OFL of 5,795 mt (12,776,000 lbs) is a 5 percent reduction in the 2024 OFL from what was implemented through the original proposed and final rules (6,090 mt, 13,426,000 lbs). Harvest in 2017–2022 has been less than 60 percent of the ACLs each year. Therefore, despite the fact that those ACLs were approximately 5 percent too high, there is not a conservation concern that harvest of yellowtail rockfish north has been higher than is sustainable.

The proposed harvest specifications and the resulting numerical calculations of harvest target management measures for yellowtail rockfish north (table 11) are all based on the 2017 assessment and follow the same harvest specifications and allocative formulas that were used in the original proposed and final rules and described in the SAFE document.

TABLE 11—PROPOSED REVISIONS TO 2024 YELLOWTAIL ROCKFISH NORTH OFL, ABC, ACL, ALLOCATIONS, AND HARVEST GUIDELINES (HGS)

2024 Specification	Original proposed and final rules (mt)	Proposed corrected (mt)
OFL	6,090	5,795
ABC	5,560	5,291
ACL	5,560	5,291
Fishery HG	4,532.5	4,263.3
Trawl (88%)	3,988.6	3,751.7
Shorebased IFQ	3,668.56	3,431.69
Non-trawl (12%)	543.9	511.6

G. Summary

NMFS proposes correcting the harvest specifications for 6 species and complexes for 2024 as described above and as summarized in table 12. The 2024 fishing season begins on January 1, 2024, therefore, the errors in the 2024 specifications currently in regulation need to be corrected expeditiously.

TABLE 12—PROPOSED REVISED 2024 OFLS, ABCS, ACLS, AND FISHERY HARVEST GUIDELINES (HGS) FOR 6 SPECIES OR COMPLEXES

Stock/complex	Area	OFL (mt)	ABC (mt)	ACL (mt)	Fishery HG (mt)
YELLOWEYE ROCKFISH	Coastwide	91.2	75.9	53.3	42.6
Canary Rockfish	Coastwide	1,434	1,296	1,296	1,227.4
Darkblotched Rockfish	Coastwide	857	782	782	758.7
Sablefish	N of 36° N lat	[1] 10,670	[1] 9,923	7,730	Not Applicable [2]
	S of 36° N lat			2,193	2,165.6
Yellowtail Rockfish	N of 40°10′ N lat	5,795	5,291	5,291	4,263.3

TABLE 12—PROPOSED REVISED 2024 OFLS, ABCS, ACLS, AND FISHERY HARVEST GUIDELINES (HGS) FOR 6 SPECIES OR COMPLEXES—Continued

Stock/complex	Area	OFL (mt)	ABC (mt)	ACL (mt)	Fishery HG (mt)
Minor Shelf Rockfish South	S of 40°10′ N lat	1,833	1,464	1,464	1,331.4

Note: Rebuilding stocks are capitalized.
[1] Values are the same as those in the 2023–2024 original proposed and final rules and are not proposed to be revised in this rule.
[2] Sablefish north of 36° N lat. has a different long-term allocation framework in the PCGFMP than the other species in this proposed rule. Proposed numerical values following this framework under the new, lower, proposed ACL are found in table 2c to subpart C.

IV. Classification

Pursuant to section 304 (b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the PCGFMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. In making its final determination, NMFS will consider the complete record, including the data, views, and comments received during the comment period.

Due to timing constraints resulting from when the errors were discovered in August 2023, the recommendations from the Council to correct these errors during its September meeting, and when the errors need to be corrected by, NMFS is providing a 15-day comment period. The corrected values in this proposed rule are consistent with the intent of the Council and what was described in the original proposed and final rules for the 2023–2024 harvest specifications and management measures. The harvest control rules used for the species and stock complex that are the subject of this proposed rule have been, in part, the subject of multiple notice and comment rulemakings over the course of the last six years. The most recent, the 2023–2024 harvest specifications and management measures, had a 30-day comment period on the proposed rule and no comments were received regarding the subject species and stock complex. Failure to implement the revised harvest specifications as soon as possible leaves harvest specifications in place that are inconsistent with the best scientific information available and are inconsistent with the intent of the Council and the original proposed and final rules. Delaying final action on these proposed measures to allow for a longer comment period than the minimum 15-day amount allowed for by the Magnuson-Stevens Act would result in significant confusion for the industry as to which values will be in place at the start of the fishing year on January 1, 2024 and therefore has the potential to negatively impact vessels as they plan their fishing operations for 2024. Failure to implement the revised harvest specifications by the start of the fishing year, January 1, 2024, will delay issuance of 2024 quota pounds for all the subject species and stock complexes. If the 2024 quotas calculated and released by NMFS based on the corrected 2024 harvest specifications proposed in this rule are delayed to allow more time for public comment, shareholders for those quotas effectively receive zero pounds for the start of the year and will be unable to begin fishing, which is contrary to the public interest and the goals and objectives of the PCGFMP to maintain year-round groundfish fishing opportunities.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the PCGFMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. This proposed rule revises the numerical values of the sablefish north ACL to correctly apply the harvest control rules recommended by the Council. As a result, the regulations that implement the long-term allocation and sharing agreements for sablefish north in the PCGFMP, including the numerical calculation of the 10 percent tribal share, must be recalculated and proposed for revision in this rule. No other tribal management measures are proposed to be revised in this rule. The regulations at 50 CFR 660.50 direct NMFS to develop tribal allocations and regulations in consultation with the affected tribes. In this instance, no change to harvest policies is proposed. Therefore, additional tribal consultation was not required and none was conducted.

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

NMFS prepared documentation for this action, which addresses the statutory requirements of the Magnuson-Stevens Act, Executive Order 12866, and the Regulatory Flexibility Act. The full suite of alternatives analyzed by the Council can be found on the Council's website at *www.pcouncil.org.* NMFS addressed the statutory requirements of the National Environmental Policy Act through preparation of an environmental impact statement (EIS). NMFS prepared an EIS for the 2015–2016 biennial harvest specifications and management measures and is available from NMFS (see **ADDRESSES**) and tiered environmental analyses (EA) every biennium since then.

This EIS and subsequent EAs examined the harvest specifications and management measures for 2015–2016 and 10-year projections for routinely adjusted harvest specifications and management measures. The 10-year projections evaluated the impacts of the ongoing implementation of harvest specifications and management measures and to evaluate the impacts of the routine adjustments that are the main component of each biennial cycle. This proposed rule corrects the numerical values that result from the application of best scientific information available and default harvest control rules analyzed in that EIS. There are no environmental effects expected from this proposed rule beyond those evaluated in the EIS and the Environmental Assessment for the 2023–2024 harvest specifications and management measures. The harvest levels for all six species or complexes have not been fully attained in recent years and so minor adjustments to the ACLs are likely to result in no discernable difference to the fishery or communities.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the 2023–2024 harvest specifications and management measures in the original proposed and final rules would not have a significant economic impact on a substantial number of small entities. The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the

Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This proposed rule makes minor, corrective adjustments to harvest specifications and related allocations and harvest targets that are unlikely to make any appreciable difference to the expected harvests in this mixed-stock fishery because the six species and complexes with proposed changes are not constraining access to co-occurring species. This action affects only a small number of species, and in a mixed stock fishery the affected entities for these few species cannot be differentiated from those described in the original proposed rule. The same small entities identified in the original proposed rule are the same parties that would be subject to the minor regulatory corrections in this proposed rule. Additional information about the affected entities and expected impacts, in the context of the entire fishery and all species, can be found in the original proposed rule (87 FR 62676; October, 14, 2022). No environmental or socioeconomic impacts are expected from the proposed changes in this rule, nor does the proposed action diverge from the harvest policies considered in that certification. The corrections proposed in this rule do not change the overall framework and management measures from the original proposed and final rules and would affect large and small entities similarly. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule contains no new information collection burden under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: October 23, 2023.

Jonathan M. Kurland,

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

For the reasons set out in the preamble, NOAA proposes to amend 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.*

■ 2. In § 660.50, revise paragraph (f)(2)(ii) to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

* * * * *

(f) * * *

(2) * * *

(ii) The Tribal allocation is 849 mt in 2023 and 773 mt in 2024 per year. This allocation is, for each year, 10 percent of the Monterey through Vancouver area (North of 36° N lat.) ACL. The Tribal allocation is reduced by 1.7 percent for estimated discard mortality.

* * * * *

■ 3. Revise tables 2a through 2c to subpart C to read as follows:

* * * * *

TABLE 2a TO PART 660, SUBPART C—2024, AND BEYOND, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HARVEST GUIDELINES

[Weights in metric tons. Capitalized stocks are overfished.]

Stocks	Area	OFL	ABC	ACL [a]	Fishery HG [b]
YELLOWEYE ROCKFISH [c]	Coastwide	91	76	53.3	42.6
Arrowtooth Flounder [d]	Coastwide	20,459	14,178	14,178	12,083
Big Skate [e]	Coastwide	1,492	1,267	1,267	1,207.2
Black Rockfish [f]	California (S of 42° N lat.)	364	329	329	326.6
Black Rockfish [g]	Washington (N of 46°16′ N lat.)	319	289	289	270.5
Bocaccio [h]	S of 40°10′ N lat.)	2,002	1,828	1,828	1,779.9
Cabezon [i]	California (S of 42° N lat.)	185	171	171	169.4
California Scorpionfish [j]	S of 34°27′ N lat.)	280	252	252	248
Canary Rockfish [k]	Coastwide	1,434	1,296	1,296	1,227.4
Chilipepper [l]	S of 40°10′ N lat.)	2,346	2,121	2,121	2,023.4
Cowcod [m]	S of 40°10′ N lat.)	112	79	79	67.8
Cowcod	(Conception)	93	67	NA	NA
Cowcod	(Monterey)	19	12	NA	NA
Darkblotched Rockfish [n]	Coastwide	857	782	782	758.7
Dover Sole [o]	Coastwide	55,859	51,949	50,000	48,402.9
English Sole [p]	Coastwide	11,158	8,960	8,960	8,700.5
Lingcod [q]	N of 40°10′ N lat.)	4,455	3,854	3,854	3,574.4
Lingcod [r]	S. of 40°10′ N lat.)	855	740	722	706.5
Longnose Skate [s]	Coastwide	1,955	1,660	1,660	1,408.7
Longspine Thornyhead [t]	N of 34°27′ N lat.)	4,433	2,846	2,162	2,108.3
Longspine Thornyhead [u]	S of 34°27′ N lat.)	.....	.....	683	680.8
Pacific Cod [v]	Coastwide	3,200	1,926	1,600	1,094
Pacific Ocean Perch [w]	N of 40°10′ N lat.)	4,133	3,443	3,443	3,297.5
Pacific Whiting [x]	Coastwide	(x)	(x)	(x)	(x)
Petrale Sole [y]	Coastwide	3,563	3,285	3,285	2,898.8
Sablefish [z]	N of 36° N lat	10,670	9,923	7,730	See table 2c
Sablefish [aa]	S of 36° N lat			2,193	2,165.6
Shortspine Thornyhead [bb]	N of 34°27′ N lat.)	3,162	2,030	1,328	1,249.7
Shortspine Thornyhead [cc]	S of 34°27′ N lat.)			702	695.3
Spiny Dogfish [dd]	Coastwide	1,883	1,407	1,407	1,055.5
Splitnose [ee]	S of 40°10′ N lat.)	1,766	1,553	1,553	1,534.3
Starry Flounder [ff]	Coastwide	652	392	392	343.7
Widow Rockfish [gg]	Coastwide	12,453	11,482	11,482	11,243.7
Yellowtail Rockfish [hh]	N of 40°10′ N lat.)	5,795	5,291	5,291	4,263.3

TABLE 2a TO PART 660, SUBPART C—2024, AND BEYOND, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HARVEST GUIDELINES—Continued

[Weights in metric tons. Capitalized stocks are overfished.]

Stocks	Area	OFL	ABC	ACL [a]	Fishery HG [b]
Stock Complexes					
Blue/Deacon/Black Rockfish [ii]	Oregon	671	594	594	592.2
Cabezon/Kelp Greenling [jj]	Washington	22	17	17	15
Cabezon/Kelp Greenling [kk]	Oregon	198	180	180	179.2
Nearshore Rockfish North [ll]	N of 40°10′ N lat.)	109	91	91	87.7
Nearshore Rockfish South [mm]	S of 40°10′ N lat.)	1,097	902	891	886.5
Other Fish [nn]	Coastwide	286	223	223	201.8
Other Flatfish [oo]	Coastwide	7,946	4,874	4,874	4,653.2
Shelf Rockfish North [pp]	N of 40°10′ N lat.)	1,610	1,278	1,278	1,207
Shelf Rockfish South [qq]	S of 40°10′ N lat.)	1,833	1,464	1,464	1,331.4
Slope Rockfish North [rr]	N of 40°10′ N lat.)	1,797	1,516	1,516	1,450.6
Slope Rockfish South [ss]	S of 40°10′ N lat.)	868	697	697	658.1

[a] Annual catch limits (ACLs), annual catch targets (ACTs) and harvest guidelines (HGs) are specified as total catch values.

[b] Fishery HGs means the HG or quota after subtracting Pacific Coast treaty Indian tribes allocations and projected catch, projected research catch, deductions for fishing mortality in non-groundfish fisheries, and deductions for EFPs from the ACL or ACT.

[c] Yelloweye rockfish. The 53.3 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2029 and an SPR harvest rate of 65 percent. 10.7 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP fishing (0.12 mt), research catch (2.92 mt), and incidental open access mortality (2.66 mt) resulting in a fishery HG of 42.6 mt. The non-trawl HG is 39.2 mt. The combined non-nearshore/nearshore HG is 8.2 mt. Recreational HGs are: 10 mt (Washington); 9.1 mt (Oregon); and 11.8 mt (California). In addition, the non-trawl ACT is 30.7, and the combined non-nearshore/nearshore ACT is 6.4 mt. Recreational ACTs are: 7.9 mt (Washington), 7.2 (Oregon), and 9.3 mt (California).

[d] Arrowtooth flounder. 2,094.98 mt is deducted from the ACL to accommodate the Tribal fishery (2,041 mt), research catch (12.98 mt) and incidental open access mortality (41 mt), resulting in a fishery HG of 12,083 mt.

[e] Big skate. 59.8 mt is deducted from the ACL to accommodate the Tribal fishery (15 mt), research catch (5.49 mt), and incidental open access mortality (39.31 mt), resulting in a fishery HG of 1,207.2 mt.

[f] Black rockfish (California). 2.26 mt is deducted from the ACL to accommodate EFP fishing (1.0 mt), research catch (0.08 mt), and incidental open access mortality (1.18 mt), resulting in a fishery HG of 326.6 mt.

[g] Black rockfish (Washington). 18.1 mt is deducted from the ACL to accommodate the Tribal fishery (18 mt) and research catch (0.1 mt), resulting in a fishery HG of 270.5 mt.

[h] Bocaccio south of 40°10′ N lat. Bocaccio are managed with stock-specific harvest specifications south of 40°10′ N lat. and within the Minor Shelf Rockfish complex north of 40°10′ N lat. 48.12 mt is deducted from the ACL to accommodate EFP fishing (40 mt), research catch (5.6 mt), and incidental open access mortality (2.52 mt), resulting in a fishery HG of 1,779.9 mt. The California recreational fishery south of 40°10′ N lat. has an HG of 749.7 mt.

[i] Cabezon (California). 1.63 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (0.02 mt), and incidental open access mortality (0.61 mt), resulting in a fishery HG of 169.4 mt.

[j] California scorpionfish south of 34°27′ N lat. 3.89 mt is deducted from the ACL to accommodate research catch (0.18 mt) and incidental open access mortality (3.71 mt), resulting in a fishery HG of 248 mt.

[k] Canary rockfish. 68.91 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP fishing (6 mt), research catch (10.08 mt), and incidental open access mortality (2.83 mt), resulting in a fishery HG of 1,227.4 mt. The combined nearshore/non-nearshore HG is 122.4 mt. Recreational HGs are: 41.8 mt (Washington); 62.9 mt (Oregon); and 112.9 mt (California).

[l] Chilipepper rockfish south of 40°10′ N lat. Chilipepper are managed with stock-specific harvest specifications south of 40°10′ N lat. and within the Minor Shelf Rockfish complex north of 40°10′ N lat. 97.7 mt is deducted from the ACL to accommodate EFP fishing (70 mt), research catch (14.04 mt), incidental open access mortality (13.66 mt), resulting in a fishery HG of 2,023.4 mt.

[m] Cowcod south of 40°10′ N lat. Cowcod are managed with stock-specific harvest specifications south of 40°10′ N lat. and within the Minor Shelf Rockfish complex north of 40°10′ N lat. 11.17 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (10 mt), and incidental open access mortality (0.17 mt), resulting in a fishery HG of 67.8 mt.

[n] Darkblotched rockfish. 23.76 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP fishing (0.5 mt), research catch (8.46 mt), and incidental open access mortality (9.8 mt) resulting in a fishery HG of 758.7 mt.

[o] Dover sole. 1,597.11 mt is deducted from the ACL to accommodate the Tribal fishery (1,497 mt), research catch (50.84 mt), and incidental open access mortality (49.27 mt), resulting in a fishery HG of 48,402.9 mt.

[p] English sole. 259.52 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), research catch (17 mt), and incidental open access mortality (42.52 mt), resulting in a fishery HG of 8,700.5 mt.

[q] Lingcod north of 40°10′ N lat. 279.63 mt is deducted from the ACL for the Tribal fishery (250 mt), research catch (17.71 mt), and incidental open access mortality (11.92 mt) resulting in a fishery HG of 3,574.4 mt.

[r] Lingcod south of 40°10′ N lat. 15.5 mt is deducted from the ACL to accommodate EFP fishing (4 mt), research catch (3.19 mt), and incidental open access mortality (8.31 mt), resulting in a fishery HG of 706.5 mt.

[s] Longnose skate. 251.3 mt is deducted from the ACL to accommodate the Tribal fishery (220 mt), and research catch (12.46 mt), and incidental open access mortality (18.84 mt), resulting in a fishery HG of 1,408.7 mt.

[t] Longspine thornyhead north of 34°27′ N lat. 53.71 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (17.49 mt), and incidental open access mortality (6.22 mt), resulting in a fishery HG of 2,108.3 mt.

[u] Longspine thornyhead south of 34°27′ N lat. 2.24 mt is deducted from the ACL to accommodate research catch (1.41 mt) and incidental open access mortality (0.83 mt), resulting in a fishery HG of 680.8 mt.

[v] Pacific cod. 506 mt is deducted from the ACL to accommodate the Tribal fishery (500 mt), research catch (5.47 mt), and incidental open access mortality (0.53 mt), resulting in a fishery HG of 1,094 mt.

[w] Pacific ocean perch north of 40°10′ N lat. Pacific ocean perch are managed with stock-specific harvest specifications north of 40°10′ N lat. and within the Minor Slope Rockfish complex south of 40°10′ N lat. 145.48 mt is deducted from the ACL to accommodate the Tribal fishery (130 mt), EFP fishing, research catch (5.39 mt), and incidental open access mortality (10.09 mt), resulting in a fishery HG of 3,297.5 mt.

[x] Pacific whiting. Pacific whiting are assessed annually. The final specifications will be determined consistent with the U.S.-Canada Pacific Whiting Agreement and will be announced in 2024.

[y] Petrale sole. 386.24 mt is deducted from the ACL to accommodate the Tribal fishery (350 mt), EFP fishing (1 mt), research catch (24.14 mt), and incidental open access mortality (11.1 mt), resulting in a fishery HG of 2,898.8 mt.

[z] Sablefish north of 36° N lat. The sablefish coastwide ACL value is not specified in regulations. The sablefish coastwide ACL value is apportioned north and south of 36° N lat., using the rolling 5-year average estimated swept area biomass from the NMFS NWFSC trawl survey, with 77.9 percent apportioned north of 36° N lat. and 22.1 percent apportioned south of 36° N lat. The northern ACL is 7,730 mt and is reduced by 773 mt for the Tribal allocation (10 percent of the ACL north of 36° N lat.). The 773 mt Tribal allocation is reduced by 1.7 percent to account for discard mortality. Detailed sablefish allocations are shown in table 1c.

[aa] Sablefish south of 36° N lat. The ACL for the area south of 36° N lat. is 2,193 mt (22.1 percent of the calculated coastwide ACL value). 27.4 mt is deducted from the ACL to accommodate research catch (2.40 mt) and the incidental open access fishery (25 mt), resulting in a fishery HG of 2,165.6 mt.

[bb] Shortspine thornyhead north of 34°27′ N lat. 78.3 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), research catch (10.48 mt), and incidental open access mortality (17.82 mt), resulting in a fishery HG of 1,249.7 mt for the area north of 34°27′ N lat.

[cc] Shortspine thornyhead south of 34°27′ N lat. 6.71 mt is deducted from the ACL to accommodate research catch (0.71 mt) and incidental open access mortality (6 mt), resulting in a fishery HG of 695.3 mt for the area south of 34°27′ N lat.

[dd] Spiny dogfish. 351.48 mt is deducted from the ACL to accommodate the Tribal fishery (275 mt), EFP fishing (1 mt), research catch (41.85 mt), and incidental open access mortality (33.63 mt), resulting in a fishery HG of 1,055.5 mt.

[ee] Splitnose rockfish south of 40°10′ N lat. Splitnose rockfish in the north is managed in the Slope Rockfish complex and with stock-specific harvest specifications south of 40°10′ N lat. 18.42 mt is deducted from the ACL to accommodate EFP fishing (1.5 mt), research catch (11.17 mt), and incidental open access mortality (5.75 mt), resulting in a fishery HG of 1,534.3 mt.

[ff] Starry flounder. 48.28 mt is deducted from the ACL to accommodate the Tribal fishery (2 mt), research catch (0.57 mt), and incidental open access mortality (45.71 mt), resulting in a fishery HG of 343.7 mt.

[gg] Widow rockfish. 238.32 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP fishing (18 mt), research catch (17.27 mt), and incidental open access mortality (3.05 mt), resulting in a fishery HG of 11,243.7 mt.

[hh] Yellowtail rockfish north of 40°10′ N lat.) N lat. Yellowtail rockfish are managed with stock-specific harvest specifications north of 40°10′ N lat. and within the Minor Shelf Rockfish complex south of 40°10′ N lat. 1,027.55 mt is deducted from the ACL to accommodate the Tribal fishery (1,000 mt), research catch (20.55 mt), and incidental open access mortality (7 mt), resulting in a fishery HG of 4,263.3 mt.

[jj] Black rockfish/Blue rockfish/Deacon rockfish (Oregon). 1.82 mt is deducted from the ACL to accommodate research catch (0.08 mt), and incidental open access mortality (1.74 mt), resulting in a fishery HG of 592.2 mt.

[jj] Cabezonkelp greenling (Washington). 2 mt is deducted from the ACL to accommodate the Tribal fishery, resulting in a fishery HG is 15 mt.

[kk] Cabezon/kelp greenling (Oregon). 0.79 mt is deducted from the ACL to accommodate research catch (0.05 mt) and incidental open access mortality (0.74 mt), resulting in a fishery HG of 179.2 mt.

[ll] Nearshore Rockfish north of 40°10′ N lat. 3.27 mt is deducted from the ACL to accommodate the Tribal fishery (1.5 mt), research catch (0.47 mt), and incidental open access mortality (1.31 mt), resulting in a fishery HG of 87.7 mt. State-specific HGs are 17.2 mt (Washington), 30.9 mt (Oregon), and 39.9 mt (California). The ACT for copper rockfish (California) is 6.99 mt. The ACT for quillback rockfish (California) is 0.96 mt.

[mm] Nearshore Rockfish south of 40°10′ N lat. 4.54 mt is deducted from the ACL to accommodate research catch (2.68 mt) and incidental open access mortality (1.86 mt), resulting in a fishery HG of 886.5 mt. The ACT for copper rockfish is 87.73 mt. The ACT for quillback rockfish is 0.97 mt.

[nn] Other Fish. The Other Fish complex is comprised of kelp greenling off California and leopard shark coastwide. 21.24 mt is deducted from the ACL to accommodate research catch (6.29 mt) and incidental open access mortality (14.95 mt), resulting in a fishery HG of 201.8 mt.

[oo] Other Flatfish. The Other Flatfish complex is comprised of flatfish species managed in the PCGFMP that are not managed with stock-specific OFLs/ABCs/ACLs. Most of the species in the Other Flatfish complex are unassessed and include: butter sole, curlfin sole, flathead sole, Pacific sanddab, rock sole, sand sole, and rex sole. 220.79 mt is deducted from the ACL to accommodate the Tribal fishery (60 mt), research catch (23.63 mt), and incidental open access mortality (137.16 mt), resulting in a fishery HG of 4,653.2 mt.

[pp] Shelf Rockfish north of 40°10′ N lat. 70.94 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (15.32 mt), and incidental open access mortality (25.62 mt), resulting in a fishery HG of 1,207.1 mt.

[qq] Shelf Rockfish south of 40°10′ N lat. 132.77 mt is deducted from the ACL to accommodate EFP fishing (50 mt), research catch (15.1 mt), and incidental open access mortality (67.67 mt) resulting in a fishery HG of 1,331.4 mt.

[rr] Slope Rockfish north of 40°10′ N lat. 65.39 mt is deducted from the ACL to accommodate the Tribal fishery (36 mt), research catch (10.51 mt), and incidental open access mortality (18.88 mt), resulting in a fishery HG of 1,450.6 mt.

[ss] Slope Rockfish south of 40°10′ N lat. 38.94 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (18.21 mt), and incidental open access mortality (19.73 mt), resulting in a fishery HG of 658.1 mt. Blackgill rockfish has a stock-specific HG for the entire groundfish fishery south of 40°10′ N lat. set equal to the species' contribution to the 40–10-adjusted ACL. Harvest of blackgill rockfish in all groundfish fisheries south of 40°10′ N lat. counts against this HG of 169.9 mt.

TABLE 2b TO PART 660, SUBPART C—2024, AND BEYOND, ALLOCATIONS BY SPECIES OR SPECIES GROUP

[Weight in metric tons]

Stocks/stock complexes	Area	Fishery HG or ACT	Trawl		Non-trawl	
			%	Mt	%	Mt
YELLOWEYE ROCKFISH [a]	Coastwide	42.6	8	3.41	92	39.2
Arrowtooth flounder	Coastwide	12,083	95	11,478.9	5	604.2
Big skate [a]	Coastwide	1,207.2	95	1,146.8	5	60.4
Bocaccio [a]	S of 40°10′ N lat	1,779.9	39.04	694.9	60.96	1,085
Canary rockfish [a]	Coastwide	1,227.4	72.3	887.4	27.7	340
Chilipepper rockfish	S of 40°10′ N lat	2,023.4	75	1,517.6	25	505.9
Cowcod [a b]	S of 40°10′ N lat	67.8	36	24.4	64	43.4
Darkblotched rockfish	Coastwide	758.7	95	720.8	5	37.9
Dover sole	Coastwide	4,8402.9	95	45,982.7	5	2,420.1
English sole	Coastwide	8,700.5	95	8265.5	5	435
Lingcod	N of 40°10′ N lat	3,574.4	45	1,608.5	55	1,965.9
Lingcod [a]	S of 40°10′ N lat	706.5	40	282.6	60	423.9
Longnose skate [a]	Coastwide	1,408.7	90	1,267.8	10	140.9
Longspine thornyhead	N of 34°27′ N lat	2,108.3	95	2,002.9	5	105.4
Pacific cod	Coastwide	1,094	95	1,039.3	5	54.7
Pacific ocean perch	N of 40°10′ N lat	3,297.5	95	3,132.6	5	164.9
Pacific whiting [c]	Coastwide	TBD	100	TBD	0	0
Petrale sole [a]	Coastwide	2898.8	.....	2,868.8	.....	30
Sablefish	N of 36° N lat	NA	See table 2c			
Sablefish	S of 36° N lat	2,165.6	42	909.6	58	1,256.0
Shortspine thornyhead	N of 34°27′ N lat	1,249.7	95	1,187.2	5	62.5
Shortspine thornyhead	S of 34°27′ N lat	695.3	.....	50	.....	645.3
Splitnose rockfish	S of 40°10′ N lat	1,534.3	95	1,457.6	5	76.7
Starry flounder	Coastwide	343.7	50	171.9	50	171.9
Widow rockfish [a]	Coastwide	11,243.7	.....	10,843.7	.....	400

TABLE 2b TO PART 660, SUBPART C—2024, AND BEYOND, ALLOCATIONS BY SPECIES OR SPECIES GROUP—Continued

[Weight in metric tons]

Stocks/stock complexes	Area	Fishery HG or ACT	Trawl		Non-trawl	
			%	Mt	%	Mt
Yellowtail rockfish	N of 40°10′ N lat	4,263.3	88	3,751.7	12	511.6
Other Flatfish	Coastwide	4,653.2	90	4,187.9	10	465.3
Shelf Rockfish [a]	N of 40°10′ N lat	1,207.1	60.2	726.7	39.8	480.4
Shelf Rockfish [a]	S of 40°10′ N lat	1,331.4	12.2	162.43	87.8	1,169.0
Slope Rockfish	N of 40°10′ N lat	1,450.6	81	1,175.0	19	275.6
Slope Rockfish [a]	S of 40°10′ N lat	658.1	63	414.6	37	243.5

[a] Allocations decided through the biennial specification process.
[b] The cowcod non-trawl allocation is further split 50:50 between the commercial and recreational sectors. This results in a sector-specific ACT of 21.7 mt for the commercial sector and 21.7 mt for the recreational sector.
[c] Consistent with regulations at § 660.55(i)(2), the commercial harvest guideline for Pacific whiting is allocated as follows: 34 percent for the C/P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shorebased IFQ Program. No more than 5 percent of the Shorebased IFQ Program allocation may be taken and retained south of 42° N lat. before the start of the primary Pacific whiting season north of 42° N lat.

TABLE 2c TO PART 660, SUBPART C—SABLEFISH NORTH OF 36° N LAT. ALLOCATIONS, 2024 AND BEYOND

[Weights in metric tons]

Year	ACL	Set-asides		Recreational estimate	Exempted fishing permit	Commercial harvest guideline (HG)	Limited entry HG		Open access HG	
		Tribal [a]	Research				Percent	mt	Percent	mt [b]
2024	7,730	773	30.7	6	1	6,919	90.6	6,269	9.4	650
Year	LE all	Limited entry (LE) trawl [c]				LE fixed gear (FG) [d]				
		All trawl	At-sea whiting	Shorebased IFQ		All FG	Primary		Daily trip limit	
2024	6,269	3,636	100	3,536		2,633	2,238		395	

[a] The tribal allocation is further reduced by 1.7 percent for discard mortality resulting in 759.9 mt in 2024.
[b] The open access HG is taken by the incidental OA fishery and the directed OA fishery.
[c] The trawl allocation is 58 percent of the limited entry HG.
[d] The limited entry fixed gear allocation is 42 percent of the limited entry HG.

* * * * *

■ 4. In § 660.140, revise table 1 to paragraph (d)(1)(ii)(D) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(D) * * *

TABLE 1 TO PARAGRAPH (d)(1)(ii)(D)—SHOREBASED TRAWL ALLOCATIONS FOR 2023 AND 2024

IFQ species	Area	2023 Shorebased trawl allocation (mt)	2024 Shorebased trawl allocation (mt)
YELLOWEYE ROCKFISH	Coastwide	4.42	3.41
Arrowtooth flounder	Coastwide	15,640.17	11,408.87
Bocaccio	South of 40°10′ N lat	700.33	694.87
Canary rockfish	Coastwide	842.50	851.42
Chilipepper	South of 40°10′ N lat	1,563.80	1517.60
Cowcod	South of 40°10′ N lat	24.80	24.42
Darkblotched rockfish	Coastwide	646.78	644.34
Dover sole	Coastwide	45,972.75	45,972.75
English sole	Coastwide	8,320.56	8,265.46
Lingcod	North of 40°10′ N lat	1,829.27	1,593.47
Lingcod	South of 40°10′ N lat	284.20	282.60
Longspine thornyhead	North of 34°27′ N lat	2,129.23	2,002.88
Pacific cod	Coastwide	1,039.30	1,039.30
Pacific halibut (IBQ) [a]	North of 40°10′ N lat	TBD	TBD
Pacific ocean perch	North of 40°10′ N lat	2,956.14	2,832.64
Pacific whiting [b]	Coastwide	159,681.38	TBD
Petrale sole	Coastwide	3,063.76	2,863.76
Sablefish	North of 36° N lat	3,893.50	3,535.91
Sablefish	South of 36° N lat	970.00	909.55
Shortspine thornyhead	North of 34°27′ N lat	1,146.67	1,117.22
Shortspine thornyhead	South of 34°27′ N lat	50	50
Splitnose rockfish	South of 40°10′ N lat	1,494.70	1,457.60
Starry flounder	Coastwide	171.86	171.86
Widow rockfish	Coastwide	11,509.68	10,367.68

TABLE 1 TO PARAGRAPH (d)(1)(ii)(D)—SHOREBASED TRAWL ALLOCATIONS FOR 2023 AND 2024—Continued

IFQ species	Area	2023 Shorebased trawl allocation (mt)	2024 Shorebased trawl allocation (mt)
Yellowtail rockfish	North of 40°10′ N lat	3,761.84	3,431.69
Other Flatfish complex	Coastwide	4,142.09	4,152.89
Shelf Rockfish complex	North of 40°10′ N lat	694.70	691.65
Shelf Rockfish complex	South of 40°10′ N lat	163.02	162.43
Slope Rockfish complex	North of 40°10′ N lat	894.43	874.99
Slope Rockfish complex	South of 40°10′ N lat	417.1	414.58

[a] Pacific halibut IBQ is set according to 50 CFR 660.55(m).
[b] Managed through an international process. This allocation will be updated when announced.

* * * * *

■ 5. In § 660.231, revise paragraph (b)(3)(i) to read as follows:

§ 660.231 Limited entry fixed gear sablefish primary fishery.

* * * * *

(b) * * *

(3) * * *

(i) A vessel participating in the primary season will be constrained by the sablefish cumulative limit associated with each of the permits registered for use with that vessel. During the primary season, each vessel authorized to fish in that season under paragraph (a) of this section may take, retain, possess, and land sablefish, up to the cumulative limits for each of the permits registered for use with that vessel (*i.e.,* stacked permits). If multiple limited entry permits with sablefish endorsements are registered for use with a single vessel, that vessel may land up to the total of all cumulative limits announced in this paragraph for the tiers for those permits, except as limited by paragraph (b)(3)(ii) of this section. Up to 3 permits may be registered for use with a single vessel during the primary season; thus, a single vessel may not take and retain, possess or land more than 3 primary season sablefish cumulative limits in any one year. A vessel registered for use with multiple limited entry permits is subject to per vessel limits for species other than sablefish, and to per vessel limits when participating in the daily trip limit fishery for sablefish under § 660.232. In 2023, the following annual limits are in effect: Tier 1 at 72,904 lb (33,069 kg), Tier 2 at 33,138 lb (15,031 kg), and Tier 3 at 18,936 lb (8,589 kg). In 2024 and beyond, the following annual limits are in effect: Tier 1 at 66,377lb (30,108 kg), Tier 2 at 30,171 lb (13,685 kg), and Tier 3 at 17,241lb (7,820 kg).

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[FR Doc. 2023–23686 Filed 10–26–23; 8:45 am]

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Notices

Federal Register
Vol. 88, No. 207
Friday, October 27, 2023

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–DA–23–0061]

Notice of Request for Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Agricultural Marketing Service's (AMS) intention to request approval, from the Office of Management and Budget (OMB), for an extension of and revision to the currently approved information collection for report forms under the Federal milk marketing order program.

DATES: Comments on this notice must be received by December 26, 2023 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit comments concerning this notice by using the electronic process available at *https://www.regulations.gov.* All comments should reference the document number and the date and the page number of this issue of the **Federal Register**. Written comments may be submitted via mail to the Office of Deputy Administrator, Dairy Program, AMS, USDA, 1400 Independence Avenue SW, Room 2530 South, Stop 0225, Washington, DC 20250–0225. All comments received will be posted without change, including any personal information provided, at *https://www.regulations.gov* and will be included in the record and made available for the public inspection. Please do not include personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. Comments may be submitted anonymously.

FOR FURTHER INFORMATION CONTACT: Janel L. Barsi, Director, Operations and Accountability Division, Dairy Program, Agricultural Marketing Service, U.S. Department of Agriculture, Room 2530, South Building, 1400 Independence Avenue SW, Washington, DC 20250–0230: Email: *Janel.Barsi@usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Report Forms under Federal Milk Orders (From Milk Handlers and Milk Marketing Cooperatives).

OMB Number: 0581–0032.

Expiration Date of Approval: February 29, 2024.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: Federal milk marketing order regulations (7 CFR parts 1000–1199) authorized under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), require milk handlers to report in detail the receipts and utilization of milk and milk products handled at each of their plants that are regulated by a Federal order. The data are needed to administer the classified pricing system and related requirements of each Federal order.

A Federal milk marketing order (hereinafter, Order) is a regulation issued by the Secretary of Agriculture that places certain requirements on the handling of milk in the area it covers. Each order is established under the authority of the Act. The Order requires that handlers of milk for a marketing area pay not less than certain minimum class prices according to how the milk is used. These prices are established under each Order after a public hearing at which evidence is received on the supply and demand conditions for milk in the market. An Order requires that payments for milk be pooled and paid to individual farmers or cooperative associations of farmers on the basis of a uniform or average price. Thus, all eligible farmers (producers) share in the market wide use-values of milk by regulated handlers.

Milk Orders help ensure adequate supplies of milk and dairy products for consumers and adequate returns to producers.

The Orders also provide for the public dissemination of market statistics and other information for the benefit of producers, handlers, and consumers.

Formal rulemaking amendments to the Orders must be approved in referenda conducted by the Secretary.

During 2022, 23,108 dairy farmers delivered over 151.6 billion pounds of milk to handlers regulated under the milk orders. This volume represents 67 percent of all milk marketed in the U.S. and 68 percent of the milk of bottling quality (Grade A) sold in the country. The value of this milk delivered to Federal milk order handlers at minimum order blend prices was over $35.9 billion. Producer deliveries of milk used in Class I products (mainly fluid milk products) totaled 41.0 billion pounds, 27 percent of total producer deliveries.

Each Order is administered by a USDA market administrator. The market administrator is authorized to levy assessments on regulated handlers to carry out the market administrator's duties and responsibilities under the Orders. Additional duties of the market administrators are to prescribe reports required of each handler, to assure that handlers pay producers and associations of producers according to the provisions of the Order. The market administrator employs a staff that verifies handlers' reports by examining records to determine that the required payments are made to producers. Most reports required from handlers are submitted monthly to the market administrator.

The forms used by the market administrators are required by the respective Orders that are authorized by the Act. The forms are used to establish the quantity of milk received by handlers, the pooling status of the handlers, the class-use of the milk used by the handler, and the butterfat content and amounts of other components of the milk.

The forms covered under this information collection require the minimum information necessary to effectively carry out the requirements of the Orders, and their use is necessary to fulfill the intent of the Act as expressed in the Orders and in the rules and regulations issued under the Orders. The information collected is used only by authorized employees of the market administrator and authorized representatives of the USDA, including AMS Dairy Programs' headquarters staff.

Estimated of Burden: Public reporting burden for this collection of information

is estimated to average 0.50 hours per response.

Respondents: Milk handlers and milk marketing cooperatives.

Estimated Number of Respondents: 679.

Estimated Total Annual Responses: 15,980.

Estimated Number of Responses per Respondent: 186.

Estimated Total Annual Burden on Respondents: 18,050 (rounded).

Comments are invited on: (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 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) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received on this information collection will be summarized and included in the final request for OMB approval. All comments will become a matter of public record, including any personal information provided.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2023–23728 Filed 10–26–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by November 27, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: National Animal Health Monitoring System Backyard Animal Keeping 2024 Study.

OMB control number: 0579–XXXX.

Summary of collection: Under the Animal Health Protection Act of 2002 (7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture is authorized to protect the health of livestock, poultry, and aquaculture populations in the United States by preventing the introduction and interstate spread of contagious, infectious, or communicable diseases of livestock, poultry, and aquatic animals and for eradicating such diseases within the United States when feasible. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS). APHIS is the only Federal agency responsible for collecting data on livestock and poultry health. As part of this mission, APHIS operates the National Animal Health Monitoring System (NAHMS) which collects statistically valid and scientifically sound data on the prevalence and economic importance of livestock, poultry, and aquaculture diseases and practices. NAHMS' studies have evolved into a collaborative government and industry initiative to help determine the most effective means of preventing and controlling diseases of livestock and poultry. NAHMS will conduct a national data collection for backyard animal keeping through a national study, Backyard Animal Keeping 2024.

APHIS will conduct two surveys using electronic questionnaires. The first survey will obtain national estimates of ownership of poultry, pigs, rabbits, and goats, and provide baseline information on ownership practices. A second survey will be performed to estimate the prevalence of chicken, pig, rabbit, and goat ownership in two of the four cities previously studied in the NAHMS Poultry 2010 study, as well as describe respondents' beliefs about chicken ownership. The study results will also be used to learn more about backyard animal keeping and food security status.

Need and use of the information: Information collected will enable APHIS to obtain national estimates of the percentage of households that own poultry, pigs, rabbits, and goats in urban and non-urban areas of the United States; describe animal management practices, such as information sources owners use to learn about animal health, access to veterinary care, length of ownership, and biosecurity practices including those relevant to antimicrobial stewardship; for households that both own and do not own poultry, pigs, rabbits, and goats, describe opinions of backyard and urban ownership of chickens, and, for non-owners only, describe any contact with live poultry and intention to own any one of these species of interest in the future; estimate the prevalence of chicken, pig, rabbit, and goat ownership in two of the cities surveyed on urban chicken ownership in 2012 (Denver, Colorado and Miami, Florida), and describe respondents' beliefs about chicken ownership to determine changes in prevalence and beliefs between 2012 and 2024; and conduct a preliminary evaluation of the relationship between backyard animal keeping and food security status. Without the aforementioned data collection, the United States' ability to collect and analyze information on the national prevalence of these species of interest and to obtain data on animal management practices and biosecurity practices would be reduced or nonexistent.

Description of respondents: Households or individuals.

Number of respondents: 112,745.

Frequency of responses: Reporting: Other (one time).

Total burden hours: 4,080.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–23785 Filed 10–26–23; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Economic Research Service

Agency Information Collection Activities: Comment Request

AGENCY: Economic Research Service (ERS), Department of Agriculture (USDA).

ACTION: Notice of information collection; request to comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ERS is proposing a new information collection to study farmers' practices and participation in cover crops, ''Corn and Soybean Grower Survey.''

DATES: Written comments on this notice must be received by December 26, 2023 to be assured of consideration. Comments received after that date will be considered to the extent practicable. Send comments to the address below.

ADDRESSES: Address all comments concerning this notice to *ers.pra@usda.gov* identified by docket number 0536–NEW.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Julie Parker at *ers.pra@usda.gov* or 202–868–7945.

SUPPLEMENTARY INFORMATION:

Title of collection: Corn and Soybean Grower Survey.

OMB Control Number: 0536–NEW.

Type of Request: A new information collection.

Abstract:

Collection of Information for Corn and Soybean Grower Survey

The proposed data collection will survey corn and soybean farmers in the Midwestern United States to study farmers' preferences for participating in programs that support cover cropping and gather new information about current cover cropping practices. This survey sample will be drawn from Midwestern states as they represent a large majority corn and soy acreage, similar policy contexts, and potential for growth in cover crop adoption. USDA agencies are interested in supporting voluntary long-run adoption of climate smart conservation practices such as cover crops through technical assistance and financial incentives. There are multiple Federal, state, and private programs that support planting cover crops. This study is interested in Federal programs, the two largest of which are the Environmental Quality Incentive Program (EQIP) and the Conservation Stewardship Program (CSP).

The survey will use questions on contract enrollment to examine how contract flexibility, ease of applying, payments, and other aspects of cover crop contracts affect farmers' willingness to enroll their corn and soybean fields in cover crop programs. Results will be compared between farmers with no history of cover cropping in Federal programs and those who have cover cropped in Federal Programs.

Participation in the survey will be voluntary, and subjects will be recruited by mail with options to participate either online or by mail. Data will be analyzed using discrete choice models to estimate farmer preferences for cover crop contracts. Results from the survey will be used in academic and Federal research publications to provide information to stakeholders and the public regarding farmer preferences for planting cover crops and participating in cover crop programs. This work will also inform future studies on adoption of cover crops and other conservation practices.

Authority: These data will be collected under the authority of U.S. Code (U.S.C.) 7 U.S.C. 2204(a) General duties of Secretary, advisory functions, research and development and 7 U.S.C 6971, Under Secretary of Agriculture for Research, Education, and Economics, as implemented under the Code of Federal Regulations (CFR) 7 CFR 2.21 which delegates to the Under Secretary, as Chief Scientist, the responsibility for agricultural systems and technology, including emerging agricultural research, education, and extension needs. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3501, *et seq.*) and Office of Management and Budget regulations at 5 CFR part 1320. 5 CFR part 1320.

Confidentiality: All ERS employees and ERS contractors must also fully comply with all provisions of the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) of 2018, title III of Public Law 115–435, codified in 44 U.S.C. ch. 35.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average approximately 30 minutes per respondent.

Respondents: The respondents will be farmers who grow corn or soy in Midwestern states.

Estimated Number of Respondents: Up to 2,250 respondents. This is based on a 15% response rate from a sample of 15,000 farmers.

Estimated Total Annual Burden on Respondents: Up to 3,625 hours.

Comments: Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of ERS, including whether the information will have practical utility; (b) the accuracy of ERS's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, use, and clarity of the information for respondents, including through the use of automated collection techniques or other forms of information technology; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Spiro Stefanou,

Administrator, Economic Research Service, United States Department of Agriculture.

[FR Doc. 2023–23755 Filed 10–26–23; 8:45 am]

BILLING CODE 3410–18–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Pennsylvania Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a Zoom meeting on Wednesday November 15, 2023 from 12:00 p.m.–1:00 p.m. Eastern time. The purpose of the meeting is to discuss the Committee's next topic of civil rights study.

Wednesday November 15, 2023 from 12:00 p.m.–1:00 p.m. Eastern time.

Registration (Audio/Visual): https://www.zoomgov.com/j/1608473377?pwd=OGxtWWNMTE94YnB2bGowSEREb1VKZz09.

Telephone (Audio Only): (833) 435–1820 Toll Free; Meeting ID: 160 847 3377.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or (202) 618–4158.

SUPPLEMENTARY INFORMATION: Members of the public may listen to these discussions. Committee meetings are available to the public through the above listed online registration link (audio/visual) or teleconference phone line (audio only). An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Closed captions will be provided. Indivudals with disabilities requiring other accommodations may contact Corrine Sanders at *csanders@usccr.gov* 10 days prior to the meeting to make their request.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to *csanders@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (202) 618–4158.

Records generated from this meeting may be inspected and reproduced as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Pennsylvania Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email address.

Agenda

I. Welcome & Roll Call
II. Discussion
III. Public Comment
IV. Next
V. Adjournment

Dated: October 24, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–23801 Filed 10–26–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Utah Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Utah Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom at 2:00 p.m. MT on Thursday, November 16, 2023. The purpose of the meeting is to discuss the Committee's project regarding the civil rights implications of disparate outcomes in Utah's K–12 education system.

DATES: Thursday, November 16, 2023, from 2:00 p.m.–3:00 p.m. Mountain Time

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1608498805.

Join by Phone (Audio Only): (833) 435–1820 USA Toll-Free; Meeting ID: 160 849 8805.

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Officer, at *dbarreras@usccr.gov* or (202) 656–8937.

SUPPLEMENTARY INFORMATION: This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to David Barreras at *dbarreras@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Utah Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov.*

Agenda

I. Welcome & Roll Call
II. Discussion: Civil Rights Implications of Disparate Outcomes in Utah's K–12 Education System
III. Public Comment
IV. Next Steps
V. Adjournment

Dated: October 24, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–23797 Filed 10–26–23; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–55–2023]

Foreign-Trade Zone (FTZ) 127, Notification of Proposed Production Activity; Trucast LLC; (Turbine Wheels); Newberry, South Carolina

Trucast LLC submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Newberry, South Carolina within FTZ 127. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on October 20, 2023.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status material(s)/component(s) and specific finished product(s) described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via *www.trade.gov/ftz.*

The proposed finished product is turbine wheels for commercial vehicles (duty rate 4.7%).

The proposed foreign-status material/component is nickel based alloy (duty-free). The request indicates that nickel based alloy is subject to duties under section 301 of the Trade Act of 1974 (section 301), depending on the country

of origin. The applicable section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov*. The closing period for their receipt is December 6, 2023.

A copy of the notification will be available for public inspection in the ''Online FTZ Information System'' section of the Board's website.

For further information, contact Christopher Wedderburn at *Chris.Wedderburn@trade.gov*.

Dated: October 23, 2023.

Elizabeth Whiteman,

Executive Secretary.

[FR Doc. 2023–23735 Filed 10–26–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD385]

Atlantic Highly Migratory Species; Atlantic Shark Management Measures; 2024 Research Fishery

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

ACTION: Notice of intent; request for applications.

SUMMARY: NMFS announces its request for applications for the 2024 shark research fishery from commercial shark fishermen with directed or incidental shark limited access permits. The shark research fishery allows for the collection of fishery-dependent and biological data for future stock assessments and to meet the research objectives of the Agency. The only commercial vessels authorized to land sandbar sharks are those participating in the shark research fishery. Shark research fishery permittees may also land other large coastal sharks (LCS), small coastal sharks (SCS), smoothhound, and pelagic sharks. Commercial shark fishermen who are interested in participating in the shark research fishery need to submit a completed Shark Research Fishery Permit Application to be considered.

DATES: Shark Research Fishery Permit Applications must be received no later than November 27, 2023.

ADDRESSES: Please submit completed applications via email to *NMFS.Research.Fishery@noaa.gov.*

For copies of the Shark Research Fishery Permit Application, please email a request to *NMFS.Research.Fishery@noaa.gov.* Copies of the Shark Research Fishery Permit Application are also available at the highly migratory species (HMS) website at *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-highly-migratory-species-exempted-fishing-permits.* Please be advised that your application may be released under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Karyl Brewster-Geisz or Delisse Ortiz at 301–427–8503, or email *NMFS.Research.Fishery@noaa.gov.*

SUPPLEMENTARY INFORMATION: Atlantic HMS fisheries (tunas, billfish, swordfish, and sharks) are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) and the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan (FMP) and its amendments are implemented by regulations at 50 CFR part 635. Specifics regarding the commercial shark quotas and the shark research fishery can be found at §§ 635.27(b) and 635.32(f).

The shark research fishery was established, in part, to maintain time series data for stock assessments and to meet NMFS' research objectives. Since the shark research fishery was established in 2008, it has allowed for: the collection of fishery-dependent data for current and future stock assessments; the operation of cooperative research to meet NMFS' ongoing research objectives; the collection of updated life-history information used in the sandbar shark (and other species) stock assessment; the collection of data on habitat preferences that might help reduce fishery interactions through bycatch mitigation; evaluation of the utility of the mid-Atlantic closed area on the recovery of dusky sharks and collection of hook-timer and pop-up satellite archival tag information to determine at-vessel and post-release mortality of dusky sharks; and collection of sharks to determine the weight conversion factor from dressed weight to whole weight.

The shark research fishery allows selected commercial fishermen the opportunity to earn revenue from selling additional sharks, including sandbar sharks. Only the commercial shark fishermen selected to participate in the shark research fishery are authorized to land sandbar sharks subject to the sandbar quota available each year. The base quota for sandbar sharks is 90.7 metric tons (mt) dressed weight (dw) per year, although this number may be reduced in the event of overharvests. The selected shark research fishery permittees will also be allowed to land other LCS, SCS, smoothhound, and pelagic sharks consistent with any restrictions established on their shark research fishery permit. Generally, the shark research fishery permits are valid only for the calendar year for which they are issued.

One hundred-percent observer coverage is required on shark research fishery trips. The specific 2024 trip limits and number of trips per month will depend on the availability of funding, number of selected vessels, the availability of observers, the available quota, and the objectives of the research fishery, and will be included in the permit terms at time of issuance. The number of participants in the research fishery changes each year. In 2023, three fishermen were chosen to participate. From 2008 through 2023, there has been an average of 6 participants each year with the range from 3 to 11. Overall, the timing of trips and the number of the trips participants taken has varied year-to-year based on seasonal availability of certain species and available quota. Specifically, the number of trips taken per month are limited by the scientific and research needs of the Agency and the number of NMFS-approved observers available; in the last few years participating vessels on average have been able to take one trip per month. Participants may also be limited in the amount of gear they can deploy on a given set (*e.g.,* number of hooks and sets, soak times, length of longline). These limits have changed both between years and during the year depending on research goals and bycatch limits.

In 2023, NMFS split 90 percent of the sandbar and LCS research fishery quotas equally among selected participants, with 16.3 mt dw (35,935 pounds (lb) dw) of sandbar shark research fishery quota and 9.0 mt dw (19,841 lb dw) of other LCS research fishery quota available to each vessel. The remaining quota was held in reserve to ensure the overall sandbar and LCS research fishery quotas were not exceeded. NMFS may use this process again for the quotas in 2024 or may consider other methods of distributing the available quotas.

In 2023, NMFS continued to implement a regional dusky bycatch limit, which was first established in 2013, in the shark research fishery,

applicable to four regions across the Gulf of Mexico and Atlantic. Under this limit, when four or more dusky sharks have been brought to the vessel dead in a region, shark research fishery permit holders in that region were prohibited from soaking their gear for longer than 3 hours. If, after the change in soak time, three additional dusky shark interactions (alive or dead) were observed, shark research fishery permit holders were prohibited from making a trip in that region for the remainder of the year, unless otherwise permitted by NMFS. Slightly different measures were established for shark research fishery participants in the mid-Atlantic shark closed area in order to allow NMFS observers to place satellite archival tags on dusky sharks and collect other scientific information on dusky sharks while also minimizing any dusky shark mortality.

To participate in the shark research fishery, commercial shark fishermen need to submit a completed Shark Research Fishery Permit Application by the deadline noted above (see **DATES**) showing that the vessel and owner(s) meet the specific criteria outlined below.

Research Objectives

Each year, the research objectives are developed by a shark board, which is comprised of NMFS representatives from the Southeast Fisheries Science Center (SEFSC) Panama City Laboratory, the Southeast Regional Office Protected Resources Division, and the HMS Management Division. The research objectives for 2024 are based on various documents, including the May 2020 Biological Opinion on the Operation of the Atlantic Highly Migratory Species Fisheries Excluding Pelagic Longline, as well as recent stock assessments for the U.S. South Atlantic blacknose, U.S Gulf of Mexico blacknose, U.S. Gulf of Mexico blacktip, sandbar, and dusky sharks (all these stock assessments can be found at *http://sedarweb.org/*). The 2024 research objectives are:

- Collect reproductive, length, sex, and age data from sandbar and other sharks throughout the calendar year for species-specific stock assessments;
- Monitor the size distribution of sandbar sharks and other species captured in the fishery;
- Collect information regarding depredation events;
- Continue ongoing shark tagging programs for identification of migration corridors and stock structure using dart and/or spaghetti tags;
- Maintain time-series of abundance from previously derived indices for the shark bottom longline observer program;
- Acquire fin-clip samples of all shark and other species for genetic analysis;
- Attach satellite archival tags to endangered smalltooth sawfish to provide information on critical habitat, preferred depth and post-release mortality, consistent with the requirements listed in the take permit issued under section 10 of the Endangered Species Act to the SEFSC Observer Program;
- Attach satellite archival tags to prohibited dusky and other sharks, as needed, to provide information on daily and seasonal movement patterns, and preferred depth;
- Evaluate hooking mortality and post-release survivorship of dusky, hammerhead, blacktip, and other sharks using hook-timers and temperature-depth recorders;
- Evaluate the effects of controlled gear experiments to determine the effects of potential hook changes to prohibited species interactions and fishery yields;
- Examine the size distribution of sandbar and other sharks captured including in the Mid-Atlantic shark time/area closure off the coast of North Carolina from January 1 through July 31;
- Develop allometric and weight relationships of selected species of sharks (*e.g.,* hammerhead, sandbar, blacktip shark);
- Collect samples such as liver and muscle plugs for stable isotope analysis as a part of a trophic level-based ecosystem study; and
- Examine the feasibility of using electronic monitoring (EM) to accurately measure soak times of bottom longline sets. This specific research objective may require participating vessels to have an EM system sensors installed for the duration of the 2024 research fishery. During each research trip, the EM sensors must be operating. The sensors will be removed after the end of the 2024 research fishery.

Selection Criteria

Shark Research Fishery Permit Applications will only be accepted from commercial shark fishermen who hold a current directed or incidental shark limited access permit. If a large number of applications are received, NMFS will give priority to directed permit holders to ensure that an appropriate number of sharks are landed to meet the research objectives.

The Shark Research Fishery Permit Application includes, but is not limited to, a request for the following information: type of commercial shark permit possessed; past participation and availability in the commercial shark fishery (not including sharks caught for display); past involvement and compliance with HMS observer programs per § 635.7; past compliance with HMS regulations at 50 CFR part 635; past and present availability to participate in the shark research fishery year-round; ability to fish in the regions and seasons requested; ability to attend necessary meetings regarding the objectives and research protocols of the shark research fishery; and ability to carry out the research objectives of the Agency. Preference will be given to those applicants who are willing and available to fish year-round and who affirmatively state that they intend to do so, to ensure the timely and accurate data collection NMFS needs to meet this year's research objectives. An applicant who has been charged criminally or civilly (*e.g.,* issued a Notice of Violation and Assessment (NOVA) or Notice of Permit Sanction) for any HMS-related violation will not be considered for participation in the shark research fishery. In addition, applicants who were selected to carry an observer in the previous 2 years for any HMS fishery, but failed to contact NMFS to arrange the placement of an observer as required per § 635.7, will not be considered for participation in the 2024 shark research fishery. Applicants who were selected to carry an observer in the previous 2 years for any HMS fishery and failed to comply with all the observer regulations per § 635.7 will also not be considered. Exceptions will be made for vessels that were selected for HMS observer coverage but did not fish in the quarter when selected and thus did not require an observer. Applicants who do not possess a valid U.S. Coast Guard safety inspection decal when the application is submitted will not be considered. Applicants who have been non-compliant with any of the HMS observer program regulations in the previous 2 years, as described above, may be eligible for future participation in shark research fishery activities by demonstrating 2 subsequent years of compliance with observer regulations at § 635.7.

Selection Process

The HMS Management Division will review all submitted applications and develop a list of qualified applicants from those applications that are deemed complete. A qualified applicant is an applicant that has submitted a complete application by the deadline (see **DATES**) and has met the selection criteria listed above. Qualified applicants are eligible to be selected to participate in the 2024 shark research fishery. The HMS Management Division will provide the

list of qualified applicants without identifying information to the SEFSC. The SEFSC will then evaluate the list of qualified applicants and, based on the temporal and spatial needs of the research objectives, the availability of observers, the availability of qualified applicants, and the available quota for a given year, will randomly select qualified applicants to conduct the prescribed research. Where there are multiple qualified applicants that meet the criteria, permittees will be randomly selected through a lottery system. If a public meeting is deemed necessary, NMFS will announce details of a public selection meeting in a subsequent **Federal Register** notice.

Once the selection process is complete, NMFS will notify the selected applicants and issue the shark research fishery permits. The shark research fishery permits will be valid through December 31, 2024, unless otherwise specified. If needed, NMFS will communicate with the shark research fishery permit holders to arrange a captain's meeting to discuss the research objectives and protocols. NMFS usually holds mandatory captain's meetings before observers are placed on vessels and may hold one for the 2024 shark research fishery in early 2024. Once the fishery starts, the shark research fishery permit holders must contact NMFS or the NMFS-designee to arrange the placement of a NMFS-approved observer for each shark research trip, and in the beginning, if required, to arrange the installation of the specific EM sensor. Selected applicants are required to allow observers the opportunity to perform their duties and assist observers as necessary. At the end of the shark fishery, shark research fishery permit holders must contact NMFS or a designee to arrange for the removal of the EM sensors.

A shark research fishery permit will only be valid for the vessel and owner(s) and terms and conditions listed on the permit, and, thus, cannot be transferred to another vessel or owner(s). Shark research fishery permit holders must carry a NMFS-approved observer on shark research fishery trips. Issuance of a shark research permit does not guarantee that the permit holder will be assigned a NMFS-approved observer on any particular trip. Rather, issuance indicates that a vessel may be issued a NMFS-approved observer for a particular trip, and on such trips, may be allowed to harvest Atlantic sharks, including sandbar sharks, in excess of the retention limits described in § 635.24(a). Applicable retention limits will be based on available quota, number of vessels participating in the 2024 shark research fishery, the research objectives set forth by the shark board, the extent of other restrictions placed on the vessel, and may vary by vessel and/or location. When not operating under the auspices of the shark research fishery, the vessel would still be able to land LCS, SCS, and pelagic sharks subject to existing retention limits on trips without a NMFS-approved observer. Additionally, during those times, the vessel would not need to operate the EM sensors.

NMFS annually invites commercial shark permit holders (directed and incidental) to submit an application to participate in the shark research fishery. Permit applications can be found on the HMS Management Division's website at *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-highly-migratory-species-exempted-fishing-permits#shark-research-fishery,* by calling 301–427–8503, or by emailing *NMFS.Research.Fishery@noaa.gov.* Final decisions on the issuance of a shark research fishery permit will depend on the submission of all required information by the deadline (see **DATES**), and NMFS' review of applicant information as outlined above. The 2024 shark research fishery will start after the opening of the shark fishery and under available quotas as published in a separate **Federal Register** final rule.

Dated: October 23, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–23715 Filed 10–26–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Req No. OS–2024–00022–FR]

Defense Health Board; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness (USD(P&R)). Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Health Board (DHB) will take place.

DATES: Open to the public Wednesday, November 29, 2023, from 9 a.m. to 5 p.m. (EST).

ADDRESSES: The address of the open meeting is 8111 Gatehouse Rd, Room 345, Falls Church, VA 22042. The meeting will be held both in-person and virtually. To participate in the meeting, see the Meeting Accessibility section for instructions.

FOR FURTHER INFORMATION CONTACT: CAPT Shawn Clausen, 703–275–6060 (voice), *shawn.s.clausen.mil@health.mil* (email). Mailing address is 7700 Arlington Boulevard, Suite 5101, Falls Church, Virginia 22042. Website: *http://www.health.mil/dhb.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), 5 U.S.C. 552b (commonly known as the ''Government in the Sunshine Act''), and 41 CFR 102–3.140 and 102–3.150.

Availability of Materials for the Meeting: Additional information, including the agenda, is available on the DHB website, *http://www.health.mil/dhb.* A copy of the agenda or any updates to the agenda for the November 29, 2023, meeting will be available on the DHB website. Any other materials presented in the meeting may also be obtained at the meeting.

Purpose of the Meeting: The DHB provides independent advice and recommendations to maximize the safety and quality of, as well as access to, health care for DoD health care beneficiaries. The purpose of the meeting is to provide progress updates on specific tasks before the DHB. In addition, the DHB will receive information briefings on current issues related to military medicine.

Agenda: The DHB anticipates receiving a decision briefing on Eliminating Racial and Ethnic Health Disparities in the Military Health System. The DHB also expects an update from the DHB Public Health Subcommittee's tasking on Effective Public Health Communication Strategies with DoD personnel.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165 and subject to the availability of space, this meeting will be held in-person and virtually and is open to the public from 9 a.m. to 5 p.m. Seating and virtual participation is limited and is on a first-come basis. All members of the public who wish to participate must register by emailing their name, rank/title, and organization/company to *dha.dhb@health.mil* or by contacting Mr. Rubens Lacerda at (703)

275–6012 no later than Wednesday, November 22, 2023. Additional details will be required from all members of the public attending in-person that do not have Gatehouse building access. Once registered, participant access information will be provided.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Mr. Rubens Lacerda at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Written Statements: Any member of the public wishing to provide comments to the DHB related to its current taskings or mission may do so at any time in accordance with section 10(a)(3) of the FACA, 41 CFR 102–3.105(j) and 102–3.140, and the procedures described in this notice. Written statements may be submitted to the DHB's Designated Federal Officer (DFO), CAPT Clausen, at *shawn.s.clausen.mil@health.mil*. Supporting documentation may also be included, to establish the appropriate historical context and to provide any necessary background information. If the written statement is not received at least five (5) business days prior to the meeting, the DFO may choose to postpone consideration of the statement until the next open meeting. The DFO will review all timely submissions with the DHB President and ensure they are provided to members of the DHB before the meeting that is subject to this notice. After reviewing the written comments, the President and the DFO may choose to invite the submitter to orally present their issue during an open portion of this meeting or at a future meeting.

Dated: October 23, 2023.

Natalie M. Ragland,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–23713 Filed 10–26–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF EDUCATION

Historically Black Colleges and Universities Capital Financing Advisory Board

AGENCY: Historically Black Colleges and Universities Capital Financing Advisory Board, Department of Education (Department), Office of Postsecondary Education (OPE).

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the agenda, time, and instructions for how to access or attend the meeting of the Historically Black Colleges and Universities Capital Financing Advisory Board (Board). This notice provides information about the meeting to members of the public who may be interested in attending and instructions for how to provide written comment. Notice of this meeting is required by Section 1009(a)(2) of 5 U.S.C. chapter 10 (Federal Advisory Committees).

DATES: The Board will hold a hybrid meeting on November 13, 2023, from 10:00 a.m. to 12:30 p.m. EST.

FOR FURTHER INFORMATION CONTACT: Donald Watson, Executive Director/Designated Federal Official, U.S. Department of Education, Office of Postsecondary Capital Financing, 400 Maryland Avenue SW, Washington, DC 20202; telephone (202) 453- 6166, or email *donald.watson@ed.gov.*

SUPPLEMENTARY INFORMATION:

Statutory Authority and Function: The Board is established by 20 U.S.C. 1066f. The Board is also governed by 5 U.S.C. chapter 10 (Federal Advisory Committees), which sets forth standards for the formation and use of advisory committees. The purpose of this Board is to advise the Secretary of Education (Secretary) and the designated bonding authority on the most effective and efficient ways to implement construction financing on the campuses of Historically Black Colleges and Universities (HBCUs). The Board also advises Congress regarding progress made in implementing the HBCU Capital Financing Program.

Meeting Agenda: The meeting agenda will include roll call; an update from the Executive Director of the HBCU Capital Financing Program; a discussion regarding several recommendations from the Board to the Secretary and to Congress; the Board may vote on those recommendations, and a discussion regarding dates and locations for meetings that will be held during calendar year 2024. The public comment period will begin immediately following the discussion of meeting dates and locations.

Instructions for Accessing and Attending the Meeting

Individuals can attend the meeting in person at 400 Maryland Ave. SW, 1st Floor, Washington, DC, Lyndon Baines Johnson Auditorium. Individuals attending virtually must register online at *https://ed-gov.zoomgov.com/webinar/register/WN_A3GrX6U_QASIFA-yVWC_bQ* any time before the meeting begins on November 13, 2023 or join using an H.323/SIP room system:

H.323: 161.199.138.10 (U.S. West) or 161.199.136.10 (U.S. East).

Meeting ID: 160 344 0326.

Passcode: 080503.

SIP: 1603440326@sip.zoomgov.com.

Passcode: 080503.

Public Comment: Members of the public interested in submitting written comments may do so via email to Donald Watson *donald.watson@ed.gov* no later than 11:59 p.m. Eastern Time (ET) on November 9, 2023. Please note that written comments should pertain to the work of the Board.

Reasonable Accommodations: The meeting is 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), please notify the contact person listed in this notice no later than two weeks 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.

Access to Records of the Meeting: The Department will post the official minutes of this meeting on the Resources—Historically Black College and University Capital Financing Program website, *https://www2.ed.gov/programs/hbcucapfinance/resources.html,* no later than 60 days after the meeting. Pursuant to 5 U.S.C. 1009(b), the public may also inspect the meeting materials and other Board records at 400 Maryland Avenue SW, Washington, DC 20202, by emailing Donald Watson at *donald.watson@ed.gov,* or calling (202) 453–6166 to schedule an appointment.

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: 20 U.S.C. 1066f.

Nasser H. Paydar,

Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 2023–23771 Filed 10–26–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0185]

Agency Information Collection Activities; Comment Request; Regional Educational Laboratory (REL) Southwest Write To Succeed Evaluation

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before December 26, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *https://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0185. 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 Christopher Boccanfuso, 202–453–7383.

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: Regional Educational Laboratory (REL) Southwest Write to Succeed Evaluation.

OMB Control Number: 1850–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 2,453.

Total Estimated Number of Annual Burden Hours: 366.

Abstract: The current authorization for the Regional Educational Laboratories (REL) program is under the Education Sciences Reform Act of 2002, part D, section 174, (20 U.S.C. 9564), administered by the Department of Education, Institute of Education Sciences (IES), National Center for Education Evaluation and Regional Assistance (NCEE). The central mission and primary function of the RELs is to support applied research and provide technical assistance to state and local education agencies within their region (ESRA, part D, section 174[f]). The REL program's goal is to partner with educators and policymakers to conduct work that is change-oriented and supports meaningful local, regional, or state decisions about education policies, programs, and practices to improve outcomes for students.

Supporting equitable educational opportunities and achievement for English learner students in New Mexico is a high priority for the New Mexico Public Education Department (NMPED, n.d., 2021). In light of analysis showing English learner students in the state have lower rates of English language arts (ELA) proficiency (Arellano et al., 2018), plus legal rulings in the state that English learner students' rights to a sufficient public education have been violated (NMPED, 2022a), NMPED created a strategic plan that includes supporting the whole child through literacy instruction that is culturally and linguistically responsive (NMPED, 2022b). Improving English learner students' English proficiency and the literacy skills of all students is a top priority of NMPED and the district and regional partners of REL Southwest. To address this problem, REL Southwest is implementing, refining, and building evidence for the Write to Succeed professional learning program. The core focus of the Write to Succeed program is scaffolded writing instruction that can support all students but with embedded opportunities to meet the language needs to English learner students. Prior to this study, the program will be further enhanced with supports for teacher collaboration and culturally and linguistically relevant instructional routines, as prior work with New Mexico partners has indicated these are two elements in need of further support.

This study is designed to measure the efficacy and implementation of the Write to Succeed. The evaluation team plans to conduct an independent evaluation using a school-level, cluster randomized control trial design to assess the program's impact on teachers' practices and beliefs and students' language and literacy outcomes. The evaluation will also assess the implementation of the program and how it may be effectively scaled. The evaluation will take place in 40 schools across an estimated 10 districts in New Mexico and will focus on teachers and students in grades 4–8. The evaluation will produce a report and presentations to study participants, practitioners, policymakers, and researchers, and infographics and blog posts for a wider audience of educators and policymakers. These will be designed to inform district and school leaders and teachers about scaffolded writing practices that could be beneficial for English learner students and all students.

Dated: October 23, 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. 2023–23692 Filed 10–26–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Availability of Draft Basis for Section 3116 Determination for Closure of the Calcined Solids Storage Facility at the Idaho National Laboratory Site, Idaho

AGENCY: Department of Energy.

ACTION: Notice of availability.

SUMMARY: The U.S. Department of Energy (DOE) announces the availability of the *Draft Basis for Section 3116 Determination for Closure of the Calcined Solids Storage Facility at the Idaho National Laboratory Site* (Draft CSSF 3116 Basis Document). The Draft CSSF 3116 Basis Document demonstrates that the Calcined Solids Storage Facility (CSSF) at closure after waste retrieval is not high-level radioactive waste (HLW) and may be disposed of in place as low-level radioactive waste (LLW). DOE prepared the Draft CSSF 3116 Basis Document pursuant to Section 3116 of the ''Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005'' (hereafter NDAA Section 3116). DOE is consulting with the U.S. Nuclear Regulatory Commission (NRC), and is also making the Draft CSSF 3116 Basis Document available for comments from states, Tribal Nations, stakeholders, and the public. After consultation with the NRC, carefully considering comments received, and performing any necessary revisions of analyses and technical documents, DOE will prepare a final CSSF 3116 Basis Document. Based on the final document, the Secretary of Energy, in consultation with the NRC, may determine in the future whether the stabilized CSSF bins (including integral equipment), transport lines, and any residual waste remaining therein at closure are non-HLW and may be disposed of in place as LLW.

DATES: DOE invites comments on the Draft CSSF 3116 Basis Document during a 45-day comment period beginning the calendar day after publication of this Notice of Availability. A public virtual meeting on the Draft CSSF 3116 Basis Document will be held on a date to be announced, currently anticipated to be November 1, 2023. Before the meeting, DOE will issue stakeholder and media notifications and publish a notice in the local newspaper providing the date, time, and virtual platform information of the public meeting. Information on the public meeting date and virtual platform information also will be available before the meeting at the website listed in *https://www.id.energy.gov/insideNEID/PublicInvolvement.htm.*

ADDRESSES: The Draft CSSF 3116 Basis Document is available on the internet at *https://www.id.energy.gov/insideNEID/PublicInvolvement.htm* and will be publicly available for review on the U.S. DOE Idaho Operations Office Public Reading Room web page at *https://inl.gov/about-inl/general-information/doe-public-reading-room.* Written comments should be submitted to: Mr. Greg Balsmeier, INTEC Program Manager for the Calcine Disposition Project, U.S. Department of Energy Idaho Operations Office, 1955 Fremont Ave., Idaho Falls, ID 83401. Alternatively, comments may also be filed electronically by email to: *DraftCSSFBasisDocument@icp.doe.gov.*

FOR FURTHER INFORMATION CONTACT: For further information about this Draft CSSF 3116 Basis Document, please contact Mr. Greg Balsmeier, INTEC Program Manager for the Calcine Disposition Project, by mail at U.S. Department of Energy Idaho Operations Office, 1995 Fremont Ave, Idaho Falls, ID 38401, by phone at 208–526–5871, or by email at *balsmege@id.doe.gov.*

SUPPLEMENTARY INFORMATION: The Idaho National Laboratory (INL) Site, near Arco, Idaho, currently stores solid calcined radioactive waste in stainless-steel bins housed in six reinforced concrete vaults that are below or partially below grade at the CSSF. The CSSF is located at the Idaho Nuclear Technology and Engineering Center (INTEC) at the INL Site. The stored calcined HLW was generated by converting liquid HLW and non-reprocessing waste into a granular solid. The liquid HLW was generated by the prior reprocessing of spent nuclear fuel (SNF). DOE's current mission focuses on the cleanup and remediation of those wastes and ultimate closure of the CSSF.

As part of that mission, DOE plans to retrieve waste from the CSSF for treatment, and disposition out of the State of Idaho. Following waste retrieval, DOE plans to stabilize in grout and pursue closure (disposal in place) of the CSSF bins (including integral equipment), transport lines, and any residual waste remaining therein.

The Draft CSSF 3116 Basis Document concerns the CSSF bins (including integral equipment), transport lines, and any residual waste remaining therein, after waste retrieval, which is anticipated to remove most of the calcine, (approximately 99% or more of the calcine (by volume) and approximately 99% of the radioactivity attributable to highly radioactive radionuclides). A small amount of calcine, less than approximately 1% by volume, is expected to remain in the CSSF at the time of closure. The final CSSF closure configuration is anticipated to include stabilizing (with grout) the bins and transport line piping void spaces. The grout will serve to provide long term structural stability, limit the amount of water infiltration into the bins and transfer lines to mitigate contaminate migration, and provide a barrier for intrusion by burrowing animals, plant roots, or humans.

NDAA Section 3116(a) provides that HLW does not include radioactive waste resulting from the reprocessing of SNF that the Secretary of Energy, in consultation with the NRC, determines:

''(1) does not require permanent isolation in a deep geologic repository for spent fuel or high-level radioactive waste;

(2) has had highly radioactive radionuclides removed to the maximum extent practical; and

(3) (A) does not exceed concentration limits for Class C low-level waste as set out in Section 61.55 of title 10, Code of Federal Regulations, and will be disposed of—

(i) in compliance with the performance objectives set out in subpart C of part 61 of title 10, Code of Federal Regulations; and

(ii) pursuant to a State-approved closure plan or State-issued permit, authority for the approval or issuance of which is conferred on the State outside of this section; or

(B) exceeds concentration limits for Class C low-level waste as set out in section 61.55 of title 10, Code of Federal Regulations, but will be disposed of—

(i) in compliance with the performance objectives set out in subpart C of part 61 of title 10, Code of Federal Regulations;

(ii) pursuant to a State-approved closure plan or State-issued permit, authority for the approval or issuance of which is conferred on the State outside of this section; and

(iii) pursuant to plans developed by the Secretary in consultation with the Commission.''

The Draft CSSF 3116 Basis Document demonstrates that after waste retrieval

activities, the CSSF at closure will meet the above criteria. DOE is predicating this Draft CSSF 3116 Basis Document on extensive analysis and scientific rationale, using a risk-informed approach, including analyses presented in the *Performance Assessment and Composite Analysis for the INTEC Calcined Solids Storage Facility at the INL Site* (CSSF PA/CA).

Specifically, this Draft CSSF 3116 Basis Document shows that the CSSF bins (including integral equipment), transport lines, and any residual waste at the time of closure does not require permanent isolation in a deep geologic repository for spent fuel or HLW, and that the highly radioactive radionuclides (those radionuclides which contribute most significantly to radiological dose to workers, the public, and the environment as well as radionuclides listed in 10 CFR 61.55) will have been removed to the maximum extent practical. As also shown in the Draft CSSF 3116 Basis Document, the stabilized (grouted) CSSF stainless-steel bins (including integral equipment), transport lines, and any residual waste at CSSF closure will not exceed concentration limits for Class C LLW. Based on the analyses in the CSSF PA/CA, this Draft CSSF 3116 Basis Document projects that potential doses to a hypothetical member of the public and hypothetical inadvertent intruder after CSSF closure will be well below the doses specified in the performance objectives for disposal of LLW. Furthermore, the CSSF closure will be performed pursuant to a State-approved closure plan.

DOE is consulting with the NRC on this Draft CSSF 3116 Basis Document and also making the Draft CSSF 3116 Basis Document available for comments from states, Tribal Nations, stakeholders, and the public. After consultation with the NRC, carefully considering comments received, and performing any necessary revisions of analyses and technical documents, DOE plans to issue a Final CSSF 3116 Basis Document. Based on the Final CSSF 3116 Basis Document, the Secretary of Energy, in consultation with the NRC, may determine in the future whether the CSSF bins (including integral equipment), transport lines, and any residual waste therein are non-HLW, and may be disposed in place as LLW.

Signing Authority

This document of the Department of Energy was signed on October 20, 2023, by Kristen Ellis, Acting Associate Principal Deputy Assistant Secretary for Regulatory and Policy Affairs, 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 October 24, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023–23761 Filed 10–26–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PL24–1–000]

Project-Area Wage Standards in the Labor Cost Component of Cost-of-Service Rates

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Proposed policy statement.

SUMMARY: The Federal Energy Regulatory Commission (Commission) proposes to clarify how the Commission will treat the use of project-area wage standards in calculating the labor cost component of jurisdictional cost-of-service rates.

DATES: Comments on this proposed policy statement are due on or before December 26, 2023.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through *https://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.
  - *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.
  - *Hand (including courier) delivery:* Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

The Comment Procedures Section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

Heidi Nielsen (Legal Information), Office of the General Counsel, (202) 502–8435, *heidi.nielsen@ferc.gov.*

Adam Pollock (Technical Information), Office of Energy Market Regulation, (202) 502–8458, *adam.pollock@ferc.gov.*

James Sarikas (Technical Information), Office of Energy Market Regulation, (202) 502–6831, *james.sarikas@ferc.gov.*

SUPPLEMENTARY INFORMATION:

I. Proposal

1. In this proposed policy statement, we clarify how the Commission will treat the use of project-area wage standards in calculating the labor cost component of cost-of-service rates, including under Natural Gas Act (NGA) sections 4, 5, and 7, 15 U.S.C. 717c–d, 717f; the Interstate Commerce Act (ICA), 49 U.S.C. app. 1(5)(a); and Federal Power Act (FPA) sections 205 and 206, 16 U.S.C. 824d–e.[1]

2. Project-area wage standards are the prevailing wages set by labor markets in the locale where the associated project work (*e.g.,* construction, capital repairs, decommissioning) is performed. They can be found in data sources that indicate the basic hourly wage rates and fringe benefit rates for labor, direct employees and/or contract personnel that prevail in a predetermined geographic area. For example, under the Davis-Bacon Act, the U.S. Department of Labor issues prevailing wage determinations based on periodic surveys of union and non-union wages paid in a particular location, which serve as the minimum wage that must be paid by contractors and subcontractors performing under certain federally funded or assisted construction contracts.[2] A number of states have enacted their own prevailing wage laws, sometimes referred to as ''Little Davis-Bacon'' laws.[3]

[1] While most interstate oil pipelines have market-based or indexed rates, some jurisdictional pipelines have cost-of-service rates on file with the Commission.

[2] ''By requiring the payment of minimum prevailing wages, Congress sought to 'ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards.' '' Dep't of Labor, *Updating the Davis-Bacon & Related Acts Reguls.,* 88 FR 57526, 57526 (Aug. 23, 2023) (citing Determination of Wage Rates Under the Davis-Bacon & Serv. Cont. Acts 5 Op. O.LC. 174, 176 (1981)) (Final Rule).

[3] Dep't of Labor, *Dollar Threshold Amount for Contract Coverage under State Prevailing Wage*

Continued

3. The Commission addressed the treatment of project-area wage rates in the cost component of natural gas pipeline cost-of-service rates in Opinion Nos. 510 and 524.[4] In Opinion No. 510, the Commission rejected a pipeline operator's proposal to use union-only wage rates from a single proxy location to estimate the labor cost of decommissioning its pipeline that spanned four states,[5] finding that the pipeline operator had not carried its burden under section 4 of the NGA to show that it would use union labor and that, based on the evidence in that proceeding, it was accordingly reasonable to estimate labor costs using a ''blended'' mix of average union and non-union wage rates in the general private construction industry in the states where the pipeline was located, ''weighted'' by the length of pipe in each state.[6] The Commission subsequently applied the same approach in Opinion No. 524, finding that the same operator had again failed to present sufficient supporting evidence for its proposal to use union-only wage rates in its estimate of decommissioning labor costs.[7]

4. In this proposed policy statement, we clarify that those decisions were based on the record evidence before the Commission in those proceedings and do not reflect a heightened standard of review with respect to project-area wage rates. Under this proposal, jurisdictional entities may include wages consistent with project-area wage standards in cost-of-service rates filed with the Commission where the record supports that outcome, as discussed below.

5. Specifically, we propose that, when a Commission-jurisdictional entity presents evidence that it: (1) pays project-area wage standards, or (2) is contractually obligated to pay project-area wage standards, or (3) commits via affidavit[8] filed in the rate proceeding that it will pay project-area wage standards, the Commission will presume, absent contrary evidence, that such project-area wage standards are just and reasonable for the relevant labor-cost component.[9] Furthermore, we propose that the Commission will reject the inclusion of labor wages consistent with project-area wage standards in cost-of-service rates when the evidence demonstrates that the jurisdictional entity has not paid or will not be paying labor wages consistent with project-area wage standards.

6. We propose that the Commission will accept as sources of project-area wage standards: (1) Davis-Bacon Act local prevailing wage determinations;[10] (2) state prevailing wage determinations;[11] (3) applicable collective-bargaining agreements or Project Labor Agreements;[12] or (4) other evidence demonstrating the prevailing wages paid in the relevant locale(s), such as an industry-accepted database used in construction cost estimates. The Commission seeks comment on the appropriateness of the four proposed sources of project-area wage standards. In particular, we seek comment on the appropriateness of using industry databases with construction cost estimates as a source of project-area wage standards as well as whether any project-area wage standards might not be captured in the first three listed categories.

7. We further propose that jurisdictional entities seeking to include project-area wage standards in cost-of-service rates should maintain and preserve records, including books of account or records for work performed by employees, contractors or subcontractors, sufficient to demonstrate that claimed project-area wages were actually paid.[13]

II. Comment Procedures

8. The Commission invites comments on this proposed policy statement on or before December 26, 2023. Comments must refer to Docket No. PL24–1–000 and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

9. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software must be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

10. Commenters that are not able to file comments electronically may file an original of their comment by USPS mail or by courier-or other delivery services. For submission sent via USPS only, filings should be mailed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submission of filings other than by USPS should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

III. Information Collection Statement

11. The Paperwork Reduction Act and the implementing regulations of the Office of Management and Budget (OMB)[14] require approval of certain information collection requirements imposed by an agency. Upon approval

Laws (Jan. 1, 2023), *https://www.dol.gov/agencies/whd/state/prevailing-wages.*

[4] *Portland Nat. Gas Transmission Sys.,* Opinion No. 510, 134 FERC ¶ 61,129 (2011), *reh'g in part,* 142 FERC ¶ 61,198 (2013), *reh'g dismissed,* 150 FERC ¶ 61,106 (2015); *Portland Nat. Gas Transmission Sys.,* Opinion No. 524, 142 FERC ¶ 61,197 (2013), *reh'g denied,* 150 FERC ¶ 61,107 (2015). Among other things, these proceedings involved estimating the expected costs for future pipeline retirements, specifically, determining the labor component for decommissioning costs to be recovered by a pipeline operator, Portland Natural Gas Transmission System.

[5] Opinion No. 510, 134 FERC ¶ 61,129 at P 124.

[6] *Id.*

[7] Opinion No. 524, 142 FERC ¶ 61,197 at PP 162–64.

[8] We remind filers that all information submitted in cost-of-service filings must be truthful and accurate, *see* 18 CFR 35.13(d)(6) (''A utility shall include in its filing an attestation . . . that . . . the cost of service statements and supporting data submitted . . . are true, accurate, and current representations of the utility's books, budgets, or other corporate documents.''), 154.308 (''The filing must include a statement . . . representing that the cost statements, supporting data, and workpapers, that purport to reflect the books of the company do, in fact, set forth the results shown by such books.''), 341.1(b)(1) (''The signature on a filing constitutes a certification that the contents are true to the best knowledge and belief of the signer . . . .''), and that failure to meet this requirement may result in a referral to the Office of Enforcement for further investigation and action, as appropriate.

[9] Consistent with 48 CFR 22.401, this proposed policy statement applies to employee or contract labor whose duties are primarily manual or physical in nature, as distinguished from mental or managerial, and does not apply to employees or contractors whose duties are primarily executive, supervisory, administrative, or clerical. For purposes of this proposed policy statement, ''wages'' means the basic hourly pay rate including fringe benefits, as more fully defined in 48 CFR 22.401.

[10] Pursuant to the Davis-Bacon Act, as amended and codified at 40 U.S.C. 3141(2), the term ''prevailing wages'' includes the basic hourly rate of pay and fringe benefits, as determined by the Department of Labor. *See* Final Rule, 88 FR at 57526 (citing 40 U.S.C. 3142, 3145), 57531, 57546, 57699, 57722–724.

[11] The applicable state prevailing wage determination should meet or exceed the Davis-Bacon Act local prevailing wage determinations.

[12] Project Labor Agreements are agreements between building trade unions and contractors. They govern terms and conditions of employment (including wage-related issues) on a construction project for all craft workers—union and nonunion. Dep't of Labor, *Project Labor Agreement Res. Guide, Project Labor, Cmty. Workforce, & Cmty. Benefits Agreements Res. Guide,* ¶ 1, *https://www.dol.gov/general/good-jobs/project-labor-agreement-resource-guide.*

[13] *See supra* note 8.

[14] 5 CFR 1320.

of a collection of information, OMB will assign an OMB Control Number and an expiration date. Respondents subject to the filing requirements will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

12. This proposed policy statement clarifies how the Commission will treat the use of project-area wage standards in calculating the labor cost component of jurisdictional cost-of-service rates filed by a natural-gas company, interstate oil pipeline, or public utility, pursuant to NGA sections 4, 5 and 7, 15 U.S.C. 717c–d, 717f; ICA, 49 U.S.C. app. 1(5)(a); and FPA sections 205 and 206, 16 U.S.C. 824d–e, respectively.

13. The Commission is submitting these reporting requirements to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act. Comments are solicited on whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques.

14. Please submit your comments (identified by Docket No. PL24–1–000) by either of the following methods: (1) eFiling at Commission's website: *https://www.ferc.gov/docs-filing/efiling.asp* or (2) Mail/Hand Delivery/Courier: Federal Energy Regulatory Commission, Secretary of the Commission, at Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852. All submissions must be formatted and filed in accordance with submission guidelines at: *https://www.ferc.gov/help/submission-guide.asp.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free).

15. *Collection Nos., Titles and OMB Control Nos.:* FERC–516 (Electric Rate Schedules and Tariff Filings, OMB Control No. 1902–0096); FERC–537 (Gas Pipeline Certificates: Construction, Acquisition and Abandonment; OMB Control No. 1902–0060); FERC–538 (Gas Pipeline Certificates: Section 7(a) Mandatory Initial Service, OMB Control No. 1902–0061); FERC–545 (Gas Pipeline Rates: Rate Change (Non-formal), OMB Control No. 1902–0154); FERC–546 (Certificated Rate Filings: Gas Pipeline Rates, OMB Control No. 1902–0155); FERC–550 (Oil Pipeline Rates—Tariff Filings and Depreciation Studies, OMB Control No. 1902–0089); FERC–555 (Preservation of Records for Public Utilities and Licensees, Natural Gas and Oil Pipeline Companies, OMB Control No. 1902–0098).

16. *Action:* Proposed modifications to collections of information in accordance with the proposed policy statement.

17. *Respondents:* The estimate of the number of respondents that may elect to use project-area wage standards in calculating the labor cost component of cost-of-service rates is based upon the existing burden inventory currently approved by OMB for filing rates cases, depreciation studies and certificate filings, include initial rates or seeking approval to charge existing rates for natural gas companies, public utilities and oil pipelines. This burden estimate is based upon one-third of the filings electing to include an additional burden by the filer to incorporate labor costs based upon paying wages that at minimum meet project-area wage standards.

18. *Frequency of Information Collection:* Utilities, when including elements in rates reflecting future capital costs, may elect to make the above showings in support of wages that are at or above project-area wage standards. Such proceedings may include but are not limited to certificates for new natural gas pipelines, general natural gas pipeline and electric utility rate cases, proposed new or modified depreciation rates, and proposed inclusion of asset retirement obligation in rates. In total, utilities may make such a showing one time per year.

19. *Necessity of Information:* The information would be necessary for the utility to receive the presumption that wages for capital projects that are at or above project-area wage standards are not just and reasonable.

20. *Internal Review:* The Commission has reviewed the proposed changes and has determined that such changes are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry in support of the Commission's ensuring just and reasonable rates. The Commission has specific, objective support for the burden estimates associated with the information collection requirements. However, we request comments with supporting background information on the estimates for burden and cost.

21. The Commission estimates the effect of the proposed policy statement on burden [15] and cost [16] as follows:

[15] ''Burden'' is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the estimated burden, refer to 5 CFR 1320.3.

[16] Commission staff estimates that the respondents' skill set (and wages and benefits) for this docket are comparable to those of Commission employees. Based on the Commission's Fiscal Year 2023 average cost of $199,867/year (for wages plus benefits, for one full-time employee), $96.00/hour is used.

ESTIMATES OF THE EFFECTS DUE TO THE PROPOSED POLICY STATEMENT IN DOCKET NO. PL24–1–000

A. Information collection	B. Number of respondents	C. Annual number of responses per respondent	D. Total number of responses (column B × column C)	E. Average burden hrs. & cost per response	F. Total annual hr. burdens & total annual cost (column D × column E)	G. Cost per respondent (column F ÷ column B)
FERC–1006 [17]						
FERC–537	22	1	22	15 hrs. $1,440	330 hrs. $31,680	$1,440
FERC 516	6	1	6	15 hrs. $1,440	90 hrs. $8,640	1,440
FERC 545	11	1	11	15 hrs. $1,440	165 hrs. $15,840	1,440
FERC 555	170	1	170	1 hr. $96	170 hrs. $16,320	96
Other Affected Collections						
FERC–538	1	1	1	15 hrs. $1,440	15 hrs. $1,440	1,440
FERC–546	16	1	16	15 hrs. $1,440	240 hrs. $23,040	1,440
FERC–550	7	1	7	15 hrs. $1,440	105 hrs. $10,080	1,440
Total Effect of the Proposed Policy Statement.			233		1,115 hrs. $107,040	

IV. Document Availability

22. 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*).

23. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

24. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission.

Issued: October 19, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–23590 Filed 10–26–23; 8:45 am]

BILLING CODE 6717–01–P

[17] The FERC 1006 is a new temporary collection number that includes the burden changes due to the proposed policy statement in the FERC–545, –537, –516, and –555, which are pending at OMB for unrelated purposes.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–5–000]

Columbia Gas Transmission, LLC; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on October 13, 2023, Columbia Gas Transmission (Columbia), 700 Louisiana Street, Suite 1300, Houston, Texas 77002–2700, filed in the above referenced docket, a prior notice request pursuant to sections 157.208 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), and Columbia's blanket certificate issued in Docket No. CP83–76–000, for authorization to abandon and replace sections of its existing SR538 pipeline, abandon its existing SR424 pipeline, install a bi-directional launching and receiving station for in-line inspection devices, and perform other related appurtenant activities. All of the above facilities are located in Hocking County, Ohio (SR538 Pipeline Replacement Project). The project will allow Columbia to conduct in-line inspection, or pigging, of Line SR538 to ensure compliance with DOT requirements for inspections of pipeline systems. The estimated cost for the project is $24.7 million, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

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 (*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. For assistance, contact the Federal Energy Regulatory Commission at *FercOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY (202) 502–8659.

Any questions concerning this request should be directed to David A. Alonzo, 700 Louisiana Street, Suite 1300, Houston, Texas 77002–2700 at (832) 320–5477 or email at *david_alonzo@tcenergy.com.*

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5 p.m. Eastern Time on December 22, 2023. How to file protests, motions to intervene, and comments is explained below.

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.*

Protests

Pursuant to section 157.205 of the Commission's regulations under the NGA,[1] any person [2] or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,[3] and must be submitted by the protest deadline, which is December 22, 2023. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [4] and the regulations under the NGA [5] by the intervention deadline for the project, which is December 22, 2023. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before December 22, 2023. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP24–5–000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov)* under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Protest'', ''Intervention'', or ''Comment on a Filing''; or [6]

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP24–5–000.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other method: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: David A. Alonzo, Manager, Project Authorizations, 700 Louisiana Street, Suite 1300, Houston, Texas 77002–2700 at (832) 320–5477, or at *david_alonzo@tcenergy.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Dated: October 23, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–23798 Filed 10–26–23; 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: EC23–124–000.

[1] 18 CFR 157.205.

[2] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[3] 18 CFR 157.205(e).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

[6] Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

Applicants: Hoosier Wind Project, LLC, Indianapolis Power & Light Company.

Description: Supplement to August 23, 2023, Joint Application for Authorization Under Section 203 of the Federal Power Act of Hoosier Wind Project, LLC, et al.

Filed Date: 10/20/23.

Accession Number: 20231020–5163.

Comment Date: 5 p.m. ET 10/30/23.

Docket Numbers: EC24–9–000.

Applicants: SunE Beacon Site 2 LLC, SunE Beacon Site 5 LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of SunE Beacon Site 2 LLC, et al.

Filed Date: 10/17/23.

Accession Number: 20231017–5178.

Comment Date: 5 p.m. ET 11/7/23.

Docket Numbers: EC24–10–000.

Applicants: Energy Center Carnegie LLC, Peoples Natural Gas Company LLC, LDC Funding LLC, Three Rivers District Energy, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Energy Center Carnegie LLC, et al.

Filed Date: 10/17/23.

Accession Number: 20231017–5180.

Comment Date: 5 p.m. ET 11/7/23.

Docket Numbers: EC24–11–000.

Applicants: Skysol, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Skysol, LLC.

Filed Date: 10/23/23.

Accession Number: 20231023–5104.

Comment Date: 5 p.m. ET 11/13/23.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–17–000.

Applicants: Beaumont ESS, LLC.

Description: Beaumont ESS, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 10/23/23.

Accession Number: 20231023–5137.

Comment Date: 5 p.m. ET 11/13/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER20–2452–006; ER20–2453–007; ER20–844–004.

Applicants: Hamilton Projects Acquiror, LLC, Hamilton Patriot LLC, Hamilton Liberty LLC.

Description: Notice of Non-Material Change in Hamilton Liberty LLC.

Filed Date: 10/23/23.

Accession Number: 20231023–5114.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER21–2460–006.

Applicants: New York Independent System Operator, Inc.

Description: First informational report of the New York Independent System Operator, Inc. in compliance with the April 20, 2023 Order.

Filed Date: 10/20/23.

Accession Number: 20231020–5186.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER22–1549–005.

Applicants: Sun Streams PVS, LLC.

Description: Notice of Non-Material Change in Status of Sun Streams PVS, LLC.

Filed Date: 10/18/23.

Accession Number: 20231018–5178.

Comment Date: 5 p.m. ET 11/8/23.

Docket Numbers: ER23–1000–003.

Applicants: ISO New England Inc., The Narragansett Electric Company.

Description: Tariff Amendment: ISO New England Inc. submits tariff filing per 35.17(b): The Narragansett Electric Company ; TSA–NECO–83, Docket No. ER23–1000 to be effective 1/1/2023.

Filed Date: 10/23/23.

Accession Number: 20231023–5118.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER23–1003–003.

Applicants: ISO New England Inc., The Narragansett Electric Company.

Description: Compliance filing: ISO New England Inc. submits tariff filing per 35: The Narragansett Electric Company; TSA–NECO–86, Docket No. ER23–1003 to be effective 1/1/2023.

Filed Date: 10/23/23.

Accession Number: 20231023–5124.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER23–2507–001.

Applicants: Central Hudson Gas & Electric Corporation, New York Independent System Operator, Inc.

Description: Tariff Amendment: Central Hudson Gas & Electric Corporation submits tariff filing per 35.17(b): Central Hudson Deficiency Response re: Rate Schedule 19 Formula Rate Filing to be effective 9/27/2023.

Filed Date: 10/23/23.

Accession Number: 20231023–5050.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–173–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Notice of Cancellation of WMPA, SA No. 6733; Queue No. AF1–286 to be effective 11/25/2023.

Filed Date: 10/20/23.

Accession Number: 20231020–5156.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–174–000.

Applicants: NorthWestern Corporation, Portland General Electric Company.

Description: § 205(d) Rate Filing: NorthWestern Corporation submits tariff filing per 35.13(a)(2)(iii: PGE–NWMT Pseudo-Tie Agreement for Clearwater to be effective 10/31/2023.

Filed Date: 10/23/23.

Accession Number: 20231023–5000.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–175–000.

Applicants: San Diego Gas & Electric Company.

Description: Informational Filing of 2024 Formula Rate Annual Update under Appendix XII of San Diego Gas & Electric Company.

Filed Date: 10/20/23.

Accession Number: 20231020–5175.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–176–000.

Applicants: San Diego Gas & Electric Company.

Description: Informational Filing of 2024 Formula Rate Annual Update under Appendix X of San Diego Gas & Electric Company.

Filed Date: 10/20/23.

Accession Number: 20231020–5176.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–177–000.

Applicants: PacifiCorp.

Description: Tariff Amendment: Termination of DG&T Const Agmt Bonanza Solar Resource Model (RS 773) to be effective 12/23/2023.

Filed Date: 10/23/23.

Accession Number: 20231023–5055.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–178–000.

Applicants: American Electric Power Service Corporation, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: American Electric Power Service Corporation submits tariff filing per 35.13(a)(2)(iii: AEP submits one Facilities Agreements re: ILDSA, SA No. 1336 to be effective 1/1/2024.

Filed Date: 10/23/23.

Accession Number: 20231023–5064.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–179–000.

Applicants: Prattsburgh Wind, LLC.

Description: Application of Prattsburgh Wind, LLC for Limited Waiver of NYISO OATT Sections 25.6.2.3.2 and 30.11.1.

Filed Date: 10/20/23.

Accession Number: 20231020–5187.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–180–000.

Applicants: New York State Electric & Gas Corporation.

Description: § 205(d) Rate Filing: NYSEG–DCEC Attachment C Annual Update to be effective 1/1/2024.

Filed Date: 10/23/23.

Accession Number: 20231023–5074.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–181–000.

Applicants: Frankland Road Solar, LLC.

Description: Baseline eTariff Filing: Application for Market Based Rate to be effective 12/22/2023.

Filed Date: 10/23/23.

Accession Number: 20231023–5076.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–182–000.

Applicants: Pennsylvania Electric Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Pennsylvania Electric Company submits tariff filing per 35.13(a)(2)(iii: Penelec Amends 10 ECSAs (5428 5924 5926 6147 6340 6401 6404 6406 6419 6420) to be effective 12/31/9998.

Filed Date: 10/23/23.

Accession Number: 20231023–5106.

Comment Date: 5 p.m. ET 11/13/23.

Docket Numbers: ER24–183–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6000; Queue No. AD2–116 to be effective 12/22/2023.

Filed Date: 10/23/23.

Accession Number: 20231023–5140.

Comment Date: 5 p.m. ET 11/13/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES24–9–000.

Applicants: Keystone Appalachian Transmission Company.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Keystone Appalachian Transmission Company.

Filed Date: 10/19/23.

Accession Number: 20231019–5192.

Comment Date: 5 p.m. ET 11/9/23.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH24–1–000.

Applicants: Lotus Infrastructure, LLC.

Description: Lotus Infrastructure, LLC submits FERC 65–B Notice of Change in Facts to Waiver Notification.

Filed Date: 10/18/23.

Accession Number: 20231018–5177.

Comment Date: 5 p.m. ET 11/8/23.

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, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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: October 23, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–23769 Filed 10–26–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2023–0492; FRL 11430–01–OAR]

Transportation and Climate Division (TCD) Grant Program Reporting Templates: Supplemental Project Application Template and Project Reporting Templates for Diesel Emission Reduction Act (DERA), Clean School Bus (CSB), Clean Heavy Duty (CHD), and Clean Ports Grant Programs; EPA ICR No. 2793.01, OMB Control No. 2060–NEW

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), ''Transportation and Climate Division (TCD) Grant Programs ICR'' (EPA ICR No. 2793.01, OMB Control No. 2060–NEW) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a new ICR. 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.

DATES: Comments must be submitted on or before December 26, 2023.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2023–0492, online using *www.regulations.gov* (our preferred method), by email to *a-and-r-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Timothy Thomas, Office of Transportation and Air Quality, (6406A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 734–214–4465; fax number: 202–343–2803; email address: *thomas.tim.l@epa.gov.*

SUPPLEMENTARY INFORMATION: This is a request for approval of a new collection. 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. *http://www.epa.gov/dockets* This notice allows 60 days for public comments. Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) 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; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be

collected; and (iv) 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. The ICR package will be submitted to OMB for review and approval.

Abstract: This supporting statement is for an Information Collection Request (ICR) for four mobile source related grant programs administered by the Transportation and Climate Division (TCD), within Environmental Protection Agency's (EPA) Office of Transportation and Air Quality (OTAQ). These four programs include: Diesel Emission Reduction Act (DERA) Grant Program, Clean School Bus (CSB) Grant Program, Clean Heavy-Duty (CHD) Grant Program, and Clean Ports Grant Program.

The DERA Grants Program and the Clean School Bus Grant Program currently collect information under an existing ICR, the General Administrative Requirements for Assistance Programs (Renewal), ICR No. 2030–0020. The EPA currently uses ICR No. 2030–0020 to collect information for most major elements of grants administration, but in order to ease the burden for applicants, awardees, and Agency staff, as well as enrich data quality across programs, the Agency needs to be able to collect information via new reporting instruments, specifically program-specific, fillable data templates. This ICR for these four programs is requesting clearance to cover fillable data templates for three phases of the grant lifecycle: initial application, quarterly reporting, and final reporting. Notably, for successful grant applicants, the information in data templates collected during the application phase of the grant lifecycle will flow into the data templates for the quarterly and final reporting periods, enabling these templates to capture data efficiently throughout the life of the entire award.

TCD uses approved procedures and forms to collect necessary information to operate its grant programs and has been providing grants under DERA since 2008. EPA is preparing to launch the 2024 Clean Port Program in late winter 2024, the 2024 Clean Heavy Duty in early spring 2024, as well as the 2024 DERA grant program in summer 2024, and overseeing the 2023 Clean School Bus Grantees, who are expected to begin reporting in mid-2024.

While these programs each have unique statutory requirements, there are key aspects that unite them as mobile source emissions reduction efforts, and by combining them as a cohort of programs under one ICR, EPA aims to enrich data quality across our programs and to ease burden on applicants and awardees considering applying for multiple programs. Additionally, collecting data via program-specific, fillable data templates that supplement the main application document will enhance the Agency's oversight of these projects as directed by Congress. Further, doing so will also provide critical real-world performance data that the Agency would not otherwise be able to procure, which can inform future research and policy decisions related to OTAQ's mission to protect human health and the environment by reducing air pollution and greenhouse gas emissions from mobile sources and advancing clean fuels and technology.

Respondents/affected entities: Entities potentially affected by this action are those interested in applying for grants under EPA's CSB, DERA, Clean Heavy Duty, and Clean Ports programs and include but are not limited to the following NAICS (North American Industry Classification System) codes: 23 Construction; 482 Rail Transportation; 483 Water Transportation; 484 Truck Transportation; 485 Transit and Ground Passenger Transportation; 4854 School and Employee Bus Transportation; 48831 Port and Harbor Operations; 61111 Elementary and Secondary Schools; 61131 Colleges, Universities, and Professional Schools; 9211 Executive, Legislative, and Other Government Support; and 9221 Justice, Public Order, and Safety Activities.

Respondent's obligation to respond: Mandatory for grant recipients.

Estimated number of respondents: 50 CSB, 112 DERA, 100 Clean Ports and 50 Clean Heavy Duty grant recipients annually.

Frequency of response: One initial report, 3 quarterly reports per year the grant is active, and one final report.

Total estimated burden: 19,701 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $1,104,668 (per year), which includes $0 annualized capital or operation & maintenance costs.

Changes in the Estimates: This is a new collection.

Karl Simon,

Director, Transportation and Climate Division, Office of Air and Radiation.

[FR Doc. 2023–23770 Filed 10–26–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–092]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or *https://www.epa.gov/nepa.*

Weekly receipt of Environmental Impact Statements (EIS)

Filed October 16, 2023 10 a.m. EST Through October 23, 2023 10 a.m. EST

Pursuant to 40 CFR 1506.9.

Notice: Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search.*

EIS No. 20230143, Draft Supplement, FERC, CA, South Feather Power Project, Comment Period Ends: 12/18/2023, Contact: Office of External Affairs 866–208–3372.

EIS No. 20230144, Final, HCIDLA, CA, One San Pedro Specific Plan Final EIR/EIS, Review Period Ends: 11/27/2023, Contact: Jinderpal Bhandal 818–601–1169.

EIS No. 20230145, Final, BOEM, CA, Programmatic Environmental Impact Statement for Oil and Gas Decommissioning Activities on the Pacific Outer Continental Shelf, Review Period Ends: 11/28/2023, Contact: Richard Yarde 805–384–6383.

EIS No. 20230146, Draft Supplement, BR, CO, Near-term Colorado River Operations Revised Draft Supplemental EIS, Comment Period Ends: 12/11/2023, Contact: Genevieve Johnson 602–228–4158.

EIS No. 20230147, Final, BLM, NV, Goldrush Mine Project, Review Period Ends: 11/27/2023, Contact: Scott Distel 775–635–4093.

EIS No. 20230148, Draft Supplement, GSA, MN, Land Port of Entry Modernization and Expansion Project at International Falls, MN, Comment Period Ends: 12/11/2023, Contact: Michael Gonczar 312–810–2326.

Amended Notice

EIS No. 20230112, Draft Supplement, NRC, FL, Site-Specific Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Subsequent License Renewal for Turkey Point Nuclear Generating Unit Nos. 3 and 4, NUREG–1437, Supplement 5a, Second Renewal, Comment Period Ends: 11/07/2023,

Contact: Lance J Rakovan 301–415–2589.

Revision to FR Notice Published 09/08/2023; Extending the Comment Period from 10/23/2023 to 11/07/2023.

EIS No. 20230116, Draft Supplement, BLM, USFWS, AK, Coastal Plain Oil and Gas Leasing Program, Comment Period Ends: 11/07/2023, Contact: Serena Sweet 907–271–4543.

Revision to FR Notice Published 09/08/2023; Extending the Comment Period from 10/23/2023 to 11/07/2023.

Dated: October 23, 2023.

Nancy Abrams,

Associate Director, Office of Federal Activities.

[FR Doc. 2023–23759 Filed 10–26–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0474; FRL–11384–01–OCSPP]

Endocrine Disruptor Screening Program (EDSP); Near-Term Strategies for Implementation; Notice of Availability and Request for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of and soliciting comment on the near-term strategies described in this document to help the Agency meet its obligations and commitments under the Federal Food, Drug, and Cosmetic Act (FFDCA), which requires, among other things, that EPA screen for and protect against endocrine disrupting effects in humans. An important part of these obligations and commitments is the Endocrine Disruptor Screening Program (EDSP), which EPA established in 1998 as a two-tier endocrine screening and testing process for pesticides and other chemicals. After over two decades of implementing the EDSP and other aspects of the mandate in FFDCA, EPA has developed near-term strategies to begin addressing the challenges it has encountered and to rebuild the EDSP. This document covers only the initial strategies that EPA is taking over the next several years to generate momentum toward its longer-term goal of timely addressing all its endocrine screening data needs and decisions. Through this notice and to help implement its strategies, EPA is also seeking additional endocrine data on two groups of active ingredients currently undergoing registration review, or explanations of why the additional data are unnecessary for EPA to make its FIFRA and FFDCA decisions.

DATES: Comments must be received on or before December 26, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0474, using the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/.*

FOR FURTHER INFORMATION CONTACT: Catherine Aubee, Endocrine Disruptor Screening Program (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: *pesticidequestions@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if you produce, manufacture, use, or import pesticide/agricultural chemicals and other chemical substances; or if you are or may otherwise be involved in the testing of chemical substances for potential endocrine effects. Potentially affected entities, identified by the North American Industrial Classification System (NAICS) codes, may include, but are not limited to:

- Chemical manufacturers, importers and processors (NAICS code 325), *e.g.,* persons who manufacture, import or process chemical substances.
- Pesticide, fertilizer, and other agricultural chemical manufacturing (NAICS code 3253), *e.g.,* persons who manufacture, import or process pesticide, fertilizer and agricultural chemicals.
- Scientific research (NAICS code 5417).

B. What is the Agency's authority for taking this action?

FFDCA section 408(p)(1) requires, among other things, that EPA ''develop a screening program, using appropriate validated test systems and other scientifically relevant information to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other effects as [EPA] may designate.'' (21 U.S.C. 346a(p)). FFDCA sections 408(p)(2) and (p)(7) require EPA to implement the EDSP by August 1999 and report to Congress on the program's progress by August 2000, respectively.

FFDCA section 408(p)(3) requires that EPA ''shall provide for the testing of all pesticide chemicals.'' FFDCA section 201 defines ''pesticide chemical'' as ''any substance that is a pesticide within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), including all active and pesticide inert ingredients of such pesticide.'' (21 U.S.C. 231(q)(1)). However, FFDCA section 408(p)(4) authorizes EPA to, by order, exempt a substance from the EDSP if the EPA ''determines that the substance is anticipated not to produce any effect in humans similar to an effect produced by a naturally occurring estrogen.'' FFDCA section 408(p)(5) identifies the requirements and processes for issuing test orders, requiring testing under the EDSP, and submitting information obtained from the testing to EPA. (21 U.S.C. 346a(p)(5)). Finally, FFDCA section 408(p)(6) requires EPA to ''as appropriate, take action under such statutory authority as is available to the Administrator, including consideration under other sections of this chapter, as is necessary to ensure the protection of public health'' for ''any substance that is found, as a result of testing and evaluation under this section, to have an endocrine effect on humans.''

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) precludes the distribution and sale of any pesticide that is not registered under FIFRA. (7 U.S.C. 136a(a)). Applications for registration of a pesticide may be submitted to EPA but must meet the requirements in FIFRA sections 3(c) and 33, which include providing complete data in support of that registration request. (7 U.S.C. 136a and 136w-8). The data required to support these applications are identified in EPA regulations at 40 CFR part 158. EPA may issue Data Call-In (DCI) notices under FIFRA section 3(c)(2)(B) to require additional data during the registration process to address a risk or after registration to maintain a registered pesticide. (7 U.S.C. 136a(c)(2)(B)). To grant a pesticide registration, FIFRA requires EPA to consider whether the pesticide has ''unreasonable adverse effects'' to human health and the environment. (7 U.S.C. 136a(c)(5)). FIFRA section 2(bb) defines ''unreasonable adverse effects on the

environment'' to mean, among other things, ''any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.'' (7 U.S.C. 136(bb)). EPA is required to review each pesticide registration every 15 years to determine whether the pesticide continues to satisfy this FIFRA standard for registration. (7 U.S.C. 136a(g)). EPA regulations at 40 CFR part 155, subpart C apply to the conduct of this registration review process.

C. What action is the Agency taking?

This document describes three near-term strategies the Agency is taking to further implement its obligations and commitments under FFDCA section 408(p) relating to the EDSP, which EPA established in 1998 as a two-tier endocrine screening and testing process for pesticides and other chemicals. EPA is pursuing these strategies to generate momentum toward its longer-term goal of timely addressing all its endocrine data needs and decisions.

Under strategy one, EPA will prioritize addressing potential human estrogen, androgen, and thyroid effects for conventional pesticide active ingredients. Although the Agency will continue to address wildlife endocrine effects and endocrine effects from other pesticide chemicals (*e.g.,* inert ingredients and active ingredients intended solely for biological or antimicrobial uses), updates and activities relating to that work are on a longer-term timeline for the reasons discussed in the strategy. Under strategy two, EPA will use existing data, routinely obtained through FIFRA registration and registration review, to determine whether additional human health-related endocrine data are needed and to make endocrine decisions under FIFRA and FFDCA section 408(p). This strategy also describes the endocrine data that EPA considers sufficient to register a new conventional active ingredient and how EPA will address endocrine data deficiencies for those registration submissions and for registration review cases. Under strategy three, EPA will phase into its registration review processes any new data requirements to address potential human estrogen, androgen, and thyroid effects for conventional pesticide active ingredients, starting with 30 registration review cases (''Group 1'' cases) that EPA has identified using a new framework for prioritizing estrogen and androgen data needs. In this notice, EPA is requesting comments and the voluntary submittal of existing information on these 30 cases and, during the comment period, plans to begin preparing DCIs with the goal of issuing those them in spring of 2024 for specified EDSP Tier 1 data for these cases.

To support the strategies described in this document, EPA has posted the following three reference documents in the docket:

1. *Use of Existing Mammalian Data to Address Data Needs and Decisions for Endocrine Disruptor Screening Program (EDSP) for Humans under FFDCA Section 408(p)* (Ref. 1). This endocrine science paper explains when and how EPA will rely on data it has already received under FIFRA to address the data needs and decisions under FFDCA section 408(p), providing the scientific support for strategies two and three.

2. *List of Conventional Registration Review Chemicals for Which an FFDCA Section 408(p)(6) Determination is Needed* (Ref. 2). This paper lists each currently registered conventional pesticide active ingredient, and how the types of data EPA has for each active ingredient inform where it fits within EPA's priorities for obtaining any additional endocrine data for those pesticides in registration review. Commenters should use this list to identify the active ingredients for which EPA is seeking information through this document.

3. *Status of Endocrine Disruptor Screening Program (EDSP) List 1 Screening Conclusions* (Ref. 3). This paper explaining EPA's decisions under FFDCA section 408(p) relating to the human endocrine system (estrogen, androgen, and thyroid endpoints) for all 52 EDSP List 1 chemicals. In 2009, EPA published the List 1 chemicals and issued test orders for them (the original List 1 had 67 chemicals). The Agency later revised the list to 52 chemicals because 15 were canceled or discontinued. The actions to address the remaining List 1 chemicals are unrelated to the development of Group 1 chemicals in this document.

Many aspects of this document overlap with policies described in a notice issued in the **Federal Register** of August 11, 1998 (63 FR 42852) (FRL–6021–3) (hereinafter referred to as the ''1998 Notice''), that established the basic components of the EDSP. EPA views this document as consistent with the policies in the 1998 Notice and thus is not rescinding or modifying those policies. Rather, this document augments the notice with complementary strategies and priorities that reflect advances in science, EPA's experience administering the EDSP, and the Agency's recent efforts to more quickly meet its FFDCA section 408(p) obligations and commitments.

D. Why is the Agency taking this action?

After over two decades of implementing FFDCA section 408(p), EPA has developed the near-term strategies in this document to begin to transparently address the challenges it has encountered and rebuild the EDSP. This document explains how the Agency currently obtains and will obtain data needed to assess a conventional pesticide active ingredient's interaction with the human estrogen, androgen, and thyroid pathways, and when and how EPA intends to make the requisite FFDCA section 408(p)(6) finding that the pesticide use adequately protects human health. This document also addresses the confusion about when and how EPA obtains data in the registration and registration review processes to assess the potential for effects to the endocrine system from use of a conventional pesticide active ingredient. These near-term strategies also help EPA respond to specific recommendations in a 2021 EPA Office of Inspector General (OIG) Report to develop a strategic plan for the EDSP and to a legal complaint filed in the Federal District Court for the Northern District of California raising similar issues.

E. Does this document contain binding requirements?

This document describes EPA's near-term strategies over the next several years to accelerate how the Agency meets its FFDCA section 408(p) obligations and commitments. The requirements in the statutes and any future FIFRA DCIs or FFDCA test orders are binding on EPA and the order recipients, respectively, but this document does not impose any binding requirements on EPA or outside parties. The strategies outlined in this document further the general goals of the program, and EPA may depart from the strategies where circumstances warrant and without prior notice. In general, however, EPA will continue to offer notice and comment on chemical-specific proposed decisions that implement these strategies.

F. What should I consider as I prepare my comments for EPA?

1. Scope of Request for Comments

As discussed further in strategy three of this document, EPA encourages the public to submit any relevant estrogen, androgen, and thyroid data for the Group 1 and Group 2 cases of pesticide

active ingredients currently in registration review. The public may also submit any explanations for why additional endocrine data are unnecessary to inform the Agency's findings under FIFRA and FFDCA section 408(p) for potential endocrine effects in humans.

Please submit any relevant endocrine data, Other Scientifically Relevant Information (OSRI), or explanations of why the additional data are unnecessary for EPA to make its FIFRA and FFDCA section 408(p) decisions to the ''Registration Review'' section of EPA's Pesticide Submission Portal (PSP). The PSP can be accessed through EPA's Central Data Exchange (CDX) using the link *https://cdx.epa.gov/.*

2. Submitting CBI

Do not submit CBI to EPA through *https://www.regulations.gov* or email. If you wish to include CBI in your comment, please follow the applicable instructions at *https://www.epa.gov/dockets/commenting-epa-dockets#rules* and clearly mark the part or all of the information that you claim to be 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.

3. Tips for Preparing Your Comments

When preparing and submitting your comments, see the commenting tips at *https://www.epa.gov//commenting-epa-dockets.*

II. Background

A. What is the endocrine system?

Endocrine systems, also referred to as hormone systems, are found in all mammals, birds, fish, and many other living organisms. These systems are made up of glands located throughout the body, the hormones synthesized by these glands and released into the bloodstream or the fluid surrounding cells, and the receptors in various organs and tissues that recognize and respond to the hormones.

B. What is the relevant history of the EDSP?

In 1996, Congress amended the FFDCA with the Food Quality Protection Act, 21 U.S.C. 346a(p), requiring EPA to develop a screening program ''to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effects as [EPA] may designate.'' In response, EPA established the EDSP, the basic components of which were described in the 1998 Notice (63 FR 42852). Further, when carrying out the EDSP, EPA ''shall provide for the testing of all pesticide chemicals,'' which includes active and inert ingredients, and ''may provide for the testing of any other substance that may have an effect that is cumulative to an effect of a pesticide chemical if the Administrator determines that a substantial population may be exposed to such a substance.'' The FFDCA required EPA to implement the EDSP by August 1999 and report to Congress on the program's progress by August 2000. EPA met both requirements on time, as the Agency began implementing the EDSP after issuing the 1998 **Federal Register** Notice (the statute does not specify when implementation ends nor steps for implementing the EDSP, and thus EPA views implementation as an ongoing activity) and the Agency issued its report to Congress in August 2000.

FFDCA section 408(p) requires EPA to screen only for estrogen effects in humans that are similar to an effect produced by a naturally occurring estrogen. Through the 1998 **Federal Register** Notice, however, EPA permissibly expanded the scope of the EDSP in two important ways. One is to include screening for androgen and thyroid effects, based on the recommendations of the Endocrine Disruptor Screening and Testing Advisory Committee (EDSTAC), which EPA formed to advise on designing a screening and testing program for chemicals. EPA had explained that it will focus on estrogen, androgen, and thyroid because they are among the most studied of the approximately 50 known vertebrate hormones, with a relatively large body of relevant data and screening tests. EPA also explained that including these three hormone systems will help the Agency understand effects on reproduction, development, and growth. Further, EPA adopted the EDSTAC recommendation to screen for effects in the same endocrine systems in wildlife because adverse effects on wildlife can forewarn of potential risks to humans and because strong evidence existed for endocrine disruption from pesticides in natural wildlife and fish populations. Throughout this document, when EPA refers to section 408(p) ''obligations and commitments,'' the Agency is describing both the mandatory aspects of this section (obligations) and the discretionary aspects (commitments), as summarized in Table 1.

TABLE 1—SUMMARY OF FFDCA SECTION 408(p) MANDATORY OBLIGATIONS AND DISCRETIONARY COMMITMENTS FOR PESTICIDE ACTIVE INGREDIENTS

FFDCA provision	Mandatory obligation	Status of obligation	EPA discretionary commitment and status
408(p)(1)	Must create estrogen screening program	Completed when EPA created the EDSP in 1998.	In 1998, expanded screening program to include androgen, thyroid, and wildlife.
408(p)(2)	Must implement screening program by Aug. 1999.	Completed the deadline obligation, but ongoing implementation.	Ongoing (currently implementing expanded screening).
408(p)(3)	Must provide for testing of all pesticide chemicals and may provide for testing of other substance with cumulative effect to a pesticide chemical.	Ongoing (currently obtaining data through FIFRA regulations and processes).	Ongoing (currently obtaining data through FIFRA regulations and processes).
408(p)(4)	None, but EPA may exempt chemical from 408(p).	Ongoing (established the Endocrine Disruptor Science Policy Council (EDSPOC) to make recommendations on exemptions).	Ongoing (established the EDSPOC to make recommendations on exemptions).
408(p)(5)	Must issue test orders	Ongoing (currently implementing for pesticide active ingredients through FIFRA regulations and processes).	Ongoing (currently implementing for pesticide active ingredients through FIFRA regulations and processes).

TABLE 1—SUMMARY OF FFDCA SECTION 408(p) MANDATORY OBLIGATIONS AND DISCRETIONARY COMMITMENTS FOR PESTICIDE ACTIVE INGREDIENTS—Continued

FFDCA provision	Mandatory obligation	Status of obligation	EPA discretionary commitment and status
408(p)(6)	Must take action to protect public health against a substance with endocrine effect.	Ongoing (working to address protections for pesticide active ingredients in FIFRA decisions).	Through this notice, EPA will begin issuing determinations for pesticide active ingredients when 408(p)(6) is met for human estrogen, androgen, and thyroid.
408(p)(7)	Must report to Congress by August 2000	Completed	N/A.

C. What is the screening and testing process under the EDSP?

Through the 1998 Notice, EPA also adopted the EDSTAC recommendation to create a two-tier EDSP screening and testing process. The purpose of the first tier of testing (Tier 1) is to screen chemicals for the *potential* to interact with the estrogen, androgen, or thyroid systems and inform the need for any additional data (*e.g.,* Tier 2) to evaluate possible adverse effects in humans or wildlife. The purpose of Tier 2 testing is to identify, characterize, and quantify those adverse effects for risk assessment. The Tier 1 screening battery consists of 11 assays, six of which are *in vivo* (performed with living organisms) and five of which are *in vitro* (performed outside of living organisms, with biological material such as cells or tissues).

As described in its January 2023 white paper on new approach methodologies (NAMs; Ref. 4), EPA has now validated two computational models that integrate bioactivity data from multiple *in vitro* assays, referred to as the ToxCast Pathway Models for estrogen and androgen receptors, which can serve as alternatives to four of the 11 assays. Specifically, the validated estrogen receptor ToxCast Pathway Model can serve as an alternative for three of the Tier 1 assays that detect estrogen activity and the validated androgen receptor ToxCast Pathway Model can serve as an alternative for one of the Tier 1 assays that detect androgen activity. Research is ongoing to develop validated models as alternatives for other Tier 1 and Tier 2 assays.

Under the EDSP two-tier process, analysis of Tier 1 screening data, in conjunction with OSRI on the endocrine system, results in one of two outcomes: a recommendation for additional data (*e.g.,* through Tier 2 testing of the chemical) to establish a dose-response relationship for any adverse effects that may result from interactions with the endocrine system, or an explanation for why no further testing is needed to assess the chemical for potential impacts to the estrogen, androgen, and thyroid hormone pathways. If more testing is recommended, the Tier 1 analysis also informs which tests may be performed.

D. How is FIFRA involved in EPA's implementation of the EDSP?

FFDCA section 408(p) is not limited to EDSP screening and testing, as paragraph (p)(6) also requires EPA to ''as appropriate, take action under such statutory authority as is available to the Administrator, including consideration under other sections of this chapter, as is necessary to ensure the protection of public health'' for ''any substance that is found, as a result of testing and evaluation under this section, to have an endocrine effect on humans.'' Because FFDCA section 408(p) does not itself provide legal authority to ''ensure the protection of public health,'' EPA must rely on authorities in other sections of FFDCA and other laws, such as FIFRA, to satisfy FFDCA section 408(p)(6). In this respect, EPA's implementation of FFDCA section 408(p) and FIFRA are closely linked.

The two are closely linked in another important manner. To meet the FIFRA requirement of ensuring that a pesticide will not cause ''unreasonable adverse effects on the environment,'' EPA reviews numerous studies to assess potential adverse outcomes from exposure to chemicals. These studies include acute, sub-chronic, and chronic toxicity, including assessments of a wide range of potential toxic effects for carcinogenicity, neurotoxicity, developmental, reproductive, and general or systemic toxicity, and other effects. These studies include endpoints that may be susceptible to endocrine influence, including effects on endocrine target organ weights and histopathology, estrus cyclicity, sexual maturation, fertility, pregnancy rates, reproductive loss, and sex ratios in offspring.

In the past, however, EPA's Office of Pesticide Programs (OPP) has generally focused on endocrine-related activities under FIFRA separate from the EDSP testing strategy. Thus, OPP's FIFRA decisions have not been explicit about how its review of required and submitted data for FIFRA informs EPA's obligations and commitments under FFDCA section 408(p). For instance, OPP amended its FIFRA data requirements at 40 CFR part 158 to incorporate an updated reproductive study, which is the same study identified in EDSP Tier 2 and which allows the Agency to fully evaluate the potential for a conventional pesticide active ingredient to interact with the estrogen and androgen pathways. However, EPA did not explain how that effort informs the obligations and commitments under FFDCA section 408(p).

In addition, while prior FIFRA decisions often referred to the FFDCA section 408(p) screening program, those decisions have not expressly discussed whether or how the data EPA reviews for its FIFRA decisions address FFDCA section 408(p) obligations or commitments. For example, FIFRA actions protect for the most sensitive endpoints in humans, which in many cases are not endocrine endpoints. In these situations, EPA did not take the final step of explaining whether or how the FIFRA decision fully addresses the data needs and decisions under FFDCA section 408(p) and protects the public from potential endocrine effects.

One reason EPA has not completed these FFDCA section 408(p) actions is that it had focused on developing the science and technology to rapidly screen for chemicals that may have the potential to disrupt the estrogen, androgen, and thyroid systems of humans and wildlife. In recent years, for example, the Agency has focused on NAMs, particularly with high-throughput testing approaches, because of their central role in supporting the screening of the thousands of chemicals covered by the EDSP. This includes EPA testing of over 1,800 chemicals using the estrogen receptor and androgen receptor ToxCast Pathway Models, which, as explained in a separate white paper previously released, fulfill the data

needs for four separate EDSP Tier 1 assays for those chemicals. Through the strategies in this document, EPA is planning to expand the scope of its EDSP work to emphasize obtaining any additional human endocrine data as part of the Agency's FIFRA decisions and to issue FFDCA section 408(p)(6) decisions where possible.

E. What concerns have been raised about EPA's implementation of the EDSP?

The issues discussed earlier have led to confusion and criticism about the extent to which EPA has implemented FFDCA section 408(p) for pesticides. These criticisms have included concerns that EPA has been failing to obtain data and assess whether a pesticide active ingredient may cause adverse endocrine effects at the regulated levels and failing to make decisions under FFDCA section 408(p)(6) that consider those data and effects. In addition, EPA understands that some stakeholders have heard different messages over the years about whether EPA would require Tier 1 data when it has adequate Tier 2 data to make FIFRA determinations and FFDCA section 408(p) findings. Through this notice, EPA seeks to transparently address some of these criticisms and concerns.

In July 2021, EPA's OIG issued a report concluding that the Agency has made limited progress in implementing the EDSP (Ref. 5). The report identified several reasons for this limited progress, including delays in testing pesticides for endocrine disruption, and lack of strategic guidance, performance measures, and other actions needed to implement the EDSP. The report offered ten recommendations for OCSPP, which the office generally agreed with and proposed to address. This document represents the Agency's strategic plan for rebuilding the EDSP that OCSPP will augment in the future. OCSPP has also begun implementing several other OIG recommendations, including publishing an EDSP white paper on NAMs, conducting an annual internal program review, and periodically updating the program website.

In December 2022, EPA received a complaint in *Alianza Nacional de Campesinas et al.* v. *EPA,* alleging that EPA has violated the FFDCA and Administrative Procedures Act by not implementing the EDSP and not testing all pesticide chemicals for possible endocrine effects. (Ref. 6).

III. Strategies To Further Implement FFDCA Section 408(p)

EPA recognizes that its past practice has created questions about whether and how the Agency has been implementing FFDCA section 408(p), and now seeks to address these questions and accelerate progress in further implementing the EDSP, beginning with the three strategies described in this section. Before discussing the strategies, EPA is identifying the two overall approaches for expediting its ability to meet its FFDCA section 408(p) obligations and commitments.

A. Obtain Needed Endocrine Data During FIFRA Registration or Registration Review

EPA will use the FIFRA registration and registration review processes to obtain data as needed to assess potential human estrogen, androgen, and thyroid effects for its FIFRA and FFDCA section 408(p) decisions. In general, EPA is already receiving some endocrine data through these processes as part of its standard FIFRA processes and regulatory data requirements. For example, for over a decade, EPA has routinely received data on mammalian estrogen and androgen effects for new conventional pesticide registrations through either a two-generation reproductive study (typically performed in the rat (Ref. 7)) or an extended one-generation reproductive toxicity (EOGRT) study (also normally performed in the rat) (Organization for Economic Cooperation and Development (OECD) TG443) (Ref. 8). In these situations, EPA will generally not need to obtain additional data for these endpoints, including Tier 1 data, as explained in strategy three. Further, EPA understands that some registrants may have generated endocrine data to meet registration requirements in other countries but never submitted those data to EPA. EPA will consider those data, if submitted, to assess the need for additional endocrine data and to make the relevant FIFRA and FFDCA section 408(p) decisions, while avoiding unnecessary duplicative testing.

Where EPA has identified outstanding endocrine data needs for a pesticide active ingredient, it will generally obtain the data through the FIFRA registration or registration review process, rather than through the FFDCA section 408(p)(5) process for issuing FFDCA test orders, as EPA already has a well-established process of seeking data through FIFRA. Further, EPA will generally obtain the data based on prioritized lists of pesticide active ingredients that it has begun developing and describes in strategy three.

B. Integrate FFDCA Data and Decisions into FIFRA Decisions

For conventional pesticide active ingredients, EPA will integrate its FFDCA section 408(p) endocrine data and decisions into its FIFRA decisions, so that the Agency can efficiently use its FIFRA process and timelines to also address its FFDCA obligations and commitments for those chemicals. This approach will significantly increase EPA's consistency and transparency about how and when the Agency is meeting its FFDCA section 408(p) obligations and commitments as part of FIFRA decisions.

Moving forward, when EPA has addressed those obligations and commitments for a pesticide active ingredient, it will clearly indicate that it has sufficient endocrine data and completed taking action under FFDCA section 408(p)(6) to ''ensure the protection of public health.'' This can occur in one of three scenarios. In scenario one, the most sensitive human endpoint identified in the pesticide's database is not an endocrine endpoint and is protective of endocrine effects at higher doses, if any are present. In scenario two, EPA exempts a pesticide active ingredient from the requirements of FFDCA section 408(p) because the Agency determines that the chemical meets the section 408(p)(4) statutory standard that it ''is anticipated not to produce any effect in humans similar to an effect produced by a naturally occurring estrogen.'' In its 2023 decision for citric acid, for instance, EPA concluded the acid is not anticipated to produce in humans or other organisms any effect similar to an effect produced by naturally occurring estrogen, androgen, or thyroid hormones, because it has no endocrine activity and no toxic effects at levels that people consume (Ref. 9).

In both scenarios, EPA will issue a determination as part of a FIFRA decision for a pesticide that the Agency has completed taking action under FFDCA section 408(p)(6) to ''ensure the protection of public health'' by regulating exposure based on the most sensitive endpoint. Although FFDCA section 408(p)(6) does not obligate EPA to issue this determination and explanation, EPA is committing to do so because the Agency recognizes the benefits of more clarity and transparency about how it implements FFDCA section 408(p). This is another example where EPA distinguishes between mandatory obligations and

discretionary commitments, as summarized in Table 1.

In scenario three, an endocrine effect is the most sensitive endpoint, so EPA would directly regulate to protect against that effect and issue a determination that it has completed taking action under FFDCA section 408(p)(6) through its FIFRA decision that uses the endocrine endpoint to regulate exposure to that pesticide. For example, the thyroid is a target organ for the insecticide fipronil, and thyroid effects were used as the basis for deriving most of the risk assessment endpoints and points of departure in the most recent human health risk assessment for this chemical (Ref. 10).

Throughout this document, when EPA refers to a FFDCA section 408(p)(6) ''decision,'' it is referring to one of these three scenarios. Strategies two and three explain when and how EPA will integrate these FFDCA section 408(p) data and decisions into its FIFRA registration and registration review decisions for conventional pesticide active ingredients.

In implementing these strategies, EPA recognizes that it cannot address all past and present challenges simultaneously. For example, EPA is concerned about overwhelming the capacity of testing laboratories if it were to immediately impose testing for the hundreds of pesticide active ingredients in registration review. In addition, EPA does not have the resources to immediately assess each active ingredient case to identify all endocrine data gaps and to begin obtaining all outstanding data immediately. Thus, EPA developed this document to help prioritize how the Agency will implement these strategies. To summarize, the three strategies discussed are as follows:

- EPA will prioritize addressing potential human estrogen, androgen, and thyroid effects for conventional pesticide active ingredients (see strategy one), starting with the use of existing data routinely obtained through FIFRA registration and registration review activities, to determine whether additional endocrine data are needed (see strategy two).
- If existing data are adequate to inform the FFDCA section 408(p)(6) and FIFRA decisions for any of the three endocrine pathways, EPA will make those decisions without obtaining additional endocrine data for that pathway (*e.g.,* Tier 1), because any additional data would be duplicative and would not alter those decisions (see strategy three).
- EPA will continue to require that all applications for conventional new active ingredient registrations include adequate data to assess potential interaction with the human estrogen, androgen, and thyroid pathways. Those data will inform the FIFRA registration decision, which will include whether or how it addresses FFDCA section 408(p) endocrine data and decisions (see strategy two).

Similarly, to ensure all existing registrations for conventional pesticide active ingredients are supported by adequate human health-related endocrine data, EPA will phase into the registration review process, using the framework discussed in this document (see strategy three), any additional data needs for evaluating potential interaction with human estrogen, androgen, and thyroid pathways. For 30 high priority conventional pesticide active ingredients, however, EPA is seeking any comments, existing endocrine data, and explanations on the need for additional endocrine data for any chemical on this list. During the public comment period, EPA will initiate the process for issuing DCIs in spring 2024 to require specified data for each of these active ingredients to address gaps in the data. EPA expects to include in the DCIs for these chemicals the requirement for the following EDSP Tier 1 studies or equivalent data: steroidogenesis, aromatase, Hershberger, female rat pubertal, and male rat pubertal studies. EPA also expects to include in the DCIs the potential for requiring submission of Tier 2 studies, based on the results of the Tier 1 studies submitted and any OSRI that may inform the weight-of-evidence analyses on those data. In the alternative, EPA expects to accept Tier 2 data in response to the DCIs to assess for potential effects to the estrogen and androgen pathways. Thus, if EPA receives an acceptable two-generation reproductive or EOGRT study, the study would fully satisfy the EDSP Tier 1 DCI for estrogen and androgen endpoints. As discussed in strategy three, EPA has prioritized the 30 chemicals because it lacks sufficient Tier 2 data for the chemicals but does have screening-level data indicating potential activity in the mammalian estrogen and/or androgen system. Further, as with new conventional active ingredient applications, EPA will explain in registration review documents for conventional active ingredients whether or how EPA's assessment or decision addresses FFDCA section 408(p) data and decisions.

1. Scope

EPA's resources for the EDSP are limited, so the Agency must prioritize which aspects of the EDSP to address first. For these near-term strategies, EPA has prioritized the registration of new conventional active ingredients and the registration review of conventional active ingredients, because they comprise the majority of registered active ingredients. The strategies are not intended to apply at this time to pesticide active ingredients that are solely intended for biological and antimicrobial uses or inert ingredients. Those ingredients span a wider range of uses and modes of action and can often present very different chemistries than conventional pesticides. EPA is still evaluating how best to prioritize human endocrine assessments for those active and inert ingredients and to develop strategies for the chemicals.

2. Strategy One: Prioritize Human Endocrine Effects

The FFDCA section 408(p)(1) mandate is limited to developing a screening program to identify potential estrogen effects in humans, but EPA in 1998 expanded the scope of the program to include potential androgen and thyroid effects in humans and potential wildlife estrogen, androgen, and thyroid effects. Because of limited resources, however, EPA will initially focus on ensuring that the potential for human endocrine effects is transparently and sufficiently addressed for conventional pesticide active ingredients.

Meanwhile, EPA will maintain its current approach in its FIFRA decisions of addressing wildlife endocrine effects if it already has adequate endocrine data for a species or group of species, supported by multiple lines of scientific evidence, as part of a new conventional registration or registration review action. EPA will also prioritize resources for research and risk assessment methods development to better understand endocrine effects in wildlife.

There are several reasons for this decision to first address EPA's statutory requirement to more fully assess human endocrine effects before assessing discretionary wildlife effects. First, EPA's scientific understanding of the impacts of chemical interactions on the human endocrine system is generally more developed than for most wildlife. Thus, the data and science currently available to EPA enable the Agency to make progress in evaluating effects on humans using the approaches presented in this document. This is especially true considering the large number of non-mammalian species that are covered by the EDSP (*e.g.,* birds, fish, amphibians). Second, EPA is already taking unprecedented steps to reduce pesticide

exposure to wildlife through its work under FIFRA and the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*). Through its ESA–FIFRA Workplan released in April 2022 and subsequent updates, EPA has prioritized mitigating pesticide effects on endangered species earlier in the FIFRA registration and registration review processes (Ref. 11). In addition, EPA has developed and will be implementing FIFRA Interim Ecological Mitigation measures for agricultural crop uses of conventional pesticide active ingredients in registration review. EPA expects that these mitigation measures will reduce pesticide exposures for ESA-listed species. EPA is also pursuing several pilot projects to expedite mitigation for listed species (*e.g.,* herbicide strategy, Hawaiian species initiative) and continuing to implement the mitigation measures from ESA biological opinions for individual pesticide active ingredients, such as certain organophosphates (Ref. 11). These mitigation measures are also expected to reduce pesticide exposure to wildlife, which will also reduce the potential for endocrine disruption.

EPA will continue to advance the science and develop strategies to consider the potential for endocrine effects on wildlife under the EDSP. For example, as outlined in the EDSP NAMs white paper, EPA is continuing to refine and apply species extrapolation processes and tools, which will help EPA understand how test results on laboratory animals extrapolate to effects on wildlife (Ref. 4). EPA is also involved in international efforts to assess the addition of thyroid endpoints to fish assays and tests that are commonly submitted to support pesticide registrations. Lastly, EPA is building datasets to support the development and validation of models that would allow *in vitro* to *in vivo* extrapolation for Tier 1 ecological studies. EPA will further discuss its approach to wildlife under the EDSP in future strategy documents. For the remainder of this document, all discussions are limited to the human endocrine system.

3. Strategy Two: Use Existing Data To Determine Whether Additional Endocrine Data Are Needed and To Inform FIFRA and FFDCA Endocrine Findings

As a key part of rebuilding the EDSP, EPA is committing to transparency when assessing the adequacy of data on whether a conventional pesticide active ingredient has the potential to interact with the estrogen, androgen, and thyroid pathways. EPA is also committing to ensure that when it authorizes a new pesticide through registration and reauthorizes its use through registration review, those decisions adequately protect human health, as required by FFDCA section 408(p)(6). EPA can make these determinations more promptly when they are based on existing data, supplemented by targeted requests for additional data and explanations to address any potential data gaps. In most cases, the existing data will already have been submitted through registration or registration review to inform the FIFRA unreasonable adverse effects finding.

In this strategy, EPA explains the overall status of what data are already typically available to the Agency on conventional pesticide active ingredients as part of its registration and registration review program. If EPA determines that available Tier 2 or other data are sufficient to fully inform the FIFRA registration/registration review and FFDCA section 408(p)(6) decisions for estrogen, androgen, and thyroid pathways, EPA will make the decisions without seeking additional EDSP Tier 1 data. In contrast, if EPA determines that additional data are needed to make the decisions, EPA will base the next steps and timing for those steps on the priority group in which the chemical belongs, as further discussed subsequently in this document.

To inform when and how EPA will use existing FIFRA data or OSRI to determine whether a pesticide has a potential endocrine effect under FFDCA section 408(p), EPA has prepared a science support paper (Ref. 1), which is available in the docket and briefly summarized in this strategy. That paper explains the data typically submitted to EPA that will meet EPA's needs for evaluating potential interaction with human estrogen, androgen, and thyroid pathways. EPA is separating its discussion of estrogen and androgen data from thyroid data because the data on estrogen and androgen are often generated together and separate from thyroid data. As discussed further subsequently in this document, EPA plans to reevaluate its approach to assessing any additional thyroid data needs in the coming years.

a. Human Estrogen and Androgen Data

EPA created the two-tier EDSP system in 1998 as one way to screen and prioritize testing for the thousands of chemicals that required screening. The goal was to limit the more expensive and lengthier Tier 2 testing by using Tier 1 screening to eliminate Tier 2 testing requirements for chemicals that had no potential to affect the human endocrine system. Since 1998, however, EPA has obtained additional data for many pesticide active ingredients through registration or registration review, because those data are also important to evaluate whether a pesticide meets the FIFRA registration standard. Specifically, in 1998, EPA updated its guidelines for the two-generation reproductive study (OCSPP 850.3800). Soon after this update, EPA required the updated study to be submitted for all new registrations of conventional pesticide active ingredients. In addition, in some cases EPA may have also received the updated study for pesticides registered before the guideline update. The updated reproductive study is the same as what EPA would have required through Tier 2 testing to determine effects on human estrogen and androgen pathways, as explained in the science support paper (Ref. 1). Similarly, for some newer pesticide active ingredients, EPA has received a rodent EOGRT study instead of an updated two-generation reproductive study. The EOGRT study provides the same estrogen and androgen data as the updated reproductive study, and thus EPA also considers the EOGRT study as a validated alternative to satisfy the Tier 2 and FIFRA data needs (Ref. 1). There may also be OSRI (such as a study submitted to meet other countries' regulatory requirements) that might meet the data needs that the Tier 2 mammalian study is designed to fulfill.

Further, if EPA has adequate Tier 2 data, it does not expect that Tier 1 data are needed to inform FFDCA section 408(p)(6) decisions for human estrogen and androgen effects and FIFRA unreasonable adverse effects determinations. EPA recognized this relationship between EDSP Tier 1 and Tier 2 data in the 1998 **Federal Register** Notice (Ref. 12) with the conceptual framework for the EDSP, which states that ''the outcome of Tier 2 is designed to be conclusive in relation to the outcome of Tier 1 and any other prior information. Thus, a negative outcome in Tier 2 will supersede a positive outcome in Tier 1.'' Consistent with this statement, when EPA has either an updated two-generation reproductive or EOGRT study, only in exceptional situations would the Agency need to consider OSRI or require more data (*e.g.,* Tier 1 data) to assess for interaction with the estrogen or androgen pathway. For example, if the outcome of a two-generation reproductive study is ambiguous or inconclusive for one or more endocrine endpoints, EPA may consider whether OSRI addresses the

ambiguity or inconclusiveness. This strategy clarifies that when EPA concludes that the two-generation reproductive study, EOGRT study, or OSRI are adequate to assess a conventional pesticide active ingredient for interaction with the estrogen or androgen pathway, it will explicitly make that determination as part of a FIFRA assessment and the accompanying registration or registration review decision. In those situations, EPA will not need or require EDSP Tier 1 data under FIFRA or FFDCA section 408(p)(5).

Based on this analysis, for new pesticide active ingredient registrations, EPA will continue to require the updated two-generation reproductive study, the alternative EOGRT study, or equivalent data. Applications for new conventional pesticide active ingredients that are not accompanied by either study or equivalent data will be deemed incomplete and unacceptable for further review.

For conventional active ingredients in registration review, EPA will first determine whether an updated reproductive or EOGRT study is available and adequate to assess for interaction with the estrogen and androgen pathways. Among the approximately 460 conventional active ingredient cases currently in registration review, EPA has received acceptable updated two-generation reproductive or EOGRT studies for approximately 90 (20%) cases. This is only an estimate based on EPA's initial analysis and will change over time.

For the remaining conventional registration review cases without the updated two-generation reproductive or EOGRT study, EPA's approach will depend on which of three groups the chemical belongs to, as discussed in strategy three. To help implement these next steps, EPA will use its Endocrine Disruptor Science Policy Council (EDSPOC), established in 2022 to review hazard and exposure data and to recommend whether to exempt a pesticide under FFDCA section 408(p)(4). The EDSPOC will recommend whether additional Tier 2 data are needed based on its review of comments and data submitted in response to this document, future DCIs for endocrine data, and all existing data for pesticides for which the Agency lacks either an updated two-generation reproductive or EOGRT study. This issue is discussed in the science support paper (Ref. 1).

b. Human Thyroid Data

Unlike the estrogen and androgen pathways, a Tier 2 assay for thyroid was not established at the time of the EDSP's creation in 1998. At the time, only the Tier 1 rat pubertal assays provided thyroid evaluation in the EDSP battery. In 2005, EPA released its ''Guidance for Thyroid Assays in Pregnant Animals, Fetuses and Postnatal Animals, and Adult Animals'' (Ref. 13), which was used to develop studies to evaluate lifestage sensitivity to thyroid effects. This includes the EOGRT study that the OECD adopted in 2011 and the comparative thyroid assay (CTA). Both studies evaluate the same endpoints as the Tier 1 rat pubertal assays for adult animals, while providing additional information on thyroid toxicity at various stages of an animal's life. If a registrant has submitted an acceptable EOGRT study with a thyroid evaluation or a CTA, EPA does not expect to need Tier 1 or other data to inform its FFDCA section 408(p)(6) decision for thyroid effects, unless the Agency identifies an issue that warrants additional lifestage information.

EPA recognizes that studies such as the EOGRT and CTA are animal and resource intensive, and certain endpoint data may be difficult to obtain (*e.g.,* advanced techniques necessary for small blood volumes particularly in young animals, limited number of laboratories capable of properly conducting studies). As a result, EPA does not require either of these studies for all pesticide active ingredients unless data indicate such a need. Currently, EPA evaluates all available thyroid data during registration or registration review to assess whether evidence exists that a chemical may cause adverse thyroid effects and determine whether additional thyroid information is needed. This includes data from several studies required under FIFRA (*e.g.,* subchronic, chronic, and carcinogenicity) for conventional pesticide active ingredients that evaluate potential thyroid toxicity. Measurements in these studies typically include thyroid organ weights and histopathology (*e.g.,* colloid amount, follicular cell height and shape) that can detect changes associated with thyroid hormone perturbations. For some of these conventional pesticide active ingredients, registrants also submit optional thyroid hormone data to EPA to provide additional characterization of potential thyroid toxicity. Additionally, EPA may also consider data from EDSP Tier 1 rat pubertal assays or OSRI that provide thyroid evaluation. These data are predominantly obtained from guideline studies in rats, which are recognized as a sensitive animal model for humans, as discussed in the science support paper (Ref. 9). Thus, a lack of thyroid toxicity in these rat studies provides a strong basis for concluding a lack of concern for thyroid toxicity in humans and thus a sufficient basis for FIFRA and FFDCA section 408(p)(6) findings. This strategy clarifies that if EPA finds no evidence of thyroid toxicity, then it will conclude that no further data are needed at that time under FIFRA and FFDCA section 408(p) to assess the conventional pesticide active ingredient for thyroid toxicity. The registration and registration review documents will explain that conclusion.

In contrast, if EPA determines that there is evidence of thyroid toxicity, EPA will refer the case to the Hazard and Science Policy Council (HASPOC), an internal peer review council that addresses whether additional data may be necessary to evaluate the potential of an active ingredient to interact with the thyroid pathway. HASPOC takes a weight-of-evidence approach to determine whether additional thyroid information is needed considering data from multiple lines of evidence, such as physical-chemical properties, toxicity of the chemical and any structurally related chemicals, exposure from the registered use pattern, and estimated risks. HASPOC has predominantly considered the need for a CTA to obtain lifestage specific thyroid measurements, including thyroid hormones. Depending on the available data, however, EPA may seek additional thyroid data for screening the chemical before requiring lifestage information. If the HASPOC concludes that no further data are needed at that time under FIFRA and FFDCA section 408(p) to assess the conventional pesticide active ingredient for thyroid effects, the EPA registration or registration review documents will explain that conclusion. If substantial new information is raised in the future calling into question these FIFRA and FFDCA findings, EPA can address the issue at that time, as appropriate to the circumstances.

EPA believes that there may be existing studies with thyroid measurements, such as EDSP Tier 1 rat pubertal assays or EOGRT studies, that EPA had not yet specifically requested. Additionally, although thyroid hormone and organ weight measures are not required as part of the EPA rat subchronic toxicity test guidelines (OCSPP 870.3050, 870.3100), registrants may submit existing or future studies that follow the OECD guidelines to support pesticide registrations. In 2018, the OECD updated its guidelines for the 28-day and 90-day rat subchronic studies (TGs 407 and 408 (Refs. 14 and 15, respectively)) to measure thyroid hormones and organ weight, in addition

to the previously required thyroid histopathology evaluations in those guidelines, to detect perturbations to the thyroid pathway. EPA anticipates that as more pesticide applications are submitted consistent with the OECD guidelines, EPA will receive additional thyroid-related data, which will be consistent with the data obtained from the Tier 1 rat pubertal assays.

As of 2023, most new conventional pesticide active ingredient registration submissions that EPA receives have not followed the voluntary 2018 OECD guidelines for the subchronic rodent oral toxicity studies. One reason is that EPA regulations allow registrants, consistent with the OECD agreement on Mutual Acceptance of Data, to decide whether to follow the EPA or the OECD guidelines for the subchronic rodent oral toxicity studies. A second reason is that registrants typically perform these types of studies many years before they submit a registration application package to EPA. The Agency expects within the next few years to begin receiving more FIFRA new pesticide active ingredient applications with studies that follow the 2018 OECD guidelines for subchronic rodent oral toxicity studies that will contain these additional thyroid-related measures.

EPA is actively considering potential revisions to its current framework for thyroid data needs, including scientific advancements and potential to require additional thyroid measures. As described in the EDSP white paper on NAMs (Ref. 4), EPA has ongoing research to develop high-throughput screening assays for thyroid-relevant targets, and models to predict thyroid-related apical outcomes (*e.g.,* growth, reproduction). Further, EPA is collaborating in international efforts to advance NAMs for thyroid effects. EPA needs additional research and peer review before it can include these NAMs in the EDSP. Thus, EPA expects to convene a FIFRA Scientific Advisory Panel (SAP) (anticipated in 2025) to obtain external peer review on potential revisions to the thyroid framework and may alter its approach after the FIFRA SAP review.

c. Where Endocrine Data Are Inadequate or Absent

Strategy two pertains to situations where EPA can clearly use existing endocrine data, but in some situations further analysis of available data will lead EPA to determine that data gaps exist. For example, EPA estimates approximately 317 conventional pesticide cases in registration review that lack an updated, post-1998 two-generation reproductive or EOGRT study. Compared to the updated guideline reproductive study that provides Tier 2 test data (Ref. 7), the pre-1998 study likely did not evaluate all the endocrine-related endpoints that were added to the test guideline in 1998. As a result, for these pesticides, EPA will need to assess the results of the pre-1998 study along with any OSRI to determine the need for additional data on the potential for estrogen and androgen effects. What constitutes additional data will depend on the extent of missing information as described in more detail in strategy three. In general, EPA will seek Tier 1 data or OSRI to augment the data obtained from the pre-1998 reproductive study. Although both FIFRA section 3(c) and FFDCA section 408(p) provide authority for EPA to obtain any additional needed endocrine data, EPA already has an established FIFRA process under section 3(c) to obtain data, so the Agency will generally use this process rather than the FFDCA process.

d. Other Potential Uses of Tier 1 Data Unrelated to the EDSP

Thus far, the discussion of Tier 1 data has been limited to whether EPA needs those data when it has adequate Tier 2 data or OSRI to assess potential effects on the human endocrine system. This is a result of the structure of the two-tier EDSP that EPA developed in 1998. More generally, however, the data listed in EDSP Tier 1 may be developed independently of the EDSP and, thus, may also inform aspects of risk assessment unrelated to FFDCA section 408(p). One potential role is to inform the required FFDCA cumulative effects analysis of whether a substance ''may have an effect that is cumulative to the effect of a pesticide chemical.'' To the extent such Tier 1 data has already been submitted (or is submitted) to EPA for purposes of the EDSP, EPA may find that data useful for informing other aspects of risk assessment. If EPA needs similar data in those or other situations, it can obtain them under FIFRA or provisions of the FFDCA unrelated to the EDSP, although it would not be called ''Tier 1 data'' per se. Because this document covers only the initial rebuilding of the EDSP, it does not address potential uses of that type of data for non-EDSP uses.

To summarize, the key parts of strategy two are as follows:

- For human estrogen and androgen effects, if EPA has an adequate updated two-generation or EOGRT study to support a new conventional pesticide active ingredient application or a currently registered conventional pesticide active ingredient in registration review, then it will likely conclude that it has sufficient data to inform its FIFRA and its FFDCA section 408(p)(6) decisions for potential human estrogen and androgen effects. In those case, EPA will not seek Tier 1 data to complete those decisions.
- Consistent with current practice, new conventional pesticide active ingredient applications will be deemed incomplete if EPA has neither an adequate updated two-generation or EOGRT study, or equivalent data. Those applications will not proceed through the registration process.
- For currently registered conventional pesticide active ingredients, strategy three explains how EPA will prioritize these pesticides to determine whether and what additional data it needs. In general, EPA will prioritize an active ingredient that lacks an adequate updated two-generation or EOGRT study (which will likely be the case for pesticides registered before 1998), if EPA determines available data are inadequate or insufficient to address interaction on the estrogen and androgen pathway.
- For human thyroid effects, if EPA has an acceptable CTA or EOGRT study with thyroid evaluations, then it will likely have sufficient thyroid toxicity data to inform its FIFRA and FFDCA 408(p)(6) decisions for potential human thyroid effects, and EPA will not seek Tier 1 data to support those decisions. When neither of these studies are available, EPA will continue with its current approach of evaluating the available data for each pesticide active ingredient. If no evidence exists of thyroid-related toxicity or if HASPOC has not recommended requiring additional data (*e.g.,* CTA) based on the weight-of-the evidence evaluation, then EPA will include in its FIFRA assessments and accompanying registration or registration review decision an explanation for why the available data are sufficient to inform its FIFRA and its FFDCA section 408(p)(6) decisions for thyroid. In these cases, EPA will not need Tier 1 data for thyroid. If HASPOC recommends additional thyroid data, OPP's regulatory divisions will review the recommendation during the registration or registration review process for the pesticide to determine whether or when to issue a DCI for the additional needed thyroid data. EPA may alter its approach to determining additional thyroid data needs following the FIFRA SAP review (anticipated in 2025) of potential revisions to its thyroid framework.

4. Strategy Three: Through Registration Review, Phase in Any New Data Requirements To Address Potential Human Estrogen, Androgen, and Thyroid Effects for Registered Conventional Pesticide Active Ingredients, Starting with Priority Chemicals

EPA's longstanding goal is for its registration review final decisions to include decisions under FFDCA section 408(p) for potential human estrogen, androgen, and thyroid effects. To continue fulfilling this goal, EPA has created a framework for conventional pesticides awaiting human endocrine decisions that prioritizes obtaining new data based on whether EPA already has data for the pesticide and, if so, whether the data indicate a potential for endocrine disruption. Depending on the answers to these questions, EPA has assigned each conventional active ingredient in registration review into one of three groups. For example, Group 1, which consists of 30 cases, is the highest priority for potential data collection.

Where possible, EPA's goal is to incorporate any data requirements for additional estrogen, androgen, and thyroid data into the start of registration review cases, as EPA does for other potential human health effects. Where the current registration review case is farther along in registration review, EPA will address any additional endocrine data needs by issuing a DCI, as appropriate, in later stages of registration review for a chemical.

The number of registration review cases presented in this section is an approximation and subject to change. Readers should not focus on the number of cases for exactness and instead use them to gain a general understanding of the number of cases currently in registration review that are priorities for further human endocrine screening and decisions. In the future, EPA plans to revise the registration review website to include updates of the number of cases presented in this section.

a. How EPA Prioritized Conventional Active Ingredients Undergoing Registration Review for Obtaining Additional Estrogen-Androgen Data

EPA has developed the framework that EPA will be using to determine which conventional pesticides in registration review require additional estrogen and androgen data for human health effects and how the Agency will prioritize obtaining additional data through DCIs (as discussed in strategy two, EPA will continue its current approach for thyroid). The framework represents EPA's initial approach to organize and prioritize the large number of registration review pesticides for any additional estrogen and androgen data and regulatory decisions, and may evolve as EPA gains experience implementing it. See Figure 1. in Ref. 2 for a diagram of the framework used for prioritizing the 403 conventional pesticide cases currently in registration review for which an FFDCA section 406(p)(6) determination is needed.

EPA has 459 conventional pesticide cases currently in registration review that have neither a registration review final decision nor an FFDCA section 408(p)(6) decision. These cases cover pesticides registered before October 2007 (with a current registration review deadline of October 2026) and some pesticides registered after this date. There are seven cases for which EPA has exempted the pesticide active ingredient from testing under FFDCA section 408(p)(4), and 49 cases from List 1 that EPA is addressing separate from this framework (see List 1 decision memo (Ref. 3)). That leaves 403 cases currently in registration review for further consideration of whether and when to require additional endocrine data. A pesticide registration review case is comprised of one or multiple pesticide active ingredients depending on the case. Many conventional pesticide cases have only one active ingredient.

Table 2 includes estimates of the number of conventional pesticide cases currently in registration review for which an FFDCA section 406(p)(6) determination is needed. EPA is addressing List 1 pesticides separately in the List 1 decision memo (Ref. 3).

TABLE 2—CATEGORIZATION OF THE 403 CONVENTIONAL PESTICIDE CASES CURRENTLY IN REGISTRATION REVIEW FOR WHICH AN FFDCA SECTION 406(p)(6) DETERMINATION IS NEEDED

Description	Number of cases *
No further testing for estrogen or androgen	86
Cases with updated 2-gen. repro. study	82
Cases with EOGRT study	4
May need further estrogen or androgen data:	317
Group 1 cases	30
Group 2 cases	126
Group 3 cases	161

* Numbers as of 8/25/2023.

As previously stated and further explained in the science support paper, either an updated two-generation reproductive or EOGRT study will generally provide sufficient data on potential estrogen and androgen effects in humans. The Agency has data from at least one of these studies for 86 of the 403 cases (82 cases with the updated reproductive study and 4 cases with the EOGRT study) (Ref. 2).

, and EPA expects to make FFDCA section 408(p)(6) decisions for these human endocrine effects as part of registration review for these pesticides without seeking further estrogen or androgen data.

For the remaining 317 cases without either study, EPA then determined whether it has data on the estrogen receptor and androgen receptor from the ToxCast Pathway Models. The ToxCast program, which generates high throughput data for chemicals of interest to EPA, has produced endocrine screening data for over 1,800 chemicals to inform the estrogen receptor and androgen receptor ToxCast Pathway Models. For 191 of the 317 cases, EPA has ToxCast Pathway Model scores for the estrogen receptor, androgen receptor, or both. The ToxCast Pathway Model scores for 30 of these 191 cases show bioactivity that may provide evidence for a potential effect on estrogen, androgen, or both, indicating the need for additional data to evaluate the potential to interact with the estrogen, androgen, or both pathways (the remaining 161 of the 317 cases without positive ToxCast data are discussed later in this section). EPA is seeking through this notice any Tier 1 data, OSRI, or explanation of how existing data address the ToxCast

Pathway Model scores, in order to determine whether there is actually a potential for an estrogen-androgen effect for these 30 cases. During the public comment period, EPA will initiate the process for issuing DCIs for these cases by spring 2024. Because the cases show the potential for endocrine activity, EPA considers them the highest priority for obtaining additional data and will refer to them as ''Group 1'' cases.

For the remaining 126 of 317 cases, ToxCast Pathway Model scores were not available for the estrogen receptor or androgen receptor. These chemicals are also high priorities for obtaining data, but not as high as Group 1 cases because data currently exist that demonstrate potential activity in the ToxCast models for the Group 1 cases. EPA considers these 126 cases ''Group 2'' for assessment and potential data collection. While the Agency prioritizes Group 1 cases, it will refine the Group 2 cases as follows. First, EPA will determine whether any of the active ingredients for those cases are exempt from further testing under FFDCA section 408(p)(4) because the Agency has determined that an active ingredient ''is anticipated not to produce any effect in humans similar to an effect produced by a naturally occurring estrogen.'' If so, EPA will exempt the active ingredient and explain its decision. Second, for the remaining cases, EPA will search for any existing estrogen or androgen data and evaluate its potential as OSRI. EPA will then determine whether further testing is needed for each of the remaining cases to make an FFDCA section 408(p) determination.

Among the 191 cases with ToxCast data, there are 161 cases that show no activity for either estrogen or androgen receptors. EPA has assigned these pesticides a lower priority for obtaining additional data, given current data suggest no potential for estrogen or androgen activity, and is referring to these 161 cases as ''Group 3.'' In the docket is a document titled, ''List of Conventional Registration Review Chemicals for Which an FFDCA Section 408(p)(6) Determination is Needed,'' that lists the pesticide cases that fall within each group, accounting for all 403 registration review cases discussed in this strategy (Ref. 2).

b. How EPA Will Obtain Additional Data and Integrate the New Data Into Registration Review

i. For Group 1 Cases: 30 Cases Without an Updated Two-Generation Reproductive or EOGRT Study but for Which ToxCast Data Show Activity for Estrogen, Androgen, or Both

For the 30 Group 1 cases, EPA will seek additional data to better understand the positive findings in the ToxCast data for estrogen, androgen, or both. Specifically, for each pesticide, EPA is seeking through this notice any Tier 1 data, OSRI, or explanation of how existing data address the existing ToxCast Pathway Model scores. During this public comment period, EPA will begin the process for issuing DCIs for these 30 cases with the goal to begin issuing them in spring 2024. The DCIs will cover all the Tier 1 data relevant to mammals, except the assays for which the ToxCast Pathway Model scores may serve as alternatives (*i.e.,* estrogen receptor binding *in vitro* assay, estrogen receptor transcriptional activation *in vitro* assay, *in vivo* uterotrophic assay, and androgen receptor binding *in vitro* assay). Thus, as part of a DCI, EPA will require data from the following five Tier 1 assays to complete screening for estrogen and androgen effects in humans: Steroidogenesis, aromatase, Hershberger, female rat pubertal, and male rat pubertal (see Table 3). In lieu of all five Tier 1 assays, EPA expects to allow a registrant, in response to a DCI, to submit an updated two-generation reproductive or EOGRT study, or equivalent data, which will generally provide conclusive data for potential estrogen and androgen effects in humans. The DCIs will be based on the Pesticide Data Call-Ins Information Collection Request (EPA No. 2288.04).

TABLE 3—ADDITIONAL EDSP TIER 1 DATA EPA EXPECTS TO REQUEST

Assay name	Estrogen pathway	Androgen pathway	Thyroid pathway
In vitro Assays			
OCSPP 890.1550—Steroidogenesis (Human Cell Line—H295R)	■	■	
OCSPP 890.1200—Aromatase (Human Recombinant)	■		
In vivo Assays			
OCSPP 890.1400—Hershberger (Rat)		■	
OCSPP 890.1450—Pubertal Development and Thyroid Function in Intact Juvenile/Peripubertal Female Rats	■		■
OCSPP 890.1500—Pubertal Development and Thyroid Function in Intact Juvenile/Peripubertal Male Rats		■	■

As EPA receives data for the Group 1 cases through public comments and any DCIs, it will determine the most efficient way to review the data and integrate them into the registration review process so that the Agency can issue its FIFRA and FFDCA section 408(p) findings for potential human estrogen, androgen, and thyroid effects. EPA must consider multiple factors when developing this timeline, including efficiencies in batching similar chemicals, the timing of when the Agency will receive and review data for other EDSP priority pesticides, the length of time needed to generate the data, the deadlines to complete other aspects of registration review for a pesticide, and the timeframe for amending pesticide labels to reflect any needed updated mitigation measures. EPA expects to release a more detailed timeline in 2024.

ii. For Group 2 Cases: 126 Cases Without Updated Two-Generation Reproductive or EOGRT Study, and No ToxCast Pathway Model Scores

EPA is not initiating the process for issuing DCIs for Group 2 cases at this time because the Agency's resources are currently limited to obtaining and reviewing additional data for the Group 1 cases. The more immediate focus on Group 1 cases will also allow EPA to apply any lessons learned in collecting and reviewing data for Group 1 to Group 2 cases. Although EPA does not yet have

a precise timeframe for issuing FIFRA DCIs for these cases, it expects to begin drafting them in 2025.

In the meantime, the Agency will make some progress on Group 2 cases in two ways. One is to consider any endocrine data or OSRI that registrants of these pesticides submit to EPA. As with Group 1 cases, EPA is particularly interested in any existing Tier 1 or Tier 2 data that the Agency is unaware of, endocrine data submitted to support distribution and use of the pesticide in other countries, or data from well-conducted studies addressing the pesticide active ingredient's endocrine effects. Although EPA cannot yet commit to reviewing these data within a specific timeframe, the Agency believes it may be useful to, at a minimum, gain a better understanding of the breadth and depth of available data for these pesticides before issuing DCIs. Thus, as with the Group 1 cases, EPA encourages registrants of Group 2 pesticides to identify and submit any relevant endocrine data that have not been submitted to EPA or any explanations for why further testing should not be required.

Second, given the large number of pesticides in the Group 2 list, EPA will identify the pesticides within this group that are higher priorities for endocrine testing. EPA will use comments, data, and explanations submitted, as well as the tools for prioritization described in its January 2023 EDSP NAMs white paper (Ref. 4), to determine which Group 2 pesticides will receive DCIs first. EPA will also use these same data and tools to determine whether to exempt any pesticides on the list from further testing under FFDCA section 408(p)(4) using its current approach to exemptions. In 2024, EPA will provide more information on its timeline for Group 2 chemicals.

iii. For Group 3: All Remaining Conventional Registration Review Cases Not in Group 1 or Group 2

As explained earlier, a main goal of rebuilding the EDSP is to incorporate the FFDCA section 408(p) obligations and commitments into the FIFRA process, including the registration review of existing pesticides. EPA will thus begin phasing into registration review those obligations and commitments for the 161 Group 3 cases. By phasing Group 3 cases into the existing registration review schedule, EPA may also need to shift where a case currently stands in registration review.

Most Group 3 cases (approximately 154 out of 161 cases) have active ingredients that were registered before October 2007 and have a current registration review deadline of October 2026. Typically, EPA issues DCIs before the draft risk assessment (DRA) phase of registration review. The pre-2007 cases, however, are generally past the DRA phase, often by several years. EPA will thus likely address its endocrine data needs as part of its continuous work plan (CWP) for these cases. Like a preliminary work plan (PWP), a CWP will provide an overview of the registration review case status, list registrations, and provide other pertinent data or information. As a continuation of an existing registration review case, the CWP will explain any new developments that EPA knows about a case, including any newly identified data or other information needed for a final registration review decision. Thus, EPA currently plans to prioritize the Group 3 cases and use the CWP to notify the public of when additional endocrine data are needed for each case and then issue a DCI to obtain the necessary data before completing a final decision for registration review. Consistent with existing EPA policy, a final decision will include an FFDCA section 406(p)(6) decision for human estrogen, androgen, and thyroid.

For the approximately seven other Group 3 cases with active ingredients registered after October 2007, EPA will determine whether to address its endocrine data needs through a CWP or a PWP. EPA will use the latter approach when it can integrate endocrine data needs into the registration review process from the outset, such as for cases without a PWP yet. Thus, for these cases, EPA will likely address the endocrine data needs before it does so for many Group 2 case, because the Group 3 case happens to be at an early enough stage of registration review where EPA can incorporate those data needs into the normal review process.

V. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. US EPA. Use of Existing Mammalian Data to Address Data Needs and Decisions for Endocrine Disruptor Screening Program (EDSP) for Humans under FFDC Section 408(p). October 2023.
2. US EPA. List of Conventional Registration Review Chemicals for Which an FFDCA Section 408(p)(6) Determination is Needed. October 2023.
3. US EPA. Status of Endocrine Disruptor Screening Program (EDSP) List 1 Screening Conclusions. October 2023.
4. US EPA. Availability of New Approach Methodologies (NAMs) in the Endocrine Disruptor Screening Program (EDSP). December 12, 2022. *https://www.regulations.gov/document/EPA-HQ-OPP-2021-0756-0002*.
4. US EPA Office of Inspector General (OIG). EPA's Endocrine Disruptor Screening Program Has Made Limited Progress in Assessing Pesticides. Report No. 21–E–0186. Report Type: Audit. July 28, 2021. *https://www.epaoig.gov/reports/audit/epas-endocrine-disruptor-screening-program-has-made-limited-progress-assessing*.
5. The United States District Court for the Northern District of California. Case No. 22-cv-9030. Filed December 20, 2022.
6. US EPA. Health Effects Test Guidelines: OPPTS 870.3800 Reproduction and Fertility Effects [EPA 712–C–98–208]. August 1, 1998. *https://www.regulations.gov/document/EPA-HQ-OPPT-2009-0156-0018*.
6. Organisation for Economic Co-operation and Development (OECD). OECD Guideline for the Testing of Chemicals, Extended One-Generation Reproductive Toxicity Study. OECD/OCDE 443. Adopted: June 25, 2018. *https://www.oecd-ilibrary.org/docserver/9789264185371-en.pdf?expires=1695671098&id=id&accname=guest&checksum=F8B12F13B2F19A2731C51FA392B78716*.
7. US EPA. Exemption of Citric Acid from the Requirements of the Endocrine Disruptor Screening Program. January 19, 2023. *https://www.regulations.gov/document/EPA-HQ-OPP-2020-0558-0008*.
8. US EPA. Fipronil: Draft Human Health Risk Assessment for Registration Review. March 20, 2020. *https://www.regulations.gov/document/EPA-HQ-OPP-2011-0448-0076*.
9. US EPA. EPA's Workplan and Progress Toward Better Protections for Endangered Species. EPA website. *https://www.epa.gov/endangered-species/epas-workplan-and-progress-toward-better-protections-endangered-species*.
10. US EPA. Endocrine Disruptor Screening Program; Proposed Statement of Policy. **Federal Register**. 63 FR 71542, December 28, 1998 (FRL–6052–9). *https://www.epa.gov/sites/default/files/2015-08/documents/122898frnotice.pdf*.
11. US EPA. Guidance for Thyroid Assays in Pregnant Animals, Fetuses and Postnatal Animals, and Adult Animals. October 24, 2005. *https://www.epa.gov/sites/default/files/2015-06/documents/thyroid_guidance_assay.pdf*.

12. OECD. OECD Guidelines for the Testing of Chemicals, Repeated Dose 28-Day Oral Toxicity Study in Rodents. OECD/OCDE 407. Adopted: October 3, 2008. *https://www.oecd-ilibrary.org/docserver/9789264070684-en.pdf?expires=1695669052&id=id&accname=guest&checksum=B2CCC35058D14B03AFA5C29EBB5D1CE5.*
13. OECD. OECD Guideline for the Testing of Chemicals, Repeated Dose 90-Day Oral Toxicity Study In Rodents. OECD/OCDE 408 Adopted: June 25, 2018. *https://www.oecd-ilibrary.org/docserver/9789264070707-en.pdf?expires=1695668998&id=id&accname=guest&checksum=19E7679541E3927AE5066BBB8CFA0F54.*

VI. Paperwork Reduction Act (PRA)

The strategies outlined in this document describe information collection activities that do not create any new paperwork burdens that require additional approval by OMB under the PRA, 44 U.S.C. 3501 *et seq.* The information collection activities associated with pesticide registration are already approved by OMB under OMB Control No. 2070–0226, entitled ''Consolidated Pesticide Registration Submission Portal'' (EPA ICR No. 2624.01). Information collection activities associated with data call-in activities, including the generation of data for registration review, are approved under OMB Control No. 2070–0174, entitled ''Pesticides Data Call-In Program Information Collection Request'' (EPA ICR No. 2288.06).

Authority: 7 U.S.C. 136 *et seq.* and 21 U.S.C. 346a.

Dated: October 20, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023–23721 Filed 10–26–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, November 1, 2023 at 10:30 a.m. and its continuation at the conclusion of the open meeting on November 2, 2023.

PLACE: 1050 First Street NE, Washington, DC and virtual (This meeting will be a hybrid meeting).

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Compliance matters pursuant to 52 U.S.C. 30109.

Matters relating to internal personnel decisions or internal rules and practices. Information for which disclosure would constitute an unwarranted invasion of privacy. Investigatory records compiled for law enforcement purposes and production would disclose investigative techniques.

Information the premature disclosure of which would be likely to have a considerable adverse effect on the implementation of a proposed Commission action.

Matters concerning participation in civil actions or proceedings or arbitration.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

Dated: October 25, 2023.

Laura E. Sinram,

Secretary and Clerk of the Commission.

[FR Doc. 2023–23907 Filed 10–25–23; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

TIME AND DATE: Thursday, November 2, 2023 at 10:30 a.m.

PLACE: Hybrid meeting: 1050 First Street NE Washington, DC (12th floor) and virtual. *Note:* For those attending the meeting in person, current COVID–19 safety protocols for visitors, which are based on the CDC COVID–19 hospital admission level in Washington, DC, will be updated on the Commission's contact page by the Monday before the meeting. See the contact page at *https://www.fec.gov/contact/.* If you would like to virtually access the meeting, see the instructions below.

STATUS: This meeting will be open to the public, subject to the above-referenced guidance regarding the COVID–19 hospital admission level and corresponding health and safety procedures. To access the meeting virtually, go to the Commission's website *www.fec.gov* and click on the banner to be taken to the meeting page.

MATTERS TO BE CONSIDERED:

Proposed Directive Regarding Investigations Conducted by the Office of General Counsel
Proposed Final Audit Report on Steve Daines for Montana (A21–04)
Draft Advisory Opinion 2023–06: Texas Majority PAC
Management and Administrative Matters

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Individuals who plan to attend in person and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Laura E. Sinram, Secretary and Clerk, at (202) 694–1040 or *secretary@fec.gov,* at least 72 hours prior to the meeting date.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

Laura E. Sinram,

Secretary and Clerk of the Commission.

[FR Doc. 2023–23930 Filed 10–25–23; 4:15 pm]

BILLING CODE 6715–01–P

GENERAL SERVICES ADMINISTRATION

[Notice–PBS–2023–06; Docket No. 2023–0002; Sequence No. 26]

Notice of Availability for a Draft Supplemental Environmental Impact Statement and Floodplain Assessment and Statement of Findings for the International Falls Land Port of Entry Modernization and Expansion Project in International Falls, Minnesota

AGENCY: Public Buildings Service (PBS), General Services Administration (GSA).

ACTION: Notice of Availability (NOA); Announcement of public hearing.

SUMMARY: This notice announces the availability of the Draft Supplemental Environmental Impact Statement (SEIS), which examines potential environmental impacts from the modernization and expansion of the International Falls Land Port of Entry (LPOE) in International Falls, Minnesota. The existing International Falls LPOE is owned and managed by GSA and is operated by the U.S. Department of Homeland Security's Customs and Border Protection (CBP). The Draft SEIS describes the purpose and need for the project; alternatives considered; the existing environment that could be affected; the potential impacts resulting from each of the alternatives; and proposed best management practices and/or mitigation measures. The Draft SEIS also includes the Draft Finding of No Practicable Alternative (FONPA), which provides a floodplain assessment and statement of findings as a result of construction in a floodplain at the International Falls LPOE.

DATES:

Public Comment Period—Interested parties are invited to provide comments on the Draft SEIS and Floodplain Assessment and Statement of Findings. The Public Comment Period begins with

publication of this NOA in the **Federal Register** and will last for 45 days until December 11, 2023. Written comments must be received by the last day of the Public Comment Period (see **ADDRESSES** section of this NOA on how to submit comments). After the comment period, GSA will prepare the Final EIS.

Hearing Date—GSA will host a hybrid virtual and in-person public hearing on Wednesday, November 8, 2023, from 6 to 8 p.m., Central Standard Time (CST), where interested parties are invited to join and provide verbal or written comments on the Draft SEIS and Floodplain Assessment and Statement of Findings. The hearing will be primarily virtual in nature, although members of the public may attend at the Koochiching County Court Administration Building to view an online broadcast of the hearing in person (see **ADDRESSES** section for location address). Refer to the VIRTUAL PUBLIC HEARING INFORMATION section of this NOA on how to access the online public hearing.

ADDRESSES:

Hearing Location—The public may attend the virtual hearing at the Koochiching County Court Administration building at 715 4th Street, 3rd Floor, International Falls, MN, 56649, to view the online presentation in-person. A GSA staff member will be available (in-person and virtually) to assist the public in providing public comments via the virtual platform.

Public Comments

In addition to oral comments and written comments provided at the public hearing, members of the public may also submit comments by one of the following methods. All oral and written comments will be considered equally and will be part of the public record.

- *Email: michael.gonczar@gsa.gov.* Please include *'International Falls LPOE SEIS'* in the subject line of the message.
- *Mail: ATTN: Michael Gonczar, International Falls LPOE SEIS;* U.S. General Services Administration, Region 5; 230 S Dearborn Street, Suite 3600, Chicago, IL 60604.

Virtual Public Hearing Information

The hybrid virtual public hearing will begin with presentations on the NEPA and National Historic Preservation Act (NHPA) processes, which are being executed concurrently for this project, as well as an overview of the proposed project, and then will continue with the findings of the Draft SEIS. A copy of the presentation slideshow will be made available prior to the hearing at: *https://www.gsa.gov/real-estate/gsa-properties/land-ports-of-entry-and-the-bil/bipartisan-infrastructure-law-construction-project/minnesota.* Following the presentation, there will be a moderated session during which members of the public can provide oral comments. Members participating virtually or attending in-person will be able to comment. Commenters will be allowed 3 minutes to provide comments. Comments will be recorded. Attendees can also provide written comments at the public hearing should they not wish to speak.

Members of the public may join the Draft SEIS virtual public hearing by entering the Meeting ID: 847 2762 2357, using any of the below methods, or by using the following link *https://us06web.zoom.us/j/84727622357.* Note that the hearing is best viewed through the Zoom app. Attendees are encouraged to download the Zoom app at the Zoom website (*https://zoom.us*) on their personal computer or on their mobile device and test their connection prior to the hearing to ensure best results.

- By personal computer (via the Zoom app)—Install the Zoom app at the Zoom website (*https://zoom.us*) and launch the Zoom app. Click *'Join a Meeting'* and enter the above Meeting ID. Follow the prompts to enter your name and email address to access the hearing; or
- By personal computer (via the Zoom website)—Using your computer's browser, go to the Zoom website at *http://zoom.us/join* and enter the above Meeting ID. Click *'Join from your browser'* and follow the prompts to enter your name; or
- By mobile device (via the Zoom mobile app)—Install and launch the Zoom app. Enter the above Meeting ID.

Whether joining through the Zoom app or web browser, attendees should follow the prompts to connect their computer audio. Attendees are encouraged to connect through the *'Computer Audio'* tab and click *'Join Audio by Computer'* under the *'Join Audio'* button on the bottom of their screen. Users who do not have a computer microphone and wish to provide a comment during the hearing may connect by following the prompts under the *'Phone Call'* tab under the *'Join Audio'* button.

For members of the public who do not have access to a personal computer, they may join the hearing audio by dialing the following number: 1–305–224–1968. When prompted, enter the following information: Meeting ID—847 2762 2357, followed by the pound (#) key; then press pound (#) again when prompted for a participant ID. Note, dialing in to the hearing is only necessary if you are not accessing the hearing through a personal computer or mobile app, or if you would like to provide oral comments during the hearing but do not have a computer microphone.

The public hearing will be recorded, and all comments provided will become part of the formal record.

FOR FURTHER INFORMATION CONTACT: Michael Gonczar, NEPA Program Manager, GSA, 312–810–2326, *michael.gonczar@gsa.gov.*

SUPPLEMENTARY INFORMATION:

Public Comment Period

The views and comments of the public are necessary in helping GSA in its decision-making process with impacts to environmental, cultural, and economic impacts. The public comment process will be accomplished through a hybrid virtual and in-person public hearing, direct mail correspondence to appropriate federal, state, and local agencies, and to private organizations and citizens who have previously expressed, or are known to have, an interest in the project. The Draft SEIS has considered previous input provided during the scoping period.

Background:

The existing 1.6-acre LPOE is located on the south bank of the Rainy River and serves as the port of entry to people and vehicles crossing the International Bridge that connects International Falls, Minnesota to the town of Fort Frances, Ontario, Canada. The International Falls Land Port of Entry Improvements Study Final EIS, released in 2011, assessed the potential environmental impacts associated with the proposed action of replacing the undersized International Falls LPOE with a new LPOE facility ''to improve safety, security, and functionality.'' A total of ten build alternatives were considered, and a preferred action alternative was identified. This alternative would consist of demolishing the existing building, constructing new facilities at the existing LPOE, and expanding the LPOE to meet the required space standards and increased security requirements of the Federal Inspection Services. This alternative would move the majority of the LPOE improvements and operations to an approximately 20-acre site southeast of the existing site between 4th Street and Rainy River. GSA signed and released a Record of Decision in January 2012 that identified a preferred alternative as it best satisfied the purpose and needs of the project with the least overall adverse impacts to

the environment. The ROD stated that the preferred alternative would have less-than-significant impacts on the natural and social environment of the study area and International Falls, including minor changes or impacts to surface water, surface water runoff, traffic, increased lighting, and hazardous substances.

Since 2011, GSA has identified the following changes to the project, which differ from the preferred alternative described in the 2011 EIS:

- There have been proposed changes in tenants and use of the space. U.S. Food and Drug Administration (FDA) no longer requires space at the LPOE; however, the U.S. Department of Agriculture/Animal Plant Health Inspection Services/–Plant Protection and Quarantine (USDA/APHIS–PPQ), and U.S. Fish and Wildlife Service (USFWS) will need space and facilities at the LPOE.
- The Packaging Corporation of America (PCA) has acquired Boise, Inc. and has a different timber unloading operation occurring adjacent to the proposed acquisition parcel, which will require modifications to the original site plan at the LPOE and offsite on PCA lands. This includes PCA's proposed trailer parking lot that was shifted further east (beyond First Creek) and includes a paved 90-trailer parking lot for PCA, which will modify traffic patterns for the LPOE.
- A section of First Creek between Route 11 and the Rainy River that was previously contained in a culvert was identified following the 2011 EIS. The culvert has been removed and is now daylighted, requiring impacts analysis.
- There has been an increase in the proposed usable square feet (USF) for overall building space needed from 42,282 to 80,611, based on the addition of a maintenance building and expansion in the sizes of all other buildings per updated agency requirements.
- Stormwater management would be redesigned in the 300-foot section of First Creek due to two new areas of pavement crossing the creek.
- The Resolute Paper Mill in Fort Frances, Ontario has since closed and has decreased rail traffic.
- New renewable energy technologies are being considered for implementation at the expanded and modernized LPOE, including solar, geothermal, and river water cooling geothermal technologies.

GSA has prepared a Draft SEIS to assess the potential impacts of these updates, which were not assessed in the 2011 EIS.

Alternatives Under Consideration:

The Proposed Action would comprise of modernization and expansion of existing International Falls LPOE facilities as previously considered in the 2011 EIS, but to consider the above project changes. GSA also considered the No Action Alternative, which assumes that GSA would not expand or modernize the International Falls LPOE.

The purpose of the Proposed Action is for GSA to support CBP's mission by bringing the International Falls LPOE operations in line with current land port design standards and operational requirements of CBP while addressing existing deficiencies identified with the ongoing port operations. Generally, the deficiencies described in the 2011 EIS remain at the LPOE. The deficiencies fall into two broad categories: deficiencies in the overall site layout and substandard building conditions. Therefore, in order to bring the International Falls LPOE operations in line with CBP's design standards and operational requirements, the Proposed Action is needed to (1) improve the capacity and functionality of the International Falls LPOE to meet future demand, while maintaining the capability to meet border security initiatives; (2) address spatial and layout constraints that lead to traffic congestion and safety issues for the employees and users of the LPOE; and (3) provide adequate space and facilities for the federal agencies to accomplish their missions.

The Draft SEIS addresses the potential environmental impacts of the proposed alternatives on environmental resources including geology and soils, water resources, biological resources, air quality, noise, transportation and traffic, land use and visual resources, infrastructure and utilities, socioeconomics, cultural resources, human health and safety, and environmental justice. Based on the analysis presented in the Draft SEIS, impacts to all resource areas would be less-than-significant (*i.e.,* negligible, minor, or moderate) adverse or beneficial. Impact reduction measures are presented in the Draft SEIS to reduce potential adverse effects.

GSA is currently undergoing formal consultation with the State Historic Preservation Officer (SHPO) and consulting parties to follow coordination procedures as required under Section 106 of the NHPA to determine impacts to historic properties. Mitigation measures may be determined in consultation between GSA, SHPO, and applicable consulting parties.

Under the Endangered Species Act (ESA), GSA coordinated with USFWS per Section 7 requirements to determine effects to federally protected species. There would be no adverse effects to federally threatened or endangered species. Correspondence with USFWS and findings are incorporated in the Draft SEIS.

The Proposed Action would take place within the 1-percent-annual-chance floodplain (also referred to as the base flood or 100-year flood) and 0.2-percent-annual-chance floodplain (also referred to as the 500-year flood) at the International Falls LPOE. In compliance with Executive Order 11988 (Floodplain Management), GSA prepared a Draft FONPA addressing potential impacts on floodplains, which is included in the Draft SEIS for public review and comment. As described in the Draft SEIS, GSA would follow federal, state, and local regulatory compliance requirements and incorporate design standards at the International Falls LPOE to minimize impacts to floodplains.

William Renner,

Director, Facilities Management and Services Programs Division, Great Lakes Region 5, U.S. General Services Administration.

[FR Doc. 2023–23490 Filed 10–26–23; 8:45 am]

BILLING CODE 6820–CF–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10143]

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 November 27, 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:* Revision of a currently approved collection; *Title of Information Collection:* State Data for the Medicare Modernization Act (MMA); *Use:* The monthly data file is provided to CMS by states on dual eligible beneficiaries. The phase-down process requires a monthly count of all full benefit dual eligible beneficiaries with an active Part D plan enrollment in the month. CMS will make this selection of records using dual eligibility status codes contained in the person-month record to identify all full-benefit dual eligible beneficiaries. *Form Number:* CMS–10143 (OMB Control Number: 0938–0958); *Frequency:* Monthly; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 51; *Total Annual Responses:* 612; *Total Annual Hours:* 4,896. (For policy questions regarding this collection contact Linda King at 410–786–1312.)

Dated: October 24, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–23786 Filed 10–26–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–R–262 and CMS–10346]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by December 26, 2023.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *https://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party.

Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision of a currently approved Information Collection; *Title of Information Collection:* CMS Plan Benefit Package (PBP) and Formulary CY 2025; *Use:* Under the Medicare Modernization Act (MMA), Medicare Advantage (MA) and Prescription Drug Plan (PDP) organizations are required to submit plan benefit packages for all Medicare beneficiaries residing in their service area. The plan benefit package submission consists of the Plan Benefit Package (PBP) software, formulary file, and supporting documentation, as necessary. MA and PDP organizations use the PBP software to describe their organization's plan benefit packages, including information on premiums, cost sharing, authorization rules, and supplemental benefits. They also generate a formulary to describe their list of drugs, including information on prior authorization, step therapy, tiering, and quantity limits.

CMS requires that MA and PDP organizations submit a completed PBP and formulary as part of the annual bidding process. During this process, organizations prepare their proposed plan benefit packages for the upcoming contract year and submit them to CMS for review and approval. CMS uses this data to review and approve the benefit packages that the plans will offer to Medicare beneficiaries. This allows CMS to review the benefit packages in a consistent way across all submitted bids during with incredibly tight timeframes. This data is also used to populate data on Medicare Plan Finder, which allows beneficiaries to access and compare Medicare Advantage and Prescription Drug plans. *Form Number:* CMS–R–262 (OMB control number: 0938–0763); Frequency: Yearly; *Affected Public:* Private Sector, Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 825; *Total Annual Responses:* 8,770; *Total Annual Hours:* 55,782 (For policy questions regarding this collection contact Kristy Holtje at 410–786–2209.)

2. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Quality Bonus Payment Appeals; *Use:* Section 1853(o) of the Act requires CMS to make QBPs to MA organizations that achieve performance rating scores of at least 4 stars under a five-star rating system. While CMS has applied a Star Rating system to MA organizations for a number of years, prior to the QBP program these Star Ratings were used only to provide additional information for beneficiaries to consider in making their Part C and D plan elections. Beginning in 2012, the Star Ratings CMS assigns for purposes of QBPs directly affected the monthly payment amount MA organizations receive from CMS under their contracts. Additionally, section 1854(b)(1)(C)(v) of the Act, as added by the Affordable Care Act, also requires CMS to change the share of savings that MA organizations must provide to enrollees as the beneficiary rebate specified at § 422.266(a) based on the level of a sponsor's Star Rating for quality performance.

The information collected on the Request for Reconsideration form from MA organizations is considered by the reconsideration official and potentially the hearing officer to review CMS's determination of the organization's eligibility for a QBP. The form asks MA organizations to select the Star Ratings measure(s) they believe was miscalculated or used incorrect data and describe what they believe is the issue. Under § 422.260(c)(3)(ii) these are the only bases for appeals. In conducting the reconsideration, the reconsideration official will review the QBP determination, the evidence and findings upon which it was based, and any other written evidence submitted by the organization with their Request for Reconsideration or by CMS before the reconsideration determination is made. *Form Number:* CMS–10346 (OMB Control Number 0938–1129; *Frequency:* Yearly; *Affected Public:* Private Sector; *Number of Respondents:* 20; *Total Annual Responses:* 20; *Total Annual Hours:* 160. (For policy questions regarding this collection contact Joy Binion at 410–786–6567.)

Dated: October 24, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–23790 Filed 10–26–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10398 #17]

Medicaid and Children's Health Insurance Program (CHIP) Generic Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: On May 28, 2010, the Office of Management and Budget (OMB) issued Paperwork Reduction Act (PRA) guidance related to the ''generic'' clearance process. Generally, this is an expedited process by which agencies may obtain OMB's approval of collection of information requests that are ''usually voluntary, low-burden, and uncontroversial collections,'' do not raise any substantive or policy issues, and do not require policy or methodological review. The process requires the submission of an overarching plan that defines the scope of the individual collections that would fall under its umbrella. On October 23, 2011, OMB approved our initial request to use the generic clearance process under control number 0938–1148 (CMS–10398). It was last approved on April 26, 2021, via the standard PRA process which included the publication of 60- and 30-day **Federal Register** notices. The scope of the April 2021 umbrella accounts for Medicaid and CHIP State plan amendments, waivers, demonstrations, and reporting. This **Federal Register** notice seeks public comment on one or more of our collection of information requests that we believe are generic and fall within the scope of the umbrella. Interested persons are invited to submit comments regarding our burden estimates or any other aspect of this collection of information, including: the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by November 13, 2023.

ADDRESSES: When commenting, please reference the applicable form number (see below) and the OMB control number (0938–1148). To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *https://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: CMS–10398 (#64)/OMB control number: 0938–1148, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Following is a summary of the use and burden associated with the subject information collection(s). More detailed information can be found in the collection's supporting statement and associated materials (see **ADDRESSES**).

Generic Information Collection

1. *Title of Information Collection:* CHIP State Plan Eligibility; *Type of Information Collection Request:* Revision of a currently approved collection; *Use:* This iteration proposes to revise CHIP State Plan template CS27 to make continuous eligibility mandatory for separate CHIPs. Additional revisions would: (1) revise language in the template to reflect that CE for children is mandatory, (2) remove age selection for optional CE and the drop-down menu for the number of months for the CE eligibility period, (3) add assurances for a state that elects to provide coverage for the from-conception-to-end-of pregnancy (FCEP) population (otherwise known as the ''unborn''), and (4) change the authority of continuous eligibility from section 2105(a)(4)(A) to 2107(e)(1)(K). *Form Number:* CMS–10398 (#17) (OMB control number: 0938–1148); *Frequency:* Once and on occasion; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 56; *Total Annual Hours:* 2,800. For policy questions regarding this collection contact: Joyce Jordan at (410) 786–3413.

Dated: October 24, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–23787 Filed 10–26–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10393, CMS–10861 and CMS–10146]

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 November 27, 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:* Revision of a previously approved collection; *Title of Information Collection:* Beneficiary and Family Centered Data Collection; *Use:* To ensure the QIOs are effectively meeting their goals, CMS collects information about beneficiary experience receiving support from the QIOs. This is a request to revise the information collection. The revisions to this information collection include the deletion of the previously approved Direct Feedback Survey and associated instructions and the General Feedback Web Survey and associated instructions. The information collection uses both qualitative and quantitative strategies to ensure CMS and the QIOs understand beneficiary experiences through all interactions with the QIO including initial contact, interim interactions, and case closure. Information collection

instruments are tailored to reflect the steps in each type of process, as well as the average time it takes to complete each process. The information collection will:

- Allow beneficiaries to directly provide feedback about the services they receive under the QIO program;
- Provide quality improvement data for QIOs to improve the quality of service delivered to Medicare beneficiaries; and
- Provide evaluation metrics for CMS to use in assessing performance of QIO contractors.

To achieve the above goals, information collection will include: Experience Survey: The Experience Survey will be administered via telephone and mail to beneficiaries/representatives after the Quality of Care (Medical Record Review) complaint/Immediate Advocacy/appeal case has been closed. The goal of the Experience Survey is to assess beneficiary overall and specific experiences with the BFCC QIOs. *Form Number:* CMS–10393 (OMB control number: 0938–1177); *Frequency:* Once; *Affected Public:* Individuals or households; *Number of Respondents:* 9,000; *Number of Responses:* 9,000; *Total Annual Hours:* 2,250. (For policy questions regarding this collection, contact Renee Graves-Dorsey at 410–786–7142.)

2. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Medicare Health Outcomes Survey Field Test; *Use:* CMS is required to collect and report quality and performance of Medicare health plans under provisions of the Social Security Act. Specifically, Section 1851(d) of the Act (Providing Information to Promote Informed Choice) requires CMS to collect data for MA plan comparison, including data on enrollee satisfaction and health outcomes, and report this information and other plan quality and performance indicators to Medicare beneficiaries prior to the annual enrollment period. The HOS meets the requirement for collecting and publicly reporting quality and other performance indicators, as HOS survey measures are incorporated into the Medicare Part C Star Ratings that are published each fall for consumers on the Medicare website.

This request is to conduct a field test with the goal of evaluating the measurement properties of new survey items, and the effects of new content and a web-based mode on response patterns and measure scores as compared to existing HOS survey items and protocols. Within each of the proposed field test protocol arms, there will be two versions of the questionnaire (see Attachments A and B) that will be identical except for slight differences in selected items where empirical data are needed to ascertain which of the two versions produces the best results (see Attachment C). The two versions of the questionnaire will test alternatives for selected new survey content that will potentially enhance and refine existing measures, allow CMS to develop new and methodologically simpler cross-sectional and longitudinal measures, expand on CMS's measurement of physical functioning and mental health, and add to CMS's efforts to measure and address health equity.

The data collected in this field test will be used by CMS to inform decisions on possible changes to HOS content and survey administration procedures. The items in the questionnaire reflect current health priorities and would provide CMS with data to study new longitudinal PROMs, cross-sectional measures, and enhancements to existing HOS measures for MA plans to use as a focus of their quality improvement efforts. Potential new measures derived from new HOS items will go through the Measures Under Consideration (MUC) process and rule-making before they are added to Star Ratings. *Form Number:* CMS–10861 (OMB Control Number: 0938–New); *Frequency:* Once; *Affected Public:* Individuals and Households; *Number of Respondents:* 136; *Number of Responses:* 6,800; *Total Annual Hours:* 2,267. (For policy questions regarding this collection contact Kimberly DeMichele at 410–786–4286.)

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Notice of Denial of Medicare Prescription Drug Coverage; *Use:* Part D plan sponsors are required to issue the Notice of Denial of Medicare Prescription Drug Coverage notice when a request for a prescription drug or payment is denied, in whole or in part. The written notice must include a statement, in understandable language, the reasons for the denial and a description of the appeals process.

The purpose of this notice is to provide information to enrollees when prescription drug coverage has been denied, in whole or in part, by their Part D plans. The notice must be readable, understandable, and state the specific reasons for the denial. The notice must also remind enrollees about their rights and protections related to requests for prescription drug coverage and include an explanation of both the standard and expedited redetermination processes and the rest of the appeal process. *Form Number:* CMS–10146 (OMB control number 0938–0976); *Frequency:* Daily; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 743; *Total Annual Responses:* 2,631,728; *Total Annual Hours:* 657,932. (For policy questions regarding this collection contact: Coretta Edmondson at 410–786–0512.)

Dated: October 24, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–23741 Filed 10–26–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Registration Requirements in the 340B Drug Pricing Program

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS or Department).

ACTION: Notice.

SUMMARY: HRSA is issuing this Notice to inform and remind stakeholders of the registration requirements for off-site, outpatient hospital facilities to participate in the 340B Drug Pricing Program (340B Program). This Notice applies to all hospital types that participate in the 340B Program.

FOR FURTHER INFORMATION CONTACT: Questions should be directed to Michelle Herzog, Deputy Director, Office of Pharmacy Affairs, Office of Special Health Initiatives, HRSA, 5600 Fishers Lane, Room 8W12, Rockville, MD 20857, or by telephone at 301–594–4353.

SUPPLEMENTARY INFORMATION: Section 340B(a)(4) of the Public Health Service Act (PHS) Act (42 U.S.C. 256b) lists the various types of organizations (''covered entities'') eligible to participate in and benefit from the 340B Program. Section 340B(d)(2)(B)(i and ii) of the PHS Act requires the development of a system by which covered entities can attest to, and HRSA can verify, continued accuracy of information in the 340B database and compliance with 340B Program requirements. Section 340B(a)(9) of the PHS Act requires the Secretary to notify participating manufacturers of the identity of those organizations that meet the definition of covered entity under 340B(a)(4). Section 340B(d)(2)(B)(iv) of the PHS Act includes requirements for the establishment of a standardized

identification system whereby each covered entity site can be identified by manufacturers for purposes of facilitating the ordering, purchasing, and delivering of covered outpatient drugs. To fulfill these statutory requirements, all covered entities and their associated sites must be registered and listed in the 340B Office of Pharmacy Affairs Information System (OPAIS).

Section 340B(a)(4) of the PHS Act defines the types of entities eligible to participate in the 340B Program. Section 340B(a)(4)(L) states that a subset of Medicare disproportionate share hospitals (DSHs), as defined in section 1886(d)(1)(B) of the Social Security Act (SSA), are eligible for the 340B Program. Sections 340B(a)(4)(M–O) state that certain sole community hospitals, rural referral centers, critical access hospitals, children's hospitals, and free-standing cancer hospitals qualify for the 340B Program. Section 340B(a)(6) indicates that qualification of one part of an institution as a covered entity does not qualify all parts of the institution as a covered entity. With regard to hospital covered entities, HRSA published final guidelines on the participation of off-site, outpatient facilities in the 340B Program in the **Federal Register** at 59 FR 47884 (Sept. 19, 1994) and provided OPAIS registration instructions at *https://www.hrsa.gov/opa/registration.* To be registered and continue to be listed in OPAIS as participating in the 340B Program, a hospital covered entity's off-site, outpatient facility must (1) be listed as reimbursable on the hospital's most recently filed Medicare Cost Report and (2) have associated outpatient costs and charges on the most recently filed Medicare Cost Report, which is filed with the Centers for Medicare & Medicaid Services (CMS). This applies to all hospital types that are eligible for the 340B Program as outlined above. After being registered, if an off-site, outpatient facility is no longer reimbursable on the hospital's most recently filed Medicare Cost Report or if a facility no longer has outpatient costs and charges on the hospital's most recently filed Medicare Cost Report, then the facility is not eligible for participation in the 340B Program.

CMS regulations at 42 CFR 413.65 outline the standards for provider-based clinics that must be met for reimbursement purposes under the Medicare Program. Specifically, 42 CFR 413.65(e) provides a number of additional requirements that off-campus facilities or organizations must satisfy, including demonstrating a ''a high level of integration with the main provider.'' Approval of provider-based status requires submission of documentation demonstrating the off-campus facility's services are provided to the same patient population as the main provider. For all hospital types eligible to participate in the 340B Program, HRSA requires submission of the most recently filed Medicare Cost Reports, in order to ensure that off-site, outpatient facilities comply with 340B Program eligibility requirements. Specifically, to be considered eligible for the 340B Program, under HRSA's longstanding guidance (59 FR 47884, Sept. 19, 1994) an off-site, outpatient facility needs to be reimbursable on a hospital's most recently filed Medicare Cost Report. Because the 340B Program is by statute a discount drug purchasing program for covered outpatient drugs (see section 340B(a)(1) of the PHS Act), the hospital must indicate that the off-site, outpatient facility also has associated outpatient costs and charges as evidenced on the hospital's most recently filed Medicare Cost Report. To meet the statutory requirements at 340B(a)(9) and (d)(2)(B)(iv) of the PHS Act, the off-site, outpatient facility must also be listed in OPAIS.

As part of the government's efforts to respond to the unprecedented circumstances of the COVID–19 Public Health Emergency (PHE), HHS allowed various flexibilities across many of the Department's programs, including the 340B Program. In June 2020, the Frequently Asked Questions (FAQ) section of the Office of Pharmacy Affairs' COVID–19 resources web page announced the availability of a waiver of the requirement that off-site, outpatient facilities be (1) listed as reimbursable on the hospital's Medicare Cost Report prior to participating in the 340B Program; and (2) registered and listed in OPAIS prior to participating in the 340B Program. The FAQ stated that for those ''. . . hospitals who are unable to register their outpatient facilities because they are *not yet* [emphasis added] on the most recently filed Medicare Cost Report, the patients of the new site may still be 340B eligible to the extent that they are patients of the covered entity.''

The information on the COVID–19 resource web page reflected that the waiver was implemented in recognition of the need for hospitals to quickly respond to the rapidly evolving conditions of the COVID–19 pandemic and assist in creating efficiencies for hospitals to adjust operations in that response. For example, by providing hospitals the ability to quickly move a clinic from within the four walls of a hospital to outside the hospital to expand capacity for care for patients with COVID–19 while lessening the exposure risk for other patients needing access to outpatient care. The FAQ also recognized that during the COVID–19 public health emergency, hospitals had to transition certain clinic functions to meet the needs of the patients (*i.e.,* shift of an outpatient surgery center to an urgent care or emergency room) and prioritize care accordingly. As stated on the COVID–19 resources web page, HRSA encouraged hospitals to document these situations in their policies and procedures and reminded these covered entities of their responsibility to demonstrate compliance with all 340B Program requirements, including compliance with diversion and duplicate discounts, and ensure that auditable records are available for any 340B drugs dispensed to patients. As indicated in the FAQ, this waiver was only intended for off-site, outpatient facilities that would be listed as reimbursable on the hospital's future Medicare Cost Report.

Various HRSA program integrity efforts conducted since the start of the COVID–19 PHE have demonstrated that the waiver has added risk and complexity to HRSA's ability to effectively oversee ongoing compliance in the 340B Program. Further, the circumstances of COVID–19 are no longer rapidly evolving in a manner that requires significant unplanned activities or changes by hospital covered entities to accommodate these exigencies or adjust operations without planning for additional requirements to conduct business. The COVID–19 public health emergency ended on May 11, 2023, and hospitals have generally returned to regular operations.

Accordingly, HRSA has determined that ending the waiver is appropriate at this time given that, as described above, there are no longer exigent circumstances of a nationwide public health emergency that require allowing hospitals to expeditiously adjust their operations and locations for providing care off-site while maintaining immediate access to the 340B Program resources. By ending the waiver, HRSA will more effectively administer the program and support program integrity efforts. This Notice is being issued to provide clarity to stakeholders and provide a sufficient time period during which hospitals may take efforts to bring their operations into compliance. In ending this waiver, HRSA maintains its original policy goals in requiring certain criteria for off-site, outpatient facility registration on an ongoing basis. This includes:

• HRSA utilizes a hospital's most recent Medicare Cost Report filing to verify eligibility of off-site, outpatient facilities. As cited above, this is the standard that the 340B Program has used for decades, and it is HRSA's policy goal to maintain the continuity of the most recently filed Medicare Cost Report standard to determine hospital off-site, outpatient eligibility for the 340B Program. HRSA is unable to verify the eligibility of 340B Program participants when off-site, outpatient facilities are permitted to participate prior to their inclusion on the most recently filed Medicare Cost Report. Further, HRSA has a long-established standard of requiring not only the hospital, but the specific off-site, outpatient facility utilizing the discounts to be listed on the hospital's most recently filed Medicare Cost Report. This is to ensure that a hospital with multiple locations may only seek participation in and remain in the program for sites that meet all eligibility requirements.

• HRSA requires off-site, outpatient facilities to be registered and listed in OPAIS in alignment with the transparency provisions of the 340B statute at sections 340B(a)(9) and (d)(2)(B)(iv) of the PHS Act. When these facilities participate without first being registered and listed in OPAIS, as occurred under the waiver, it can create confusion and make efforts to audit or determine compliance difficult because HRSA, states, and drug manufacturers do not have uniform and comprehensive visibility into which sites are eligible to purchase 340B drugs. OPAIS is a centralized resource not just for HRSA, but also for manufacturers and states, who use it to plan operations (such as distribution) that may adjust depending on the number of facilities in a given location.

• Section 340B(a)(5)(A) of the PHS Act prohibits duplicate discounts in the 340B Program. This occurs when a manufacturer provides both a Medicaid rebate and a 340B discount on the same drug. HRSA's Medicaid Exclusion File (MEF) is a mechanism used to prevent duplicate discounts in Medicaid Fee-for Service for 340B drugs and serves as the official data source to determine whether 340B drugs are billed to Medicaid. The waiver increases the risk of duplicate discounts as unregistered sites cannot be listed on the MEF, as only sites registered and listed in OPAIS can be added to the MEF. Therefore, manufacturers and states would not know which sites use 340B for their Medicaid patients, as the MEF is used by them to decrease the likelihood of duplicate discounts. Requiring registration of sites to obtain access to 340B discounts on drugs may also decrease the risk of diversion that drugs would be dispensed to individuals for whom HRSA is unable to verify their patient eligibility status.

In addition to the foregoing policy goals, audits of covered entities suggest that the waiver is widely used by covered entities though it is no longer necessary to meet the unique challenges due to the unprecedented COVID–19 pandemic. For example, in FY 2023 audits of hospital covered entities, HRSA found that more than one-third of those hospital covered entities were using 340B drugs in unregistered sites, and those hospital covered entities reported that the unregistered sites would be listed on a future Medicare Cost Report. However, as of May 11, 2023, those off-site, outpatient facilities were not registered in OPAIS, causing significant challenges for HRSA to determine compliance for these participating sites, as it was unclear whether the unregistered sites would ever be eligible and an integral part of a 340B hospital. In that time period between the audits and May 11, 2023, hospitals should have been able to register offsite, outpatient facilities on OPAIS. Although these covered entities made representations to HRSA that those offsite, outpatient sites would be registered on the next filed Medicare Cost Report, HRSA has found that despite these representations, those covered entities did not attempt to bring those sites into compliance with HRSA requirements. As another example and as part of ongoing program integrity initiatives, HRSA recently engaged in risk-based program integrity efforts focused on hospitals that were at higher risk of compliance issues due to volume of purchases; number of off-site, outpatient sites; or prior audit findings. Specific to these efforts, HRSA sent letters in March 2023 to 60 hospitals containing a series of questions and information requests regarding program compliance, including the use of 340B drugs at off-site, outpatient facilities. Recipients of the letters included the 20 hospitals with the highest volume of purchases in the 340B Program, the 20 hospitals with the highest numbers of off-site, outpatient facilities in the 340B Program, and 20 additional covered entities that had other potential compliance risks. Based on analysis of Medicare Cost Report data, HRSA found that 27 of the 60 hospitals utilized 340B drugs at sites that were not listed on the most recently filed Medicare Cost Report. HRSA also found that some hospitals did not maintain that their offsite, outpatient facilities continued to have outpatient costs and charges on the most recently filed Medicare Cost Report. For sites that are using 340B drugs, but not listed on the hospital's most recently filed Medicare Cost Report, do not have associated outpatient costs and charges, or registered in OPAIS, HRSA cannot verify whether use of 340B drugs at those sites for patients is warranted, leading to possible diversion and duplicate discounts. Accordingly, HRSA determined that there is a need to verify off-site, outpatient facilities prior to their participation in the 340B program and on an on-going basis to ensure that they continue to meet 340B Program eligibility criteria.

HRSA's audit and other program integrity activities related to off-site, outpatient facilities highlight the increased 340B Program compliance risks associated with hospitals continuing to use a waiver that is no longer necessary. As some covered entities believed the waiver would continue indefinitely and would not be tied to the end of the PHE, HRSA is providing a transition period for covered entities to come into compliance with the off-site, outpatient facility registration requirements. This transition period will provide the opportunity for all hospitals to register, or take affirmative efforts to come into compliance with program requirements within an appropriate time. The burden of registration and including a facility in the next filed Medicare Cost Report does not take significant resources, and hospitals making good faith efforts to come into compliance should be able to adjust operations within this transition time period. Additionally, as was stated on the COVID–19 resources web page, HRSA encouraged hospitals to document situations in which the waiver was utilized and ensure that auditable records were available for any 340B drugs dispensed to patients. Accordingly, HRSA expects that the information needed for hospitals to register, or take affirmative efforts to come into compliance, should be readily available to affected hospital covered entities. HRSA will enforce its longstanding registration requirements as outlined below.

I. Transition Period for Registration of Off-Site, Outpatient Facilities

HRSA's approach to enforcement of 340B registration requirements will occur as follows:

1. HRSA will continue to allow off-site, outpatient facilities that are currently listed on the hospital's most recently filed Medicare Cost Report with

associated outpatient costs and charges, but that have not yet registered in OPAIS, to continue to use 340B drugs for patients of the covered entity pending registration of the facility in OPAIS during the next 340B Program quarterly registration period (January 1–16). If a facility is not registered during January 1–16 quarterly registration period, the hospital covered entity may be subject to audit and compliance action.

2. HRSA will continue to allow off-site, outpatient facilities that are not yet listed as a reimbursable facility on the hospital's most recently filed Medicare Cost Report with associated outpatient costs and charges to continue to use 340B drugs for patients of the covered entity if the following conditions are met:

a. The off-site, outpatient facility was opened and began using 340B drugs prior to the publication date of this Notice; and

b. The hospital that is the covered entity and the parent organization for the off-site, outpatient facility provides HRSA, via email to *340Bcompliance@hrsa.gov* within 90 days of publication date of this Notice, with the following information consistent with 340B registration requirements:

- The name of the off-site, outpatient facility;
- The date the site will be listed on the hospital's Medicare Cost Report (this must be the next filed Medicare Cost Report) with associated outpatient costs and charges; and
- The date the covered entity will register the site in OPAIS.

If a covered entity does not provide this information within 90-days of publication of this Notice, any off-site, outpatient facility that is not listed on the most recently filed Medicare Cost Report with associated outpatient costs and charges will have to cease purchasing 340B drugs for use at those facilities and will be subject to audit and compliance action. Consistent with longstanding 340B Program requirements, covered entities that provide this information within 90 days of publication must subsequently register in OPAIS at the soonest possible opportunity (and no later than the dates listed in the information provided to HRSA), and recertify in OPAIS annually with the most recently filed Medicare Cost Report with associated outpatient costs and charges.

3. Hospital covered entities using 340B drugs at off-site, outpatient facilities that are not listed on the most recently filed Medicare Cost Report with associated outpatient cost and charges, are not in OPAIS, and do not meet categories 1 or 2 above are out of compliance and must stop using 340B drugs at these unregistered sites as soon as practically possible, but no later than 90 days after the publication of this Federal Register Notice. After the 90-day grace period, non-compliant covered entities may be subject to audit and compliance action. HRSA is allowing for a 90-day grace period for affected hospitals to come into compliance and does not believe that any undue burden would be caused by reverting back to its original program guidelines, which have been in place since 1994.

II. Other Deadlines

Deadlines for 340B Program requirements other than those listed above are not affected by this Notice. All other registrations and change requests are not affected by this Notice and will be processed as they are received.

Carole Johnson,

Administrator.

[FR Doc. 2023–23702 Filed 10–26–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Information Technology Advisory Committee Schedule of Meetings

AGENCY: Office of the National Coordinator for Health Information Technology (ONC), HHS.

ACTION: Notice of meetings.

SUMMARY: The Health Information Technology Advisory Committee (HITAC) was established in accordance with the 21st Century Cures Act and the Federal Advisory Committee Act. The HITAC, among other things, identifies priorities for standards adoption and makes recommendations to the National Coordinator for Health Information Technology (National Coordinator). The HITAC will hold public meetings for the remainder of 2023 and throughout 2024. See list of public meetings below.

FOR FURTHER INFORMATION CONTACT: Michael Berry, Designated Federal Officer, at *Michael.Berry@hhs.gov,* (202) 701–0795.

SUPPLEMENTARY INFORMATION: Section 4003(e) of the 21st Century Cures Act (Pub. L. 114–255) establishes the Health Information Technology Advisory Committee (referred to as the ''HITAC''). The HITAC will be governed by the provisions of the Federal Advisory Committee Act (FACA) (Pub. L. 92–463), as amended, (5 U.S.C. app.), which sets forth standards for the formation and use of federal advisory committees.

Composition: The HITAC is comprised of at least 25 members, of which:

- No fewer than 2 members are advocates for patients or consumers of health information technology;
- 3 members are appointed by the HHS Secretary
  - 1 of whom shall be appointed to represent the Department of Health and Human Services and
  - 1 of whom shall be a public health official;
- 2 members are appointed by the majority leader of the Senate;
- 2 members are appointed by the minority leader of the Senate;
- 2 members are appointed by the Speaker of the House of Representatives;
- 2 members are appointed by the minority leader of the House of Representatives;
- Other members are appointed by the Comptroller General of the United States.

Members serve for one-, two-, or three-year terms. All members may be reappointed for a subsequent three-year term. Each member is limited to two three-year terms, not to exceed six years of service. Members serve without pay but will be provided per-diem and travel costs for committee services, if warranted.

Recommendations: The HITAC recommendations to the National Coordinator are publicly available at *https://www.healthit.gov/topic/federal-advisory-committees/recommendations-national-coordinator-health-it.*

Public Meetings: All HITAC meetings will be virtual. Please note that some HITAC meetings may also have an in-person meeting option. For web conference instructions and the most up-to-date information, including in-person meeting location (if applicable), please visit the HITAC calendar on the ONC website, *www.healthit.gov/topic/federal-advisory-committees/hitac-calendar.*

The schedule of remaining meetings to be held in 2023 and throughout 2024 is as follows:

- November 9, 2023, from approximately 9:30 a.m. to 4:00 p.m./Eastern Time (virtual and in-person meeting options, address: Hubert H. Humphrey Federal Building, 200 Independence Ave SW, Washington, DC 20201)
- January 18, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time
- February 8, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time
- March 7, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time
- April 11, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time

- May 16, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time
- June 13, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time
- July 11, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time
- August 15, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time
- September 12, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time
- October 17, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time
- November 7, 2024, from approximately 10:00 a.m. to 3:00 p.m./Eastern Time

All meetings are open to the public. Additional meetings may be scheduled as needed.

Contact Person for Meetings: Michael Berry, *Michael.Berry@hhs.gov.* 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. Please email Michael Berry for the most current information about meetings.

Agenda: As outlined in the 21st Century Cures Act, the HITAC will develop and submit recommendations to the National Coordinator on the topics of interoperability, privacy and security, patient access, and use of technologies that support public health. In addition, the committee will also address any administrative matters and hear periodic reports from ONC. ONC intends to make background material available to the public no later than 24 hours prior to the meeting start time. If ONC is unable to post the background material on its website prior to the meeting, the material will be made publicly available on ONC's website after the meeting, at *www.healthit.gov/hitac.*

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person prior to the meeting date. An oral public comment period will be scheduled at each meeting. Time allotted for each commenter will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled public comment period, ONC will take written comments after the meeting.

ONC welcomes the attendance of the public at its HITAC meetings. If you require special accommodations due to a disability, please contact Michael Berry at least seven (7) days in advance of the meeting.

Notice of these meetings are given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., app. 2).

Dated: October 16, 2023.

Michael Berry,

Designated Federal Officer, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2023–23762 Filed 10–26–23; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Diversity Training Grants.

Date: December 1, 2023.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sun Saret, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 208–S, Bethesda, MD 20892, (301) 435–0270, *sun.saret@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: October 23, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–23751 Filed 10–26–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; 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 Council on Minority Health and Health Disparities.

The meeting will be held as a virtual meeting and is open to the public as indicated below. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocast at the following link: *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 Council on Minority Health and Health Disparities.

Date: February 1, 2024.

Closed: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Name of Committee: National Advisory Council on Minority Health and Health Disparities.

Date: February 2, 2024.

Open: 11:00 a.m. to 5:00 p.m.

Agenda: Opening Remarks, Administrative Matters, Director's Report, Presentations, and Other Business of the Council.

Place: National Institutes of Health, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Paul Cotton, Ph.D., RDN, Director, Office of Extramural Research Activities, National Institute on Minority Health and Health Disparities, National Institutes of Health, 6707 Democracy Boulevard, Suite 800, Bethesda, MD 20892, 301–402–1366, *paul.cotton@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the

name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: NIMHD: *https://www.nimhd.nih.gov/about/advisory-council/,* where an agenda and any additional information for the meeting will be posted when available.

Dated: October 24, 2023.

Victoria E. Townsend,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–23753 Filed 10–26–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Collection of Grants and Contracts Data the Historically Black Colleges and Universities (HBCUs) and Small Businesses May Be Interested in Pursuing, (Office of the Director)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide an opportunity for public comment on proposed data collection projects, the National Institutes of Health, Office of the Director, Office of Acquisitions and Logistics Management, Small Business Program Office, will publish periodic summaries of existing projects to be submitted to the Office of Management and Budget for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Keondra Watts, Program Analyst, NIH, Office of the Director, Office of Acquisitions and Logistics Management, Small Business Program Office, 6701 Rockledge Dr., Bethesda, MD 20892–7786, or call non-toll-free number (301) 443–8722 or email your request, including your address to: *Keondra.Watts@nih.gov*. Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: written comments and/or suggestions from the public and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function 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, 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) Ways to minimizes the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Collection of Grants and Contracts data the Historically Black Colleges and Universities and small businesses may be interested in pursuing, 0925–0767, exp., date, 01/31/2024 Extension, Office of the Director, Office of Acquisitions and Logistics Management, Small Business Program Office, National Institutes of Health.

Need and Use of Information Collection: Presidential Executive Order 13779 is the White House Initiative to Promote Excellence and Innovation at Historically Black Colleges and Universities (HBCUs). Through this initiative, Federal agencies were mandated to assist in strengthening HBCUs' ability for equitable participation in Federal programs and explore new ways to improve the relationship between the Federal Government and HBCUs. This initiative has established how the agency intends to increase the capacity of HBCUs to compete effectively for grants and contracts.

The Path to Excellence and Innovation was a comprehensive plan to expand the existing National Institutes of Health (NIH) Small Business Program in the Office of Acquisition and Logistics Management. The Path to Excellence provided a platform for increased transparency between HBCUs and the Federal Government through the provision of outreach events, training opportunities, and one-on-one assistance. There were nineteen schools and each school had chosen one or more small business teaming partner(s) to support their effort in this program. Through the collection of this information, the NIH Small Business Program Office will gain insight into what government grants and contracts are of interest to HBCUs and small businesses. This information has supported the initiative to help HBCUs and small businesses because this tool aids them to be more knowledgeable about what opportunities regarding grants and contracts exist for their organization.

Office of Management and Budget approval is requested for a 3-year extension. There are no costs to respondents other than their time. The total estimated annualized burden hours are 108.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
HBCU Pre-Solicitation Portal for Contracts and Grants	65	10	10/60	108
Total		650		108

Dated: October 19, 2023.

Tara A. Schwetz,

Acting Principal Deputy Director, National Institutes of Health.

[FR Doc. 2023–23690 Filed 10–26–23; 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; Understanding Chronic Conditions Understudied Among Women.

Date: November 20–21, 2023.

Time: 9:00 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: Pablo M. Blazquez Gamez, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 435–1042, *pablo.blazquezgamez@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–23–013 and RFA–OD–23–014—Understanding Chronic Conditions Understudied Among Women Special Emphasis Panel (SEP).

Date: November 20–21, 2023.

Time: 10:00 a.m. to 6:30 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: Jessica Bellinger, Ph.D., Scientific Review Officer, Center for Scientific of Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, Bethesda, MD 20892, 301–827–4446, *bellingerjd@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Microbial Diagnostics, Detection and Decontamination.

Date: November 28–29, 2023.

Time: 9:30 a.m. to 7:30 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: Shinako Takada, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–827–5997, *shinako.takada@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Research Enhancement Awards: Biological and Molecular Technologies.

Date: November 28, 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: Rebecca Catherine Burgess, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 480–8034, *rebecca.burgess@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Basic, Shared, and High-End Mass Spectrometry Instrumentation (S10) Special Emphasis Panel.

Date: November 30, 2023.

Time: 9:30 a.m. to 7:30 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: Sudha Veeraraghavan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7846, Bethesda, MD 20892, (301) 827–5263, *sudha.veeraraghavan@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Topics in Health Services Research, Health Information Technology, and Aging.

Date: December 4–5, 2023.

Time: 9:00 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: Lauren Susan Penney, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496–1968, *penneyls@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; DP1 Catalyst—HIV Comorbidities, Coinfections, and Complications.

Date: December 5, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Joshua D. Powell, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–5370, *josh.powell@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR23–138: Instrumentation Grant Program for Resource-Limited Institutions (S10).

Date: December 6, 2023.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: James J. Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–806–8065, *lijames@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: HIV/AIDS Biological Review Panel.

Date: December 11, 2023.

Time: 11:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Velasco Cimica, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–1760, *velasco.cimica@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Medical Imaging, Cardiovascular and Surgical Devices, Biomedical Sensing, Measurement and Instrumentation Small Business.

Date: December 12, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Steven Anthony Ripp, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–3010, *steven.ripp@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Molecular Genetics and Genomics.

Date: December 12, 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: Linda Wagner Jurata, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 496–8032, *linda.jurata@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: October 23, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–23748 Filed 10–26–23; 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; (SEP): Neurotechnology and Eye Diseases.

Date: November 21, 2023.

Time: 12:00 p.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: Lai Yee Leung, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1011D, Bethesda, MD 20892, (301) 827–8106, *leungl2@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR/RFA Panel: Animal and Biological Material Resource Centers and Resource-Related Research Projects.

Date: November 28–29, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rolf Jakobi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6190, MSC 7806, Bethesda, MD 20892, 301–435–1718, *jakobir@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–23–137: Science Education Partnership Award (SEPA) R25.

Date: November 29–30, 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: James J Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–806–8065, *lijames@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Topics in Basic Cancer Immunology.

Date: November 29, 2023.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: 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.*

(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: October 23, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–23746 Filed 10–26–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; Rare Disease Clinical Trial Readiness.

Date: February 15, 2024.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jing Chen, Ph.D., Scientific Review Officer, Office of Scientific Review, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1080, Bethesda, MD 20892, (301) 827–3268, *chenjing@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: October 23, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–23750 Filed 10–26–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0292]

National Chemical Transportation Safety Advisory Committee Meeting; November 2023 Meeting

AGENCY: Coast Guard, Department of Homeland Security.

ACTION: Notice of cancellation.

SUMMARY: The meeting of the National Chemical Transportation Safety Advisory Committee scheduled for November 28 through 30, 2023, from 9 a.m. until 5 p.m. Central Standard Time (CST) is cancelled.

DATES: The cancelled meeting was announced in the **Federal Register** on Tuesday, October 10, 2023, at 88 FR 69936.

FOR FURTHER INFORMATION CONTACT: Lieutenant Ethan T. Beard, Alternate Designated Federal Officer of the National Chemical Transportation Safety Advisory Committee, telephone, (202) 372–1419, or email *Ethan.T.Beard@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Committee acts solely in an advisory capacity to the Secretary of the Department of Homeland Security through the Commandant of the Coast Guard and the Director of Commercial Regulations and Standards on matters related to the safe and secure marine transportation of hazardous materials.

Notice of cancellation of this meeting is given under the *Federal Advisory Committee Act* (5 U.S.C., ch. 10).

Dated: October 23, 2023.

Benjamin J. Hawkins,

Acting Director of Commercial Regulations and Standards.

[FR Doc. 2023–23691 Filed 10–26–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[OMB Control Number 1651–0009]

Agency Information Collection Activities; Revision of Existing Collection; U.S. Customs Declaration (CBP Form 6059B)

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

ACTION: 30-Day Notice and request for comments.

SUMMARY: U.S. Customs and Border Protection (CBP), Department of Homeland Security, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than November 27, 2023) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (88 FR 13452) on March 03, 2023, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (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, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: U.S. Customs Declaration.
OMB Number: 1651–0009.
Form Number: 6059B.
Current Actions: CBP is submitting a revision package to terminate the APC Program, announce MPC Expansion, and add the CBP One Mobile Application to the collection.
Type of Review: Revision.
Affected Public: Individuals.
Abstract: CBP Form 6059B, Customs Declaration, is used as a standard report of the identity and residence of each person arriving in the United States. This form is also used to declare imported articles to U.S. Customs and Border Protection (CBP) in accordance with 19 CFR 122.27, 148.12, 148.13, 148.110, 148.111; 31 U.S.C. 5316 and Section 498 of the Tariff Act of 1930, as amended (19 U.S.C. 1498).

Section 148.13 of the CBP regulations prescribes the use of the CBP Form 6059B when a written declaration is required of a traveler entering the United States. Generally, written declarations are required from travelers arriving by air or sea. Section 148.12 requires verbal declarations from travelers entering the United States. Generally, verbal declarations are required from travelers arriving by land.

CBP continues to find ways to improve the entry process through the use of mobile technology to ensure it is safe and efficient. To that end, CBP has deployed a process which allows travelers to use a mobile app to submit information to CBP prior to arrival in domestic locations and prior to departure at preclearance locations. This process, called Mobile Passport Control (MPC) allows travelers to self-segment upon arrival into the United States or departing a preclearance location. The MPC process also helps determine under what circumstances CBP should require a written customs declaration (CBP Form 6059B) and when it is beneficial to admit travelers who make an oral customs declaration during the primary inspection. MPC eliminates the administrative tasks performed by the officer during a traditional inspection and in most cases will eliminate the need for respondents/travelers to fill out a paper declaration. MPC provides a more efficient and secure in person inspection between the CBP Officer and the traveler.

Another electronic process that CBP has in lieu of the paper 6059B is the Automated Passport Control (APC). This is a CBP program that facilitates the entry process for travelers by providing self-service kiosks in CBP's Primary Inspection area that travelers can use to make their declaration.

Both APC and MPC allow an electronic method for travelers to answer the questions that appear on form 6059B without filling out a paper form. APC program will continue to collect this information until the program is terminated on September 30, 2023.

A sample of CBP Form 6059B can be found at: https://www.cbp.gov/newsroom/publications/forms?title=6059.

This collection is available in the following languages: English, French, Vietnamese, German, Italian, Japanese, Korean, Polish, Portuguese, Russian, Chinese, Hebrew, Spanish, Dutch, Arabic, Farsi, and Punjabi.

New Change

APC Program Termination

The Automated Passport Control (APC) program is terminated as of September 30, 2023. Termination of the APC program will allow CBP passenger processing to streamline into a single Simplified Arrival workflow without need of interacting with a kiosk. The removal of the kiosk space will also provide additional queueing space for travelers that will utilize MPC to expedite their entry process into the United States.

MPC Expansion

Mobile Passport Control (MPC) program will expand to include U.S. Legal permanent residents (LPR) and Visa Waiver Program (VWP) country visitors arriving for their second visit to the United States. The Automated Passport Control (APC) program previously captured this population, and CBP is now expanding the MPC program to be used by these populations. U.S. LPRs are eligible for SA's photo biometric confirmation upon arrival into the United States. Other classes of admission eligible for SA's photo biometric confirmation will be considered for MPC inclusion as a future update.

CBP One™ Mobile Application

A new mobile application testing the operational effectiveness of a process which allows travelers to use a mobile application to submit information to CBP, in advance, prior to arrival. This second mobile capability is under the current CBP One™ application which is a platform application that serves as a single portal for travelers and stakeholders to virtually interact with CBP. The CBP One™ application will also allow travelers to self-segment upon arrival at land borders in the United States.

Similar to the MPC application, the CBP One™ application eliminates the administrative tasks performed by the officer during a traditional inspection and in most cases will eliminate the need for respondents/travelers to fill out a paper declaration. In addition, the CBP One™ application will also provide a more efficient and secure in person inspection between the CBP Officer and the traveler at the land border.

Unique to the CBP One™ application is that while the MPC submission is completed upon arrival, the CBP One™ application must be submitted in advance and will require the additional data elements:

1. Traveler Identify the Port of Entry (POE).
2. Time and/or date of arrival.

In addition, like the MPC application, travelers will provide their answers to CBP's questions, take a self-picture/selfie and submit the information via the CBP One™ application, after the plane lands. This will allow for advance vetting and proper resource management at the POE. This capability through the CBP One™ application is available to all travelers arriving with authorized travel documents, including foreign nationals.

Type of Information Collection: Customs Declarations (Form 6059B).
Estimated Number of Respondents: 34,006,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 34,006,000.
Estimated Time per Response: 4 minutes.
Estimated Total Annual Burden Hours: 2,278,402.
Type of Information Collection: Verbal Declarations.
Estimated Number of Respondents: 233,000,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 233,000,000.
Estimated Time per Response: 10 seconds.
Estimated Total Annual Burden Hours: 699,000.
Type of Information Collection: MPC APP.
Estimated Number of Respondents: 3,500,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 3,500,000.
Estimated Time per Response: 2 minutes.
Estimated Total Annual Burden Hours: 115,500.
Type of Information Collection: CBP One APP.
Estimated Number of Respondents: 500,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 500,000.
Estimated Time per Response: 2 minutes.
Estimated Total Annual Burden Hours: 16,500.

Dated: October 24, 2023.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2023–23783 Filed 10–26–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX24GG009950000]

Public Meeting of the Scientific Earthquake Studies Advisory Committee

AGENCY: Geological Survey, Department of the Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act (FACA), as amended, the U.S. Geological Survey (USGS) is publishing this notice to announce that a Federal Advisory Committee meeting of the Scientific Earthquake Studies Advisory Committee (SESAC) will take place.

DATES: The hybrid meeting will be held in person and virtually via Microsoft Teams on November 16, 2023, from 8:00 a.m. to 6:00 p.m., Mountain Time and on November 17, 2023, from 8:00 a.m. to 2 p.m. Mountain Time.

ADDRESSES: The in-person component of the meeting will be held at the USGS, 1711 Illinois St., Golden, Colorado. Comments can be sent to Dr. Gavin Hayes, USGS, by email at *ghayes@usgs.gov* or by telephone at 303–374–4449.

FOR FURTHER INFORMATION CONTACT: Dr. Gavin Hayes, USGS, by email at *ghayes@usgs.gov* or by telephone at 303–374–4449. Individuals in the United States who are deaf, blind, 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 meeting is being held under the provisions of the FACA of 1972 (5 U.S.C., appendix 2), the Government in the Sunshine Act of 1976 (5 U.S.C. 552B, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The SESAC will review current activities of the USGS Earthquake Hazards Program (EHP), discuss future priorities, and consider its draft report to the USGS Director.

Agenda Topics: Earthquake Hazards Program (EHP) strategic planning; administration priorities and interactions; budget opportunities; balance of activities supported by the EHP; external grants; National Earthquake Hazards Reduction Program (NEHRP); National Seismic Hazard

Model; ShakeAlert; reports from SESAC sub-committees; the latest report to the USGS Director, and EHP responses.

Meeting Accessibility/Special Accommodations: The meeting is open to the public and will take place on November 16, 2023, from 8:00 a.m. to 6:00 p.m., Mountain Time and on November 17, 2023, from 8:00 a.m. to 2 p.m. Mountain Time. Members of the public wishing to attend the meeting should contact Dr. Gavin Hayes (see **FOR FURTHER INFORMATION CONTACT**). Virtual meeting instructions will be provided to registered attendees prior to the meeting.

Please make requests in advance for sign-language interpreter services, assistive listening devices, or other reasonable accommodations. We ask that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice at least seven (7) business days prior to the meeting to give the Department of the Interior sufficient time to process your request. All reasonable accommodation requests are managed on a case-by-case basis.

Public Disclosure of Comments: There will be an opportunity for public comments during both days of the meeting. Depending on the number of people who wish to speak and the time available, the time for individual comments may be limited. Written comments may also be sent to the SESAC for consideration. To allow for full consideration of information by the SESAC members, written comments must be provided to Dr. Gavin Hayes (see **FOR FURTHER INFORMATION CONTACT**) at least three (3) business days prior to the meeting. Any written comments received will be provided to SESAC members before the meeting.

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 may ask us in your comment to withhold your PII from public review, we cannot guarantee that we will be able to do so.

Authority: 5 U.S.C. ch. 10.

Linda R. Huey,

USGS Program Specialist, Natural Hazards Mission Area.

[FR Doc. 2023–23767 Filed 10–26–23; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_UT_FRN_MO4500170231]

Notice of Realty Action: Noncompetitive (Direct) Sale of Public Land in Garfield County, Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) is proposing a non-competitive (direct) sale of a 5.27-acre parcel of public land in Garfield County, Utah, to Millard ''Crockett'' Dumas. The sale would resolve an inadvertent unauthorized use of public lands. The sale would be subject to the applicable provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, and the BLM land sale regulations. The sale would be for no less than the appraised fair market value of $5,000.

DATES: Interested parties must submit written comments no later than December 11, 2023.

ADDRESSES: Mail written comments to BLM Kanab Field Office, Field Manager, 669 South Highway 89A, Kanab, UT 84741, or submit them online at *https://eplanning.blm.gov/eplanning-ui/project/2020901/510.*

FOR FURTHER INFORMATION CONTACT: Brandon Johnson, Realty Specialist, BLM Utah State Office, phone: (435) 819–0016, email: *kbjohnso@blm.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: In the 1970s, the adjacent landowner misinterpreted the boundary of their private property and inadvertently built flood retention structures, corrals, and a barn that encroached onto what is now an isolated parcel of public land. Mr. Dumas later purchased the private property and has nominated the public land parcel for direct sale. The parcel is only accessible through Mr. Dumas' property. The BLM proposes to offer the land for direct sale to resolve the issue.

The following described public land in Garfield County has been examined and found suitable for sale under the authority of Sections 203 and 209 of FLPMA, as amended:

Salt Lake Meridian, Utah

T. 35 S., R. 3 E.,
Sec. 5, parcel A.

The area described contains 5.27 acres, according to the official plat of survey of the said land, on file with the BLM.

The proposed sale conforms with the BLM Kanab Field Office Resource Management Plan, approved in October 2008. There is no known mineral value in the parcel, so the mineral estate would also be conveyed, in accordance with Section 209 of FLPMA. The lands are identified as available for disposal and listed by the legal description in Appendix D on page A5–1. A parcel-specific environmental assessment (EA), document number DOI–BLM–UT–P020–2022–0013–EA, was prepared in connection with this realty action and may be viewed at *https://eplanning.blm.gov/eplanning-ui/project/2020901/510.*

The land is suitable for direct sale under FLPMA, without competition, consistent with 43 CFR 2711.3–3(a)(4), as direct sales may be used ''when in the opinion of the authorized officer, a competitive sale is not appropriate and the public interest would best be served by a direct sale[,]'' including when ''the adjoining ownership pattern and access indicate a direct sale is appropriate[.]'' The parcel is only accessible through Mr. Dumas' private property, and no other potential bidder currently has legal access to this parcel. It is also suitable for direct sale consistent with 43 CFR 2711.3–3(a)(5) because there is a need to resolve an inadvertent and unauthorized use of public lands, which are encumbered by privately constructed improvements.

Pursuant to the requirements of 43 CFR 2711.1–2(d), publication of this notice in the **Federal Register** will segregate the land from all forms of appropriation under the public land laws, including the mining laws, except for the sale provisions of FLPMA. Until completion of the sale, the BLM will no longer accept land use applications affecting this public land. The segregative effect will terminate upon issuance of a patent, publication in the **Federal Register** of termination of the segregation, or on October 27, 2025, unless extended by the BLM Utah State Director in accordance with 43 CFR 2711.1–2(d) prior to the termination date.

The conveyance document, if issued, will include the following terms, covenants, conditions, and reservations:

1. A reservation to the United States for ditches and canals constructed by

the authority of the United States under the Act of Aug. 30, 1890;

2. Valid existing rights issued prior to conveyance;

3. An appropriate indemnification clause protecting the United States from claims arising out of the purchaser's use, occupancy, or operations on the conveyed lands;

4. Additional terms and conditions that the authorized officer deems appropriate.

The EA, appraisal, maps, mineral potential report, and environmental site assessment are available for review at the location listed in the **ADDRESSES** section earlier. Interested parties may submit, in writing, any comments concerning the sale, including notifications of any encumbrances or other claims relating to the parcel (see **ADDRESSES**).

The BLM Utah State Director will review adverse comments regarding the parcel and may sustain, vacate, or modify this realty action, in whole or in part. In the absence of timely objections, this realty action will become the final determination of the Department of the Interior.

In addition to publication in the **Federal Register**, the BLM will also publish this notice in *the Insider* newspaper, once a week, for three consecutive weeks.

Before including your address, phone number, email address, or other personal identifying information in your comments, the BLM will make your entire comment—including your personal identifying information—publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 43 CFR 2711)

Gregory Sheehan,

Utah State Director.

[FR Doc. 2023–23693 Filed 10–26–23; 8:45 am]

BILLING CODE 4331–25–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[BOEM–2021–0043; EEEE500000 234E1700D2 ET1SF0000.EAQ000]

Oil and Gas Decommissioning Activities on the Pacific Outer Continental Shelf

AGENCY: Bureau of Safety and Environmental Enforcement (BSEE), DOI.

ACTION: Notice of availability of the final programmatic Environmental Impact Statement (PEIS) for oil and gas decommissioning activities on the Pacific Outer Continental Shelf.

SUMMARY: BSEE announces the availability of the Final PEIS for Oil and Gas Decommissioning Activities on the Pacific Outer Continental Shelf (OCS). The Final PEIS identifies BSEE's Proposed Action and analyzes its potential environmental impacts, as well as those of three alternative actions and a number of alternative component activities.

DATES: BSEE will issue a Record of Decision no sooner than November 4, 2023.

ADDRESSES: The Final PEIS with appendices is available for review on the Bureau of Ocean Energy Management's (BOEM's) website at *www.boem.gov/Pacific-Decomm-PEIS.*

FOR FURTHER INFORMATION CONTACT: For further information on the Final PEIS, you may contact BOEM or BSEE. The BOEM point of contact (POC) is Mr. Richard Yarde, Regional Supervisor, Bureau of Ocean Energy Management, Pacific OCS Region, 760 Paseo Camarillo, Suite 102, Camarillo, CA 93010–6002. You may also contact Mr. Yarde by telephone at (805) 384–6379 or email at *richard.yarde@boem.gov.* The BSEE POC is Mr. Bruce Hesson, Regional Director, Bureau of Safety and Environmental Enforcement, Pacific Region, 760 Paseo Camarillo, Suite 102, Camarillo, CA 93010. You may also contact Mr. Hesson by telephone at (805) 384–6373 or email at *bruce.hesson@bsee.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Action: The proposed action evaluated in this Final PEIS is for BSEE to review and approve, reject, or approve with conditions, operator decommissioning applications for the complete removal and disposal of Pacific OCS oil and gas platforms, associated pipelines, and other facilities. Under the proposed action, all platforms, pipelines, and other facilities, and their related infrastructure, would be removed to a depth of 15 feet below the mudline, as required by regulation (30 CFR 250.1728(a)).

Alternatives Considered: The four alternatives analyzed in the Final PEIS include complete removal (Proposed Action), partial removal without artificial reef option, partial removal with artificial reef option, and no action. The activities analyzed in the PEIS include, but are not limited to, platform removal employing non-explosive severance, removal of associated pipelines and other facilities and obstructions, onshore disposal, abandonment-in-place of associated pipelines, complete removal of topside superstructure, partial jacket removal to at least 85 feet below the waterline, and one sub-alternative using explosive severance if necessary for the platform jackets.

Availability of the Final PEIS: You may download or view the Final PEIS, appendices, and associated information on the following BOEM website: *www.boem.gov/Pacific-Decomm-PEIS,* or on the following BSEE website: *https://www.bsee.gov/stats-facts/ocs-regions/pacific/pacific-region-federal-ocs-decommissioning.* You may also contact BOEM or BSEE at the above addresses for a copy on a flash drive or a paper copy.

Authority: 42 U.S.C. 4231 *et seq.;* 40 CFR 1506.6.

Kevin M. Sligh, Sr.,

Director, Bureau of Safety and Environmental Enforcement.

[FR Doc. 2023–23623 Filed 10–26–23; 8:45 am]

BILLING CODE P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1378–1379 (Review)]

Low Melt Polyester Staple Fiber From South Korea and Taiwan; Scheduling of Expedited Five-Year Reviews

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of expedited reviews pursuant to the Tariff Act of 1930 (''the Act'') 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 within a reasonably foreseeable time.

DATES: October 6, 2023.

FOR FURTHER INFORMATION CONTACT: Kenneth Gatten III (202–708–1447), 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 October 6, 2023, the Commission determined that the domestic interested party group response to its notice of institution (88 FR 42748, July 3, 2023) of the subject five-year reviews was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting full reviews.[1] Accordingly, the Commission determined that it would conduct expedited reviews pursuant to section 751(c)(3) of the Act (19 U.S.C. 1675(c)(3)).[2]

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Staff report.—A staff report containing information concerning the subject matter of the reviews has been placed in the nonpublic record, and will be made available to persons on the Administrative Protective Order service list for these reviews on November 14, 2023. A public version will be issued thereafter, pursuant to § 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in § 207.62(d) of the Commission's rules, interested parties that are parties to the reviews and that have provided individually adequate responses to the notice of institution,[3] and any party other than an interested party to the reviews may file written comments with the Secretary on what determinations the Commission should reach in the reviews. Comments are due on or before 5:15 p.m. on November 22, 2023, and may not contain new factual information. Any person that is neither a party to the five-year reviews nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by November 22, 2023. However, should the Department of Commerce (''Commerce'') extend the time limit for its completion of the final results of its reviews, the deadline for comments (which may not contain new factual information) on Commerce's final results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must 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.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination.—The Commission has determined these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: These reviews are being conducted under authority of title VII of the Act; this notice is published pursuant to § 207.62 of the Commission's rules.

By order of the Commission.

Issued: October 24, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–23758 Filed 10–26–23; 8:45 am]

BILLING CODE 7020–02–P

[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's website.

[2] Commissioner Randolph Stayin did not participate.

[3] The Commission has found the responses submitted on behalf of Huvis Indorama Advanced Materials, LLC and Nan Ya Plastics Corporation, America to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

INTERNATIONAL TRADE COMMISSION

Submission for OMB Review; Comment Request; Notice of Request for Extension of Previously Approved Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: International Trade Commission.

ACTION: 60-Day notice and request for comments.

SUMMARY: This notice announces the intention of the U.S. International Trade Commission (Commission) to request a three-year extension, under the Paperwork Reduction Act of 1995 (the Act), of the current generic clearance for the Collection of Qualitative Feedback on Agency Service Delivery that the Office of Management and Budget (OMB) previously approved. This collection was developed as part of a Federal Government-wide effort to streamline the process for seeking feedback from the public on service delivery. The current generic survey clearance is assigned OMB Control No. 3117–0222; it will expire on March 31, 2024. The Commission requests comments concerning the proposed information collections under section 3506(c)(2)(A) of the Act; this notice describes such comments in greater detail in the supplementary information section below.

DATES: To assure that the Commission will consider your comments, it must receive them no later than 60 days after publication of this notice in the **Federal Register**.

ADDRESSES: All Commission offices are in the United States International Trade Commission Building, 500 E Street SW, Washington, DC. Please note the Secretary's Office will accept only electronic filings at this time. No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. See **SUPPLEMENTARY INFORMATION** section below for instructions on how to submit written comments.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of supporting documents from Zachary Coughlin (*Zachary.Coughlin@usitc.gov* or 202–205–3435). 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. You may also obtain general information concerning the Commission by accessing its website (*https://www.usitc.gov).*

SUPPLEMENTARY INFORMATION:

Written Comments

You may submit comments, identified by docket number MISC–034. All submissions should be addressed to the Secretary and must conform to the provisions of section 201.8 of the Commission's Rules of Practice and Procedure (19 CFR 201.8). Section 201.8 and the Commission's Handbook on Filing Procedures require that interested parties file documents electronically on or before the filing deadline. Filings

must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Request for Comments

The Commission solicits comments as to: (1) Whether the proposed information collection is necessary for the proper performance of the Commission's functions, including whether the information will have practical utility; (2) the accuracy of the Commission's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used; (3) the quality, utility, clarity, and design of the information to be collected; and (4) minimization of the burden of the proposed information collection on those who are to respond (including through the use of appropriate automated, electronic, mechanical, or other technological forms of information technology (*e.g.,* permitting electronic submission of responses)). To the extent appropriate, please cite to specific experiences that your firm has had with other governmental surveys and data collections.

Summary of the Proposed Information Collections

(1) Need for the Proposed Information Collections

The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner. This qualitative feedback provides useful insights on perceptions and opinions of customers and stakeholders. The feedback helps the Commission gain understanding into customer or stakeholder experiences and expectations and provides an early warning of issues with service, or focuses attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections allow for ongoing, collaborative and actionable communications between the Commission and its customers and stakeholders and contribute directly to the improvement of program management.

(2) Description of the Information To Be Collected

The solicitation of feedback will target areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are noncontroversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency;
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

(3) Estimated Burden of the Proposed Information Collection

The Commission estimates that information collections issued under the requested generic clearance will impose an average annual burden of 350 hours on 1000 respondents.

No record keeping burden is known to result from the proposed collection of information.

By order of the Commission.

Issued: October 24, 2023.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2023–23756 Filed 10–26–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Appointment of Individuals To Serve as Members of the Performance Review Board

AGENCY: United States International Trade Commission.

ACTION: Appointment of individuals to serve as members of Performance Review Board.

DATES: *Applicable Date:* October 23, 2023.

FOR FURTHER INFORMATION CONTACT: Eric Mozie, Director of Human Resources, or Ronald Johnson, Deputy Director of Human Resources, U.S. International Trade Commission (202) 205–2651.

SUPPLEMENTARY INFORMATION: The Chairman of the U.S. International Trade Commission has appointed the following individuals to serve on the Commission's Performance Review Board (PRB):

Chair of the PRB: Commissioner Amy Karpel
Member—John Ascienzo
Member—Dominic Bianchi
Member—Nannette Christ
Member—Catherine DeFilippo
Member—Katie Higginbothom
Member—Margaret Macdonald
Member—William Powers
Member—Keith Vaughn

This notice is published in the **Federal Register** pursuant to the requirement of 5 U.S.C. 4314(c)(4). Hearing impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 205–1810.

By order of the Chairman.

Issued: October 23, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–23696 Filed 10–26–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–650–651 (Final) (Remand)]

Phosphate Fertilizers From Morocco and Russia

AGENCY: International Trade Commission.

ACTION: Notice of Remand Proceedings.

SUMMARY: The U.S. International Trade Commission (''Commission'') hereby gives notice of the procedures it intends to follow to comply with the court-ordered remand of its final determinations in the countervailing duty investigations of phosphate fertilizers from Morocco and Russia. For further information concerning the conduct of these remand proceedings and rules of general application, consult the Commission's Rules of Practice and Procedure.

DATES: October 23, 2020.

FOR FURTHER INFORMATION CONTACT: Calvin Chang ((202) 205–3062), Office of Investigations, or Courtney McNamara ((202) 205–3095), Office of General Counsel, 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 Investigation Nos. 701–TA–650–651 (Final) may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—In March 2021, the Commission determined that an industry in the United States was materially injured by reason of imports of phosphate fertilizers that were found to be subsidized by the governments of Morocco and Russia.[1] *Phosphate Fertilizers from Morocco and Russia,* Investigation Nos. 701–TA–650–651 (Final), USITC Pub. 5172 (March 2021). Several respondent parties contested the Commission's determinations in two separate actions, which were later consolidated, before the U.S. Court of International Trade (''CIT''). The CIT remanded for reconsideration the Commission's factual finding regarding the feasibility of reshipment of phosphate fertilizer from one destination to another. *OCP S.A.* v. *United States,* Consolidated Court No. 21–00219, Slip Op. 23–136 (Ct. Int'l Trade, September 19, 2023).

Participation in the remand proceedings.—Only those persons who were interested parties that participated in the investigations (*i.e.,* persons listed on the Commission Secretary's service list) and were also parties to the appeal may participate in the remand proceedings. Such persons need not file any additional appearances with the Commission to participate in the remand proceedings, unless they are adding new individuals to the list of persons entitled to receive business proprietary information (''BPI'') under administrative protective order. BPI referred to during the remand proceedings will be governed, as appropriate, by the administrative protective order issued in the investigations. The Secretary will maintain a service list containing the names and addresses of all persons or their representatives who are parties to the remand proceedings, and the Secretary will maintain a separate list of those authorized to receive BPI under the administrative protective order during the remand proceedings.

Written submissions.—The Commission is reopening the record in these proceedings for the limited purpose of issuing a short supplemental questionnaire to U.S. producers and U.S. importers. The Commission is otherwise not reopening the record for the collection of new factual information. The Commission will make available any new factual information obtained during the remand proceedings not already served to the parties in the investigations (as identified by the public of BPI service list). The Commission will permit the parties to file written comments limited to addressing new factual information obtained during the remand proceedings and how the Commission could best comply with the Court's remand instructions.

The comments must be based solely on the information in the Commission's record. The Commission will reject submissions containing additional factual information or arguments pertaining to issues other those defined above. The deadline for filing comments is November 27, 2023. Comments must be limited to a total of twenty-five (25) double-spaced and single-sided pages of textual material for domestic interested parties, inclusive of attachments and exhibits; and a total of twenty-five (25) double-spaced and single-sided pages of textual material for respondent interested parties, inclusive of attachments and exhibits.

Parties are advised to consult with the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission. All written submissions must conform to the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. 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. The Commission's *Handbook on E-Filing,* available on the Commission's website at *http://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, will not be accepted unless good cause is shown for accepting such submissions or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

By order of the Commission.

Issued: October 24, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–23774 Filed 10–26–23; 8:45 am]

BILLING CODE 7020–02–P

[1] Commissioner David S. Johanson dissented.

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2009–0025]

UL LLC: Applications for Expansion of Recognition and Proposed Modification to the NRTL Program's List of Appropriate Test Standards

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the applications of UL LLC, for expansion of the scope of recognition as a Nationally Recognized Testing Laboratory (NRTL) and presents the agency's preliminary finding to grant the applications. Additionally, OSHA proposes to add thirteen test standards to the NRTL Program's List of Appropriate Test Standards.

DATES: Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before November 13, 2023.

ADDRESSES: Submit comments by any of the following methods:

Electronically: You may submit comments and attachments electronically at: *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov*. Documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (OSHA–2009–0025). OSHA will place comments, attachments and other information and requests, including personal information, in the public docket without revision, and these materials will be available online at *http://www.regulations.gov*. Therefore, the agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

Extension of comment period: Submit requests for an extension of the comment period on or before November 13, 2023 to the Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor; or by fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov*.

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, phone: (202) 693–1911 or email: *robinson.kevin@dol.gov*.

SUPPLEMENTARY INFORMATION:

I. Notice of the Application for Expansion

OSHA is providing notice that UL LLC, (UL) is applying to expand the current recognition as a NRTL. UL requests the addition of thirty-five test standards to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by NRTLs or applicant organizations for initial recognition, as well as for expansion or renewal of recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides a preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including UL, which details that NRTL's scope of recognition. These pages are available from the OSHA website at *https://www.osha.gov/dts/otpca/nrtl/index.html*.

UL currently has fifty-five facilities (sites) recognized by OSHA for product testing and certification, with headquarters located at: UL LLC, 333 Pfingsten Road, Northbrook, Illinois 60062. A complete list of UL sites recognized by OSHA is available at *https://www.osha.gov/dts/otpca/nrtl/ul.html*.

II. General Background on the Application

UL submitted two applications, one dated December 24, 2021 (OSHA–2009–0025–0053), and a second dated May 5, 2023 (OSHA–2009–0025–0054). The first application was amended on July 19, 2022, to remove two standards from the original request (OSHA–2009–0025–0055). In total, the expansion applications, as amended, requested the addition of thirty-seven test standards to the scope of recognition. OSHA has determined that two of the standards included in the amended expansion application, UL 80079–36 and 80079–37, are not appropriate test standards and is therefore not proposing they be included for inclusion in UL's NRTL Scope of Recognition or in the NRTL Program's List of Appropriate Test Standards. This notice covers the expansion to include the remaining thirty-five standards. OSHA staff performed a detailed analysis of the application packets and other pertinent information. OSHA did not perform any on-site reviews in relation to these applications.

Table 1, below, lists the test standards found in UL's applications for expansion for testing and certification of products under the NRTL Program.

TABLE 1—PROPOSED TEST STANDARDS FOR INCLUSION IN UL'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 62841–1	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 1: General Requirements.
UL 62841–2–1	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Part 2–1: Particular Requirements for Hand-Held Drills and Impact Drills.
UL 62841–2–2	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 2–2: Particular Requirements For Hand-Held Screwdrivers and Impact Wrenches.
UL 62841–2–3 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 2–3: Particular Requirements For Hand-Held Grinders, Disc-Type Polishers And Disc-Type Sanders.
UL 62841–2–4	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 2–4: Particular Requirements For Hand-Held Sanders And Polishers Other.
UL 62841–2–5	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 2–5: Particular Requirements for Hand-Held Circular Saws.
UL 62841–2–8	Safety Requirements for Particular Requirements for Hand-Held Shears and Nibblers.
UL 62841–2–9	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn and Garden Machinery—Safety—Part 2–9: Particular Requirements for Hand-Held Tappers and Threaders.
UL 62841–2–10	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Part 2–10: Particular Requirements for Hand-Held Mixers.
UL 62841–2–11	Safety Requirements for Particular Requirements for Hand-Held Reciprocating Saws.
UL 62841–2–14	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn And Garden Machinery—Safety—Part 2–14: Particular Requirements for Hand-Held Planers.
UL 62841–2–17	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 2–17: Particular Requirements for Hand-Held Routers.
UL 62841–2–21	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Part 2–21: Particular Requirements for Hand-Held Drain Cleaners.
UL 62841–3–1	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–1: Particular Requirements For Transportable Table Saws.
UL 62841–3–4	Safety Requirements for Particular Requirements for Transportable Bench Grinders.
UL 62841–3–6	Safety Requirements for Particular Requirements for Transportable Diamond Drills with Liquid System.
UL 62841–3–7 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 3–7: Particular Requirements for Transportable Wall Saws.
UL 62841–3–9	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–9: Particular Requirements for Transportable Mitre Saws.
UL 62841–3–10	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–10: Particular Requirements for Transportable Cut-Off Machines.
UL 62841–3–12 * ...	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–12: Particular Requirements for Transportable Threading Machines.
UL 62841–3–13	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Part 3–13: Particular Requirements for Transportable Drills.
UL 62841–3–14 * ...	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 3–14: Particular Requirements for Transportable Drain Cleaners.
UL 62841–3–1000 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 3–1000: Particular Requirements For Transportable Laser Engravers.
UL 62841–4–1	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn And Garden Machinery-Safety-Part 4–1: Particular Requirements for Chain Saws.
UL 62841–4–2	Standard for Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn And Garden Machinery—Safety—Part 4–2: Particular Requirements for Hedge Trimmers.
UL 62841–4–4 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 4–4: Particular Requirements For Lawn Trimmers, Lawn Edge Trimmers, Grass Trimmers, Brush Cutters And Brush Saws.
UL 62841–4–1000 *	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 4–1000: Particular Requirements For Utility Machines.
UL 60745–2–23	Hand-Held Motor-Operated Electric Tools—Safety—Part 2–23: Particular Requirements for Die Grinders and Small Rotary Tools.
UL 60079–33 *	Explosive Atmospheres—Part 33: Equipment Protection by Special Protection ''s''.
UL 2610 *	Commercial Premises Security Alarm Units and Systems.
UL 428A *	Electrically Operated Valves for Gasoline and Gasoline/Ethanol Blends with Nominal Ethanol Concentrations Up to 85 Percent (E0–E85).
UL 428B *	Electrically Operated Valves for Diesel Fuel, Biodiesel Fuel, Diesel/Biodiesel Blends with Nominal Biodiesel Concentrations Up To 20 Percent (B20), Kerosene, and Fuel Oil.
UL 3100 *	ANSI/CAN/UL Automated Mobile Platforms (AMPs).
UL 2743	Standard for Portable Power Packs.
UL 8400 *	Virtual Reality, Augmented Reality and Mixed Reality Technology Equipment.

* In this notice, OSHA also proposes to add these test standards to the NRTL Program's List of Appropriate Test Standards.

III. Proposal To Add New Test Standards to the NRTL Program's List of Appropriate Test Standards

Periodically, OSHA will propose to add new test standards to the NRTL list of appropriate test standards following an evaluation of the test standard document. To qualify as an appropriate test standard, the agency evaluates the document to: (1) verify it represents a product category for which OSHA requires certification by a NRTL; (2) verify the document represents a product and not a component; and (3) verify the document defines safety test specifications (not installation or operational performance specifications).

OSHA becomes aware of new test standards through various avenues. For example, OSHA may become aware of new test standards by: (1) monitoring notifications issued by certain Standards Development Organizations; (2) reviewing applications by NRTLs or applicants seeking recognition to include new test standards in their scopes of recognition; and (3) obtaining notification from manufacturers, manufacturing organizations, government agencies, or other parties. OSHA may determine to include a new test standard in the list, for example, if the test standard is for a particular type of product that another test standard also covers or it covers a type of product that no standard previously covered.

In this notice, OSHA proposes to add thirteen new test standards to the NRTL Program's list of appropriate test standards. Table 2, below, lists the test standards that are new to the NRTL Program. OSHA preliminarily determines that these test standards are appropriate test standards. OSHA seeks public comment on this preliminary determination.

TABLE 2—STANDARDS OSHA IS PROPOSING TO ADD TO THE NRTL PROGRAM'S LIST OF APPROPRIATE TEST STANDARDS

Test standard	Test standard title
UL 62841–2–3	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 2–3: Particular Requirements For Hand-Held Grinders, Disc-Type Polishers And Disc-Type Sanders.
UL 62841–3–7	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–7: Particular Requirements for Transportable Wall Saws.
UL 62841–3–12	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–12: Particular Requirements for Transportable Threading Machines.
UL 62841–3–14	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–14: Particular Requirements for Transportable Drain Cleaners.
UL 62841–3–1000	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 3–1000: Particular Requirements For Transportable Laser Engravers.
UL 62841–4–1000	Electric Motor-Operated Hand-Held Tools, Transportable Tools and Lawn and Garden Machinery—Safety—Part 4–1000: Particular Requirements For Utility Machines.
UL 62841–4–4	Electric Motor-Operated Hand-Held Tools, Transportable Tools And Lawn And Garden Machinery—Safety—Part 4–4: Particular Requirements for Lawn Trimmers, Lawn Edge Timmers, Grass Trimmers, Brush Cutters And Brush Saws.
UL 60079–33	Explosive Atmospheres—Part 33: Equipment Protection by Special Protection ''s''.
UL 2610	Commercial Premises Security Alarm Units and Systems.
UL 428A	Electrically Operated Vales for Gasoline and Gasoline/Ethanol Blends with Nominal Ethanol Concentrations Up to 85 Percent (E0–E85).
UL 428B	Electrically Operated Valves for Diesel Fuel, Biodiesel Fuel, Diesel/Biodiesel Blends with Nominal Biodiesel Concentrations Up To 20 Percent (B20), Kerosene, and Fuel Oil.
UL 3100	ANSI/CAN/UL Automated Mobile Platforms (AMPs).
UL 8400	Virtual Reality, Augmented Reality and Mixed Reality Technology Equipment.

IV. Preliminary Findings on the Applications

UL submitted acceptable applications for expansion of the scope of recognition. OSHA's review of the application files and related material preliminarily indicates that UL can meet the requirements prescribed by 29 CFR 1910.7 for expanding recognition to include the addition of the test standards listed above for NRTL testing and certification. This preliminary finding does not constitute an interim or temporary approval of UL's applications.

OSHA also preliminarily determined that the test standards listed above are appropriate test standards.

OSHA seeks public comment on these preliminary determinations.

V. Public Participation

OSHA welcomes public comment as to whether UL meets the requirements of 29 CFR 1910.7 for expansion of recognition as a NRTL and whether the test standards listed above are appropriate test standards that should be included in the NRTL Program's List of Appropriate Test Standards. Comments should consist of pertinent written documents and exhibits.

Commenters needing more time to comment must submit a request in writing, stating the reasons for the request by the due date for comments. OSHA will limit any extension to 10 days unless the requester justifies a longer time period. OSHA may deny a request for an extension if it is not adequately justified.

To review copies of the exhibits identified in this notice, as well as comments submitted to the docket, contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor. These materials also are generally available online at *https://www.regulations.gov* under Docket No. OSHA–2009–0025 (for further information, see the ''*Docket*'' heading in the section of this notice titled **ADDRESSES**),

OSHA staff will review all comments to the docket submitted in a timely manner and after addressing the issues raised by these comments, make a recommendation to the Assistant Secretary for Occupational Safety and Health on whether to grant UL's applications for expansion of its scope of recognition and to add the test standards listed above to the NRTL Program's List of Appropriate Test Standards. The Assistant Secretary will make the final decision on granting the applications and on adding the test standards listed above to the NRTL Program's List of Appropriate Test Standards. In making these decisions, the Assistant Secretary may undertake other proceedings prescribed in Appendix A to 29 CFR 1910.7.

OSHA will publish a public notice of its final decision in the **Federal Register**.

VI. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393, Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC, on October 20, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–23734 Filed 10–26–23; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0050]

The Anhydrous Ammonia Storage and Handling Standard; Revision of the Office of Management and Budget (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning its proposal to the revision the Office of Management and Budget's (OMB) approval for the information collection requirements specified in the Anhydrous Ammonia Storage and Handling Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by December 26, 2023.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the docket are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number OSHA–2010–0050 for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The Anhydrous Ammonia Storage and Handling Standard (29 CFR 1910.111) specifies a number of paperwork requirements. The following is a brief description of the collection of information requirements contained in the standard.

Paragraph (b)(3) of the Standard specifies that systems have nameplates if required, and that these nameplates ''be permanently attached to the system (as specified by paragraph (b)(3)(ii)(j)) so as to be readily accessible for inspection. . . .'' In addition, this paragraph requires that markings on containers and systems covered by paragraphs (c) (''Systems utilizing stationary, non-refrigerated storage containers''), (f) (''Tank motor vehicles for the transportation of ammonia''), (g) (''Systems mounted on farm vehicles other than for the application of ammonia''), and (h) (''Systems mounted on farm vehicles for the application of ammonia'') provide information regarding nine specific characteristics of the containers and systems. Similarly, paragraph (b)(4) of the Standard specifies that refrigerated containers be marked with a nameplate on the outer covering in an accessible place that provides information regarding eight specific characteristics of the container.

The required markings ensure that employers use only properly designed and tested containers and systems to store anhydrous ammonia, thereby preventing accidental release of, and exposure of workers to, this highly toxic and corrosive substance.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB approves the revision of the collection of information (paperwork) requirements contained in the Anhydrous Ammonia Storage and Handling Standard. There is a change of six burden hours (336 to 342) for documentation by a professional engineer for the safety of the equipment being used in this ICR request.

Type of Review: Revision of a currently approved collection.

Title: Anhydrous Ammonia Storage and Handling Standard.

OMB Number: 1218–0208.

Affected Public: Business or other for-profit; farms.

Number of Respondents: 207,100.

Number of Responses: 2,059.

Frequency of Response: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 342.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at 202–693–1648; or (3) by hard copy. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (OSHA–2010–0050). You may supplement electronic submissions by uploading document files electronically.

Comments and submissions are posted without change at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *https://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC, on October 20, 2023.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–23754 Filed 10–26–23; 8:45 am]

BILLING CODE 4510–26–P

OFFICE OF MANAGEMENT AND BUDGET

Request for Comments on Updated Guidance for Modernizing the Federal Risk Authorization Management Program (FedRAMP)

AGENCY: Office of Management and Budget.

ACTION: Notice of public comment period.

SUMMARY: The Office of Management and Budget (OMB) is seeking public comment on a proposed memorandum titled, *Modernizing the Federal Risk Authorization Management Program (FedRAMP).*

DATES: The public comment period begins on October 27, 2023, and ends November 27, 2023.

ADDRESSES: The proposed memorandum is available at *https://www.cio.gov/policies-and-priorities/FedRAMP/.*

Submission of comments is voluntary. Please submit comments via *https://www.regulations.gov,* a Federal website that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type ''OMB–2023–0021'' in the search box, click ''Search,'' click the ''Comment'' button underneath ''Request for Comments on Proposed Guidance for Modernizing the Federal Risk Authorization Management Program (FedRAMP),'' and follow the instructions for submitting comments. All comments received will be posted to *https://www.regulations.gov,* so commenters should not include information they do not wish to be posted (*e.g.,* personal or confidential business information). Additionally, the OMB System of Records Notice, OMB Public Input System of Records, OMB/INPUT/01 includes a list of routine uses associated with the collection of this information.

FOR FURTHER INFORMATION CONTACT: Carol Bales, OMB, at 202.395.9915 or *cbales@omb.eop.gov* or Eric Mill, at 202.881.7182 or *Eric.R.Mill@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) proposes to issue updated guidance to Federal agencies on the Federal Risk Authorization Management Program (FedRAMP). In December 2011, OMB issued *Security Authorization of Information Systems in Cloud Computing Environments,* establishing the Federal Risk Authorization Management Program to accelerate the secure adoption of cloud services. In 2022, recognizing the value that FedRAMP has provided to Federal agencies and to industry, Congress established FedRAMP in statute through the FedRAMP Authorization Act (''the Act''), 44 U.S.C. 3607–3616, as a program of the General Services Administration (GSA) that is overseen by a Board consisting of technology leaders drawn from Federal agencies.

The Act further provides for OMB to issue guidance to define the categories of cloud products and services within the scope of the FedRAMP program and to describe additional responsibilities of the FedRAMP Program Management Office (PMO) and Board beyond those assigned by the Act. OMB also has a general responsibility under the Act to oversee the effectiveness of FedRAMP and to encourage consistency in agencies' adoption and use of secure cloud services.

The proposed memorandum would support the Biden-Harris Administration's goals for modernizing Federal information technology and has been prepared by the Office of Management and Budget in consultation with key stakeholders.

Clare Martorana,

Federal Chief Information Officer, Office of the Federal Chief Information Officer, Office of Management Budget.

[FR Doc. 2023–23839 Filed 10–26–23; 8:45 am]

BILLING CODE 3110–05–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 23–108]

Heliophysics Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration (NASA) announces a meeting of the Heliophysics Advisory Committee (HPAC). This Committee functions in an advisory capacity to the Director, Heliophysics Division, in the NASA Science Mission Directorate. The meeting will be held for the purpose of soliciting, from the science community and other persons, scientific and technical information relevant to program planning.

DATES: Tuesday, November 14, 2023, 10 a.m.–5 p.m.; Wednesday, November 15, 2023, 9:30 a.m.–5 p.m.; and Thursday, November 16, 2023, 9:30 a.m.–12 p.m. All times are Eastern Time.

FOR FURTHER INFORMATION CONTACT: Ms. KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355 or *karshelia.kinard@nasa.gov*.

SUPPLEMENTARY INFORMATION: This meeting will be virtual. The meeting will take place telephonically and via WebEx. Any interested person must use a touch-tone phone to participate in this meeting. To join by telephone, the numbers are: 1–929–251–9612 or 1–415–527–5035, for each day.

The WebEx link is *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m2c166394b3bdd893949b1a410ce31f40* and the meeting number is 2764 871 5032. The password is pA6QJxWv@83 (72675998 from phones and video systems) (case sensitive), for each day.

The agenda for the meeting includes the following topics:

- Heliophysics Program Annual Performance Review According to the Government Performance and Results Act Modernization Act
- Heliophysics Division Update

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2023–23689 Filed 10–26–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (23–108)]

Heliophysics Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration (NASA) announces a meeting of the Heliophysics Advisory Committee (HPAC). This Committee functions in an advisory capacity to the Director, Heliophysics Division, in the NASA Science Mission Directorate. The meeting will be held for the purpose of soliciting, from the science community and other persons, scientific and technical information relevant to program planning.

DATES: Tuesday, November 14, 2023, 10:00 a.m.–5:00 p.m.; Wednesday, November 15, 2023, 9:30 a.m.–5:00 p.m.; and Thursday, November 16, 2023, 9:30 a.m.–12:00 p.m. All times are Eastern Time.

SUPPLEMENTARY INFORMATION: This meeting will be virtual. The meeting will take place telephonically and via WebEx. Any interested person must use a touch-tone phone to participate in this meeting. To join by telephone, the numbers are: 1–929–251–9612 or 1–415–527–5035, for each day.

The WebEx link is *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m2c166394b3bdd893949b1a410ce31f40* and the meeting number is 2764 871 5032. The password is pA6QJxWv@83 (72675998 from phones and video systems) (case sensitive), for each day.

The agenda for the meeting includes the following topics:

- Heliophysics Program Annual Performance Review According to the Government Performance and Results Act Modernization Act
- Heliophysics Division Update

FOR FURTHER INFORMATION CONTACT: Ms. KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355 or *karshelia.kinard@nasa.gov.*

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2023–23732 Filed 10–26–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (23–109)]

NASA Planetary Science Advisory Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Aeronautics and Space Administration (NASA) announces a meeting of the Planetary Science Advisory Committee. The meeting will be held for the purpose of soliciting, from the scientific community and other persons, scientific and technical information relevant to program planning.

DATES: Monday, November 13, 2023, 10:00 a.m. to 6:00 p.m.; Tuesday, November 14, 2023, 10:00 a.m. to 6:00 p.m. All times are Eastern Time.

FOR FURTHER INFORMATION CONTACT: Ms. KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355 or *karshelia.kinard@nasa.gov.*

SUPPLEMENTARY INFORMATION: The meeting is virtual and will be available telephonically and via WebEx.

For Monday, November 13, 2023, the WebEx information for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m8a802c5d9edc7d6ad33e1d7619898e8e.* The Webinar number is: 2764 696 3398 and the Webinar password is: PACNov-231 (72266803 from phones and video systems). To join by telephone call, use US Toll: +1–415–527–5035 (Access Code: 276 469 63398).

For Tuesday, November 14, 2023, the WebEx information for attendees is: *https://nasaenterprise.webex.com/nasaenterprise/j.php?MTID=m92f001d6fcd685eed0c4af280442d0f3.* The Webinar number is: 2760 033 6624 and the Webinar password is: PACNov–232 (72266803 from phones and video systems). To join by telephone call, use US Toll: +1–415–527–5035 (Access Code: 2760 033 6624).

Accessibility: Captioning will be provided for this meeting. We are committed to providing equal access to this meeting for all participants. If you need alternative formats or other reasonable accommodations, please contact Ms. KarShelia Kinard, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–2355 or *karshelia.kinard@nasa.gov.*

The agenda for the meeting includes the following topics:

—Planetary Science Division Update

—Planetary Science Division Research and Analysis Program Update

—Mars Sample Return Update

—Astrobiology Update

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Patricia Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2023–23789 Filed 10–26–23; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of October 30, November 6, 13, 20, 27, December 4, 2023. The schedule for Commission meetings is subject to change on short notice. The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

PLACE: The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

STATUS: Public.

Members of the public may request to receive the information in these notices electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301–415–1969, or by email at *Betty.Thweatt@nrc.gov.*

MATTERS TO BE CONSIDERED:

Week of October 30, 2023

Thursday, November 2, 2023

9:00 a.m. Strategic Programmatic Overview of the Operating Reactors and New Reactors Business Lines (Public Meeting); (Contact: Jennie Rankin: 301–415–1530)

Additional Information: The meeting will be held in the Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/*

Week of November 6, 2023—Tentative

There are no meetings scheduled for the week of November 6, 2023.

Week of November 13, 2023—Tentative

Thursday, November 16, 2023

9:00 a.m. Briefing on Region I Activities and External Engagement (Public Meeting); (Contact: Wesley Held: 301–287–3591)

Additional Information: The meeting will be held at the Market and Broad Conference Room, 475 Allendale Rd., Suite 102, King of Prussia, Pennsylvania. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/.*

Week of November 20, 2023—Tentative

There are no meetings scheduled for the week of November 20, 2023.

Week of November 27, 2023—Tentative

There are no meetings scheduled for the week of November 27, 2023.

Week of December 4, 2023—Tentative

There are no meetings scheduled for the week of December 4, 2023.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Wesley Held at 301–287–3591 or via email at *Wesley.Held@nrc.gov.*

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: October 25, 2023.

For the Nuclear Regulatory Commission.

Wesley W. Held,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2023–23923 Filed 10–25–23; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0033]

Information Collection: Notices of Enforcement Discretion (NOEDs) for Operating Power Reactors and Gaseous Diffusion Plants (NRC Enforcement Policy)

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''Notices of Enforcement Discretion (NOEDs) for Operating Power Reactors and Gaseous Diffusion Plants (NRC Enforcement Policy).''

DATES: Submit comments by November 27, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0033 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–2023–0033.
- *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.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession Nos. ML22056A177 and ML19193A023. The supporting statement is available in ADAMS under Accession No. ML23177A253.
- *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 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer,

U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

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

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''Notices of Enforcement Discretion (NOEDs) for Operating Power Reactors and Gaseous Diffusion Plants (NRC Enforcement Policy).'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on June 12, 2023, 88 FR 38106.

1. *The title of the information collection:* Notices of Enforcement Discretion (NOEDs) for Operating Power Reactors and Gaseous Diffusion Plants (NRC Enforcement Policy).

2. *OMB approval number:* 3150–0136.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* Not applicable.

5. *How often the collection is required or requested:* On occasion.

6. *Who will be required or asked to respond:* Those licensees that voluntarily request enforcement discretion through the NOED process.

7. *The estimated number of annual responses:* 8 (4 reporting responses + 4 recordkeepers).

8. *The estimated number of annual respondents:* 4.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 680 (600 reporting + 80 recordkeeping).

10. *Abstract:* The NRC's Enforcement Policy includes the circumstances in which the NRC may grant a NOED. On occasion, circumstances arise when a power plant licensee's compliance with a Technical Specification (TS) Limiting Condition for Operation or any other license condition would involve an unnecessary plant shutdown or transient. Similarly, for a gaseous diffusion plant, circumstances may arise where compliance with a Technical Safety Requirement (TSR) or other condition would unnecessarily call for a total plant shutdown, or compliance would unnecessarily place the plant in a condition where safety, safeguards, or security features were degraded or inoperable. In these circumstances, a licensee or certificate holder may request that the NRC exercise enforcement discretion, and the NRC staff may choose to not enforce the applicable TS, TSR, or other license or certificate condition. This enforcement discretion is designated as a NOED. A licensee or certificate holder seeking the issuance of a NOED must justify, in accordance with NRC Enforcement Manual (ADAMS Accession No. ML22056A177), the safety basis for the request, including an evaluation of the safety significance and potential consequences of the proposed request, a description of proposed compensatory measures, a justification for the duration of the request, the basis for the licensee's or certificate holder's conclusion that the request does not have a potential adverse impact on the public health and safety, and does not involve adverse consequences to the environment, and any other information the NRC staff deems necessary before making a decision to exercise discretion.

Dated: October 24, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–23792 Filed 10–26–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0101]

Information Collection: NRC Form 483, Registration Certificate—In Vitro Testing With Byproduct Material Under General License

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, NRC Form 483, ''Registration Certificate—In Vitro Testing with Byproduct Material Under General License.''

DATES: Submit comments by December 26, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0101. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov*. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* David C. Cullison, Office of the Chief Information Officer, Mail Stop: T–6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

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: David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington,

DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0101 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–2023–0101. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2023–0101 on this website.
- *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*. A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML23214A355. The supporting statement is available in ADAMS under Accession No. ML23214A375.
- *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 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov*.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0101, in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

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

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection:* NRC Form 483, Registration Certificate—In Vitro Testing with Byproduct Material Under General License.

2. *OMB approval number:* 3150–0038.

3. *Type of submission:* Extension.

4. *The form number, if applicable:* NRC Form 483.

5. *How often the collection is required or requested:* There is a one-time submittal of information to receive a validated copy of the NRC Form 483 with an assigned registration number. In addition, any changes in the information reported on the NRC Form 483 must be reported in writing to the NRC within 30 days after the effective date of the change.

6. *Who will be required or asked to respond:* Any physician, veterinarian in the practice of veterinary medicine, clinical laboratory, or hospital which desires a general license to receive, acquire, possess, transfer, or use specified units of byproduct material in certain in vitro clinical or laboratory tests.

7. *The estimated number of annual responses:* 3.

8. *The estimated number of annual respondents:* 3.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 0.51 hours annually, (3 registrations/year using NRC Form 483 x 0.17 hrs. per NRC Form 483 = 0.51 hrs.).

10. *Abstract:* Section 31.11 of title 10 of the *Code of Federal Regulations* (10 CFR), established a general license authorizing any physician, clinical laboratory, veterinarian in the practice of veterinary medicine, or hospital to possess certain small quantities of byproduct material for in vitro clinical or laboratory tests not involving the internal or external administration of the byproduct material or the radiation therefrom to human beings or animals. Possession of byproduct material under 10 CFR 31.11 is not authorized until the physician, clinical laboratory, veterinarian in the practice of veterinary medicine, or hospital has filed the NRC Form 483 and received from the Commission a validated copy of the NRC Form 483 with a registration number. The licensee can use the validated copy of the NRC Form 483 to obtain byproduct material from a specifically licensed supplier. The NRC incorporates this information into a database which is used to verify that a general licensee is authorized to receive the byproduct material.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

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

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

Dated: October 24, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–23793 Filed 10–26–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–352 and 50–353; NRC–2023–0182]

Constellation Energy Generation, LLC; Limerick Generating Station, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; opportunity to comment, request a hearing, and petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering issuance of an amendment to Renewed Facility Operating License Nos. NPF–39 and NPF–85, issued to Constellation Energy Generation, LLC, for operation of the Limerick Generating Station, Units 1 and 2 (Limerick). The amendment would make changes to technical specifications (TS) affecting postulated accidents during cold shutdown and refueling operations and make temporary changes to the Limerick TS related to anticipated transients without scram (ATWS) mitigation systems during power production operation.

DATES: Submit comments by November 27, 2023. Request for a hearing or petitions for leave to intervene must be filed by December 26, 2023.

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–2023–0182. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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

FOR FURTHER INFORMATION CONTACT: Nicholas Smith, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2509; email: *Nicholas.Smith@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0182 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–2023–0182.
- *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.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *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 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), 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–2023–0182 in your comment submission.

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

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

II. Introduction

The NRC is considering issuance of an amendment to Renewed Facility Operating License Nos. NPF–39 and NPF–85, issued to Constellation Energy Generation, LLC, for operation of the Limerick Generating Station, Units 1 and 2, located in Montgomery County, Pennsylvania.

In accordance with section 50.90 of title 10 of the *Code of Federal Regulations* (10 CFR) ''Application for amendment of license, construction permit, or early site permit,'' Constellation Energy Generation, LLC (Constellation) requests an amendment to Appendix A, ''Technical Specifications'' of Renewed Facility Operating License Nos. NPF–39 and NPF–85 for Limerick Generating Station, Units 1 and 2, (Limerick) respectively. The proposed TS changes will establish consistency with the Limerick accident analysis and the plant design and support the installation of a digital modification at Limerick during upcoming refueling outages. The proposed Limerick TS changes will temporarily modify TS requirements affecting the mitigation of ATWS events during power production operations, for example, removing the automatic activation of the recirculating pumps for a period of 30 days prior to the refueling outage. The TS requirements for ATWS systems to remain operational and conduct surveillance on automatic activation systems during cold shutdown and refueling operations is temporarily removed so that the systems can be converted from analog to digital. Constellation has evaluated whether a significant hazards consideration is involved with the proposed amendment by focusing on the three conditions set forth in 10 CFR 50.92, ''Issuance of amendment,'' as discussed in the question responses.

Before any issuance of the proposed license amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and NRC's regulations.

The NRC has made a proposed determination that the license amendment request involves no significant hazards consideration (NSHC). Under the NRC's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1)

involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of NSHC, as modified by NRC staff shown in square brackets, which is presented as follows:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

[For changes related to cold shutdown and refuel operations]

The proposed changes revise TS requirements, actions, and testing during cold shutdown and refueling to be consistent with the accident analysis and the plant design. The proposed changes do not change any of the previously evaluated accidents in the Updated Final Safety Analysis Report (UFSAR). None of the accidents previously evaluated in [cold shutdown or refueling] assume a concurrent loss of offsite power or automatic ECCS [emergency core cooling system] initiation. None of the accidents previously evaluated in [cold shutdown and refueling] assume automatic starting of a diesel generator or automatic sequencing of loads on the emergency busses. None of the accidents previously evaluated in [cold shutdown or refueling] assume a manual reactor scram during refueling. None of the accidents previously evaluated assume the reactor equipment interlocks are engaged with the reactor mode switch in Shutdown. Therefore, elimination of these requirements from the TS will have no effect on the likelihood of an accident previously evaluated nor their mitigation. Elimination of the requirement to suspend core alterations with no operable ECCS subsystem in [cold shutdown or refueling] will not affect the initiation of a draining event nor its mitigation.

[For changes related to power production operations]

The proposed changes establish a one-time Anticipated Transient Without Scram Recirculation Pump Trip (ATWS–RPT) LCO [limiting condition for operation] Applicability condition where ATWS–RPT is not required for 30 days under certain plant operational constraints for both channels of ATWS–RPT instrumentation, as well as the applicability and surveillance requirements for the associated Standby Liquid Control System (SLCS) and the Reactor Water Cleanup (RWCU) isolation instrumentation. The ATWS–RPT instrumentation, the SLCS, and RWCU instrumentation are mitigative systems and components. As such, the proposed changes do not impact any accident or event precursors. The probability of an ATWS event occurring does not increase due to this proposed change.

Therefore proposed change[s related to power production operations] do not involve a significant increase in the probability of an accident previously evaluated.

The consequences of the ATWS are not increased since the plant will be operating at a reduced power level [with operational constraints] during the 30 days when ATWS–RPT system is inoperable. The most severe/limiting ATWS events are initiated by a pressurization transient. With SCRAM failure, a pressurization transient can result in a large power spike which may be significantly higher than rated power. The large increase in power exacerbates vessel pressurization.

[. . .]

[Based on the plant operating at a lower power state with operational constraints, and proposed risk mitigation actions being adopted as compensatory measures, there will be no increase in consequences of this type of event. If the mitigation of an ATWS at full power is comparable to that of the ATWS at this lower power state, with the proposed compensatory measures, then there is no significant increase to the consequences of the systems being changed.]

Therefore, proposed change[s related to ATWS mitigation systems in power production operations] [will] not involve a significant increase in the consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

[For changes related to cold shutdown and refuel operations]

The proposed changes revise TS requirements, actions, and testing during cold shutdown and refueling to establish consistency with the accident analysis and the plant design. The proposed changes do not change the assumed design functions of the affected systems in the applicable [cold shutdown and refuel operations]. The proposed changes do not create any credible new accidents as the associated initiating events, such as loss of power and a draining event, are already considered in the licensing basis.

[For changes related to power production operations]

The proposed changes establish a one-time ATWS–RPT LCO Applicability condition where ATWS–RPT is not required for 30 days under certain plant operational constraints for both channels of ATWS–RPT instrumentation, as well as the applicability and surveillance requirements for the associated SLCS and the RWCU isolation instrumentation. These changes impact a mitigating system for an existing transient. As such, the unavailability of this mitigation system would not be considered an initiator of a new or different kind of accident.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

[For changes related to cold shutdown and refuel operations]

The proposed changes revise TS requirements, actions, and testing during cold shutdown and refueling to be consistent with the accident analysis. The proposed changes do not affect the analysis of any accident or event in the plant's licensing basis. The proposed changes do not alter any design basis or safety limit, or any controlling numerical values for parameters established in the UFSAR or the license.

[For changes related to power production operations]

Based on a deterministic sensitivity analysis of the ATWS AOR [abnormal occurrence report], the proposed changes will not cause a significant reduction in the margin of safety provided that the plant is operated at a reduced thermal power level.

The use of available safety related and non-safety related equipment during the 30-day RRCS [Redundant Reactivity Control System] demolition period, at a reduced power level [with operational constraints], will continue to protect the fuel, reactor, and containment from failure during a postulated ATWS event. The fuel cladding barrier is protected via adequate cooling and SLCS injection. The reactor coolant system boundary is protected by ensuring compliance with the ASME emergency class pressure limit of 120% of design pressure. The containment is protected by ensuring the suppression pool pressure and temperature limits are met. Thus, there is no need for any reduction in the margin of safety established in the [Limerick] design and licensing basis for the primary fission product barriers.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

Based on the above, Constellation concludes that the proposed amendments do not involve a significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of no significant hazards consideration is justified.

The NRC staff has reviewed the licensee's analysis, as modified by the NRC staff, and based on this review, the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the license amendment request involves a NSHC.

The NRC is seeking public comments on this proposed determination that the license amendment request involves no significant hazards consideration. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 60-day notice period. However, if circumstances change during the notice period, such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. The Commission expects that the need to take this action will occur very infrequently.

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult 10 CFR 2.309. If a petition is filed, the presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration, which will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 (*https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML20340A053*) and the NRC's public website at *https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate.*

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the ''Guidance for Electronic Submissions to the NRC'' (ADAMS Accession No. ML13031A056) and the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html.*

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *Hearing.Docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or

their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)–(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket, which is publicly available at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendment dated February 17, 2023 (ADAMS Accession No. ML23052A023), as supplemented on July 21, 2023 (ADAMS Accession No. ML23202A219), July 31, 2023 (ADAMS Accession No. ML23212B105), and August 16, 2023 (ADAMS Accession No. ML23228A094).

Attorney for licensee: Jason Zorn, Associate General Counsel, Constellation Energy Generation, LLC, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001.

NRC Branch Chief: Hipolito J. Gonzalez.

Dated: October 24, 2023.

For the Nuclear Regulatory Commission.

Hipolito J. Gonzalez,

Chief, Plant Licensing Branch I, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2023–23766 Filed 10–26–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 030–02278; NRC–2023–0147]

Curators of the University of Missouri; South Farm

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a Finding of No Significant Impact (FONSI) and accompanying Environmental Assessment (EA) for the unrestricted release of the Curators of the University of Missouri South Farm site located in Columbia, Missouri. Based on the analysis in the EA, the NRC staff has concluded that there would be no significant impacts to environmental resources from the proposed unrestricted release and, therefore, a FONSI is appropriate.

DATES: The EA and FONSI referenced in this document are available on October 27, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0147 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0147. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual 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:* 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 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael M. LaFranzo, Region III, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 630–829–9865; email: *Michael.LaFranzo@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

By letter dated November 9, 2018, the Curators of the University of Missouri requested the removal from License 24–00513–32 of the South Farm site located in Columbia, Missouri. The South Farm site, approximately 60 m by 23 m (200 ft by 75 ft), was operated as a chemical waste disposal facility, including the radiological component, between 1969 and 1972. As required by section 51.30 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Environmental Assessment,'' the NRC prepared an EA that documents the NRC staff's independent evaluation of the potential environmental impacts associated with the unrestricted release of the South Farm site. Based on the analysis in the EA, the NRC staff has concluded that there would be no significant impacts to environmental resources from the Curators of the University of Missouri proposal and, therefore, a FONSI is appropriate.

II. Environmental Assessment

Description of the Proposed Action

By application dated November 9, 2018, as supplemented by letters dated

May 8, 2020, November 9, 2020, April 19, 2022, and May 19, 2022, the licensee proposed the unrestricted release and removal from License 24–00513–32 of the South Farm site. The site is approximately 60 m by 23 m (200 ft by 75 ft) and was operated as a chemical waste disposal facility between 1969 and 1972. The chemical waste disposed of at the South Farm site also included a radiological component.

Need for the Proposed Action

Approval of the proposed action would permit additional remediation of the site (soil) for non-radiological constituents at a later time and allow the NRC to fulfill its responsibilities under the Atomic Energy Act of 1954, as amended (AEA), to ensure protection of the public health and safety and the environment by verifying that the site meets the requirements for unrestricted release in 10 CFR 20.1402, ''Radiological criteria for unrestricted use.''

Environmental Impacts of the Proposed Action

The NRC's evaluation of the proposed action is that the South Farm site will have minimal impacts on the environment to include future land use, geology and soils, water resources, ecology, air quality, and noise and will comply with NRC's unrestricted release criteria pursuant to 10 CFR part 20, ''Standards for Protection Against Radiation.''

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.,* the ''no-action'' alternative). An alternate approach is not to release the area for unrestricted use. The consequences could significantly limit the ability of the Curators of the University of Missouri to remediate the site for non-radiological constituents at a later time and allow the NRC to fulfill its responsibilities under the AEA to ensure protection of the public health and safety and the environment.

Alternative Use of Resources

The proposed action does not involve any different environmental resources beyond those considered in the final environmental statement.

Agencies and Persons Consulted

Between May 9, 2020, and May 19, 2022, the NRC staff consulted with the State of Missouri's Radiological Control Department regarding the environmental impact of the proposed action. The State of Missouri's Radiological Control Department made comments which were addressed by NRC staff. On May 19, 2022, the State indicated that they did not have additional comments for consideration.

III. Finding of No Significant Impact

The NRC staff has concluded that the proposed licensing action, to release the South Farm disposal area as designated by the Curators of the University of Missouri for unrestricted use, would not significantly affect the quality of the human environment. The NRC staff considered the impacts on land use, transportation, geology and soils, water resources, ecology, air quality, noise, historical and cultural resources, visual and scenic resources, socioeconomic resources, public and occupational health, and waste management and concluded that radiological doses to members of the public would be below applicable limits in 10 CFR part 20. On the basis of the EA, the NRC finds that there are no significant environmental impacts from the action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a FONSI is appropriate. In accordance with 10 CFR 51.32(a)(4), this FONSI incorporates the EA set forth in this notice by reference.

IV. 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 description	ADAMS accession No.
Curators of the University of Missouri—Columbia—Decommissioning Amendment Request—Partial Site Release of South Farm, dated November 9, 2018.	ML18318A032.
Request for Comments on Draft Environmental Assessment and Safety Evaluation Report for Proposed Decommissioning Project at South Farm site, Curators of the University of Missouri—Columbia of Missouri, dated May 8, 2020.	ML20127H882 (non-public, withheld pursuant to 10 CFR 2.390).
Request for Comments on Draft Environmental Assessment and Safety Evaluation Report for Proposed Decommissioning Project at South Farm Site, Curators of the University of Missouri—Columbia, Columbia, Missouri, and the Dose Assessment for the South Farm—License No. 24–00513–32, dated November 9, 2020.	ML20329A267 (non-public, withheld pursuant to 10 CFR 2.390).
Comment Resolution on Draft Environmental Assessment and Safety Evaluation Report for the Proposed Decommissioning Project at South Farm Site, Curators of the University of Missouri—Columbia; Columbia, Missouri, and the Dose Assessment for South Farm—License Number 24–00513–32, dated April 19, 2022.	ML21299A026 (non-public, withheld pursuant to 10 CFR 2.390).
Response to Comment Resolution on Draft Environmental Assessment and Safety Evaluation Report for the Proposed Decommissioning Project at South Farm Site, Curators of the University of Missouri—Columbia; Columbia, Missouri, and the Dose Assessment for South Farm—License Number 24–00513–32, dated May 19, 2022.	ML22146A346.
Environmental Assessment for Release of South Farm Site at Curators of the University of Missouri, Columbia, Missouri; Materials License 24-0051332, Docket 030–02278.	ML23279A056.
Safety Evaluation Report for Release of South Farm Site at the Curators of the University of Missouri, Columbia, Missouri; Materials License 24–00513–32, Docket 030–02278.	ML23278A150.

Dated: October 23, 2023.

For the Nuclear Regulatory Commission.

Michael M. LaFranzo,

Senior Health Physicist, Decommissioning, Reactors, ISFSI and Health Physics Branch, Division of Radiological Safety and Security, Region III.

[FR Doc. 2023–23695 Filed 10–26–23; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Disclosure of Termination Information

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 (OMB) extend approval, under the Paperwork Reduction Act, of a collection of information on the disclosure of termination information

under its regulations for distress terminations and for PBGC–initiated terminations (OMB control number 1212–0065; expires April 30, 2024). 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 December 26, 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 Disclosure of Termination Information 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 Disclosure of Termination Information. All comments received will be posted without change to PBGC's website, *http://www.pbgc.gov,* including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

Copies of the collection of information may be obtained without charge by writing to the 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: Monica O'Donnell (*o'donnell.monica@pbgc.gov*), Law Clerk, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington DC 20024–2101; 202–229–8706. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Sections 4041 and 4042 of the Employee Retirement Income Security Act of 1974, as amended (''ERISA''), 29 U.S.C 1301–1461, govern the termination of single-employer defined benefit pension plans that are subject to title IV of ERISA. A plan administrator may initiate a distress termination pursuant to section 4041(c), and PBGC may itself initiate proceedings to terminate a pension plan under section 4042 if PBGC determines that certain conditions are present. Under sections 4041 and 4042 of ERISA, upon a request by an affected party, a plan administrator must disclose information it has submitted to PBGC in connection with a distress termination filing, and a plan administrator or plan sponsor must disclose information it has submitted to PBGC in connection with a PBGC-initiated termination. The provisions also require PBGC to disclose the administrative record relating to a PBGC-initiated termination upon request by an affected party.

The existing collection of information was approved through April 30, 2024, under OMB control number 1212–0065. PBGC intends to request that OMB extend its approval of this collection of information for 3 years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC estimates that approximately 30 plans will terminate as distress or PBGC-initiated terminations each year and that two participants or other affected parties of every nine distress terminations or PBGC-initiated terminations filed will annually make requests for termination information, or $\frac{2}{9}$ of 30 (approximately 7 per year). PBGC estimates that the hour burden for each request will be about 20 hours. PBGC expects that the staff of plan administrators and sponsors will perform the work in-house and that no work will be contracted to third parties. The total annual hour burden is estimated to be 140 hours (7 plans × 20 hours), and the total annual cost burden is estimated to be $0.

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.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2023–23722 Filed 10–26–23; 8:45 am]

BILLING CODE 7709–02–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2024–21 and CP2024–21; MC2024–22 and CP2024–22; MC2024–23 and CP2024–23; MC2024–24 and CP2024–24]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 30, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the

modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*https://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2024–21 and CP2024–21; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 81 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 20, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* October 30, 2023.

2. *Docket No(s).:* MC2024–22 and CP2024–22; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 82 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 20, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* October 30, 2023.

3. *Docket No(s).:* MC2024–23 and CP2024–23; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 83 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 20, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* October 30, 2023.

4. *Docket No(s).:* MC2024–24 and CP2024–24; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 84 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* October 20, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* October 30, 2023.

This Notice will be published in the **Federal Register**.

Mallory S. Richards,

Attorney-Advisor.

[FR Doc. 2023–23709 Filed 10–26–23; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98784; File No. SR–C2–2023–022]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

October 23, 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 October 13, 2023, Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe C2 Exchange, Inc. (the ''Exchange'' or ''C2 Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Trading Permit Holders (''TPHs'') and non-TPHs on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gbps'') circuit and $7,500 per physical port for a 10 Gbps circuit. The Exchange proposes to increase the monthly fee for 10 Gbps physical ports from $7,500 to $8,500 per

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–C2–2023–014). On September 1, 2023, the Exchange withdrew that filing and submitted SR–C2–2023–020. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–C2–2023–021). On October 13, 2023, the Exchange withdrew that filing and submitted this filing. No comment letters were received in connection with any of the foregoing rule filings.

port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: Cboe BZX Exchange, Inc. (options and equities platforms), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe EDGA Exchange, Inc., (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its TPHs and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gbps physical ports. Further, the current 10 Gbps physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gbps physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, TPHs are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gbps physical ports and charging a higher fee as compared to the 1 Gbps physical port is equitable as the 1 Gbps physical port is 1/10th the size of the 10 Gbps physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gbps alternative is lower than the value of the 10 Gbps alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gbps physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gbps physical ports is reasonably and appropriately allocated.

The Exchange also notes TPHs and non-TPHs will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a TPH of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that 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, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 17 registered options exchanges that trade options (13 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately

[4] *See e.g.*, The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83455 (June 15, 2018), 83 FR 28892 (June 21, 2018) (SR–C2–2018–014).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[13] *Id.*

20% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 4 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, MIAX Emerald LLC, and most recently, MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 52 TPHs, Cboe BZX has 61 members that trade options, and Cboe EDGX has 51 members that trade options. There is also no firm that is a Member of C2 Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-TPHs also resell exchange 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 connectivity fees), which alternative is already being used by non-TPHs and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.[19] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of TPHs that connect to the Exchange indirectly via the third-party).[20] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple TPHs are able to share a single physical port (and corresponding bandwidth) with other non-affiliated TPHs if purchased through a third-party reseller.[21] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. As such, even firms that wish to utilize a single, dedicated 10 Gbps port (*i.e.,* use one single 10 Gbps port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller because such reseller may be providing additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). Further, as noted above, 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. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[22]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 13 non-Cboe affiliated options markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (October 13, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[20] *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).

[21] For example, a third-party reseller may purchase one 10 Gbps physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gbps each and leverage the same single port.

[22] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated TPHs equally (i.e., all market participants that choose to purchase the 10 Gbps physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gbps physical port (which cost is not changing) or may choose to obtain access via a third-party reseller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gbps physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [23] and paragraph (f) of Rule 19b–4 [24] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–C2–2023–022 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–C2–2023–022. 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–C2–2023–022 and should be submitted on or before November 17, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23706 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4(f).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98780; File No. SR–NYSEARCA–2023–70]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade Shares of the Grayscale Ethereum Trust Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)

October 23, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 10, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following under NYSE Arca Rule 8.201–E: Grayscale Ethereum Trust (ETH) (the ''Trust'').[4] The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under NYSE Arca Rule 8.201–E, the Exchange may propose to list and/or trade pursuant to unlisted trading privileges ''Commodity-Based Trust Shares.'' [5] The Exchange proposes to list and trade shares (''Shares'') [6] of the Trust pursuant to NYSE Arca Rule 8.201–E.[7]

The Trust is the world's largest Ethereum (''ETH'') investment fund by assets under management as of the date of this filing. The Trust has approximately $4.8 billion in assets under management [8] (representing 2.5% of all ETH in circulation), its Shares trade millions of dollars in daily volume and are held by more than a quarter of a million American investor accounts seeking exposure to ETH without the cost and complexity of purchasing the asset directly. However, because the Trust is not currently listed as an exchange-traded product (''ETP''), the value of the Shares has not been able to closely track the value of the Trust's underlying ETH. The Sponsor thus believes that allowing Shares of the Trust to list and trade on the Exchange as an ETP (*i.e.,* converting the Trust to a spot Ethereum ETP) would unlock over $1.6 billion of value [9] for the Trust's shareholders and provide other investors with a safe and secure way to invest in ETH on a regulated national securities exchange.

The sponsor of the Trust is Grayscale Investments, LLC (''Sponsor''), a Delaware limited liability company. The Sponsor is a wholly owned subsidiary of Digital Currency Group, Inc. (''Digital Currency Group''). The trustee for the Trust is Delaware Trust Company (''Trustee''). The custodian for the Trust is Coinbase Custody Trust Company, LLC (''Custodian'').[10] The distribution and marketing agent for the Trust is Grayscale Securities, LLC (the ''Marketing Agent''). The index provider for the Trust is CoinDesk Indices, Inc. (the ''Index Provider'').

The Trust is a Delaware statutory trust, formed on December 13, 2017, that operates pursuant to a trust agreement between the Sponsor and the Trustee (''Trust Agreement''). The Trust has no fixed termination date.

Operation of the Trust

According to the Annual Report, the Trust's assets consist solely of ETH, Incidental Rights,[11] IR Virtual Currency,[12] proceeds from the sale of ETH, Incidental Rights, and IR Virtual Currency pending use of such cash for payment of Additional Trust Expenses [13] or distribution to

[4] The Trust was previously named Ethereum Investment Trust, whose name was changed pursuant to a Certificate of Amendment to the Certificate of Trust of Ethereum Investment Trust filed with the Delaware Secretary of State on January 11, 2019.

[5] Commodity-Based Trust Shares are securities issued by a trust that represent investors' discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the Trust.

[6] The Shares are expected to be listed under the ticker symbol ''ETH.''

[7] On April 17, 2020, the Trust confidentially filed its draft registration statement on Form 10 under the '34 Act) (File No. 377–03131) (the ''Draft Registration Statement on Form 10''). On June 16, 2020, the Trust confidentially filed Amendment No. 1 to the Draft Registration Statement on Form 10. The Jumpstart Our Business Startups Act (the ''JOBS Act''), enacted on April 5, 2012, added Section 6(e) to the Securities Act of 1933 (the ''Securities Act'' or '''33 Act''). Section 6(e) of the Securities Act provides that an ''emerging growth company'' may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than $1,000,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently submitted its Draft Registration Statement on Form 10 to the Commission on a confidential basis. On August 6, 2020, the Trust filed its registration statement on Form 10 under the Securities Act (File No. 000–56193) (the ''Registration Statement on Form 10''). On October 2, 2020, the Trust filed Amendment No. 1 to the Registration Statement on Form 10. On, October 5, 2020, the Registration Statement on Form 10 was automatically deemed effective. On March 5, 2021, February 25, 2022, and March 1, 2023, the Trust filed its annual report on Form 10–K under the Securities Act (File No. 000–56193) (the ''Annual Reports''). On November 6, 2020, May 7, 2021, August 6, 2021, November 5, 2021, May 6, 2022, August 5, 2022, November 4, 2022, May 5, 2023 and August 4, 2023, the Trust filed its quarterly reports on Form 10–Q under the Securities Act (File No. 000–56193) (the ''Quarterly Reports''). The descriptions of the Trust, the Shares, and ETH contained herein are based, in part, on the Annual Reports and Quarterly Reports. On January 17, 2019, the Trust submitted to the Commission an amended Form D as a business trust. Shares of the Trust have been quoted on OTC Market's OTCQX Best Marketplace under the symbol ''ETHE'' since June 20, 2019. On May 23, 2019 and March 20, 2020, the Trust published annual reports for ETHE for the periods ended December 31, 2018 and December 31, 2019, respectively. On May 23, 2019, August 8, 2019, November 11, 2019, May 8, 2020, and August 6, 2020, the Trust published quarterly reports for ETHE for the periods ended March 31, 2019, June 30, 2019, September 30, 2019, March 31, 2020, and June 30, 2020, respectively. Reports published before October 5, 2020, the date on which the Trust's Shares became registered pursuant to Section 12(g) of the Act, can be found on OTC Market's website (*https://www.otcmarkets.com/stock/ETHE/disclosure*), and reports published on or after October 5, 2020 can be found on OTC Market's website and the Commission's website (*https://www.sec.gov/edgar/browse/?CIK=1725210&owner=exclude*). The Shares will be of the same class and will have the same rights as shares of ETHE. According to the Sponsor, freely tradeable shares of ETHE will remain freely tradeable Shares on the date of the listing of the Shares that are unregistered under the Securities Act. Restricted shares of ETHE will remain subject to private placement restrictions on such date, and the holders of such restricted shares will continue to hold those Shares subject to those restrictions until they become freely tradable Shares.

[8] As of September 28, 2023.

[9] As of September 28, 2023.

[10] According to the Annual Report, Digital Currency Group owns a minority interest in Coinbase, Inc., which is the parent company of the Custodian, representing less than 1.0% of its equity.

[11] ''Incidental Rights'' are rights to acquire, or otherwise establish dominion and control over, any virtual currency or other asset or right, which rights are incident to the Trust's ownership of ETH and arise without any action of the Trust, or of the Sponsor or Trustee on behalf of the Trust.

[12] ''IR Virtual Currency'' is any virtual currency tokens, or other asset or right, acquired by the Trust through the exercise (subject to the applicable provisions of the Trust Agreement) of any Incidental Right.

[13] ''Additional Trust Expenses'' are any expenses incurred by the Trust in addition to the Sponsor's Fee that are not Sponsor-paid Expenses, including, but not limited to, (i) taxes and governmental charges, (ii) expenses and costs of any extraordinary services performed by the Sponsor (or any other service provider) on behalf of the Trust to protect the Trust or the interests of shareholders (including in connection with any Incidental Rights, any IR Virtual Currency, or any other staking consideration), (iii) any indemnification of the Custodian or other agents, service providers or counterparties of the Trust, (iv) the fees and

Continued

shareholders, and any rights of the Trust pursuant to any agreements, other than the Trust Agreement, to which the Trust is a party. Each Share represents a proportional interest, based on the total number of Shares outstanding, in each of the Trust's assets as determined by reference to the Index Price,[14] less the Trust's expenses and other liabilities (which include accrued but unpaid fees and expenses). The Sponsor expects that the market price of the Shares will fluctuate over time in response to the market prices of ETH. In addition, because the Shares reflect the estimated accrued but unpaid expenses of the Trust, the number of ETH represented by a Share will gradually decrease over time as the Trust's ETH are used to pay the Trust's expenses. The Trust does not expect to take any Incidental Rights or IR Virtual Currency it may hold into account for purposes of determining the Trust's ''Digital Asset Holdings'' (as described below) or the Digital Asset Holdings per Share.

The activities of the Trust are limited to (i) issuing ''Baskets'' (as defined below) in exchange for ETH transferred to the Trust as consideration in connection with creations, (ii) transferring or selling ETH, Incidental Rights, IR Virtual Currency, or any other staking consideration as necessary to cover the ''Sponsor's Fee'' and/or certain Trust expenses, (iii) transferring ETH in exchange for Baskets surrendered for redemption (subject to obtaining regulatory approval from the SEC and approval of the Sponsor), (iv) causing the Sponsor to sell ETH, Incidental Rights, IR Virtual Currency, or any other staking consideration on the termination of the Trust, (v) making distributions of Incidental Rights, IR Virtual Currency, and/or any other staking consideration, or cash from the sale thereof, and (vi) engaging in all administrative and security procedures necessary to accomplish such activities in accordance with the provisions of the Trust Agreement, the Custodian Agreement, the Index License Agreement, and the Participant Agreements.

In addition, the Trust may engage in any lawful activity necessary or desirable in order to facilitate shareholders' access to Incidental Rights or IR Virtual Currency, provided that such activities do not conflict with the terms of the Trust Agreement. The Trust will not be actively managed. It will not engage in any activities designed to obtain a profit from, or to ameliorate losses caused by, changes in the market prices of ETH.

Investment Objective

According to the Annual Report, and as further described below, the Trust's investment objective is for the value of the Shares (based on ETH per Share) to reflect the value of the ETH held by the Trust, determined by reference to the Index Price, less the Trust's expenses and other liabilities. While an investment in the Shares is not a direct investment in ETH, the Shares are designed to provide investors with a cost-effective and convenient way to gain investment exposure to ETH. A substantial direct investment in ETH may require expensive and sometimes complicated arrangements in connection with the acquisition, security and safekeeping of the ETH and may involve the payment of substantial fees to acquire such ETH from third-party facilitators through cash payments of U.S. dollars. Because the value of the Shares is correlated with the value of ETH held by the Trust, it is important to understand the investment attributes of, and the market for, ETH.

ETH and the Ethereum Network [15]

According to the Annual Report, Ethereum, or ETH, is a digital asset that is created and transmitted through the operations of the peer-to-peer ''Ethereum Network,'' a decentralized network of computers that operates on cryptographic protocols. No single entity owns or operates the Ethereum Network, the infrastructure of which is collectively maintained by a decentralized user base. The Ethereum Network allows people to exchange tokens of value, called Ether, which are recorded on a public transaction ledger known as a blockchain. ETH can be used to pay for goods and services, including computational power on the Ethereum network, or it can be converted to fiat currencies, such as the U.S. dollar, at rates determined on ''Digital Asset Exchanges'' [16] that trade ETH or in individual end-user-to-end-user transactions under a barter system.

Furthermore, the Ethereum Network also allows users to write and implement smart contracts—that is, general-purpose code that executes on every computer in the network and can instruct the transmission of information and value based on a sophisticated set of logical conditions. Using smart contracts, users can create markets, store registries of debts or promises, represent the ownership of property, move funds in accordance with conditional instructions and create digital assets other than ETH on the Ethereum Network. Smart contract operations are executed on the Ethereum Blockchain in exchange for payment of ETH. The Ethereum Network is one of a number of projects intended to expand blockchain use beyond just a peer-to-peer money system.

The Ethereum Network went live on July 30, 2015. Unlike other digital assets, such as Bitcoin, which are solely created through a progressive mining process, 72.0 million ETH were created in connection with the launch of the Ethereum Network. At the time of the network launch, a non-profit called the Ethereum Foundation was the sole organization dedicated to protocol development.

The Ethereum Network is decentralized in that it does not require governmental authorities or financial institution intermediaries to create, transmit, or determine the value of ETH. Rather, following the initial distribution of ETH, ETH is created, burned, and allocated by the Ethereum Network protocol through a process that is currently subject to an issuance and burn rate. The value of ETH is determined by the supply of and demand for ETH on the Digital Asset Exchanges or in private end-user-to-end-user transactions.

New ETH are created and rewarded to the validators of a block in the Ethereum Blockchain for verifying transactions. The Ethereum Blockchain is effectively a decentralized database that includes all blocks that have been validated, and it is updated to include new blocks as they are validated. Each ETH transaction is broadcast to the Ethereum Network and, when included in a block,

expenses related to the listing, quotation or trading of the Shares on any Secondary Market (including legal, marketing and audit fees and expenses) to the extent exceeding $600,000 in any given fiscal year and (v) extraordinary legal fees and expenses, including any legal fees and expenses incurred in connection with litigation, regulatory enforcement or investigation matters.

[14] The ''Index Price'' means the U.S. dollar value of an ETH derived from the Digital Asset Exchanges that are reflected in the Index, calculated at 4:00 p.m., New York time, on each business day. For purposes of the Trust Agreement, the term ETH Index Price has the same meaning as the Index Price as defined herein.

[15] The description of ETH and the Ethereum Network in this section was provided by the Sponsor and is based on the Annual Report.

[16] A ''Digital Asset Market'' is a ''Brokered Market,'' ''Dealer Market,'' ''Principal-to-Principal Market'' or ''Exchange Market,'' as each such term is defined in the Financial Accounting Standards Board Accounting Standards Codification Master Glossary. The ''Digital Asset Exchange Market'' is the global exchange market for the trading of ETH, which consists of transactions on electronic Digital Asset Exchanges. A ''Digital Asset Exchange'' is an electronic marketplace where exchange participants may trade, buy and sell ETH based on bid-ask trading. The largest Digital Asset Exchanges are online and typically trade on a 24-hour basis, publishing transaction price and volume data.

recorded in the Ethereum Blockchain. As each new block records outstanding ETH transactions, and outstanding transactions are settled and validated through such recording, the Ethereum Blockchain represents a complete, transparent and unbroken history of all transactions of the Ethereum Network.

Among other things, ETH is used to pay for transaction fees and computational services (*i.e.,* smart contracts) on the Ethereum Network; users of the Ethereum Network pay for the computational power of the machines executing the requested operations with ETH. Requiring payment in ETH on the Ethereum Network incentivizes developers to write quality applications and increases the efficiency of the Ethereum Network because wasteful code costs more, while also ensuring that the Ethereum Network remains economically viable by compensating for contributed computational resources.

Smart Contracts and Development on the Ethereum Network

Smart contracts are programs that run on a blockchain that can execute automatically when certain conditions are met. Smart contracts facilitate the exchange of anything representative of value, such as money, information, property, or voting rights. Using smart contracts, users can send or receive digital assets, create markets, store registries of debts or promises, represent ownership of property or a company, move funds in accordance with conditional instructions and create new digital assets.

Development on the Ethereum Network involves building more complex tools on top of smart contracts, such as decentralized apps (''DApps''); organizations that are autonomous, known as decentralized autonomous organizations (''DAOs''); and entirely new decentralized networks. For example, a company that distributes charitable donations on behalf of users could hold donated funds in smart contracts that are paid to charities only if the charity satisfies certain pre-defined conditions.

Moreover, the Ethereum Network has also been used as a platform for creating new digital assets and conducting their associated initial coin offerings. As of June 30, 2023, a majority of digital assets were built on the Ethereum Network, with such assets representing a significant amount of the total market value of all digital assets.

More recently, the Ethereum Network has been used for decentralized finance (''DeFi'') or open finance platforms, which seek to democratize access to financial services, such as borrowing, lending, custody, trading, derivatives and insurance, by removing third-party intermediaries. DeFi can allow users to lend and earn interest on their digital assets, exchange one digital asset for another and create derivative digital assets such as stablecoins, which are digital assets pegged to a reserve asset such as fiat currency. Over the course of 2022, between $20 billion and $98 billion worth of digital assets were locked up as collateral on DeFi platforms on the Ethereum Network.[17]

In addition, the Ethereum Network and other smart contract platforms have been used for creating non-fungible tokens, or ''NFTs.'' Unlike digital assets native to smart contract platforms that are fungible and enable the payment of fees for smart contract execution, NFTs allow for digital ownership of assets that convey certain rights to other digital or real-world assets. This new paradigm allows users to own rights to other assets through NFTs, which enable users to trade them with others on the Ethereum Network. For example, an NFT may convey rights to a digital asset that exists in an online game or a Dapp, and users can trade their NFT in the Dapp or game, and carry them to other digital experiences, creating an entirely new free-market, internet-native economy that can be monetized in the physical world.

Overview of the Ethereum Network's Operations

In order to own, transfer, or use ETH directly on the Ethereum Network (as opposed to through an intermediary, such as a custodian), a person generally must have internet access to connect to the Ethereum Network. ETH transactions may be made directly between end-users without the need for a third-party intermediary. To prevent the possibility of double-spending ETH, a user must notify the Ethereum Network of the transaction by broadcasting the transaction data to its network peers. The Ethereum Network provides confirmation against double-spending by memorializing every transaction in the Ethereum Blockchain, which is publicly accessible and transparent. This memorialization and verification against double-spending is accomplished through the Ethereum Network validation process, which adds ''blocks'' of data, including recent transaction information, to the Ethereum Blockchain.

[17] DeFiLlama, ''Ethereum Total Value Locked,'' *https://defillama.com/chain/Ethereum.*

Summary of an ETH Transaction

Prior to engaging in ETH transactions directly on the Ethereum Network, a user generally must first install on its computer or mobile device an Ethereum Network software program that will allow the user to generate a private and public key pair associated with an ETH address, commonly referred to as a ''wallet.'' The Ethereum Network software program and the ETH address also enable the user to connect to the Ethereum Network and transfer ETH to, and receive ETH from, other users.

Each Ethereum Network address, or wallet, is associated with a unique ''public key'' and ''private key'' pair. To receive ETH, the ETH recipient must provide its public key to the party initiating the transfer. This activity is analogous to a recipient for a transaction in U.S. dollars providing a routing address in wire instructions to the payor so that cash may be wired to the recipient's account. The payor approves the transfer to the address provided by the recipient by ''signing'' a transaction that consists of the recipient's public key with the private key of the address from where the payor is transferring the ETH. The recipient, however, does not make public or provide to the sender its related private key.

Neither the recipient nor the sender reveals their private keys in a transaction, because the private key authorizes transfer of the funds in that address to other users. Therefore, if a user loses his private key, the user may permanently lose access to the ETH contained in the associated address. Likewise, ETH is irretrievably lost if the private key associated with them is deleted and no backup has been made. When sending ETH, a user's Ethereum Network software program must validate the transaction with the associated private key. In addition, since every computation on the Ethereum Network requires processing power, there is a transaction fee involved with the transfer that is paid by the payor. The resulting digitally validated transaction is sent by the user's Ethereum Network software program to the Ethereum Network validators to allow transaction confirmation.

Ethereum Network validators record and confirm transactions when they validate and add blocks of information to the Ethereum Blockchain. In proof-of-stake, validators compete to be randomly selected to validate transactions. When a validator is selected to validate a block, it creates that block, which includes data relating to (i) the verification of newly submitted

and accepted transactions and (ii) a reference to the prior block in the Ethereum Blockchain to which the new block is being added. The validator becomes aware of outstanding, unrecorded transactions through the data packet transmission and distribution discussed above.

Upon the addition of a block included in the Ethereum Blockchain, the Ethereum Network software program of both the spending party and the receiving party will show confirmation of the transaction on the Ethereum Blockchain and reflect an adjustment to the ETH balance in each party's Ethereum Network public key, completing the ETH transaction. Once a transaction is confirmed on the Ethereum Blockchain, it is irreversible.

Some ETH transactions are conducted ''off-blockchain'' and are therefore not recorded in the Ethereum Blockchain. Some ''off-blockchain transactions'' involve the transfer of control over, or ownership of, a specific digital wallet holding ETH or the reallocation of ownership of certain ETH in a pooled-ownership digital wallet, such as a digital wallet owned by a Digital Asset Exchange. In contrast to on-blockchain transactions, which are publicly recorded on the Ethereum Blockchain, information and data regarding off-blockchain transactions are generally not publicly available. Therefore, off-blockchain transactions are not truly ETH transactions in that they do not involve the transfer of transaction data on the Ethereum Network and do not reflect a movement of ETH between addresses recorded in the Ethereum Blockchain. For these reasons, off-blockchain transactions are subject to risks, as any such transfer of ETH ownership is not protected by the protocol behind the Ethereum Network or recorded in, and validated through, the blockchain mechanism.

Creation of New ETH

Initial Creation of ETH

Unlike other digital assets such as Bitcoin, which are solely created through a progressive mining process, 72.0 million ETH were created in connection with the launch of the Ethereum Network. The initial 72.0 million ETH were distributed as follows:

Initial Distribution: 60.0 million ETH, or 83.33% of the supply, were sold to the public in a crowd sale conducted between July and August 2014 that raised approximately $18 million.

Ethereum Foundation: 6.0 million ETH, or 8.33% of the supply, were distributed to the Ethereum Foundation for operational costs.

Ethereum Developers: 3.0 million ETH, or 4.17% of the supply, were distributed to developers who contributed to the Ethereum Network.

Developer Purchase Program: 3.0 million ETH, or 4.17% of the supply, were distributed to members of the Ethereum Foundation to purchase at the initial crowd sale price.

Following the launch of the Ethereum Network, ETH supply initially increased through a progressive mining process. Following the introduction of EIP–1559, described below, ETH supply and issuance rate varies based on factors such as recent use of the network.

Proof-of-Work Mining Process

Prior to September 2022, Ethereum operated using a proof-of-work consensus mechanism. Under proof-of-work, in order to incentivize those who incurred the computational costs of securing the network by validating transactions, there was a reward given to the computer that was able to create the latest block on the chain. Every 12 seconds, on average, a new block was added to the Ethereum Blockchain with the latest transactions processed by the network, and the computer that generated this block was awarded a variable amount of ETH, depending on use of the network at the time. In certain mining scenarios, referred to as an uncle/aunt reward, ETH was sometimes sent to another miner if they were also able to find a solution, but their block was not included. Due to the nature of the algorithm for block generation, this process (generating a ''proof-of-work'') was guaranteed to be random. The process by which a digital asset was ''mined'' resulted in new blocks being added to such digital asset's blockchain and new digital assets being issued to the miners. Prior to the Merge upgrade, described below, computers on the Ethereum Network engaged in a set of prescribed complex mathematical calculations in order to add a block to the Ethereum Blockchain and thereby confirm ETH transactions included in that block's data.

Proof-of-Stake Process

In the second half of 2020, the Ethereum Network began the first of several stages of an upgrade that was initially known as ''Ethereum 2.0'' and eventually became known as the ''Merge'' to transition the Ethereum Network from a proof-of-work consensus mechanism to a proof-of-stake consensus mechanism. The Merge was completed on September 15, 2022, and the Ethereum Network has operated on a proof-of-stake model since such time.

Unlike proof-of-work, in which miners expend computational resources to compete to validate transactions and are rewarded coins in proportion to the amount of computational resources expended, in proof-of-stake, miners (sometimes called validators) risk or ''stake'' coins to compete to be randomly selected to validate transactions and are rewarded coins in proportion to the amount of coins staked. Any malicious activity, such as validating multiple blocks, disagreeing with the eventual consensus, or otherwise violating protocol rules, results in the forfeiture or ''slashing'' of a portion of the staked coins. Proof-of-stake is viewed as more energy efficient and scalable than proof-of-work and is sometimes referred to as ''virtual mining.'' Every 12 seconds, approximately, a new block is added to the Ethereum Blockchain with the latest transactions processed by the network, and the validator that generated this block is awarded ETH.

Limits on ETH Supply

The rate at which new ETH are issued and put into circulation is expected to vary. Following the Merge, approximately 1,700 ETH are issued per day, though the issuance rate varies based on the number of validators on the network. In addition, the issuance of new ETH could be partially or completely offset by the burn mechanism introduced by the EIP–1559 modification, under which ETH are removed from supply at a rate that varies with network usage. On occasion, the ETH supply has been deflationary over a 24-hour period as a result of the burn mechanism. The attributes of the new consensus algorithm are subject to change, but in sum, the new consensus algorithm and related modifications reduced total new ETH issuances and could turn the ETH supply deflationary over the long term.

As of June 30, 2023, approximately 120 million ETH were outstanding.[18]

Modifications to the ETH Protocol

The Ethereum Network is an open source project with no official developer or group of developers that controls it. However, historically the Ethereum Network's development has been overseen by the Ethereum Foundation and other core developers. The Ethereum Foundation and core developers are able to access and alter the Ethereum Network source code and,

[18] CoinMarketCap, ''Ethereum,'' *https://coinmarketcap.com/currencies/ethereum/.*

as a result, they are responsible for quasi-official releases of updates and other changes to the Ethereum Network's source code.

For example, in 2019, the Ethereum Network completed a network upgrade called Metropolis that was designed to enhance the usability of the Ethereum Network and was introduced in two stages. The first stage, called Byzantium, was implemented in October 2017. The purpose of Byzantium was to increase the network's privacy, security, and scalability and reduce the block reward from 5.0 ETH to 3.0 ETH. The second stage, called Constantinople, was implemented in February 2019, along with another upgrade, called St. Petersburg. Another network upgrade, called Istanbul, was implemented in December 2019. The purpose of Istanbul was to make the network more resistant to denial of service attacks, enable greater ETH and Zcash interoperability as well as other Equihash-based proof-of-work digital assets, and to increase the scalability and performance for solutions on zero-knowledge privacy technology like SNARKs and STARKs. The purpose of these upgrades was to prepare the Ethereum Network for the introduction of a proof-of-stake algorithm and reduce the block reward from 3.0 ETH to 2.0 ETH. In the second half of 2020, the Ethereum Network began the first of several stages of an upgrade culminating in the Merge. The Merge amended the Ethereum Network's consensus mechanism to include proof-of-stake. Forthcoming upgrades will include sharding. The purpose of sharding is to increase scalability of a database, such as a blockchain, by splitting the data processing responsibility among many nodes, allowing for parallel processing and validation of transactions. This contrasts with the existing Ethereum Blockchain, which requires each node to process and validate every transaction.

In 2021, the Ethereum network implemented the EIP–1559 upgrade. EIP–1559 changed the methodology used to calculate the fees paid to miners (now validators). This new methodology splits fees into two components: a base cost and priority fee. The base cost is now removed from circulation, or ''burnt'', and the priority fee is paid to validators. EIP–1559 has reduced the total net issuance of ETH fees to validators. The release of updates to the Ethereum Network's source code does not guarantee that the updates will be automatically adopted. Users and validators must accept any changes made to the Ethereum source code by downloading the proposed modification of the Ethereum Network's source code. A modification of the Ethereum Network's source code is only effective with respect to the Ethereum users and validators that download it. If a modification is accepted only by a percentage of users and validators, a division in the Ethereum Network will occur such that one network will run the pre-modification source code and the other network will run the modified source code. Such a division is known as a ''fork.'' Consequently, as a practical matter, a modification to the source code becomes part of the Ethereum Network only if accepted by participants collectively having a majority of the validation power on the Ethereum Network.

Core development of the Ethereum source code has increasingly focused on modifications of the Ethereum protocol to increase speed and scalability and also allow for financial and non-financial next generation uses. The Trust's activities will not directly relate to such projects, though such projects may utilize ETH as tokens for the facilitation of their non-financial uses, thereby potentially increasing demand for ETH and the utility of the Ethereum Network as a whole. Conversely, projects that operate and are built within the Ethereum Blockchain may increase the data flow on the Ethereum Network and could either ''bloat'' the size of the Ethereum Blockchain or slow confirmation times.

Custody of the Trust's ETH

Digital assets and digital asset transactions are recorded and validated on blockchains, the public transaction ledgers of a digital asset network. Each digital asset blockchain serves as a record of ownership for all of the units of such digital asset, even in the case of certain privacy-focused digital assets, where the transactions themselves are not publicly viewable. All digital assets recorded on a blockchain are associated with a public blockchain address, also referred to as a digital wallet. Digital assets held at a particular public blockchain address may be accessed and transferred using a corresponding private key.

Key Generation

Public addresses and their corresponding private keys are generated by the Custodian in secret key generation ceremonies at secure locations inside faraday cages, which are enclosures used to block electromagnetic fields and mitigate attacks. The Custodian uses quantum random number generators to generate the public and private key pairs.

Once generated, private keys are encrypted, separated into ''shards,'' and then further encrypted. After the key generation ceremony, all materials used to generate private keys, including computers, are destroyed. All key generation ceremonies are performed offline. No party other than the Custodian has access to the private key shards of the Trust.

Key Storage

Private key shards are distributed geographically in secure vaults around the world, including in the United States. The locations of the secure vaults may change regularly and are kept confidential by the Custodian for security purposes.

The Digital Asset Account [19] uses offline storage, or ''cold storage,'' mechanisms to secure the Trust's private keys. The term cold storage refers to a safeguarding method by which the private keys corresponding to digital assets are disconnected and/or deleted entirely from the internet. Cold storage of private keys may involve keeping such keys on a non-networked (or ''airgapped'') computer or electronic device or storing the private keys on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus, paper, or a metallic object). A digital wallet may receive deposits of digital assets but may not send digital assets without use of the digital assets' corresponding private keys. In order to send digital assets from a digital wallet in which the private keys are kept in cold storage, either the private keys must be retrieved from cold storage and entered into an online, or ''hot,'' digital asset software program to sign the transaction, or the unsigned transaction must be transferred to the cold server in which the private keys are held for signature by the private keys and then transferred back to the online digital asset software program. At that point, the user of the digital wallet can transfer its digital assets.

Security Procedures

The Custodian is the custodian of the Trust's private keys in accordance with the terms and provisions of the Custodian Agreement. Transfers from the Digital Asset Account require certain security procedures, including, but not limited to, multiple encrypted private key shards, usernames, passwords and 2-step verification. Multiple private key shards held by the

[19] The Digital Asset Account is a segregated custody account controlled and secured by the Custodian to store private keys, which allows for the transfer of ownership or control of the Trust's ETH on the Trust's behalf.

Custodian must be combined to reconstitute the private key to sign any transaction in order to transfer the Trust's assets. Private key shards are distributed geographically in secure vaults around the world, including in the United States.

As a result, if any one secure vault is ever compromised, this event will have no impact on the ability of the Trust to access its assets, other than a possible delay in operations, while one or more of the other secure vaults is used instead. These security procedures are intended to remove single points of failure in the protection of the Trust's assets.

Transfers of ETH to the Digital Asset Account will be available to the Trust once processed on the Blockchain.

Subject to obtaining regulatory approval to operate a redemption program and authorization of the Sponsor, the process of accessing and withdrawing ETH from the Trust to redeem a Unit by an Authorized Participant will follow the same general procedure as transferring ETH to the Trust to create a Unit by an Authorized Participant, only in reverse.

Digital Asset Holdings

According to the Annual Report, the Trust's assets consist solely of ETH, Incidental Rights, IR Virtual Currency, proceeds from the sale of ETH, Incidental Rights, and IR Virtual Currency pending use of such cash for payment of Additional Trust Expenses or distribution to the shareholders, and any rights of the Trust pursuant to any agreements, other than the Trust Agreement, to which the Trust is a party. Each Share represents a proportional interest, based on the total number of Shares outstanding, in each of the Trust's assets as determined in the case of ETH by reference to the Index Price, less the Trust's expenses and other liabilities (which include accrued but unpaid fees and expenses). The Sponsor expects that the market price of the Shares will fluctuate over time in response to the market prices of ETH. In addition, because the Shares reflect the estimated accrued but unpaid expenses of the Trust, the number of ETH represented by a Share will gradually decrease over time as the Trust's ETH is used to pay the Trust's expenses. The Trust does not expect to take any Incidental Rights or IR Virtual Currency it may hold into account for purposes of determining the Trust's Digital Asset Holdings or the Digital Asset Holdings per Share.

The Sponsor will evaluate the ETH held by the Trust and determine the Digital Asset Holdings of the Trust in accordance with the relevant provisions of the Trust Documents. The following is a description of the material terms of the Trust Documents as they relate to valuation of the Trust's ETH and the Digital Asset Holdings calculations.

On each business day at 4:00 p.m., New York time, or as soon thereafter as practicable (the ''Evaluation Time''), the Sponsor will evaluate the ETH held by the Trust and calculate and publish the Digital Asset Holdings of the Trust. To calculate the Digital Asset Holdings, the Sponsor will:

1. Determine the Index Price as of such business day.
2. Multiply the Index Price by the Trust's aggregate number of ETH owned by the Trust as of 4:00 p.m., New York time, on the immediately preceding day, less the aggregate number of ETH payable as the accrued and unpaid Sponsor's Fee as of 4:00 p.m., New York time, on the immediately preceding day.
3. Add the U.S. dollar value of ETH, calculated using the Index Price, receivable under pending creation orders, if any, determined by multiplying the number of the Baskets represented by such creation orders by the Basket Amount and then multiplying such product by the Index Price.
4. Subtract the U.S. dollar amount of accrued and unpaid Additional Trust Expenses, if any.
5. Subtract the U.S. dollar value of the ETH, calculated using the Index Price, to be distributed under pending redemption orders, if any, determined by multiplying the number of Baskets to be redeemed represented by such redemption orders by the Basket Amount and then multiplying such product by the Index Price (the amount derived from steps 1 through 5 above, the ''Digital Asset Holdings Fee Basis Amount'').
6. Subtract the U.S. dollar amount of the Sponsor's Fee that accrues for such business day, as calculated based on the Digital Asset Holdings Fee Basis Amount for such business day.

In the event that the Sponsor determines that the primary methodology used to determine the Index Price is not an appropriate basis for valuation of the Trust's ETH, the Sponsor will utilize the cascading set of rules as described in ''Trust Valuation of ETH'' below. In addition, in the event that the Trust holds any Incidental Rights and/or IR Virtual Currency, the Sponsor may, at its discretion, include the value of such Incidental Rights and/or IR Virtual Currency in the determination of the Digital Asset Holdings, provided that the Sponsor has determined in good faith a method for assigning an objective value to such Incidental Rights and/or IR Virtual Currency. At this time, the Trust does not expect to take any Incidental Rights or IR Virtual Currency it may hold into account for the purposes of determining the Digital Asset Holdings or the Digital Asset Holdings per Share.

ETH Value

Digital Asset Exchange Valuation

According to the Annual Report, the value of ETH is determined by the value that various market participants place on ETH through their transactions. The most common means of determining the value of an ETH is by surveying one or more Digital Asset Exchanges where ETH is traded publicly (*e.g.,* Coinbase Pro, Kraken, and LMAX Digital). Additionally, there are over-the-counter dealers or market makers that transact in ETH.

Digital Asset Exchange Public Market Data

On each online Digital Asset Exchange, ETH is traded with publicly disclosed valuations for each executed trade, measured by one or more fiat currencies such as the U.S. dollar or euro. Over-the-counter dealers or market makers do not typically disclose their trade data.

As of June 30, 2023, the Digital Asset Exchanges included in the Index are Coinbase Pro, Kraken, and LMAX Digital. As further described below, the Sponsor and the Trust reasonably believe each of these Digital Asset Exchanges are in material compliance with applicable U.S. federal and state licensing requirements and maintain practices and policies designed to comply with know-your-customer (''KYC''), anti-money-laundering (''AML'') regulations.

Coinbase Pro: A U.S.-based exchange registered as a money services business (''MSB'') with the U.S. Department of the Treasury's Financial Crimes Enforcement Network (''FinCEN'') and licensed as a virtual currency business under the New York State Department of Financial Services (''NYDFS'') BitLicense program, as well as money transmitter in various U.S. states.

Kraken: A U.S.-based exchange registered as an MSB with FinCEN and licensed as money transmitter in various U.S. states. Kraken does not hold a BitLicense.

LMAX Digital: A U.K.-based exchange registered as a broker with the Financial Conduct Authority. LMAX Digital does not hold a BitLicense.

Currently, there are several Digital Asset Exchanges operating worldwide,

and online Digital Asset Exchanges represent a substantial percentage of ETH buying and selling activity and provide the most data with respect to prevailing valuations of ETH. These exchanges include established exchanges such as exchanges included in the Index, which provide a number of options for buying and selling ETH. The below table reflects the trading volume in ETH and market share [20] of the ETH–U.S. dollar trading pair of each of the Digital Asset Exchanges included in the Index as of June 30, 2023,[21] using data reported by the Index Provider from December 14, 2017 to June 30, 2023:

Digital asset exchanges included in the index as of June 30, 2023	Volume (ETH)	Market share (%)
Coinbase Pro	399,687,249	34.61
Kraken	132,211,166	11.45
LMAX Digital	65,848,432	5.70
Total ETH–U.S. dollar trading pair	597,746,846	51.76

The domicile, regulation, and legal compliance of the Digital Asset Exchanges included in the Index varies. Information regarding each Digital Asset Exchange may be found, where available, on the websites for such Digital Asset Exchanges, among other places.

The Index and the Index Price

The Index is a U.S. dollar-denominated composite reference rate for the price of ETH. The Index is designed to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity from impacting the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events.

The Index Price is determined by the Index Provider through a process in which trade data is cleansed and compiled in such a manner as to algorithmically reduce the impact of anomalistic or manipulative trading. This is accomplished by adjusting the weight of each data input based on price deviation relative to the observable set, as well as recent and long-term trading volume at each venue relative to the observable set.

Constituent Exchange Selection

According to the Annual Report, the Digital Asset Exchanges that are included in the Index are selected by the Index Provider utilizing a methodology that is guided by the International Organization of Securities Commissions (''IOSCO'') principles for financial benchmarks. For an exchange to become a Digital Asset Exchange included in the Index (a ''Constituent Exchange''), it must satisfy the criteria listed below (the ''Inclusion Criteria''):

- Sufficient USD liquidity relative to the size of the listed assets;
- No evidence in the past 12 months of trading restrictions on individuals or entities that would otherwise meet the exchange's eligibility requirements to trade;
- No evidence in the past 12 months of undisclosed restrictions on deposits or withdrawals from user accounts;
- Real-time price discovery;
- Limited or no capital controls;
- Transparent ownership including a publicly-owned ownership entity;
- Publicly available language and policies addressing legal and regulatory compliance in the US, including KYC (Know Your Customer), AML (Anti-Money Laundering) and other policies designed to comply with relevant regulations that might apply to it;
- Be a U.S.-domiciled exchange or a non-U.S. domiciled exchange that is able to service U.S. investors;
- Offer programmatic spot trading of the trading [22] pair; and
- Reliably publish trade prices and volumes on a real-time basis through Rest and Websocket APIs.

A Digital Asset Exchange is removed as a Constituent Exchanges when it no longer satisfies the Inclusion Criteria. The Index Provider does not currently include data from over-the-counter markets or derivatives platforms among the Constituent Exchanges. According to the Annual Report, over-the-counter data is not currently included because of the potential for trades to include a significant premium or discount paid for larger liquidity, which creates an uneven comparison relative to more active markets. There is also a higher potential for over-the-counter transactions to not be arms-length, and thus not be representative of a true market price. ETH derivative markets are also not currently included as the markets remain relatively thin. The Index Provider will consider IOSCO principles for financial benchmarks and the management of trading venues of ETH derivatives and the aforementioned Inclusion Criteria when considering inclusion of over-the-counter or derivative platform data in the future.

The Index Provider and the Sponsor have entered into an index license agreement, dated as of February 1, 2022 (as amended, the ''Index License Agreement''), governing the Sponsor's

[20] Market share is calculated using trading volume data (in ETH) provided by the Index Provider for certain Digital Asset Exchanges, including Coinbase Pro, Kraken, and LMAX Digital, as well as certain other large U.S.-dollar denominated Digital Asset Exchanges that are not included in the Index as of June 30, 2023, including Bitstamp, Binance.US (data included from April 1, 2020), Bitfinex, Bittrex (data included from July 31, 2018), Cboe Digital (data included from October 1, 2020), FTX.US (data included from July 1, 2021 through November 10, 2022), Gemini, HitBTC (data included from June 13, 2019 through March 31, 2020), OKCoin (data included from December 25, 2018 through December 31, 2022), and itBit (data included from December 27, 2018).

[21] On January 19, 2020, the Index Provider removed itBit due to a lack of trading volume and added LMAX Digital to the Index based on the exchange meeting the liquidity thresholds as part of its scheduled quarterly review. Effective July 23, 2022, the Index Provider removed Bitstamp from the Index due to the exchange's failure to meet the minimum liquidity requirement, and added FTX.US as a Constituent Exchange based on its satisfaction of the minimum liquidity requirement as part of its scheduled quarterly review. Effective November 10, 2022, the Index Provider removed FTX.US from the Index due to FTX.US's announcement that trading on the exchange may be halted, which would impact FTX.US's ability to reliably publish trade prices and volumes on a real-time basis through APIs, and did not add any Constituent Exchanges as part of its review. Effective January 28, 2023, the Index Provider added Binance.US to the Index based on the exchange meeting the minimum liquidity requirement, and did not remove any Constituent Exchanges as part of its quarterly review. On June 17, 2023, the Index Provider removed Binance.US from the Index, due to Binance.US's announcement that the exchange was suspending U.S. dollar deposits and withdrawals and planned to delist its U.S. dollar trading pairs, and did not add any Constituent Exchanges as part of its review.

[22] Exchanges with programmatic trading offer traders an application programming interface that permits trading by sending programmed commands to the exchange.

use of the Index Price.[23] Pursuant to the terms of the Index License Agreement, the Index Provider may adjust the calculation methodology for the Index Price without notice to, or consent of, the Trust or its shareholders. The Index Provider may decide to change the calculation methodology to maintain the integrity of the Index Price calculation should it identify or become aware of previously unknown variables or issues with the existing methodology that it believes could materially impact its performance and/or reliability. The Index Provider has sole discretion over the determination of Index Price and may change the methodologies for determining the Index Price from time to time. Shareholders will be notified of any material changes to the calculation methodology or the Index Price in the Trust's current reports and will be notified of all other changes that the Sponsor considers significant in the Trust's periodic or current reports. The Trust will determine the materiality of any changes to the Index Price on a case-by-case basis, in consultation with external counsel.

The Index Provider may change the trading venues that are used to calculate the Index or otherwise change the way in which the Index is calculated at any time. For example, the Index Provider has scheduled quarterly reviews in which it may add or remove Constituent Exchanges that satisfy or fail the Inclusion Criteria. The Index Provider does not have any obligation to consider the interests of the Sponsor, the Trust, the shareholders, or anyone else in connection with such changes. While the Index Provider is not required to publicize or explain the changes or to alert the Sponsor to such changes, it has historically notified the Trust of any material changes to the Constituent Exchanges, including any additions or removals of the Constituent Exchanges, in addition to issuing press releases in connection with the same. The Sponsor will notify investors of any such material event by filing a current report on Form 8–K. Although the Index methodology is designed to operate without any manual intervention, rare events would justify manual intervention. Intervention of this kind would be in response to non-market-related events, such as the halting of deposits or withdrawals of funds on a Digital Asset Exchange, the unannounced closure of operations on a Digital Asset Exchange, insolvency or the compromise of user funds. In the event that such an intervention is necessary, the Index Provider would issue a public announcement through its website, API and other established communication channels with its clients.

Determination of the Index Price

The Index applies an algorithm to the price of ETH on the Constituent Exchanges calculated on a per second basis over a 24-hour period. The Index's algorithm is expected to reflect a four-pronged methodology to calculate the Index Price from the Constituent Exchanges:

- *Volume Weighting:* Constituent Exchanges with greater liquidity receive a higher weighting in the Index, increasing the ability to execute against (*i.e.,* replicate) the Index in the underlying spot markets.
- *Price-Variance Weighting:* The Index Price reflects data points that are discretely weighted in proportion to their variance from the rest of the Constituent Exchanges. As the price at a particular exchange diverges from the prices at the rest of the Constituent Exchanges, its weight in the Index Price consequently decreases.
- *Inactivity Adjustment:* The Index Price algorithm penalizes stale activity from any given Constituent Exchange. When a Constituent Exchange does not have recent trading data, its weighting in the Index Price is gradually reduced until it is de-weighted entirely. Similarly, once trading activity at a Constituent Exchange resumes, the corresponding weighting for that Constituent Exchange is gradually increased until it reaches the appropriate level.
- *Manipulation Resistance:* In order to mitigate the effects of wash trading and order book spoofing, the Index only includes executed trades in its calculation. Additionally, the Index only includes Constituent Exchanges that charge trading fees to its users in order to attach a real, quantifiable cost to any manipulation attempts.

The Index Provider re-evaluates the weighting algorithm on a periodic basis, but maintains discretion to change the way in which an Index Price is calculated based on its periodic review or in extreme circumstances. The exact methodology to calculate the Index Price is not publicly available. Still, the Index is designed to limit exposure to trading or price distortion of any individual Digital Asset Exchange that experiences periods of unusual activity or limited liquidity by discounting, in real-time, anomalous price movements at individual Digital Asset Exchanges.

The Sponsor believes the Index Provider's selection process for Constituent Exchanges as well as the methodology of the Index Price's algorithm provides a more accurate picture of ETH price movements than a simple average of Digital Asset Exchange spot prices, and that the weighting of ETH prices on the Constituent Exchanges limits the inclusion of data that is influenced by temporary price dislocations that may result from technical problems, limited liquidity or fraudulent activity elsewhere in the ETH spot market. By referencing multiple trading venues and weighting them based on trade activity, the Sponsor believes that the impact of any potential fraud, manipulation or anomalous trading activity occurring on any single venue is reduced.

If the Index Price becomes unavailable, or if the Sponsor determines in good faith that such Index Price does not reflect an accurate price for ETH, then the Sponsor will, on a best efforts basis, contact the Index Provider to obtain the Index Price directly from the Index Provider. If after such contact such Index Price remains unavailable or the Sponsor continues to believe in good faith that such Index Price does not reflect an accurate price for the relevant digital asset, then the Sponsor will employ a cascading set of rules to determine the Index Price, as described below in ''Determination of the Index Price When Index Prices are Unavailable.''

The Trust values its ETH for operational purposes by reference to the Index Price. The Index Price is the value of an ETH as represented by the Index, calculated at 4:00 p.m., New York time, on each business day.

Illustrative Example

For the purposes of illustration, outlined below are examples of how the attributes that impact weighting and adjustments in the aforementioned methodology may be utilized to generate the Index Price for a digital asset. In this example, the Constituent Exchanges for the Index Price for a digital asset are Coinbase Pro, Kraken, LMAX Digital, and Bitstamp.

The Index Price algorithm, as described above, accounts for manipulation at the outset by only including data from executed trades on Constituent Exchanges that charge trading fees. Then, the below-listed elements may impact the weighting of the Constituent Exchanges on the Index price as follows:

- *Volume Weighting:* Each Constituent Exchange will be weighted to appropriately reflect the trading

[23] Upon entering into the Index License Agreement, the Sponsor and the Index Provider terminated the license agreement between the parties dated as of February 28, 2019.

volume share of the Constituent Exchange relative to all the Constituent Exchanges during this same period. For example, an average hourly weighting of 67.06%, 14.57%, 11.88%, and 6.49% for Coinbase Pro, LMAX Digital, Kraken, and Bitstamp, respectively, would represent each Constituent Exchange's share of trading volume during the same period.

• *Inactivity Adjustment:* Assume that a Constituent Exchange represented a 14% weighting on the Index Price of a digital asset, which is based on the per-second calculations of its trading volume and price-variance relative to the cohort of Constituent Exchanges included in such Index, and then went offline for approximately two hours. The index algorithm would automatically recognize inactivity and start de-weighting the Constituent Exchange at the 3-minute mark and continue to do so over a 7-minute period until its influence was effectively zero, 10-minutes after becoming inactive. As soon as trading activity resumed at the Constituent Exchange, the index algorithm would re-weight it to the appropriate weighting based on trading volume and price-variance relative to the cohort of Constituent Exchanges included in the Index. Due to the period of inactivity, it would re-weight the Constituent Exchange activity to a weight lower than its original weighting—for example, to 12%.

• *Price-Variance Weighting:* Assume that for a one-hour period, the digital asset's execution prices on one Constituent Exchange were trading more than 7% higher than the average execution prices on another Constituent Exchange. The algorithm will automatically detect the anomaly and reduce that specific Constituent Exchange's weighting to 0% for that one-hour period, ensuring a reliable spot reference unaffected by the localized event.

Determination of the Index Price When Index Prices Are Unavailable

The Sponsor uses the following cascading set of rules to calculate the Index Price.[24] For the avoidance of doubt, the Sponsor will employ the below rules sequentially and in the order as presented below, should one or more specific rule(s) fail.

1. Index Price = The price set by the Index as of 4:00 p.m., New York time, on the valuation date. If the Index becomes unavailable, or if the Sponsor determines in good faith that the Index does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Index Provider to obtain the Index Price directly from the Index Provider. If after such contact the Index remains unavailable or the Sponsor continues to believe in good faith that the Index does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

2. Index Price = The price set by Coin Metrics Real-Time Rate (the ''Secondary Index'') as of 4:00 p.m., New York time, on the valuation date (the ''Secondary Index Price''). The Secondary Index Price is a real-time reference rate price, calculated using trade data from constituent markets selected by Coin Metrics (the ''Secondary Index Provider''). The Secondary Index Price is calculated by applying weighted-median techniques to such trade data where half the weight is derived from the trading volume on each constituent market and half is derived from inverse price variance, where a constituent market with high price variance as a result of outliers or market anomalies compared to other constituent markets is assigned a smaller weight. If the Secondary Index becomes unavailable, or if the Sponsor determines in good faith that the Secondary Index does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Secondary Index Provider to obtain the Secondary Index Price directly from the Secondary Index Provider. If after such contact the Secondary Index remains unavailable or the Sponsor continues to believe in good faith that the Secondary Index does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

3. Index Price = The price set by the Trust's principal market (the ''Tertiary Pricing Option'') as of 4:00 p.m., New York time, on the valuation date. The Tertiary Pricing Option is a spot price derived from the principal market's public data feed that is believed to be consistently publishing pricing information as of 4:00 p.m., New York time, and is provided to the Sponsor via an application programming interface. If the Tertiary Pricing Option becomes unavailable, or if the Sponsor determines in good faith that the Tertiary Pricing Option does not reflect an accurate price, then the Sponsor will, on a best efforts basis, contact the Tertiary Pricing Provider to obtain the Tertiary Pricing Option directly from the Tertiary Pricing Provider. If after such contact the Tertiary Pricing Option remains unavailable after such contact or the Sponsor continues to believe in good faith that the Tertiary Pricing Option does not reflect an accurate price, then the Sponsor will employ the next rule to determine the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

4. Index Price = The Sponsor will use its best judgment to determine a good faith estimate of the Index Price. There are no predefined criteria to make a good faith assessment and it will be made by the Sponsor in its sole discretion.

In the event of a fork, the Index Provider may calculate the Index Price based on a digital asset that the Sponsor does not believe to be the appropriate asset that is held by the Trust.[25] In this

[24] The Sponsor updated these rules on January 11, 2022.

[25] According to the Annual Report, when a modification is introduced and a substantial majority of users and miners consent to the modification, the change is implemented and the network remains uninterrupted. However, if less than a substantial majority of users and miners consent to the proposed modification, and the modification is not compatible with the software prior to its modification, the consequence would be what is known as a ''hard fork'' of the Ethereum Network, with one group running the pre-modified software and the other running the modified software. The effect of such a fork would be the existence of two versions of ETH running in parallel, yet lacking interchangeability. For example, in July 2016, Ethereum ''forked'' into Ethereum and a new digital asset, Ethereum Classic, as a result of the Ethereum network community's response to a significant security breach in which an anonymous hacker exploited a smart contract running on the Ethereum network to syphon approximately $60 million of ETH held by the DAO, a distributed autonomous organization, into a segregated account. In response to the hack, most participants in the Ethereum community elected to adopt a ''fork'' that effectively reversed the hack. However, a minority of users continued to develop the original blockchain, with the digital asset on that blockchain now referred to as Ethereum Classic, or ETC. ETC now trades on several Digital Asset Exchanges. In the event of a hard fork of the Ethereum Network, the Sponsor will, if permitted by the terms of the Trust Agreement, use its discretion to determine, in good faith, which peer-to-peer network, among a group of incompatible forks of the Ethereum Network, is generally accepted as the Ethereum Network and should therefore be considered the appropriate network for the Trust's purposes. The Sponsor will base its determination on a variety of then relevant factors, including, but not limited to, the Sponsor's beliefs regarding expectations of the core developers of ETH, users, services, businesses, miners, and other constituencies, as well as the actual continued acceptance of, mining power on, and community engagement with, the Ethereum Network. There is no guarantee that the Sponsor will choose the digital asset that is ultimately the most valuable fork, and the Sponsor's decision may adversely affect the value of the Shares as a result. The Sponsor may also disagree with shareholders,

Continued

event, the Sponsor has full discretion to use a different index provider or calculate the Index Price itself using its best judgment.

The Sponsor may, in its sole discretion, select a different index provider, select a different index price provided by the Index Provider, calculate the Index Price by using the cascading set of rules set forth above, or change the cascading set of rules set forth above at any time.[26]

The Impact of the Approval of ETH Futures ETFs on Spot ETH ETPs Like the Trust

On October 2, 2023, the date of this filing, the first ETH-based exchange-traded funds (''ETFs'') were approved by the Commission for trading.[27] The ETFs hold ETH futures contracts that trade on the CME and settle using the CME CF Ethereum Reference Rate (''ERR''), which is priced based on the spot ETH markets Coinbase, Kraken, LMAX, Bitstamp, Gemini, and itBit, essentially the same spot markets that are included in the Index that the Trust uses to value its ETH holdings. Given that the Commission has approved ETFs that offer exposure to ETH futures, which themselves are priced based on the underlying spot ETH market, the Sponsor believes that the Commission must also approve ETPs that offer exposure to spot ETH, like the Trust.

In the context of other digital asset-based ETF and ETP proposals for Bitcoin, the Commission has sought to justify treating futures-based ETFs differently from spot-based ETFs because of (i) distinctions between the regulations under which the two products would be registered (the Investment Company Act of 1940 (the '' '40 Act'') for digital-asset futures ETFs and '33 Act for spot digital-asset ETPs) and (ii) the existence of regulation and surveillance-sharing over the CME digital-asset futures market through the Intermarket Surveillance Group (''ISG''), as compared to the spot market for those digital assets.[28] The Sponsor believes that this reasoning is unsupported for the following reasons.

The '40 Act Offers No More Investor Protections Than the '33 Act in the Context of ETH-Based ETF and ETP Proposals

While the '40 Act has certain added investor protections that the '33 Act does not require, these protections do not seek to allay harms arising from underlying assets or markets of assets that ETFs hold, such as the potential for fraud or manipulation in such markets. In other words, the Sponsor does not believe that the application of the '40 Act supports the purported justifications the Commission has made in denying other spot digital asset ETPs. Instead, the '40 Act seeks to remedy certain abusive practices in the *management* of investment companies such as ETFs, and thus places certain restrictions on ETFs and ETF sponsors. The '40 Act explicitly lists out the types of abuses it seeks to prevent, and places certain restrictions related to accounting, borrowing, custody, fees, and independent boards, among others. Notably, none of these restrictions address an ETF's underlying assets, whether ETH futures or spot ETH, or the markets from which such assets' pricing is derived, whether the CME ETH futures market or spot ETH markets. As a result, the Sponsor believes that the distinction between registration of ETH futures ETFs under the '40 Act and the registration of spot ETH ETPs under the '33 Act is one without a difference in the context of ETH-based ETP proposals.

Surveillance-Sharing With the CME ETH Futures Market Is Sufficient To Protect Against Fraud and Manipulation in the Underlying Spot ETH Market

The Sponsor believes that, because the CME ETH futures market is priced based on the underlying spot ETH market, any fraud or manipulation in the spot market would necessarily affect the price of ETH futures, thereby affecting the net asset value of an ETP holding spot ETH or an ETF holding ETH futures, as well as the price investors pay for such product's shares. Accordingly, either CME surveillance can detect spot-market fraud that affects both futures ETFs and spot ETPs, or that surveillance cannot do so for either type of product. Having approved ETH futures ETFs in part on the basis of such surveillance, the Commission has clearly determined that CME surveillance can detect spot-market fraud that would affect spot ETPs, and the Sponsor thus believes that it must also approve spot ETH ETPs on that basis.

* * * * *

In summary, the Sponsor believes that the distinctions between the '40 Act and the '33 Act, and the surveillance-sharing available for the CME ETH futures market versus the spot ETH market, are not meaningful in the context of ETH-based ETF and ETP proposals, and that such reasoning cannot be a basis for the Commission treating ETH futures ETFs differently from spot ETH ETPs like the Trust. The Sponsor believes that the Commission's approval of ETH futures ETFs means it must also approve spot ETH ETPs like the Trust.

The Structure and Operation of the Trust Protects Investors and Satisfies Commission Requirements for ETH-Based Exchange Traded Products

Even if the Commission had not approved ETH futures ETFs, the Sponsor still believes the Commission should approve the listing and trading of Shares of the Trust. In the context of prior spot digital asset ETP proposal disapproval orders for Bitcoin, the Commission expressed concerns about

security vendors, and the Index Provider on what is generally accepted as ETH and should therefore be considered ''ETH'' for the Trust's purposes, which may also adversely affect the value of the Shares as a result.

[26] The Sponsor will provide notice of any such changes in the Trust's periodic or current reports and, where applicable, will file a proposed rule change with the Commission.

[27] These ETFs included the Bitwise Ethereum Strategy ETF, Bitwise Bitcoin & Ether Equal Weight Strategy ETF, Hashdex Ether Strategy ETF, ProShares Ether Strategy ETF, ProShares Bitcoin & Ether Strategy ETF, ProShares Bitcoin & Ether Equal Weight Strategy ETF, Valkyrie Bitcoin & Ethereum Strategy ETF, VanEck Ethereum Strategy ETF, and Volatility Shares Ethereum Strategy ETF.

[28] *See, e.g.,* Chair Gary Gensler Public Statement, ''Remarks Before the Aspen Security Forum,'' (August 3, 2021), stating that the Chair looked forward to the Commission's review of Bitcoin-based ETF proposals registered under the '40 Act, ''particularly if those are limited to [the] CME-traded Bitcoin futures,'' noting the ''significant investor protection'' offered by the '40 Act, *https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03;* Securities Exchange Act Release No. 93559 (November 12, 2021), 86 FR 64539 (November 18, 2021) (SR–CboeBZX–2021–019) (Order Disapproving a Proposed Rule Change to List and Trade Shares of the VanEck Bitcoin Trust under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares) (''VanEck Order'') (denying the first spot bitcoin ETP registered under the '33 Act following the first approval of a bitcoin futures ETF registered under the '40 Act, noting the differences in the standard of review that applies to such products); Securities Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (SR–NYSEArca–2021–53) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of the Teucrium Bitcoin Futures Fund under NYSE ARCA Rule 8.200–E, Commentary .02 (Trust Issued Receipts)) (''Teucrium Order'') (approving the first bitcoin futures ETP registered under the '33 Act, stating that ''With respect to the proposed ETP, the underlying bitcoin assets are CME bitcoin futures contracts. The relevant analysis, therefore, is whether Arca has a comprehensive surveillance sharing agreement with a regulated market of significant size related to CME bitcoin futures contracts. As discussed below, taking into consideration the direct relationship between the regulated market with which Arca has a surveillance-sharing agreement and the assets held by the proposed ETP, as well as developments with respect to the CME bitcoin futures market—including the launch of exchange-traded funds registered under the Investment Company Act of 1940 (''1940 Act'') that hold CME bitcoin futures (''Bitcoin Futures ETFs'')—the Commission concludes that the Exchange has the requisite surveillance-sharing agreement.'').

the underlying Digital Asset Market due to the potential for fraud and manipulation and has outlined the reasons why such ETP proposals have been unable to satisfy these concerns.[29] For purposes of the Trust's ETH-based ETP proposal, the Sponsor anticipates that the Commission may have the same concerns and addresses each of these in turn below.

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission outlined that a proposal relating to a digital asset-based ETP could satisfy its concerns regarding potential for fraud and manipulation by demonstrating:

(1) *Inherent Resistance to Fraud and Manipulation:* that the underlying commodity market is inherently resistant to fraud and manipulation;

(2) *Other Means to Prevent Fraud and Manipulation:* that there are other means to prevent fraudulent and manipulative acts and practices that are sufficient; or

(3) *Surveillance Sharing:* that the listing exchange has entered into a surveillance sharing agreement with a regulated market of significant size relating to the underlying or reference assets.

As described below, the Sponsor believes the structure and operation of the Trust are designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest, and to respond to the specific concerns that the Commission may have with respect to potential fraud and manipulation in the context of an ETH-based ETP.

How the Trust Meets Standards in the Prior Spot Digital Asset ETP Disapproval Orders

1. Resistance to or Prevention of Fraud and Manipulation

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission disagreed with the proposition that a digital asset's fungibility, transportability and exchange tradability combine to provide unique protections against, and allow such digital asset to be uniquely resistant to, attempts at price manipulation. The Commission reached its conclusion based on concessions by one issuer that 95% of the reported trading in the digital asset, Bitcoin, is ''fake'' or non-economic, effectively admitting that the properties of Bitcoin do not make it inherently resistant to manipulation. Such issuer's concessions were further compounded by evidence of potential and actual fraud and manipulation in the historical trading of Bitcoin on certain marketplaces such as (1) ''wash'' trading, (2) trading based on material, non-public information, including the dissemination of false and misleading information, (3) manipulative activity involving Tether, and (4) fraud and manipulation.[30]

The Sponsor acknowledges the possibility that fraud and manipulation may exist in commodity markets and that digital asset trading, such as ETH, *on any given exchange* may be no more uniquely resistant to fraud and manipulation than other commodity markets.[31] However, the Sponsor believes that the fundamental features of digital assets, including fungibility, transportability and exchange tradability offer novel protections beyond those that exist in traditional commodity markets or equity markets when combined with other means, as discussed further below.

2. Other Means To Prevent Fraud and Manipulation

The Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[32] In evaluating the effectiveness of this type of resistance, the Commission does not apply a ''cannot be manipulated'' standard. Instead, the Commission requires that such resistance to fraud and manipulation be novel and beyond those protections that exist in traditional commodity markets or equity markets for which the Commission has long required surveillance-sharing agreements in the context of listing derivative securities products.[33]

The Sponsor believes the Index represents a novel means to prevent fraud and manipulation from impacting a reference price for ETH and that it offers protections beyond those that exist in traditional commodity markets or equity markets. The Index operates materially similarly to CoinDesk Bitcoin Price Index (XBX). Specifically, digital assets, such as ETH, are novel and exist outside traditional commodity markets. It therefore stands to reason that the methods by which they trade will be novel and that the market for digital assets like ETH will have different attributes than traditional commodity markets. Digital assets like ETH were only introduced within the past decade, twenty years after the first U.S. ETFs were offered[34] and 150 years after the first futures were offered.[35] In contrast to older commodities such as gold, silver, platinum, palladium or copper, which the Commission has noted all had at least one significant, regulated market for trading futures on the underlying commodity at the time commodity trust ETPs were approved for listing and trading, the first trading in digital assets like ETH took place entirely in an open, transparent and online setting where other commodities cannot trade.

[29] *See* Securities Exchange Act Release Nos. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (SR–BatsBZX–2016–30) (Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust) (the ''Winklevoss Order''); 87267 (October 9, 2019), 84 FR 55382 (October 16, 2019) (SR–NYSEArca–2019–01) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201–E) (the ''Bitwise Order''); 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR–NYSEArca–2019–39) (Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E) (the ''Wilshire Phoenix Order''); 83904 (August 22, 2018), 83 FR 43934 (August 28, 2018) (SR–NYSEArca–2017–139) (Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF) (the ''ProShares Order''); 83912 (August 22, 2018), 83 FR 43912 (August 28, 2018) (SR–NYSEArca–2018–02) (Order Disapproving a Proposed Rule Change Relating to Listing and Trading of the Direxion Daily Bitcoin Bear 1X Shares, Direxion Daily Bitcoin 1.25X Bull Shares, Direxion Daily Bitcoin 1.5X Bull Shares, Direxion Daily Bitcoin 2X Bull Shares, and Direxion Daily Bitcoin 2X Bear Shares Under NYSE Arca Rule 8.200–E) (the ''Direxion Order''); 83913 (August 22, 2018), 83 FR 43923 (August 28, 2018) (SR–CboeBZX–2018–01) (Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF) (the ''GraniteShares Order'') (together, the ''Prior Spot Digital Asset ETP Disapproval Orders'').

[30] *See* Bitwise Order, 84 FR at 55383 (discussing analysis of the Bitcoin spot market that asserts that 95% of the spot market is dominated by fake and non-economic activity, such as wash trades), 55391 (discussing possible sources of fraud and manipulation in the bitcoin spot market). *See also* Winklevoss Order, 83 FR at 37585–86 (discussing pending litigation against a Bitcoin trading platform for fraudulent conduct relating to Tether); Bitwise Order, 84 FR at 55391 n.140, 55402 & n.331 (same); Winklevoss Order, 83 FR at 37584–86 (discussing potential types of manipulation in the Bitcoin spot market). The Commission has also noted that fraud and manipulation in the Bitcoin spot market could persist for a significant duration. *See, e.g.,* Bitwise Order, 84 FR at 55405 & n.379.

[31] *See generally* Bitwise Order.

[32] *See* Winklevoss Order, 84 FR at 37580, 37582–91; Bitwise Order, 84 FR at 55383, 55385–406; Wilshire Phoenix Order, 85 FR at 12597.

[33] *See* Winklevoss Order, 84 FR at 37582; Wilshire Phoenix Order, 85 FR at 12597.

[34] SEC, ''Investor Bulletin: Exchange-Traded Funds (ETFs),'' August 2012, *https://www.sec.gov/investor/alerts/etfs.pdf.*

[35] Commodity Futures Trading Commission (''CFTC''), ''History of the CFTC,'' *https://www.cftc.gov/About/HistoryoftheCFTC/history_precftc.html.*

The Trust has priced its Shares consistently for more than six years based on the Index. The Sponsor believes the Trust's use of the Index specifically addresses the Commission's concerns in that the Index serves as an alternative means to prevent fraud and manipulation. Specifically, the Index can (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events.

As described in more detail below, the Sponsor believes that the Index accomplishes those objectives in the following ways:

1. The Index tracks the Digital Asset Exchange Market price through trading activity at ''U.S.-Compliant Exchanges''; [36]

2. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity in real-time through systematic adjustments;

3. The Index is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events; and

4. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific exchange through a cross-exchange composite index rate.

1. The Index tracks the Digital Asset Exchange Market price through trading activity at ''U.S.-Compliant Exchanges.''

To reduce the risk of fraud, manipulation, and other anomalous trading activity from impacting the Index, only U.S.-Compliant Exchanges are eligible to be included in the Index.

The Index maintains a minimum number of three exchanges and a maximum number of five exchanges to track the Digital Asset Exchange Market while offering replicability for traders and market makers.[37]

U.S.-Compliant Exchanges possess safeguards that protect against fraud and manipulation. For example, U.S.-Compliant Exchanges regulated by the NYDFS under the BitLicense program have regulatory requirements to implement measures designed to effectively detect, prevent, and respond to fraud, attempted fraud, market manipulation, and similar wrongdoing, and to monitor, control, investigate and report back to the NYDFS regarding any wrongdoing.[38] These exchanges also have the following obligations: [39]

- Submission of audited financial statements including income statements, statements of assets/liabilities, insurance, and banking;
- Compliance with capitalization requirements set at NYDFS's discretion;
- Prohibitions against the sale or encumbrance to protect full reserves of custodian assets;
- Fingerprints and photographs of employees with access to customer funds;
- Retention of a qualified Chief Information Security Officer and annual penetration testing/audits;
- Documented business continuity and disaster recovery plan, independently tested annually; and
- Participation in an independent exam by NYDFS.

Other U.S.-Compliant Exchanges have voluntarily implemented measures to protect against common forms of market manipulation.[40]

Furthermore, all U.S.-Compliant Exchanges are considered MSBs that are subject to FinCEN's federal and state reporting requirements that provide additional safeguards. For example, unscrupulous traders may be less likely to engage in fraudulent or manipulative acts and practices on exchanges that (1) report suspicious activity to FinCEN as money services businesses, (2) report to state regulators as money transmitters, and/or (3) require customer identification through KYC procedures. U.S.-Compliant Exchanges are required to: [41]

- Identify people with ownership stakes or controlling roles in the MSB;
- Establish a formal Anti-Money Laundering (AML) policy in place with documentation, training, independent review, and a named compliance officer;
- Implement strict customer identification and verification policies and procedures;
- File Suspicious Activity Reports (SARs) for suspicious customer transactions;
- File Currency Transaction Reports (CTRs) for cash-in or cash-out transactions greater than $10,000; and
- Maintain a five-year record of currency exchanges greater than $1,000 and money transfers greater than $3,000.

Lastly, because of ETH's classification as a commodity, the CFTC has authority to police fraud and manipulation on U.S.-Compliant Exchanges.[42]

The Sponsor acknowledges that there are substantial differences between FinCEN and New York state regulations and the Commission's regulation of the national securities exchanges.[43] The Sponsor does not believe the inclusion of U.S.-Compliant Exchanges is in and of itself sufficient to prove that the Index is an alternative means to prevent fraud and manipulation such that surveillance sharing agreements are not required, but does believe that the inclusion of only U.S.-Compliant Exchanges in the Index is one significant way in which the Index is

[36] ''U.S.-Compliant Exchanges'' are exchanges in the Digital Asset Exchange Market that are compliant with applicable U.S. federal and state licensing requirements and practices regarding AML and KYC regulations. All Constituent Exchanges are U.S.-Compliant Exchanges. ''Non-U.S.-Compliant Exchanges'' are all other exchanges in the Digital Asset Exchange Market. As of June 30, 2023, the U.S.-Compliant Exchanges that the Index Provider considered for inclusion in the Index were Coinbase Pro, Kraken and LMAX Digital. From these U.S.-Compliant Exchanges, the Index Provider then applies additional Inclusion Criteria to determine the Constituent Exchange. Effective July 23, 2022, the Index Provider removed Bitstamp from the Index due to the exchange's failure to meet the minimum liquidity requirement and added FTX.US as a Constituent Exchange based on its satisfaction of the minimum liquidity requirement as part of its scheduled quarterly review. Effective November 10, 2022, the Index Provider removed FTX.US from the Index due to FTX.US's announcement that trading on the exchange may be halted, which would impact FTX.US's ability to reliably publish trade prices and volumes on a real-time basis through APIs, and did not add any Constituent Exchanges as part of its review. Effective January 28, 2023, the Index Provider added Binance.US to the Index based on the exchange meeting the minimum liquidity requirement, and did not remove any Constituent Exchanges as part of its quarterly review. On June 17, 2023, the Index Provider removed Binance.US from the Index, due to Binance.US's announcement that the exchange was suspending U.S. dollar deposits and withdrawals and planned to delist its U.S. dollar trading pairs, and did not add any Constituent Exchanges as part of its review.

[37] According to the Sponsor, the more exchanges included in the Index, the more ability there is for traders and market makers to trade against the Index by arbitraging price differences. For example, in the event of variances between ETH prices on Constituent Exchanges and non-Constituent Exchanges, arbitrage trading opportunities would exist. These discrepancies generally consolidate over time, as price differences across exchanges are realized and capitalized upon by traders and market makers.

[38] *See, e.g.,* ''DFS Takes Action to Deter Fraud and Manipulation in Virtual Currency Markets,'' *available at: https://www.dfs.ny.gov/about/press/pr1802071.htm.*

[39] *See* ''New York's Final ''BitLicense'' Rule: Overview and Changes from July 2014 Proposal,'' June 5, 2015, Davis Polk, *available at: https://www.davispolk.com/files/new_yorks_final_bitlicense_rule_overview_changes_july_2014_proposal.pdf.*

[40] As of the date of filing, one of the three Constituent Exchanges, Coinbase Pro, is regulated by NYDFS.

[41] *See* BSA Requirements for MSBs, FinCEN website: *https://www.fincen.gov/bsarequirements-msbs.*

[42] ''U.S. CFTC Chief Behnam Reinforces View of Ether as Commodity,'' Coindesk (Mar. 28, 2023), *https://www.coindesk.com/policy/2023/03/28/us-cftc-chief-behnam-reinforces-view-of-ether-as-commodity/;* CME Group, *https://www.cmegroup.com/markets/cryptocurrencies/ether/ether.html?gad=1&gclid=EAIaIQobChMI44KBmu7ygAMVavvjBx2P4g5yEAAYASAAEgJSZfD_BwE&gclsrc=aw.ds.*

[43] *See* Bitwise Order, 84 FR at 55392; Wilshire Phoenix Order, 85 FR at 12603.

protected from the potential impacts of fraud and manipulation.

2. The Index mitigates the impact of instances of fraud, manipulation, and other anomalous trading activity in real-time through systematic adjustments.

The Index is calculated once every second according to a systematic methodology that relies on observed trading activity on the Constituent Exchanges. While the precise methodology underlying the Index is currently proprietary, the key elements of the Index are outlined below:

- *Volume Weighting:* Constituent Exchanges with greater liquidity receive a higher weighting in the Index, increasing the ability to execute against (*i.e.,* replicate) the Index in the underlying spot markets.
- *Price-Variance Weighting:* The Index reflects data points that are discretely weighted in proportion to their variance from the rest of the Constituent Exchanges. As the price at a Constituent Exchange diverges from the prices at the rest of the Constituent Exchanges, its weight in the Index consequently decreases.
- *Inactivity Adjustment:* The Index algorithm penalizes stale activity from any given Constituent Exchange. When a Constituent Exchange does not have recent trading data, its weighting in the Index is gradually reduced, until it is de-weighted entirely. Similarly, once trading activity at the Constituent Exchange resumes, the corresponding weighting for that Constituent Exchange is gradually increased until it reaches the appropriate level.
- *Manipulation Resistance:* In order to mitigate the effects of wash trading and order book spoofing, the Index only includes executed trades in its calculation. Additionally, the Index only includes Constituent Exchanges that charge trading fees to its users in order to attach a real, quantifiable cost to any manipulation attempts.

3. The Index is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events.

The Index Provider reviews and periodically updates which exchanges are included in the Index by utilizing a methodology that is guided by the IOSCO principles for financial benchmarks.

According to the Index methodology, for an exchange to become a Constituent Exchange, it must satisfy the following Inclusion Criteria:

- Sufficient USD liquidity relative to the size of the listed assets;
- No evidence in the past 12 months of trading restrictions on individuals or entities that would otherwise meet the exchange's eligibility requirements to trade;
- No evidence in the past 12 months of undisclosed restrictions on deposits or withdrawals from user accounts;
- Real-time price discovery;
- Limited or no capital controls;
- Transparent ownership including a publicly-owned ownership entity;
- Publicly available language and policies addressing legal and regulatory compliance in the US, including KYC (Know Your Customer), AML (Anti-Money Laundering) and other policies designed to comply with relevant regulations that might apply to it;
- Be a U.S.-domiciled exchange or a non-U.S. domiciled exchange that is able to service U.S. investors;
- Offer programmatic spot trading of the trading pair; and
- Reliably publish trade prices and volumes on a real-time basis through Rest and Websocket APIs.

Although the Index methodology is designed to operate without any human interference, rare events would justify manual intervention. Manual intervention would only be in response to ''non-market-related events'' (*e.g.,* halting of deposits or withdrawals of funds, unannounced closure of exchange operations, insolvency, compromise of user funds, etc.). In the event that such an intervention is necessary, the Index Provider would issue a public announcement through its website, API and other established communication channels with its clients.[44]

4. The Index mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific exchange through a cross-exchange composite index rate.

The Index is based on the price and volume data of multiple U.S.-Compliant Exchanges that satisfy the Index Provider's Inclusion Criteria. By referencing multiple trading venues and weighting them based on trade activity, the impact of any potential fraud, manipulation, or anomalous trading activity occurring on any single venue is reduced. Specifically, the effects of fraud, manipulation, or anomalous trading activity occurring on any single venue are de-weighted and consequently diluted by non-anomalous trading activity from other Constituent Exchanges.

Although the Index is designed to accurately capture the market price of ETH, third parties may be able to purchase and sell ETH on public or private markets included or not included among the Constituent Exchanges, and such transactions may take place at prices materially higher or lower than the Index Price. For example, based on data provided by the Index Provider, on any given day during the twelve months ended June 30, 2023, the maximum differential between the 4:00 p.m., New York time spot price of any single Digital Asset Exchange included in the Index and the Index Price was 2.76% and the average of the maximum differentials of the 4:00 p.m., New York time spot price of each Digital Asset Exchange included in the Index and the Index Price was 0.82%. During this same period, the average differential between the 4:00 p.m., New York time spot prices of all the Digital Asset Exchanges included in the Index and the Index Price was 0.01%.[45]

Since inception of the Trust, the Trust has consistently priced its Shares at 4:00 p.m., New York time based on the Index Price.[46] While that pricing would be known to the market, the Sponsor believes that, even if efforts to manipulate the price of ETH at 4:00 p.m., E.T. were successful on any exchange, such activity would have had a negligible effect on the pricing of the Trust, due to the controls embedded in the structure of the Index.

Accordingly, the Sponsor believes that the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events. For these reasons, the Sponsor believes that the Index

[44] To the extent any such intervention has a material impact on the Trust, the Sponsor will also issue a public announcement.

[45] All Digital Asset Exchanges that were included in the Index throughout the period were considered in this analysis.

[46] Prior to February 1, 2022, the Trust valued its ETH for operational purposes by reference to the volume-weighted average Index Price (the ''Old Index Price''). The Old Index Price was calculated by applying a weighting algorithm to the price and trading volume data for the immediately preceding 24-hour period as of 4:00 p.m., New York time, derived from the Constituent Exchanges reflected in the Index on such trade date, and overlaying an averaging mechanism to the price produced. Thus, whereas the Old Index Price reflected the price of an ETH at 4:00 p.m., New York time, calculated by taking the average of each price of an ETH produced by the Index over the preceding 24-hour period, the Index Price now is the price of an ETH at 4:00 p.m., New York time, calculated based on the price and trading volume data of the Digital Asset Exchanges included in the Index over the preceding 24-hour period. The Index Price differs from the Old Index Price only in that it does not use an additional averaging mechanism; the Index Price otherwise uses the same methodology as the Old Index Price, and there has been no change to the Index used to determine the Index Price or the criteria used to select the Constituent Exchanges.

represents an effective alternative means to prevent fraud and manipulation and the Trust's reliance on the Index addresses the Commission's concerns with respect to potential fraud and manipulation.

3. A Significant, Regulated and Surveilled Market Exists and Is Closely Connected With Spot Market for ETH

In the Prior Spot Digital Asset ETP Disapproval Orders, the Commission described both the need for and the definition of a surveilled market of significant size for commodity-trust ETPs like the Trust to date.[47] Specifically, the Commission explained that:

> for the commodity-trust ETPs approved to date for listing and trading, there has been in every case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group membership in common with, that market.[48]

Further, the Commission stated that its interpretation of the term ''market of significant size'' depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.[49] Accordingly, the terms ''significant market'' and ''market of significant size'' could mean:

> a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[50]

In the context of the Prior Spot Digital Asset ETP Disapproval Orders specifically, the Commission has stated that establishing a lead-lag relationship between the futures market and the spot market is central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the futures market to successfully manipulate prices on those spot platforms that feed into the proposed ETP's pricing mechanism such that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct.[51] In particular, if the spot market leads the futures market, this would indicate that it would not be necessary to trade on the futures market to manipulate the proposed ETP, even if arbitrage worked efficiently, because the futures price would move to meet the spot price.

While studies have found that the CME futures market does lead the spot market in the context of Bitcoin,[52] as explained in the Sponsor's briefs and argument in its prevailing case before the D.C. Circuit Court of Appeals regarding its Bitcoin-based ETP proposal, the lead/lag question is irrelevant. If a would-be manipulator were to attempt to manipulate either a spot ETP or futures ETP by trading futures on the CME, then a surveillance-sharing agreement with the CME would provide access to information concerning that activity.[53] If, on the other hand, a would-be manipulator were to attempt to manipulate either a spot ETP or a futures ETP by trading on the spot market, then a surveillance-sharing agreement with the CME would also be able to provide access to information concerning that activity. If that were not true, the Commission could not have approved the Bitcoin futures ETPs. Given that the Commission has approved Bitcoin futures ETPs, the Commission must have concluded that the CME is capable of detecting manipulation attempts in the spot bitcoin market. And given that the Commission has now approved ETH futures ETFs, it must have concluded that the CME is capable of detecting manipulation attempts in the spot ETH market as well. Accordingly, the Sponsor believes that disapproval of the instant proposal on such grounds would be arbitrary given that Shares of the Trust would be just as protected from fraud as shares of previously approved ETH futures ETPs.

Regardless of the irrelevance of the lead/lag relationship and the mixed findings regarding the lead/lag relationship between the CME futures and spot markets in the context of Bitcoin, the Sponsor believes that the CME futures market represents a large, surveilled and regulated market and meets the Commission's definition of a ''significant market.'' For example, from November 1, 2019 to August 31, 2023, the CME futures market trading volume was over $373 billion, compared to $701 billion in trading volume across the Constituent Exchanges included in the Index. With over 50% of the Index trading volume, the CME futures market represents significant coverage of U.S.-Compliant Exchanges in the Ether market. In addition, the CME futures market trading volume from November 1, 2019 to August 31, 2023 was approximately 43% of the trading volume of the U.S. dollar-denominated spot markets referenced in the Bitwise Order.[54]

Given the size of the CME futures markets, the Sponsor believes such markets meet the Commission's definition of ''significant market'' because there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, since arbitrage between the derivative and spot markets would tend to counter an attempt to manipulate the spot market alone. As a result, the Exchange's ability to obtain information regarding trading in the Shares and futures from markets and other entities that are members of the Intermarket Trading Group (''ISG''), including the CME, would assist the Exchange in detecting and deterring misconduct.

The Sponsor also believes it is unlikely that the ETP would become the predominant influence on prices in the market. While future inflows to the proposed Trust cannot be predicted, to provide comparable data, the Sponsor examined the change in market capitalization of ETH with net inflows into the Trust, which currently trades on OTC Markets and is largest and most liquid ETH investment product in the

[47] *See* Winklevoss Order, 83 FR at 37593–94; Bitwise Order, 84 FR at 55383, 55410; Wilshire Phoenix Order, 85 FR at 12609.

[48] *See* Winklevoss Order, 83 FR at 37594.

[49] *See* Winklevoss Order, 83 FR at 37594; Bitwise Order, 84 FR at 55410; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43925; Direxion Order, 83 FR at 43914; Wilshire Phoenix Order, 85 FR at 12609.

[50] *See* Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that will provide guidance to market participants.

[51] *See* Bitwise Order, 84 FR at 55411; Wilshire Phoenix Order, 85 FR at 12612.

[52] *See* Memorandum to File from Neel Maitra, Senior Special Counsel (Fintech & Crypto Specialist), Division of Trading and Markets, U.S. Securities and Exchange Commission re: Meeting with Representatives from Fidelity Digital Assets, et al. and attachment (SR–CboeBZX–2021–039) (September 8, 2021), *available at: https://www.sec.gov/comments/sr-cboebzx-2021-039/srcboebzx2021039-250110.pdf;* Letter from Bitwise Asset Management, Inc. re: File Number SR–NYSEArca–2021–89 (February 25, 2022), *available at: https://www.sec.gov/comments/sr-nysearca-2021-89/srnysearca202189-20117902-270822.pdf;* Letter from Wilson Sonsini Goodrich and Rosati, P.C. and Chapman and Cutler LLP, on behalf of Bitwise Asset Management, Inc. re: File No. SR–NYSEArca–2021–89 (March 7, 2022), *available at: https://www.sec.gov/comments/sr-nysearca-2021-89/srnysearca202189-20118794-271630.pdf.*

[53] *Grayscale Investments, LLC* v. *Securities and Exchange Commission,* No. 22–1142, Commission Reply Br. 27.

[54] These spot markets include Binance.US, Coinbase Pro, Bitfinex, Kraken, Bitstamp, BitFlyer, Poloniex, Bittrex, and itBit.

world.[55] From November 1, 2019 to August 31, 2023, the market capitalization of ETH grew from $20 billion to $198 billion, a $178 billion increase. Over the same period, the Trust experienced $1.2 billion of inflows. The cumulative inflow into the Trust over the stated time period was only 0.6% of the aggregate growth of ETH's market capitalization.

Additionally, the Trust experienced approximately $70.2 billion of trading volume from November 1, 2019 to August 31, 2023, only 19% of the CME futures market and 10% of the Index over the same period.

* * * * *

In summary, the Sponsor believes that the foregoing addresses concerns the Commission may have with respect to ETH-based ETPs, based on the Commission's articulated concerns with respect to potential fraud and manipulation in Bitcoin-based ETPs. Specifically, the Sponsor believes that, although ETH is not itself inherently resistant to fraud and manipulation, the Index represents an effective means to prevent fraudulent and manipulative acts and practices. As discussed above, the Trust has used the Index to price the Shares for more than six years, and the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity on the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events. The Sponsor also believes that the CME futures market is a significant, surveilled and regulated market that is closely connected with the spot market for ETH and fulfills the requirements for surveillance sharing given the Exchange's ability to obtain information from markets and other entities that are members of the ISG to assist in detecting and deterring misconduct.

Creation of Shares

According to the Annual Report, the Trust will issue Shares to Authorized Participants from time to time, but only in one or more Baskets (with a Basket being a block of 100 Shares). The Trust will not issue fractions of a Basket. The creation of Baskets will be made only in exchange for the delivery to the Trust, or the distribution by the Trust, of the number of whole and fractional ETH represented by each Basket being created, which is determined by dividing (x) the number of ETH owned by the Trust at 4:00 p.m., E.T., on the trade date of a creation order, after deducting the number of ETH representing the U.S. dollar value of accrued but unpaid fees and expenses of the Trust (converted using the Index Price at such time, and carried to the eighth decimal place), by (y) the number of Shares outstanding at such time (with the quotient so obtained calculated to one one-hundred-millionth of one ETH (*i.e.,* carried to the eighth decimal place)), and multiplying such quotient by 100 (the ''Basket Amount''). All questions as to the calculation of the Basket Amount will be conclusively determined by the Sponsor and will be final and binding on all persons interested in the Trust. The Basket Amount multiplied by the number of Baskets being created is the ''Total Basket Amount.'' The number of ETH represented by a Share will gradually decrease over time as the Trust's ETH are used to pay the Trust's expenses. As of June 30, 2023, each Share represented approximately 0.0097 of one ETH.

Authorized Participants are the only persons that may place orders to create Baskets. Each Authorized Participant must (i) be a registered broker-dealer, (ii) enter into an agreement with the Sponsor and the Liquidity Provider (as defined below), if applicable, that provides the procedures for the creation and redemption of Baskets and for the delivery of ETH required for Creation Baskets and Redemption Baskets (each, a ''Participant Agreement'') and (iii) in the case of creation or redemption in-kind, own an ETH wallet address that is known to the Custodian as belonging to the Authorized Participant. An Authorized Participant may act for its own account or as agent for broker-dealers, custodians and other securities market participants that wish to create or redeem Baskets. Shareholders who are not Authorized Participants will only be able to redeem their Shares through an Authorized Participant.

Although the creation of Baskets requires the delivery to the Trust of the Total Basket Amount, an Authorized Participant may deposit cash, which will facilitate the purchase or sale of ETH on behalf of the Authorized Participant through one or more eligible companies (each, a ''Liquidity Provider'') that have entered into a Participant Agreement with the Sponsor, the Administrator, the Marketing Agent, and the relevant Authorized Participant.

The Participant Agreement provides the procedures for the creation of Baskets and for the delivery of the whole and fractional ETH required for such creations. The Participant Agreement and the related procedures attached thereto may be amended by the Sponsor and the relevant Authorized Participant. Under the Participant Agreement, the Sponsor has agreed to indemnify each Authorized Participant against certain liabilities, including liabilities under the Securities Act.

Authorized Participants do not pay a transaction fee to the Trust in connection with the creation of Baskets, but there may be transaction fees associated with the validation of the transfer of ETH by the Ethereum Network. Authorized Participants who deposit ETH with the Trust in exchange for Baskets will receive no fees, commissions or other form of compensation or inducement of any kind from either the Sponsor or the Trust, and no such person has any obligation or responsibility to the Sponsor or the Trust to effect any sale or resale of Shares.

Creation Procedures

On any business day, an Authorized Participant may place an order with the Administrator to create one or more Baskets. Orders for creations may be placed either ''in-kind'' or ''in-cash.'' Orders for creation in-kind must be placed with the Administrator no later than 3:59:59 p.m., New York time, and no later than 4:59:59 p.m., New York time, for creations in-cash (in each case, the ''Order Cutoff Time'').

In-kind creations will take place as follows, where ''T'' is the trade date and each day in the sequence must be a business day:

[55] To further illustrate the size and liquidity of the Trust, as of September 6, 2023, compared with global commodity ETPs, the Trust would rank 24th in assets under management and 83rd in notional trading volume for the preceding 30 days.

T	T+1
• The Authorized Participant places a creation order with the Administrator. • The Marketing Agent accepts (or rejects) the creation order, which is communicated to the Authorized Participant by the Administrator. • The Total Basket Amount is determined as soon as practicable after 4:00 p.m., New York time.	• The Authorized Participant transfers the Total Basket Amount to the Custodian no later than 4:00 p.m., New York time. • Once the Total Basket Amount is received by the Custodian, the Administrator directs the Transfer Agent to credit the number of Baskets created to the Authorized Participant's DTC account.

In-cash creations will take place as follows, where ''T'' is the trade date and each day in the sequence must be a business day:

T – 1	T	T+1
• The Authorized Participant places a creation order with the Administrator. • The Marketing Agent accepts (or rejects) the creation order, which is communicated to the Authorized Participant by the Administrator. • The Authorized Participant sends 110% of the U.S. dollar value of the number of baskets ordered pursuant to such creation order, as calculated using the Index Price as of the order date (the ''Cash Collateral Amount'') to the Administrator.	• The Sponsor notifies the Liquidity Provider of the creation order and the Liquidity Provider may begin purchasing ETH to deliver the Total Basket Amount. • The Total Basket Amount is determined as soon as practicable after 4:00 p.m., New York time.	• The Liquidity Provider delivers the Total Basket Amount to the Custodian no later than 4:00 p.m., New York time. • Once the Total Basket Amount is received by the Custodian, the Administrator directs the Transfer Agent to credit the number of Baskets created to the Authorized Participant's DTC account. • The Administrator sends the Liquidity Provider cash equal to the U.S. dollar value of the Total Basket Amount, as determined on the trade date, plus the Variable Fee, and returns the remaining amount of the Cash Collateral Amount (if any) to the Authorized Participant.

Redemption of Shares

The Trust may redeem Shares from time to time but only in Baskets. A Basket equals a block of 100 Shares. The number of outstanding Shares is expected to decrease from time to time as a result of the redemption of Baskets. The redemption of Baskets requires the distribution by the Trust of the number of ETH represented by the Baskets being redeemed. The redemption of a Basket will be made only in exchange for the distribution by the Trust of the number of whole and fractional ETH represented by each Basket being redeemed, the number of which is determined by dividing (x) the number of ETH owned by the Trust at 4:00 p.m., New York time, on the relevant trade date of a redemption order, after deducting the number of ETH representing the U.S. dollar value of accrued but unpaid fees and expenses of the Trust (converted using the Index Price at such time, and carried to the eighth decimal place) by (y) the number of Shares outstanding at such time (with the quotient so obtained calculated to one one-hundred-millionth of one ETH (*i.e.,* carried to the eighth decimal place)), and multiplying such quotient by 100.

Authorized Participants are the only persons that may place orders to redeem Baskets. Shareholders who are not Authorized Participants will be able to redeem their Shares only through an Authorized Participant.

Each Participant Agreement provides the procedures for the redemption of Baskets and for the delivery of the whole and fractional ETH required for such redemption. The Participant Agreement and the related procedures attached thereto may be amended by the Sponsor and the relevant Authorized Participant.

Authorized Participants do not pay a transaction fee to the Trust in connection with the redemption of Baskets, but there may be transaction fees associated with the validation of the transfer of ETH by the Ethereum Network.

Redemption Procedures

The Trust will also redeem Shares on a continuous basis but only in Baskets of 100 Shares. The procedures by which an Authorized Participant can redeem one or more Baskets mirror the procedures for the creation of Baskets. On any business day, an Authorized Participant may place an order with the Administrator to redeem one or more Baskets. Redemption orders must be placed with the Administrator no later than the Order Cutoff Time.

In-kind redemptions will take place as follows, where ''T'' is the trade date and each day in the sequence must be a business day:

T	T+2
• The Authorized Participant places a redemption order with the Administrator. • The Marketing Agent accepts (or rejects) the redemption order, which is communicated to the Authorized Participant by the Administrator. • The Total Basket Amount is determined as soon as practicable after 4:00 p.m., New York time.	• The Authorized Participant delivers Baskets from its DTC account to the Transfer Agent no later than 4:00 p.m., New York time. • Once the Baskets are received by the Transfer Agent, the Custodian transfers the Total Basket Amount to the Authorized Participant and the Transfer Agent cancels the Shares.

In-cash redemptions will take place as follows, where ''T'' is the trade date and each day in the sequence must be a business day:

T – 1	T	T+2
• The Authorized Participant places a redemption order with the Administrator. • The Marketing Agent accepts (or rejects) the redemption order, which is communicated to the Authorized Participant by the Administrator.	• The Sponsor notifies the Liquidity Provider of the redemption order and the Liquidity Provider may begin selling ETH to deliver the Total Basket Amount. • The Total Basket Amount is determined as soon as practicable after 4:00 p.m., New York time.	• The Authorized Participant delivers Baskets to be redeemed to the Transfer Agent no later than 4:00 p.m., New York time. • The Liquidity Provider deposits with the Administrator cash equal to the U.S. dollar value of the Total Basket Amount, as determined on the trade date. • Once the Baskets are received by the Transfer Agent and the Administrator sends the above-mentioned cash equal to the U.S. dollar value of the Total Basket Amount less the Transaction Fee, the Variable Fee and all other charges and fees payable in connection with the redemption order to the Authorized Participant, the Transfer Agent cancels the Shares. • The Custodian sends the Liquidity Provider the number of ETH equal to the Total Basket Amount and the Administrator sends the Variable Fee to the Liquidity Provider.

Suspension of Orders

The creation or redemption of Shares may be suspended generally, or refused with respect to particular requested creations or redemptions, during any period when the transfer books of the Transfer Agent are closed or if circumstances outside the control of the Sponsor or its delegates make it for all practical purposes not feasible to process creation orders or redemption orders. The Administrator may reject an order or, after accepting an order, may cancel such order by rejecting the Total Basket Amount if: (i) such order is not presented in proper form as described in the Participant Agreement, (ii) the transfer of the Total Basket Amount comes from an account other than an ETH wallet address that is known to the Custodian as belonging to the Authorized Participant or (iii) the fulfillment of the order, in the opinion of counsel, might be unlawful, among other reasons. None of the Sponsor or its delegates will be liable for the suspension, rejection or acceptance of any creation order or redemption order.

In particular, upon the Trust's receipt of any Incidental Rights and/or IR Virtual Currency in connection with a fork, airdrop or similar event, the Sponsor may suspend redemptions until it is able to cause the Trust to sell or distribute such Incidental Rights and/or IR Virtual Currency.

Availability of Information

The Trust's website (*https://grayscale.com/products/grayscale-ethereum-trust/*) will include quantitative information on a per Share basis updated on a daily basis, including, (i) the current Digital Asset Holdings per Share daily and the prior business day's Digital Asset Holdings per Share and the reported closing price of the Shares; (ii) the mid-point of the bid-ask price [56] as of the time the Digital Asset Holdings per Share is calculated (''Bid-Ask Price'') and a calculation of the premium or discount of such price against such Digital Asset Holdings per Share; and (iii) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid-Ask Price against the Digital Asset Holdings per Share, within appropriate ranges, for each of the four previous calendar quarters (or for as long as the Trust has been trading as an ETP if shorter). In addition, on each business day the Trust's website will provide pricing information for the Shares.

One or more major market data vendors, will provide an intra-day indicative value (''IIV'') per Share updated every 15 seconds, as calculated by the Exchange or a third party financial data provider during the Exchange's Core Trading Session (9:30 a.m. to 4:00 p.m., E.T.).[57] The IIV will be calculated using the same methodology as the Digital Asset Holdings per Share of the Trust (as described above), specifically by using the prior day's closing Digital Asset Holdings per Share as a base and updating that value during the NYSE Arca Core Trading Session to reflect changes in the value of the Trust's Digital Asset Holdings during the trading day.

The IIV disseminated during the NYSE Arca Core Trading Session should not be viewed as an actual real-time update of the Digital Asset Holdings per Share, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the NYSE Arca Core Trading Session by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The Digital Asset Holdings for the Trust will be calculated by the Sponsor once a day and will be disseminated daily to all market participants at the same time. To the extent that the Sponsor has utilized the cascading set of rules described in ''Index Price'' above, the Trust's website will note the valuation methodology used and the price per ETH resulting from such calculation. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association (''CTA'').

Quotation and last sale information for ETH will be widely disseminated through a variety of major market data vendors, including Bloomberg and Reuters. In addition, real-time price (and volume) data for ETH is available by subscription from Reuters and Bloomberg. The spot price of ETH is available on a 24-hour basis from major market data vendors, including Bloomberg and Reuters. Information relating to trading, including price and

[56] The bid-ask price of the Trust is determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day Digital Asset Holdings.

[57] The IIV on a per Share basis disseminated during the Core Trading Session should not be viewed as a real-time update of the Digital Asset Holdings, which is calculated once a day.

volume information, in ETH will be available from major market data vendors and from the exchanges on which ETH are traded. The normal trading hours for Digital Asset Exchanges are 24-hours per day, 365-days per year.

On each business day, the Sponsor will publish the Index Price, the Trust's Digital Asset Holdings, and the Digital Asset Holdings per Share on the Trust's website as soon as practicable after its determination. If the Digital Asset Holdings and Digital Asset Holdings per Share have been calculated using a price per ETH other than the Index Price for such Evaluation Time, the publication on the Trust's website will note the valuation methodology used and the price per ETH resulting from such calculation.

The Trust will provide website disclosure of its Digital Asset Holdings daily. The website disclosure of the Trust's Digital Asset Holdings will occur at the same time as the disclosure by the Sponsor of the Digital Asset Holdings to Authorized Participants so that all market participants are provided such portfolio information at the same time. Therefore, the same portfolio information will be provided on the public website as well as in electronic files provided to Authorized Participants. Accordingly, each investor will have access to the current Digital Asset Holdings of the Trust through the Trust's website, as well as from one or more major market data vendors.

The value of the Index, as well as additional information regarding the Index, will be available on a continuous basis at *https://www.coindesk.com/indices.*

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m., E.T. in accordance with NYSE Arca Rule 7.34–E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00, for which the MPV for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.201–E. The trading of the Shares will be subject to NYSE Arca Rule 8.201–E(g), which sets forth certain restrictions on Equity Trading Permit Holders (''ETP Holders'') acting as registered Market Makers in Commodity-Based Trust Shares to facilitate surveillance. The Exchange represents that, for initial and continued listing, the Trust will be in compliance with Rule 10A–3 [58] under the Act, as provided by NYSE Arca Rule 5.3–E. A minimum of 100,000 Shares of the Trust will be outstanding at the commencement of trading on the Exchange.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Trust.[59] Trading in Shares of the Trust will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The Exchange may halt trading during the day in which an interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the Digital Asset Holdings per Share is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the Digital Asset Holdings per Share is available to all market participants.

Surveillance

The Exchange represents that trading in the Shares of the Trust will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[60] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement (''CSSA'').[61] The Exchange is also able to obtain information regarding trading in the Shares in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

All statements and representations made in this filing regarding (a) the description of the portfolios of the Trust, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The Sponsor has represented to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

[58] 17 CFR 240.10A–3.

[59] *See* NYSE Arca Rule 7.12–E.

[60] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[61] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all components of the Trust may trade on markets that are members of ISG or with which the Exchange has in place a CSSA.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an ''Information Bulletin'' of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (1) the procedures for creations of Shares in Baskets; (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) information regarding how the value of the Index and the IIV are disseminated; (4) the possibility that trading spreads and the resulting premium or discount on the Shares may widen during the Opening and Late Trading Sessions, when an updated IIV will not be calculated or publicly disseminated; and (5) trading information. The Exchange notes that investors purchasing Shares directly from the Trust will receive a prospectus.

In addition, the Information Bulletin will reference that the Trust is subject to various fees and expenses as described in the Annual Report. The Information Bulletin will disclose that information about the Shares of the Trust is publicly available on the Trust's website.

The Information Bulletin will also discuss any relief, if granted, by the Commission or the staff from any rules under the Act.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[62] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.201–E. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares with other markets that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares from such markets. In addition, the Exchange may obtain information regarding trading in the Shares from markets that are members of ISG or with which the Exchange has in place a CSSA. Also, pursuant to NYSE Arca Rule 8.201–E(g), the Exchange is able to obtain information regarding trading in the Shares and the underlying ETH or any ETH derivative through ETP Holders acting as registered Market Makers, in connection with such ETP Holders' proprietary or customer trades through ETP Holders which they effect on any relevant market.

The proposed rule change is also designed to prevent fraudulent and manipulative acts and practices because, although the Digital Asset Exchange Market is not inherently resistant to fraud and manipulation, the Index serves as a means sufficient to mitigate the impact of instances of fraud and manipulation on a reference price for ETH. Specifically, the Index provides a better benchmark for the price of ETH than the Digital Asset Exchange Market price because it (1) tracks the Digital Asset Exchange Market price through trading activity at U.S.-Compliant Exchanges; (2) mitigates the impact of instances of fraud, manipulation and other anomalous trading activity in real-time through systematic adjustments; (3) is constructed and maintained by an expert third-party index provider, allowing for prudent handling of non-market-related events; and (4) mitigates the impact of instances of fraud, manipulation and other anomalous trading activity concentrated on any one specific exchange through a cross-exchange composite index rate. The Trust has used the Index to price the Shares for more than four years, and the Index has proven its ability to (i) mitigate the effects of fraud, manipulation and other anomalous trading activity from impacting the ETH reference rate, (ii) provide a real-time, volume-weighted fair value of ETH and (iii) appropriately handle and adjust for non-market related events, such that efforts to manipulate the price of ETH would have had a negligible effect on the pricing of the Trust, due to the controls embedded in the structure of the Index. In addition, certain of the Index's Constituent Exchanges also have or have begun to implement market surveillance infrastructure to further detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing, including market manipulation. The proposed rule change is also designed to prevent fraudulent and manipulative acts and practices based on the existence of the CME futures market as a large, surveilled and regulated market that is closely connected with the spot market for ETH and through which the Exchange could obtain information to assist in detecting and deterring potential fraud or manipulation.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that there is a considerable amount of ETH price and market information available on public websites and through professional and subscription services. Investors may obtain, on a 24-hour basis, ETH pricing information based on the spot price for ETH from various financial information service providers. The closing price and settlement prices of ETH are readily available from the Digital Asset Exchanges and other publicly available websites. In addition, such prices are published in public sources, or on-line information services such as Bloomberg and Reuters. The Digital Asset Holdings per Share will be calculated daily and made available to all market participants at the same time. The Trust will provide website disclosure of its Digital Asset Holdings daily. One or more major market data vendors will disseminate for the Trust on a daily basis information with respect to the most recent Digital Asset Holdings per Share and Shares outstanding. In addition, if the Exchange becomes aware that the Digital Asset Holdings per Share is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the Digital Asset Holdings is available to all market participants. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The IIV will be widely disseminated on a per Share basis every 15 seconds during the NYSE Arca Core Trading Session (normally 9:30 a.m., E.T., to 4:00 p.m., E.T.) by one or more major market data vendors. The Exchange represents that the Exchange may halt trading during the day in which an interruption to the dissemination of the IIV or the value of the Index occurs. If the interruption to the dissemination of the IIV or the value of the Index persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning

[62] 15 U.S.C. 78f(b)(5).

of the trading day following the interruption.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a CSSA. In addition, as noted above, investors will have ready access to information regarding the Trust's Digital Asset Holdings, IIV, and quotation and last sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of an additional type of exchange-traded product, and the first such product based on ETH, which will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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 the 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–NYSEARCA–2023–70 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEARCA–2023–70. 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–NYSEARCA–2023–70 and should be submitted on or before November 17, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[63]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23703 Filed 10–26–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98787; File No. SR–CboeEDGX–2023–064]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

October 23, 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 October 13, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

[63] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (''EDGX Options'') relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's equities platform (EDGX Equities), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGX–2023–045). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–058. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeEDGX–2023–063). On October 13, 2023, the Exchange withdrew that filing and submitted this filing. No comment letters were received in connection with any of the foregoing rule filings.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83430 (June 14, 2018), 83 FR 28697 (June 20, 2018) (SR–CboeEDGX–2018–017).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that 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, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 17 registered options exchanges that trade options (13 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 20% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, MIAX Emerald LLC, and most recently MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 51 members that trade options, Cboe BZX has 61 members that trade options, and Cboe C2 has 52 Trading Permit Holders (''TPHs'') (*i.e.,* members). There is also no firm that is a Member of EDGX Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange 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 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 to its Exchange.[19] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[20] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[21] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. As such, even firms that wish to utilize a single, dedicated 10 Gb port (*i.e.,* use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller because such reseller may be providing additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). Further, as noted above, 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. Therefore given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Further, the Exchange believes its offerings are more affordable

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (October 13, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not haave to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[20] *See, e.g.,* Nasdaq Price List—US 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).

[21] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

as compared to similar offerings at competitor exchanges.[22]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 13 non-Cboe affiliated options markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [23] and paragraph (f) of Rule 19b–4 [24] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGX–2023–064 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–CboeEDGX–2023–064. 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

[22] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4(f).

submissions should refer to file number SR–CboeEDGX–2023–064 and should be submitted on or before November 17, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23708 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98785; File No. SR–CboeBZX–2023–083]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

October 23, 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 October 13, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX Options'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (''BZX Options'') relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's equities platform (BZX Equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeBZX–2023–047). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeBZX–2023–068. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeBZX–2023–79). On October 13, 2023, the Exchange withdrew that filing and submitted this filing. No comment letters were received in connection with any of the foregoing rule filings.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83429 (June 14, 2018), 83 FR 28685 (June 20, 2018) (SR–CboeBZX–2018–038).

physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that 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, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 17 registered options exchanges that trade options (13 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single options exchange has more than approximately 20% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, MIAX Emerald LLC, and most recently, MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 61 members that trade options, Cboe EDGX has 51 members that trade options, and Cboe C2 has 52 Trading Permit Holders (''TPHs'') (*i.e.,* members). There is also no firm that is a Member of BZX Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,[15] and NYSE Arca Options has 69 members,[16] MIAX Options has 46 members [17] and MIAX Pearl Options has 40 members.[18]

A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange 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 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 to its Exchange.[19] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets U.S. Options Market Volume Summary (October 13, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[15] *See https://www.nyse.com/markets/american-options/membership#directory.*

[16] *See https://www.nyse.com/markets/arca-options/membership#directory.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.*

[18] *See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.*

[19] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

that connect to the Exchange indirectly via the third-party).[20] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[21] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. As such, even firms that wish to utilize a single, dedicated 10 Gb port (*i.e.,* use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller because such reseller may be providing additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). Further, as noted above, 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. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[22] Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 13 non-Cboe affiliated options markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [23] and paragraph (f) of Rule 19b–4 [24] thereunder. At any time within

[20] *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).

[21] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[22] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

[23] 15 U.S.C. 78s(b)(3)(A).

[24] 17 CFR 240.19b–4(f).

60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–083 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–CboeBZX–2023–083. 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–CboeBZX–2023–083 and should be submitted on or before November 17, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23707 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35036; File No. 812–15398]

26North BDC, Inc., et al.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies (''BDCs'') and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

APPLICANTS: 26North BDC, Inc., 26North Direct Lending LP, 26North Direct Lending II LP, Tidal Notes Issuer LLC, Gemini Notes Issuer LLC, Jordan Notes Issuer LLC, Ripple Notes Issuer LLC, Chestnut Notes Issuer LLC and Element Notes Issuer LLC.

FILING DATES: The application was filed on October 20, 2022, and amended on February 2, 2023, and August 2, 2023.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at *Secretarys-Office@sec.gov* and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on November 13, 2023 and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: *fmarra@26n.com, nicole.runyan@kirkland.com,* and *gregory.rowland@davispolk.com.*

FOR FURTHER INFORMATION CONTACT: Stephan N. Packs, Senior Counsel, or Terri G. Jordan, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: For Applicants' representations, legal analysis, and conditions, please refer to Applicants' Second Amended and Restated Application, dated August 2, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at, *http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Dated: October 24, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23764 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–107, OMB Control No. 3235–0116]

Submission for OMB Review; Comment Request; Extension: Form 6–K—Exchange Act Rules 13a–16 and 15d–16

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

[25] 17 CFR 200.30–3(a)(12).

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form 6–K (17 CFR 249.306) is a disclosure document under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) that must be filed by a foreign private issuer to report material information promptly after the occurrence of specified or other important corporate events that are disclosed in the foreign private issuer's home country. The purpose of Form 6–K is to ensure that U.S. investors have access to the same information that foreign investors do when making investment decisions. Form 6–K is a public document and all information provided is mandatory. Form 6–K takes approximately 8.7 hours per response and is filed by approximately 34,794 issuers annually. We estimate 75% of the 8.7 hours per response (6.525 hours) is prepared by the issuer for a total annual reporting burden of 227,031 hours (6.525 hours per response × 34,794 responses). The remaining burden hours are reflected as a cost to the foreign private issuers.

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by November 27, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov*.

Dated: October 23, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23714 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–559, OMB Control No. 3235–0621]

Submission for OMB Review; Comment Request; Extension: Form 15F

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form 15F (17 CFR 249.324) is filed by a foreign private issuer when terminating its Exchange Act reporting obligations pursuant to Exchange Act Rule 12h–6 (17 CFR 240.12h–6). Form 15F requires a foreign private issuer to disclose information that helps investors understand the foreign private issuer's decision to terminate its Exchange Act reporting obligations and assists the Commission staff in determining whether the filer is eligible to terminate its Exchange Act reporting obligations pursuant to Rule 12h–6. Rule 12h–6 provides a process for a foreign private issuer to exit the Exchange Act registration and reporting regime when there is relatively little U.S. investor interest in its securities. Rule 12h–6 is intended to remove a disincentive for foreign private issuers to register their securities with the Commission by lessening concerns that the Exchange Act registration and reporting system would be difficult to exit once an issuer enters it. The information provided to the Commission is mandatory and all information is made available to the public upon request. We estimate that Form 15F takes approximately 30 hours to prepare and is filed by approximately 30 foreign private issuers. We estimate that 25% of the 30 hours per response (7.5 hours per response) is prepared by the filer for a total annual reporting burden of 225 hours (7.5 hours per response × 30 responses).

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by November 27, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov*.

Dated: October 23, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23711 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98783; File No. SR-CboeEDGA–2023–017]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

October 23, 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 October 13, 2023, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA Equities'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*),

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Cboe BZX Exchange, Inc. (options and equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4)[9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGA–2023–011). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGA–2023–015. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeEDGA–2023–016). On October 13, 2023, the Exchange withdrew that filing and submitted this filing. No comment letters were received in connection with any of the foregoing rule filings.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83449 (June 15, 2018), 83 FR 28890 (June 21, 2018) (SR–CboeEDGA–2018–010).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that 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 equities product, such as within the Over-the-Counter (OTC) markets which does not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 103 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe BYX has 110 members and Cboe BZX has 132 members. There is also no firm that is a Member of EDGA Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange 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 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 to its Exchange.[18] The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. As such, even firms that wish to utilize a single, dedicated 10 Gbps port (*i.e.,* use one single 10 Gbps port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller because such reseller may be providing additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). Further, as noted above, 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. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29, 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership,.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *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).

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

[21] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10 Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e., all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [22] and paragraph (f) of Rule 19b–4 [23] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeEDGA–2023–017 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–CboeEDGA–2023–017. 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

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f).

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–CboeEDGA–2023–017 and should be submitted on or before November 17, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23705 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–564, OMB Control No. 3235–0628]

Submission for OMB Review; Comment Request; Extension: Rule 17g–2

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 17g–2 (17 CFR 240.17g–2) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 17g–2, ''Records to be made and retained by nationally recognized statistical rating organizations,'' implements the Commission's recordkeeping rulemaking authority under Section 17(a) of the Exchange Act.[1] The rule requires a Nationally Recognized Statistical Rating Organization (''NRSRO'') to make and retain certain records relating to its business and to retain certain other business records, if such records are made. The rule also prescribes the time periods and manner in which all these records must be retained. There are 10 credit rating agencies registered with the Commission as NRSROs under section 15E of the Exchange Act, which have already established the recordkeeping policies and procedures required by Rule 17g–2. Based on staff experience, NRSROs are estimated to spend a total industry-wide burden of 2,650 annual hours to make and retain the appropriate records.[2]

Written comments are invited on: (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 estimates of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

The Commission 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 OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by November 27, 2023 to (i) *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov* and (ii) Please direct your written comments to: Dave Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F St. NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: October 23, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23710 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–137, OMB Control No. 3235–0145]

Submission for OMB Review; Comment Request; Extension: Regulation 13D and Regulation 13G; Schedule 13D and Schedule 13G

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Schedules 13D and 13G (17 CFR 240.13d–101 and 240.13d–102) are filed pursuant to Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(d) and 78m(g)) (''Exchange Act'') and Regulations 13D and 13G (17 CFR 240.13d–1—240.13d–7) thereunder to report beneficial ownership of equity securities registered under Section 12 (15 U.S.C. 78*l*) of the Exchange Act. Regulations 13D and 13G provide investors, the subject issuers, and market participants with information about the accumulation of equity securities that may have the potential to change or influence control of an issuer. Schedules 13D and 13G are filed by persons, including small entities, to report their ownership of more than 5% of a class of equity securities registered under Section 12.

We estimate that it takes approximately 14.5 burden hours to prepare a Schedule 13D and it is filed by approximately 1,508 filers. In addition, we estimate that 25% of the 14.5 hours per response (3.625 hours per response) is carried internally by the filer for a total annual reporting burden of 5,467 hours (3.625 hours per response × 1,508 responses).

We estimate that it takes approximately 12.4 hours per response to prepare a Schedule 13G and it is filed by approximately 7,079 filers. In addition, we estimate 25% of the 12.4 hours per response (3.1 hours per response) is carried internally by the filer for a total annual reporting burden of 21,945 hours (3.1 hours per response × 7,079 responses),

The Schedules combined are filed by 8,587 filers and they take approximately 12.769 hours per response. In addition,

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78q.

[2] 10 currently registered NRSROs × 265 hours = 2,650 hours.

we estimate 25% of the 12.769 (3.19225 hours per response) is carried internally by the filer for a total annual reporting burden of 27,412 hours (3.1923 hours per response × 8,587 responses). The estimated burden hours are made solely for purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms.

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by November 27, 2023 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 23, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23712 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98782; File No. SR–CboeEDGX–2023–065]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

October 23, 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 October 16, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Equities'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Equities'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees.[3]

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: $2,500 per physical port for a 1 gigabit (''Gb'') circuit and $7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from $7,500 to $8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.[4] The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's options platform (EDGX Options), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (''Affiliate Exchanges'').[5]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[8] requirement that

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on July 3, 2023 (SR–CboeEDGX–2023–044). On September 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–057. On September 29, 2023, the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees (the ''OIP''). On September 29, 2023, the Exchange filed the proposed fee change (SR–CboeEDGX–2023–62). On October 13, 2023, the Exchange withdrew that filing and on business date October 16, 2023 submitted this filing. No comment letters were received in connection with any of the foregoing rule filings.

[4] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[5] The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] *Id.*

the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) [9] of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.[10] Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.[11] Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.[12] Indeed, the Exchange believes assessing fees that are a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable. As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port. Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10th the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (*e.g.,* ability to receive certain market data products). Thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers. Moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network. As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that 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 equities product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange. Indeed, there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.[13] Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.[14] Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange has 124 members that trade equities, Cboe BZX has 132 members that trade equities, Cboe EDGA has 103 members and Cboe BYX has 110 members. There is also no firm that is a Member of EDGX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,[15] IEX has 129 members,[16] and MIAX Pearl has 51 members.[17]

A market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. The Exchange notes that third-party non-Members also resell exchange 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 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 to its Exchange.[18] The

[9] 15 U.S.C. 78f(b)(4).

[10] *See* Securities and Exchange Release No. 83450 (June 15, 2018), 83 FR 28884 (June 21, 2018) (SR–CboeEDGX–2018–016).

[11] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[12] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed $22,000 per month, per port.

[13] *Id.*

[14] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[15] *See https://www.nyse.com/markets/nyse/membership.*

[16] *See https://www.iexexchange.io/membership.*

[17] *See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.*

[18] Third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, third-party resellers can

Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.,* fee based on number of Members that connect to the Exchange indirectly via the third-party).[19] Particularly, these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services. The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.[20] This allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity. These third-party sellers may also provide an additional value to market participants as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings. As such, even firms that wish to utilize a single, dedicated 10 Gbps port (*i.e.,* use one single 10 Gbps port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller because such reseller may be providing additional services and infrastructure support alongside the physical port offering (*e.g.,* providing space, hosting, power, and other long-haul connectivity options). Further, as noted above, 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. Therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings. Because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained. Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.[21]

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets. Indeed, market participants are free to choose which exchange or reseller to use to satisfy their business needs. Moreover, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues. The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.,* all market participants that choose to purchase the 10 Gb physical port). Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants. For example, market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller. While pricing may be increased for the larger capacity physical ports, such options provide far more capacity and are purchased by those that consume more resources from the network. Accordingly, the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants—lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.

The Exchange's proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine

help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. Many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. This may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. This facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business.

[19] *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).

[20] For example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port.

[21] *See e.g.,* The Nasdaq Stock Market LLC (''Nasdaq''), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of $15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. *See also* New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed $22,000 per month, per port.

whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [22] and paragraph (f) of Rule 19b–4 [23] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CboeEDGX–2023–065 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGX–2023–065. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*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–CboeEDGX–2023–065 and should be submitted on or before November 17, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–23704 Filed 10–26–23; 8:45 am]

BILLING CODE 8011–01–P

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f).

[24] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18118 and #18119; FLORIDA Disaster Number FL–00192]

Presidential Declaration Amendment of a Major Disaster for the State of Florida

AGENCY: Small Business Administration.

ACTION: Amendment 5.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Florida (FEMA–4734–DR), dated 08/31/2023.

Incident: Hurricane Idalia.

Incident Period: 08/27/2023 through 09/04/2023.

DATES: Issued on 10/16/2023.

Physical Loan Application Deadline Date: 11/29/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 05/31/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Florida, dated 08/31/2023, is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 11/29/2023.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–23747 Filed 10–26–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18061 and #18062; HAWAII Disaster Number HI–00073]

Presidential Declaration Amendment of a Major Disaster for the State of Hawaii

AGENCY: Small Business Administration.

ACTION: Amendment 4.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Hawaii (FEMA–4724–DR), dated 08/10/2023.

Incident: Wildfires, including High Winds.

Incident Period: 08/08/2023 through 09/30/2023.

DATES: Issued on 10/13/2023.

Physical Loan Application Deadline Date: 11/09/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 05/10/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Hawaii, dated 08/10/2023, is hereby amended to establish the incident period for this disaster as beginning 08/08/2023 and continuing through 09/30/2023.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–23743 Filed 10–26–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18094 and #18095; HAWAII Disaster Number HI–00074]

Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Hawaii

AGENCY: Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Hawaii (FEMA–4724–DR), dated 08/21/2023.

Incident: Wildfires, including High Winds.

Incident Period: 08/08/2023 through 09/30/2023.

DATES: Issued on 10/13/2023.

Physical Loan Application Deadline Date: 10/20/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 05/21/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Hawaii, dated 08/21/2023, is hereby amended to establish the incident period for this disaster as beginning 08/08/2023 and continuing through 09/30/2023.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Francisco Sánchez, Jr.,

Associate Administrator, Office of Disaster Recovery & Resilience.

[FR Doc. 2023–23749 Filed 10–26–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #18185 and #18186; OKLAHOMA Disaster Number OK–00172]

Administrative Disaster Declaration of a Rural Area Amendment for the State of Oklahoma

AGENCY: Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Administrative disaster declaration of a rural area for the State of Oklahoma dated 09/20/2023.

Incident: Rural Area—Severe Storms, Straight-Line Winds and Tornadoes.

Incident Period: 06/14/2023 through 06/18/2023.

DATES: Issued on 10/20/2023.

*Physical Loan Application Deadline Date:*11/20/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 06/20/2024.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: The notice of an Administrative disaster declaration of a rural area for the State of Oklahoma, dated 09/20/2023 is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Pushmataha.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2023–23745 Filed 10–26–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF STATE

[Public Notice: 12247]

Notice of Determinations; Additional Culturally Significant Objects Being Imported for Exhibition—Determinations: ''The Golden Path: Maimonides Across Eight Centuries'' Exhibition

SUMMARY: On April 12, 2023, notice was published of determinations pertaining to certain objects to be included in an exhibition entitled ''The Golden Path: Maimonides Across Eight Centuries.'' Notice is hereby given of the following determinations: I hereby determine that certain additional objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary display in the aforesaid exhibition at the Yeshiva University Museum, New York, New York, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Reed Liriano, Program Coordinator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street, NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The notice was published at 88 FR 22081 (April 12, 2023). The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Nicole L. Elkon,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2023–23698 Filed 10–26–23; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 12233]

Determination Under Section 620(q) of the Foreign Assistance Act of 1961 Relating to Assistance for Uzbekistan and Romania

Pursuant to the authority vested in me by section 620(q) of the Foreign Assistance Act of 1961 (FAA), Executive Order 12163, and Department of State Delegation of Authority 513, I hereby determine that assistance for Uzbekistan and Romania is in the national interest of the United States and thereby waive

the application of section 620(q) of the FAA with respect to such assistance.

This determination shall be published in the **Federal Register** and, with the accompanying Memorandum of Justification, shall be transmitted to Congress.

Dated: June 30, 2023.

Wendy R. Sherman,

Deputy Secretary of State.

[FR Doc. 2023–23719 Filed 10–26–23; 8:45 am]

BILLING CODE 4710–23–P

DEPARTMENT OF STATE

[Public Notice: 12241]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: ''Japanese Tastes in Chinese Ceramics: Tea Utensils, Kaiseki Dishes, and More'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary display in the exhibition ''Japanese Tastes in Chinese Ceramics: Tea Utensils, Kaiseki Dishes, and More'' at the Asian Art Museum, San Francisco, California, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Reed Liriano, Program Coordinator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000, and Delegation of Authority No. 523 of December 22, 2021.

Nicole L. Elkon,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2023–23699 Filed 10–26–23; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 12227]

Determination Under Section 620(q) of the Foreign Assistance Act of 1961 Relating to Assistance to Zimbabwe

Pursuant to the authority vested in me by section 620(q) of the Foreign Assistance Act of 1961 (FAA), Executive Order 12163, and Department of State Delegation of Authority 513, I hereby determine that targeted assistance to Zimbabwe in the areas of health, good governance and respect for human rights, education, leadership, agriculture/food security, poverty reduction, livelihoods, family planning and reproductive health, macroeconomic growth (including anti-corruption efforts), helping victims of trafficking and combatting trafficking, and advancing biodiversity and wildlife conservation, as well as the continuation of assistance that would have a significant adverse effect on vulnerable populations if suspended, is in the national interest of the United States and thereby waive the application of section 620(q) of the FAA with respect to such assistance.

This determination shall be published in the **Federal Register** and, with the accompanying Memorandum of Justification, shall be transmitted to Congress.

Dated: September 28, 2023.

Richard Verma,

Deputy Secretary of State for Management and Resources.

[FR Doc. 2023–23718 Filed 10–26–23; 8:45 am]

BILLING CODE 4710–26–P

DEPARTMENT OF STATE

[Public Notice: 12226]

Determination Under Section 7012 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2023 Relating to Assistance to Zimbabwe

Pursuant to the authority vested in me by section 7012 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2023 (Div. K, Pub. L. 117–328) (SFOAA); Executive Order 12163, as amended by Executive Order 13346; and Delegation of Authority 513, I hereby determine that targeted assistance to Zimbabwe in the areas of health, good governance and respect for human rights, education, leadership, agriculture/food security, poverty reduction, livelihoods, family planning and reproductive health, macroeconomic growth (including anti-corruption efforts), helping victims of trafficking and combatting trafficking, and advancing biodiversity and wildlife conservation, as well as the continuation of assistance that would have a significant adverse effect on vulnerable populations if suspended, is in the national interest of the United States. I thereby waive with respect to Zimbabwe the application of section 7012 of the FY 2023 SFOAA with respect to such assistance.

This determination shall be published in the **Federal Register** and, along with the accompanying Memorandum of Justification, shall be transmitted to Congress.

Dated: September 28, 2023.

Richard Verma,

Deputy Secretary of State for Management and Resources.

[FR Doc. 2023–23717 Filed 10–26–23; 8:45 am]

BILLING CODE 4710–26–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36728]

New Era Railroad, LLC—Acquisition and Change in Operator Exemption—RMW Ventures, LLC

New Era Railroad, LLC (NER), a noncarrier, has filed a verified notice of exemption under 49 CFR part 1150, subpart D to acquire and operate approximately 26.46 miles of rail line owned by RMW Ventures, LLC (RMW), between milepost 117.0 in the vicinity of Curryville, Ind., and milepost 123.0 at Bluffton, Ind.; and from milepost 123.8 at Bluffton to milepost 144.26 in the vicinity of Van Buren, Ind. (the Line).[1] The verified notice states that the Line is currently operated by Wabash Central

[1] On October 20, 2023, NER filed an amended verified notice withdrawing portions of the verified notice pertaining to the acquisition of incidental overhead trackage rights over approximately 0.8 miles of rail line owned by Norfolk Southern Railway Company (NSR) between milepost 123.0 (corresponding to NSR milepost 163.0) and milepost 123.8 (corresponding to NSR milepost 162.2). NER states that it will make other arrangements for interchange and operations over the NSR rail line.

Railway, LLC (WCR), a short line controlled by RMW.

According to the verified notice, NER and RMW have reached terms pursuant to which NER will acquire the Line. The verified notice states that, upon the closing of the railroad asset sale, RMW will terminate the lease agreement with WCR, and, as part of the transaction, WCR shall end its leasehold operating rights over the Line. The verified notice states that NER intends to commence common carrier operations over the Line on or after the anticipated effective date of this notice.

NER certifies that the transaction does not involve any provision that would limit future interchange with a third-party connecting carrier. NER further certifies that its projected annual revenues resulting from the transaction will not exceed $5 million and will not result in NER's becoming a Class I or Class II rail carrier. Under 49 CFR 1150.32(b), a change in operator requires that notice be given to shippers. NER states that notice of the proposed transaction has been provided to shippers on the Line.

The earliest this transaction may be consummated is November 10, 2023, the effective date of the exemption. If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than November 3, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36728, must be filed with the Surface Transportation Board via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on NER's representative, Michael J. Barron, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to NER, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov*.

Decided: October 24, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Eden Besera,

Clearance Clerk.

[FR Doc. 2023–23768 Filed 10–26–23; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent of Waiver With Respect to Land; Indianapolis Regional Airport, Indianapolis, Indiana

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA is considering a proposal to change 0.577 acres of airport land from aeronautical use to non-aeronautical use and to authorize the sale of airport property located at Indianapolis Regional Airport, Indianapolis, Indiana. The aforementioned land is not needed for aeronautical use. The land is made up of two parcels and is located along the County Road 600 in Hancock County, just east of Indianapolis Regional Airport, Indianapolis, Indiana. The Sponsor is proposing to release and ultimately sell the land for future public use.

DATES: Comments must be received on or before November 27, 2023.

ADDRESSES: All requisite and supporting documentation will be made available for review by appointment at the FAA Chicago Airports District Office, Melanie Myers, Program Manager, 2300 East Devon Avenue, Des Plaines, Illinois 60018. Telephone: (847) 294–7525/Fax: (847) 294–7046 and Eric Anderson, Director of Properties, Indianapolis Airport Authority, 7800 Col. H. Weir Cook Memorial Drive, Indianapolis, IN 46241 Telephone: 317–487–5135.

Written comments on the Sponsor's request may be submitted using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov,* and follow the instructions for sending your comments electronically.
- *Mail:* Melanie Myers, Program Manager, Federal Aviation Administration, Chicago Airports District Office, 2300 East Devon Avenue, Des Plaines, Illinois 60018. Telephone: (847) 294–7525/Fax: (847) 294–7046.
- *Hand Delivery:* Deliver to mail address above between 8 a.m. and 5 p.m. Monday through Friday, excluding Federal holidays.
- *Fax:* (847) 294–7046.

FOR FURTHER INFORMATION CONTACT: Melanie Myers, Program Manager, Federal Aviation Administration, Chicago Airports District Office, 2300 East Devon Avenue, Des Plaines, Illinois 60018. Telephone: (847) 294–7525/Fax: (847) 294–7046.

SUPPLEMENTARY INFORMATION: In accordance with section 47107(h) of title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

The land consists of two original airport acquired parcels. The parcels were acquired under Airport Development Aid Program ADAP–02 grant number 5–18–0037–02. The Sponsor is proposing to change the land from aeronautical use to non-aeronautical use and intends to ultimately sell the land at fair market value to Hancock County to widen County Road 600 for construction of roadway traffic circles. This is currently vacant land and is not needed for aeronautical purposes.

The disposition of proceeds from any future sale of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999 (64 FR 7696).

This notice announces that the FAA is considering the release of the subject airport property at the Indianapolis Regional Airport, Indianapolis, Indiana from federal land covenants, subject to a reservation for continuing right of flight as well as restrictions on the released property as required in FAA Order 5190.6B section 22.16. Approval does not constitute a commitment by the FAA to financially assist in the disposal of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA.

Land Description

A part of the Southwest Quarter of Section 7, Township 16 North, Range 6 East, Hancock County, Indiana, and being that part of the grantor's land lying within the right-of-way lines depicted on the attached Right-of-Way Parcel Plat, marked Exhibit ''B'', described as follows: Commencing at the southwest closing corner of said section, designated by point ''48'' on the Location Control Route Survey Plat recorded in Instrument 100004410 Surv. in the Office of the Recorder of said county, thence North 89 degrees 24 minutes 16 seconds East 69.96 feet along the south line of the said section to the west line of the grantor's land and

the east boundary of County Road 600 West; thence North 00 degrees 14 minutes 09 seconds West 8.60 feet along the boundary of said County Road 600 West; thence North 01 degree 11 minutes 33 seconds West 265 .47 feet along said boundary; thence North 01 degree 03 minutes 25 seconds West 160.63 feet along said boundary to the point of beginning of this description, designated by point ''969'' on said Parcel Plat; thence North 01 degree 03 minutes 25 seconds West 5.35 feet along the west line of the grantor's land and the boundary of said county road; thence North 00 degrees 28 minutes 35 seconds West 273.65 feet along the west line of the grantor's land and the boundary of said county road to point ''962'' designated on said Parcel Plat; thence South 13 degrees 35 minutes 05 seconds East 74.95 feet to point ''963'' designated on said Parcel Plat; thence South 84 degrees 37 minutes 39 seconds East 40.66 feet to point ''964'' designated on said Parcel Plat; thence North 70 degrees 28 minutes 47 seconds East 57.00 feet to point ''965'' designated on said Parcel Plat; thence South 19 degrees 31 minutes 20 seconds East 78.00 feet to point ''966'' designated on said Parcel Plat; thence South 61 degrees 00 minutes 55 seconds West 54.74 feet to point ''967'' designated on said Parcel Plat; thence South 33 degrees 51 minutes 05 seconds West 95.18 feet to point ''968'' designated on said Parcel Plat; thence South 39 degrees 17 minutes 08 seconds West 54.64 feet to the point of beginning and containing 0.388 acres, more or less.

A part of the Northwest Quarter of Section 18, Township 16 North, Range 6 East, Hancock County, Indiana, and being that part of the grantor's land lying within the right-of-way lines depicted on the attached Right-of-Way Parcel Plat, marked Exhibit ''B'', described as follows: Beginning on the north line of the said section North 89 degrees 24 minutes 16 seconds East 69.96 feet from the northwest closing corner of said section, designated by point ''48'' on the Location Control Route Survey Plat recorded in Instrument 100004410 Surv. in the Office of the Recorder of said county, which point of beginning is on the west line of the grantor's land and the east boundary of County Road 600 West; thence continuing North 89 degrees 24 minutes 16 seconds East 37.91 feet along the north line of said section line; thence South 00 degrees 19 minutes 33 seconds East 117.07 feet to point ''972'' designated on said Parcel Plat; thence South 31 degrees 46 minutes 08 seconds West 71.88 feet to the west line of the grantor's land and the east boundary of said County Road 600 West; thence North 00 degrees 14 minutes 09 seconds West 177.79 feet along the east boundary of County Road 600 West to the point of beginning and containing 0.129 acres, more or less.

A part of the Southwest Quarter of Section 7, Township 16 North, Range 6 East, Hancock County, Indiana, and being that part of the grantor's land lying within the right-of-way lines depicted on the attached Right-of-Way Parcel Plat, marked Exhibit ''B'', described as follows: Beginning on the south line of the said section North 89 degrees 24 minutes 16 seconds East 69.96 feet from the southwest closing corner of said section, designated by point ''48'' on the Location Control Route Survey Plat recorded in Instrument 100004410 Surv. in the Office of the Recorder of said county, which point of beginning is on the west line of the grantor's land and the east boundary of County Road 600 West; thence North 00 degrees 14 minutes 09 seconds West 8.60 feet along the west line of the grantor's land and the boundary of said county road; thence North 01 degree 11 minutes 33 seconds West 83.08 feet along the boundary of said County Road to point ''970'' designated on said Parcel Plat; thence South 40 degrees 47 minutes 45 seconds East 60.33 feet to point ''971'' designated on said Parcel Plat; thence South 00 degrees 19 minutes 33 seconds East 45.60 feet to the south line of said section; thence South 89 degrees 24 minutes 16 seconds West 37.91 feet along the south line of said section to the point of beginning and containing 0.060 acres, more or less.

Issued in Des Plaines, Illinois on October 24, 2023.

Debra L. Bartell,

Manager, Chicago Airports District Office, FAA, Great Lakes Region.

[FR Doc. 2023–23752 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2023–0042]

Agency Information Collection Activities: Request for Comments for a New Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice and request for comments.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for an information collection, which is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by December 26, 2023.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 0042 by any of the following methods:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kenneth Petty, Office of Planning (HEPP–1), 202–366–6654, and Spencer Stevens, Office of Planning (HEPP–20), 202–366–6221, Department of Transportation, Federal Highway Administration, Office of Civil Rights, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

SUPPLEMENTARY INFORMATION:

Title: Survey of Metropolitan Planning Organizations and State Departments of Transportation Regarding Practices for Incorporating Equity and Meaningful Public Involvement in Transportation Planning and Project Decision-Making.

Background: The U.S. Department of Transportation (DOT, or ''the Department'') is committed to pursuing a comprehensive approach to advancing equity for all. In support of the Department's Equity Action Plan (*https://www.transportation.gov/priorities/equity/equity-action-plan*), DOT is working to support transportation agencies in better addressing the needs of underserved communities.

One focus area for DOT relates to the Department's programmatic enforcement of Title VI of the Civil Rights Act (DOT Order 1000.12C), including emphasizing agency review of potentially-discriminatory plans,

investment programs, and projects to prevent unlawful discrimination, and empower communities, including limited English proficient communities, in transportation decision-making (49 CFR 21.5, 21.7, 21.9 and 28 CFR part 406). DOT is also emphasizing the requirements of Section 504 of the Rehabilitation Act (28 CFR 35.104) and of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) for ensuring that transportation plans and investment programs do not discriminate on the basis of disability and provide equal opportunity and access for persons with disabilities.

In August of 2022, FHWA conducted a survey of all State departments of transportation (State DOTs) and metropolitan planning organizations (MPOs) to better understand how these agencies consider equity and comply with Title VI in transportation planning and programming activities (OMB Control Number 2125–0665). This survey included questions about how each State DOT or MPO uses quantitative data or tools to analyze equity factors for transportation plans and investment programs, as well as how each agency provides a meaningful and representative role to members of all communities, including underserved and limited English proficient communities, in shaping these plans and programs (28 CFR part 407). Information from the survey was used to help the Department form an understanding of the state of the practice related to equity and civil rights compliance and meaningful public involvement in transportation planning and programming, and to inform research products and capacity-building activities for State DOTs and MPOs, to help them improve practices.

FHWA plans to conduct follow-up annual surveys, beginning in 2024, to monitor the progress of State DOTs and MPOs in advancing their transportation planning equity and meaningful public involvement practices, and to identify ongoing research, training, and technical assistance needs. These surveys will cover similar topics as the 2022 survey, with reworded questions to reduce respondent burden and to align with updates to the Department's Equity Action Plan and other policies or guidance.

Survey responses may also inform future revisions to existing guidance, or the development of new guidance, to DOT funding recipients on meeting the requirements of title VI of the Civil Rights Act, the National Environmental Policy Act, section 504 of the Rehabilitation Act, the Americans with Disabilities Act, transportation planning and programming, or other legal or regulatory requirements that relate to transportation equity and public involvement.

FHWA plans to conduct the survey on a voluntary-response basis, utilizing an electronic survey platform. This is planned as an annual information collection, and FHWA estimates that the survey will take approximately one hour to complete. The survey will consist of both multiple-choice and short-answer question formats.

Respondents: 52 State DOTs and approximately 420 MPOs.

Frequency: Annually, beginning in 2024.

Estimated Average Burden per Response: Approximately 60 minutes per respondent.

Estimated Total Annual Burden Hours: Approximately 472 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued On: October 23, 2023.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2023–23694 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0182]

Agency Information Collection Activities; Renewal of a Currently Approved Information Collection: Generic Clearance of Customer Satisfaction Surveys

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. In order to work continuously to ensure that our programs are effective and meet our customers' needs, FMCSA requests approval to renew an ICR titled, ''Generic Clearance of Customer Satisfaction Surveys.'' This ICR allows FMCSA to continue collecting feedback on our service delivery. By feedback, we mean information that provides useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

DATES: Comments on this notice must be received on or before December 26, 2023.

ADDRESSES: You may submit comments identified by Docket Number FMCSA–2023–0182 using any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001 between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.
- *Fax:* 1–202–493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Roxane Oliver, FMCSA, Office of Analysis, Department of Transportation, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 385–2324, *Roxane.Oliver@dot.gov.*

SUPPLEMENTARY INFORMATION:

Instructions

All submissions must include the Agency name and docket number. For detailed instructions on submitting comments, see the Public Participation heading below. Note that all comments received will be posted without change to *https://www.regulations.gov,* including any personal information

provided. Please see the Privacy Act heading below.

Public Participation and Request for Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2023–0182), indicate the specific section of this document to which your comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *https://www.regulations.gov/docket/FMCSA-2023-0182/document,* click on this notice, click ''Comment,'' and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing.

Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

Privacy Act

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.*

Background

Executive Order 12862, Setting Customer Service Standards, and most recently updated E.O. 13571, requires the Federal Government to provide the ''highest quality service possible to the American people.'' Under the order, the ''standard of quality for services provided to the public shall be: Customer service equal to the best in business.'' In order to work continuously to ensure that our programs are effective and meet our customers' needs, FMCSA seeks to renew OMB's approval of a generic clearance to collect qualitative feedback from our customers on our service delivery. The surveys covered in this generic clearance provide a means for FMCSA to collect this data directly from our customers. By qualitative feedback, we mean information that provides useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback provides insights into customer or stakeholder perceptions, experiences and expectations, provides an early warning of issues with service, or focuses attention on areas of communication, training or changes in operations that might improve delivery of products or services. These collections allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. They also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback targets areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses are assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will submit a planned collection for approval under this generic clearance only if it meets the conditions that such collections are:

- voluntary;
- low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden hours per respondent) and are low-cost for both the respondents and the Federal Government;
- noncontroversial and do not raise issues of concern to other Federal agencies;
- targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- only collecting personally identifiable information (PII) to the extent necessary and not retaining it;
- only collecting information intended to be used only internally for general service improvement and program management, and any release outside the agency must indicate the qualitative nature of the information;
- not to be used for the purpose of substantially informing influential policy decisions; and
- intended to yield only qualitative information.

This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made; the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size; and the expected response rate, methods for assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other mechanisms that are designed to yield quantitative results. As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Title: Generic Clearance of Customer Satisfaction Surveys.

OMB Control Number: 2126–0061.

Type of Request: Renewal of currently approved collection.

Respondents: State and local agencies, general public and stakeholders; original equipment manufacturers and suppliers to the commercial motor vehicle (CMV) industry; fleets, owner-operators, state CMV safety agencies, research organizations and contractors; news organizations and safety advocacy groups.

Estimated Number of Respondents: 5,900 (5,000 customer satisfaction survey respondents + 100 listening sessions/stakeholder feedback forums respondents + 300 focus group respondents + 500 strategic planning customer satisfaction survey respondents).

Estimated Time per Response: Range from 10 to 120 minutes.

Expiration Date: July 31, 2024.

Frequency of Response: Generally, on an annual basis.

Estimated Total Annual Burden: 1,758 hours (833 hours for customer satisfaction surveys + 200 hours for listening sessions/stakeholder feedback forums + 600 hours for focus groups + 125 hours for strategic planning customer satisfaction surveys).

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) whether the proposed collection is necessary for the performance of

FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize or include your comments in the request for OMB's clearance of this ICR.

Issued under the authority of 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2023–23744 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2014–0107; FMCSA–2014–0385; FMCSA–2014–0386; FMCSA–2018–0135; FMCSA–2018–0138; FMCSA–2021–0014]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for eight individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on September 12, 2023. The exemptions expire on September 12, 2025.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Comments

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2014–0107, FMCSA–2014–0385, FMCSA–2014–0386, FMCSA–2021–0014, FMCSA–2018–0135, or FMCSA–2018–0138) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption requests. 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 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

II. Background

On September 6, 2023, FMCSA published a notice announcing its decision to renew exemptions for eight individuals from the hearing standard in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (88 FR 60732). The public comment period ended on October 5, 2023, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid (35 FR 6458, 6463 (Apr. 22, 1970) and 36 FR 12857 (July 8, 1971), respectively).

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based upon its evaluation of the eight renewal exemption applications, FMCSA announces its decision to exempt the following drivers from the hearing requirement in § 391.41(b)(11).

As of September 12, 2023, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following eight individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers (88 FR 60734):

Daniel Alcozer (IL)

Alex Courtney Bertling (OR)

Mark Howard (NY)

David Jakubowski (CA)

Jay Larson (TX)

Tia Matthews (TX)

Eduwin Pineiro (TX)

Jason Swearington (TX)

The drivers were included in docket numbers FMCSA–2014–0107, FMCSA–2014–0385, FMCSA–2014–0386, FMCSA–2021–0014, FMCSA–2018–0135, or FMCSA–2018–0138. Their exemptions were applicable as of September 12, 2023 and will expire on September 12, 2025.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136, 49 U.S.C. chapter 313, or the FMCSRs.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–23742 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0198]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: ANDIAMO (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 27, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0198 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov*. Search MARAD–2023–0198 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* 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–2023–0198, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document 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, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *ANDIAMO* is:

—*Intended Commercial Use of Vessel:* ''Day Charters.''
—*Geographic Region Including Base of Operations:* ''Florida, Georgia, South Carolina (Base of Operations: Ponte Vedra, FL)''.
—*Vessel Length and Type:* 62′5″.

The complete application is available for review identified in the DOT docket as MARAD 2023–0198 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES.** Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0198 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

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(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–23773 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0202]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: ALL ABOURB (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 27, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0202 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0202 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* 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–2023–0202, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document 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, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *ALL ABOURB* is:

—*Intended Commercial Use of Vessel:* ''Day Cruises in Seattle area, Lake Union, and Lake Washington. Overnight Charters in the San Juan Islands.''

—*Geographic Region Including Base of Operations:* ''Washington state. (Base of Operations: Seattle, WA)''

—*Vessel Length and Type:* 76′ Motor Yacht.

The complete application is available for review identified in the DOT docket as MARAD 2023–0202 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0202 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

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(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–23772 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0200]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: CAZADORA (Motor); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the

Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 27, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0200 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0200 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* 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–2023–0200, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document 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, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *CAZADORA* is:

—*Intended Commercial Use of Vessel:* ''Harbor Cruises, Chartered Fishing.''
—*Geographic Region Including Base of Operations:* ''California (Base of Operations: Long Beach, CA)''
—*Vessel Length and Type:* 40′ Sportfisher

The complete application is available for review identified in the DOT docket as MARAD–2023–0200 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0200 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

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(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–23775 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0199]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: NO CURFEW (Sail); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders

or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 27, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2023–0199 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0199 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* 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–2023–0199, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document 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, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *NO CURFEW* is:

—*Intended Commercial Use of Vessel:* ''AYCA Term Charters & Day Charters up to 12 paying passengers.''
—*Geographic Region Including Base of Operations:* ''Florida, New York, Rhode Island (Base of Operations: Saint James, NY)''
—*Vessel Length and Type:* 78′

The complete application is available for review identified in the DOT docket as MARAD 2023–0199 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES.** Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0199 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

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(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–23777 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2023–0201]

Coastwise Endorsement Eligibility Determination for a Foreign-Built Vessel: NADIYA (Sail); Invitation for Public Comments

AGENCY: Maritime Administration, DOT.

ACTION: Notice.

SUMMARY: The Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to issue coastwise endorsement eligibility determinations for foreign-built vessels which will carry no more than twelve passengers for hire. A request for such a determination has been received by MARAD. By this notice, MARAD seeks comments from interested parties as to any effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. Information about the requestor's vessel, including a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 27, 2023.

ADDRESSES: You may submit comments identified by DOT Docket Number

MARAD–2023–0201 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Search MARAD–2023–0201 and follow the instructions for submitting comments.
- *Mail or Hand Delivery:* 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–2023–0201, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document 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, or to submit comments that are confidential in nature, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Patricia Hagerty, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE, Room W23–461, Washington, DC 20590. Telephone: (202) 366–0903. Email *patricia.hagerty@dot.gov.*

SUPPLEMENTARY INFORMATION: As described in the application, the intended service of the vessel *NADIYA* is:

—*Intended Commercial Use of Vessel:* ''6-pack crewed overnight sail charters near shore.''
—*Geographic Region Including Base of Operations:* ''Florida, South Carolina, North Carolina, Virginia, Delaware, Maine. (Base of Operations: Key West, FL)''
—*Vessel Length and Type:* 47′ Sailing Catamaran.

The complete application is available for review identified in the DOT docket as MARAD–2023–0201 at *https://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the employment of the vessel in the coastwise trade to carry no more than 12 passengers will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, MARAD will not issue an approval of the vessel's coastwise endorsement eligibility. Comments should refer to the vessel name, state the commenter's interest in the application, and address the eligibility criteria given in section 388.4 of MARAD's regulations at 46 CFR part 388.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov,* keyword search MARAD–2023–0201 or visit the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit the information you claim to be confidential commercial information by email to *SmallVessels@dot.gov.* Include in the email subject heading ''Contains Confidential Commercial Information'' or ''Contains CCI'' and state in your submission, with specificity, the basis for any such confidential claim highlighting or denoting the CCI portions. If possible, please provide a summary of your submission that can be made available to the public.

In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under those procedures will be exempt from disclosure under FOIA.

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(a), 46 U.S.C. 55103, 46 U.S.C. 12121)

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2023–23776 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2023–0045]

Advisory Committee on Underride Protection; Notice of Public Meeting

AGENCY: National Highway Traffic Safety Administration, U.S. Department of Transportation (DOT).

ACTION: Notice of public meeting.

SUMMARY: The National Highway Traffic Safety Administration (NHTSA) announces a meeting of the Advisory Committee on Underride Protection (ACUP). This notice announces the date, time, and location of the meeting, which will be open to the public. The purpose of ACUP is to provide advice and recommendations to the Secretary of Transportation on safety regulations to reduce underride crashes and fatalities relating to underride crashes.

DATES: This meeting will be held on November 15, 2023, from 12:30 p.m. to 4:30 p.m. EST. Pre-registration is required to attend this online meeting. A link permitting access to the meeting will be distributed to registrants within 24 hours of the meeting start time.

ADDRESSES: The meeting will be held virtually via Zoom. Information and registration for the meeting will be available on the NHTSA website (*https://www.nhtsa.gov/events-and-public-meetings*) at least one week in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: James Myers, U.S. Department of

Transportation, NHTSA, Special Vehicles and Systems Division, 1200 New Jersey Avenue SE, Washington, DC 20590, *acup@dot.gov* or (202) 493–0031.

SUPPLEMENTARY INFORMATION:

I. Background

ACUP was established as a statutory committee pursuant to Section 23011(d) of the November 2021 Infrastructure Investment and Jobs Act, Public Law 117–58 (commonly referred to as the Bipartisan Infrastructure Law or BIL), and in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2. The purpose of ACUP is to provide information, advice, and recommendations to the Secretary of Transportation on safety regulations to reduce underride crashes and fatalities relating to underride crashes.

The Committee duties include the following:

a. Gathering information as necessary to discuss issues presented by the Designated Federal Officer (DFO).

b. Deliberating on issues relevant to safety regulations related to underride crashes and fatalities from underride crashes.

c. Providing written consensus advice to the Secretary on underride protection to reduce underride crashes and fatalities relating to underride crashes.

II. Agenda

The meeting agenda will include the following:

I. Review of Committee Guidelines
II. New Member Introductions
III. Underride Discussion
  a. Target Population
  b. Guard technologies—existing and emerging
  c. Other existing and emerging crash avoidance technologies
  d. Implementation and operation hurdles

III. Public Participation

This meeting will be open to the public. We are committed to providing equal access to this meeting for all participants. Persons with disabilities in need of an accommodation should send a request to the individual in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than November 8, 2023.

Members of the public may also submit written materials, questions, and comments to the Committee in advance to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than November 8, 2023. All advance submissions will be reviewed by the DFO. If approved, advance submissions shall be circulated to ACUP representatives for review prior to the meeting. All advance submissions will become part of the official record of the meeting.

Authority: The Committee is established as a statutory committee under the authority of section 23011 of the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58 (2021), and established in accordance with the provisions of the FACA, as amended, 5 U.S.C. App. 2.

Issued in Washington, DC, under authority delegated in 49 CFR 1.95 and 49 CFR 501.8.

Raymond R. Posten,

Associate Administrator, Rulemaking.

[FR Doc. 2023–23697 Filed 10–26–23; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Alcohol and Tobacco Tax and Trade Bureau Information Collection Requests

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 requests 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 these requests.

DATES: Comments should be received on or before November 27, 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:

Alcohol and Tobacco Tax and Trade Bureau (TTB)

1. *Title:* Combined Alcohol Excise Tax Returns and Operations Reports—Pilot Test.

OMB Control Number: 1513–NEW.

Type of Review: Request for a new OMB Control Number.

Description: Under the Internal Revenue Code (IRC) at 26 U.S.C. 5061, the Federal excise tax on distilled spirits, wine, and beer is collected on the basis of a return which taxpayers file on a semi-monthly, quarterly, or annual basis, depending on the amount of their annual tax liability (see 26 U.S.C. 5061(d)(4)). In addition, under the IRC at 26 U.S.C. 5207, 5367, and 5415, taxpayers for distilled spirits, wine, and beer, respectively, must furnish reports of operations and transactions as the Secretary of the Treasury prescribes by regulation.

Currently, under those IRC authorities, the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations in 27 CFR chapter I require alcohol excise taxpayers to report their excise tax liability using form TTB F 5000.24, Excise Tax Return, approved under OMB No. 1513–0083. In addition, alcohol excise taxpayers must file operations reports accounting for their production, removals, losses, and certain other matters that effect their excise tax liability. Distilled spirits plant proprietors file up to four separate operations reports on a monthly basis on TTB F 5110.11, TTB F 5110.28, TTB F 5110.40, and TTB F 5110.43, approved under OMB Nos. 1513–0039, 1513–0041, 1513–0047, and 1513–0049, concerning, respectively, storage, processing, production, and denaturing operations. Wine premises proprietors file monthly operations reports on TTB F 5120.17, approved under OMB No. 1513–0053. Brewers, depending on their annual tax liability, file operations reports either on a monthly basis using TTB F 5130.9 or on a quarterly basis using TTB F 5130.9 or TTB F 5130.26, both of which are approved under OMB No. 1513–0007.

As part of TTB's efforts to lower respondent burden, the Bureau is developing a combined tax return and simplified operations report and intends to pilot its use with alcohol excise taxpayers. Under this pilot, alcohol excise taxpayers will submit a letterhead application to join the pilot program as an alternative method to their filing the current tax return and operations reports under existing regulatory requirements. Once approved, taxpayers participating in the pilot program will file their combined

alcohol excise return and simplified operations report under the due dates currently applicable to their excise tax returns.

The collected information will allow TTB to identify the excise taxpayer, the amount of taxes due, and the amount of payment made. Additionally, the collected information will allow TTB to identify the amount of distilled spirits, wine, or beer the taxpayer produced, removed, transferred, and disposed of during the reporting period, which effects the amount of alcohol excise tax due, while reducing the overall burden of filing separate tax returns and operations reports.

TTB is beginning this pilot test program with the information collection and instruments related to the combined beer excise tax and operations report; it will issue information collections and instruments related to the wine and distilled spirits excise tax and operations reports at later dates.

Form: TTB F 5130.Pilot-A & B.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 8,300.

Frequency of Response: Semi-monthly, Quarterly, Annually.

Estimated Total Number of Annual Responses: 60,000.

Estimated Time per Response: Varies from 27 to 40 minutes per response.

Estimated Total Annual Burden Hours: 32,950.

2. *Title:* Usual and Customary Business Records Relating to Denatured Spirits (TTB REC 5150/1).

OMB Control Number: 1513–0062.

Type of Review: Extension without change of a currently approved collection.

Description: Denatured distilled spirits, which generally are not subject to Federal excise tax, may be used for industrial purposes in the manufacture of nonbeverage products. To prevent diversion of denatured spirits to taxable beverage use, the Internal Revenue Code (IRC) at 26 U.S.C. 5271–5275 imposes a system of permits, bonds, recordkeeping, and reporting requirements on persons that procure or use such alcohol. Those IRC sections also authorize the Secretary of the Treasury to issue regulations regarding those matters. Under those IRC authorities, the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations in 27 CFR part 20 require industrial alcohol users to keep certain usual and customary business records regarding the distribution, procurement, and use of denatured spirits. TTB uses the required records to account for denatured spirits and ensure compliance with statutory and regulatory requirements.

Form: None.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 3,100.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 3,100.

Estimated Time per Response: None.

Estimated Total Annual Burden Hours: 0.

Authority: 44 U.S.C. 3501 *et seq.*

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2023–23799 Filed 10–26–23; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–NEW]

Agency Information Collection Activity: Veteran Reimbursement Claim Form

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Health Administration (VHA), 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 extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before December 26, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Grant Bennett, Office of Regulations, Appeals, and Policy (10BRAP), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *Grant.Bennett@va.gov.* Please refer to ''OMB Control No. 2900–NEW'' 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 Avenue NW, Washington, DC 20420, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–NEW'' 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, VHA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: Veteran Reimbursement Claim Form (VA Form 10–320).

OMB Control Number: 2900–NEW.

Type of Review: New collection.

Abstract: Veterans may claim reimbursement for certain medical costs, as authorized by 38 U.S.C. 1728. The new Veteran Reimbursement Claim Form, VA Form 10–320, will be utilized by Veterans requesting reimbursement for various out-of-pocket expenses that occurred as a result of non-VA medical services that may be eligible for payment under 38 CFR 17.4025 (Veterans Community Care Program), 38 CFR 17.120 (Unauthorized), 38 CFR 17.1002 (Millennium Bill), and 38 CFR 17.1200—17.1230 (COMPACT Act). In order for VA to process and repay these expenses, Veterans must submit necessary information to support their request and justify reimbursement.

VA Form 10–320 will be used to collect information from Veterans seeking reimbursement for certain medical expenses. This claim form will be used to support payment of certain unauthorized non-VA medical services. Veterans may use this form to submit claims for reimbursement for a variety of services, such as pharmacy costs, training classes, emergent suicide care, and other medical expenses.

Affected Public: Individuals or households.

Estimated Annual Burden: 14,283 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 85,700.

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. 2023–23784 Filed 10–26–23; 8:45 am]

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Part II

National Labor Relations Board

29 CFR Part 103
Standard for Determining Joint Employer Status; Final Rule

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

RIN 3142–AA21

Standard for Determining Joint Employer Status

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board has decided to issue this final rule for the purpose of carrying out the National Labor Relations Act (NLRA or Act) by rescinding and replacing the final rule entitled ''Joint Employer Status Under the National Labor Relations Act,'' which was published on February 26, 2020, and took effect on April 27, 2020. The final rule establishes a new standard for determining whether two employers, as defined in the Act, are joint employers of particular employees within the meaning of the Act. The Board believes that this rule will more explicitly ground the joint-employer standard in established common-law agency principles and provide guidance to parties covered by the Act regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment. Under the final rule, an entity may be considered a joint employer of another employer's employees if the two share or codetermine the employees' essential terms and conditions of employment.

DATES: Effective December 26, 2023. This rule has been classified as a major rule subject to Congressional review. However, at the conclusion of the congressional review, if the effective date has been changed, the National Labor Relations Board will publish a document in the **Federal Register** to establish the new effective date or to withdraw the rule.

FOR FURTHER INFORMATION CONTACT: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001, (202) 273–1940 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Background

Section 2(2) of the National Labor Relations Act defines an ''employer'' to include ''any person acting as an agent of an employer, *directly or indirectly.*'' 29 U.S.C. 152(2) (emphasis added). In turn, the Act provides that the ''term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise . . . .'' Id. 152(3). Section 7 of the Act provides that employees shall have the right

> to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities.

Id. 157. Section 9(c) of the Act authorizes the Board to process a representation petition when employees wish to be represented for collective bargaining. Id. 159(c). And Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. Id. 158(a)(5).

The Act does not specifically address situations in which statutory employees are employed jointly by two or more statutory employers (*i.e.,* it is silent as to the definition of ''joint employer''), but, as discussed below, the Board, with court approval, has long applied common-law agency principles to determine when one or more entities share or codetermine the essential terms and conditions of employment of a particular group of employees.

B. The Development of Joint-Employment Law Under the National Labor Relations Act

As set forth more fully in the Board's September 4, 2022 notice of proposed rulemaking (the NPRM), in *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 481 (1964), a representation case involving the relationship between a company operating a bus terminal and its cleaning contractor, the Supreme Court explained that the question of whether Greyhound ''possessed sufficient control over the work of the employees to qualify as a joint employer'' was ''essentially a factual question'' for the Board to determine.[1] On remand, the Board held that Greyhound and the cleaning contractor were joint employers of the employees at issue because they ''share[d], or codetermine[d], those matters governing essential terms and conditions of employment.'' *Greyhound Corp.,* 153 NLRB 1488, 1495 (1965), enfd. 368 F.2d 776 (5th Cir. 1966). For nearly two decades following the Board's decision in *Greyhound,* the Board regarded the right to control employees' work and their terms and conditions of employment as determinative in analyzing whether entities were joint employers of particular employees. Board precedent from this time period generally did not require a showing that both putative joint employers actually or directly exercised control.[2] The

[1] See *Standard for Determining Joint-Employer Status,* 87 FR 54641 (Sept. 7, 2022).

[2] See, *e.g., Globe Discount City,* 209 NLRB 213, 213–214 & fn. 3 (1974) (finding joint employer based on license agreements, without reference to any exercise of authority); *Lowery Trucking Co.,* 177 NLRB 13, 15 (1969) (finding joint employer based in part on unexercised right to reject other employer's employee), enfd. sub nom. *Ace-Alkire Freight Lines* v. *NLRB,* 431 F.2d 280 (8th Cir. 1970) (observing that ''[w]hile [putative joint employer] never rejected a driver hired by [supplier], it had the right to do so''); *United Mercantile, Inc.,* 171 NLRB 830, 831–832 (1968) (finding joint employer based on license agreements, without reference to any exercise of authority); *Floyd Epperson,* 202 NLRB 23, 23 (1973) (finding joint employer based in part on indirect control over wages and discipline), enfd. 491 F.2d 1390 (6th Cir. 1974); *Buckeye Mart,* 165 NLRB 87, 88 (1967) (finding Buckeye joint employer of employees of Fir Shoe based solely on contractually reserved authority over, inter alia, discharge decisions and rules and regulations governing employee conduct), enfd. 405 F.2d 1211 (6th Cir. 1969); *Jewel Tea Co.,* 162 NLRB 508, 510 (1966) (finding joint employer based on contractually reserved, unexercised power to effectively control hire, discharge, wages, hours, terms, ''and other conditions of employment'' and observing: ''That the licensor has not exercised such power is not material, for an operative legal predicated for establishing a joint-employer relationship is a reserved right in the licensor to exercise such control''); *Value Village,* 161 NLRB 603, 607 (1966) (finding joint employer based on operating agreement and observing ''[s]ince the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record.''); *Spartan Department Stores,* 140 NLRB 608, 608–610 & fn. 1, 4 (1963) (finding joint employer based solely on uniform license agreements); *Taylor's Oak Ridge Corp.,* 74 NLRB 930, 938 (1947) (finding joint employer based solely on contractually reserved authority over numerous essential terms and conditions of employment, and observing: ''That the Employer's power of control may not in fact have been exercised is immaterial, since the right to control, rather than the actual exercise of that right, is the touchstone of the employer-employee relationship.''); *General Motors Corp. (Baltimore, MD),* 60 NLRB 81 (1945) (finding joint employer based on contractually reserved authority, despite testimony that entity exercised no control in practice); *Anderson Boarding & Supply Co.,* 56 NLRB 1204, 1206 (1944) (finding joint employer based on unexercised contractual authority); *Bethlehem-Fairfield Shipyard, Inc.,* 53 NLRB 1428, 1431 (1943) (finding joint employer based on reserved rights to dismiss employees and set wage scales, despite crediting testimony entity actually exercised no control).

Our colleague observes that a number of these cases involve department store licensing relationships. He argues that the Board did not purport to apply general common-law agency principles in these cases but instead applied a distinctive analysis focused on ''whether the department store was in a position to influence the licensee's labor relations policies.'' We disagree. The cases we cite above, including the department store cases, ultimately rest on early post-Taft-Hartley Board decisions that are consistent with the

Board's reliance on reserved or indirect control in joint-employer cases during this period was well within the mainstream of both Board and judicial treatment of such control in the independent contractor context, including in non-labor-law settings, and reviewing courts broadly endorsed the Board's consideration of forms of reserved and indirect control as probative in the joint-employer analysis.[3]

In *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1123 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), the United States Court of Appeals for the Third Circuit endorsed the Board's ''share or codetermine'' formulation of the joint-employer standard. While later Board decisions continued to adhere to this formulation, they also began imposing new requirements that the Board now believes lacked a clear basis in established common-law agency principles or prior Board or judicial decisions. See *TLI, Inc.,* 271 NLRB 798 (1984); *Laerco Transportation,* 269 NLRB 324 (1984). In particular, these decisions began requiring (1) that a putative joint employer ''actually'' exercise control, (2) that such control be ''direct and immediate,'' and (3) that such control not be ''limited and routine.'' See, *e.g., AM Property Holding Corp.,* 350 NLRB 998, 999–1003 (2007), enfd. in relevant part sub nom. *Service Employees International Union, Local 32BJ* v. *NLRB,* 647 F.3d 435 (2d Cir. 2011); *Airborne Express,* 338 NLRB 597, 597 (2002); *Flagstaff Medical Center,* 357 NLRB 659, 666–667 (2011).

In 2015, the Board restored and clarified its traditional, common-law based standard for determining whether two employers, as defined in Section 2(2) of the Act, are joint employers of particular employees within the meaning of Section 2(3) of the Act. See *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB 1599 (2015) (*BFI*). Consistent with established common-law agency principles, and rejecting the control-based restrictions that the Board had previously established without explanation, the Board announced that it would consider evidence of reserved and indirect control over employees' essential terms and conditions of employment when analyzing joint-employer status.

While *BFI* was pending on review before the United States Court of Appeals for the District of Columbia Circuit, and following a change in the Board's composition, a divided Board issued a notice of proposed rulemaking with the goal of establishing a joint-employer standard that departed in significant respects from *BFI*.[4] During the comment period, the District of Columbia Circuit issued its decision in *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d 1195, 1222 (D.C. Cir. 2018), upholding ''as fully consistent with the common law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis,'' and remanding the case to the Board to refine the new standard.[5]

Thereafter, on February 26, 2020, the Board promulgated a final rule that again introduced control-based restrictions that narrowed the joint-employer standard.[6] In light of the District of Columbia Circuit's decision in *BFI* v. *NLRB,* the Board modified the proposed rule to ''factor in'' evidence of indirect and reserved control over essential terms and conditions of employment, but only to the extent such indirect and/or reserved control ''supplements and reinforces'' evidence that the entity also possesses or exercises direct and immediate control over essential terms and conditions of employment.[7] The final rule also explained that establishing that an entity ''shares or codetermines the essential terms and conditions of another employer's employees'' requires showing that the entity ''possess[es] and exercise[s] such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment

final rule's approach. For example, in one early case, the Board held that ''an employer-employee relationship is established where the [entity] for whom services are rendered possesses the right of control over such fundamental matters as the employees' day-to-day operations and their basic working conditions.'' *Franklin Simon & Co.,* 94 NLRB 576, 579 (1951). In that case, the Board found that a department store and its licensee were joint employers because ''a substantial right of control over matters fundamental to the employment relationship is retained and exercised by *both* [entities].'' Id. (emphasis in original). We find these statements instructive and see no indication that the Board intended such statements to apply solely in the department store context, as our colleague implies. As for *Buckeye Mart,* supra, which our colleague suggests is at odds with the broader principles we argue animated the Board's early decisions, we note that in that case the Board found a department store to jointly employ the employees of one of its licensees but not the other. At most, this case shows that the Board applied the relevant standard to find one joint-employment relationship but not another based on the particular language of the license agreements at issue. It does not call the relevant standard or its underlying principles into question.

[3] See, *e.g., Carrier Corp.* v. *NLRB,* 768 F.2d 778, 781 (6th Cir. 1985) (finding joint employer based in part on entity's consulting about wages and benefits with direct employer and reserved authority to request removal or dismissal of employees); *International Chemical Workers Union Local 483* v. *NLRB,* 561 F.2d 253, 255 (D.C. Cir. 1977) (''Whether Cabot and P & K were joint employers depends upon the amount of actual *and potential* control that Cabot had over the replacement employees. This in turn, to a certain extent, is dependent upon the amount and nature of control that Cabot exercised *and was authorized to exercise* under the contract.'') (emphasis added); *Vaughn Bros.,* 94 NLRB 382, 383 (1951) (''Under this [common-law] test an employment relationship exists where the person for whom the services are performed reserves the right, even though not exercised, to control the manner and means by which the result is accomplished.''); *Alaska Salmon Industry, Inc. (Seattle Wash),* 81 NLRB 1335, 1338 (1949) (''[A]n employee relationship . . . is found to exist where the person for whom the services are performed reserves the right (even if not exercised) to control the manner and means by which the result is accomplished.''); *San Marcos Telephone Co.,* 81 NLRB 314, 317 (1949) (''Under [common-law] doctrine, an employee relationship, rather than that of an independent contractor, exists where the person for whom the services are performed reserves the right (even if not exercised) to control the manner and means by which the result is accomplished.''); *Steinberg and Co.,* 78 NLRB 211, 220–221, 223 (1948) (''Under [common-law] doctrine it has been generally recognized that an employer-employee relationship exists where the person for whom the services are performed reserves the right to control the manner and means by which the result is accomplished.''), enf. denied 182 F.2d 850 (5th Cir. 1950). See also judicial decisions discussed in Sec. I.D., below.

[4] See *The Standard for Determining Joint Employer Status,* 83 FR 46681 (Sept. 14, 2018). Then-Member McFerran dissented.

[5] The court specifically required that on remand the Board clarify its ''articulation and application of the indirect-control element'' of the *BFI* joint-employer standard to the extent that the Board had not ''distinguish[ed] between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment.'' 911 F.3d at 1222–1223. The court further instructed the Board on remand to more explicitly apply the second part of the *BFI* standard (''whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining''), and specifically, to clarify ''which terms and conditions are 'essential' to permit 'meaningful collective bargaining,''' and what such bargaining ''entails and how it works in this setting.'' Id. at 1221–1222 (quoting 362 NLRB at 1600). After accepting the court's remand, a newly constituted Board declined to clarify the *BFI* standard in any respect, instead finding that ''retroactive application of any clarified variant of [that standard] in this case would be manifestly unjust.'' *Browning-Ferris Industries of California, Inc.,* 369 NLRB No. 139, slip op. 1 (2020), vacated and remanded, 45 F.4th 38 (D.C. Cir. 2022). As discussed below, and contrary to the view of our dissenting colleague, the instant rule fully explicates the indirect-control element in Section IV and V.

[6] See *Joint Employer Status Under the National Labor Relations Act,* 85 FR 11184 (Feb. 26, 2020).

[7] Id. at 11185–11186, 11194–11198 & 11236. The final rule defined ''indirect control'' as ''indirect control over essential terms and conditions of employment of another employer's employees but not control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract.'' Id. at 11236.

relationship with those employees.'' [8] In turn, the final rule defined ''substantial direct and immediate control'' to mean ''direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees'' and ''substantial'' to exclude control that is ''only exercised on a sporadic, isolated, or de minimis basis.'' [9] The final rule set forth an ''exhaustive'' list of essential terms and conditions of employment comprised of ''wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction'' and discussed some examples of conduct that would or would not rise to the level of direct and immediate control of each term or condition on the list.[10]

C. The Notice of Proposed Rulemaking

On September 7, 2022, the Board issued a new joint-employer NPRM. 87 FR 54641, 54663 (September 7, 2022). In the NPRM, the Board detailed recent developments in its joint-employer law. The Board noted that the Board's 2020 final rule (2020 rule) marked the first occasion when the Board addressed joint-employer doctrine through rulemaking. The NPRM stated the Board's preliminary view, subject to comments, that the 2020 rule's embrace of control-based restrictions unnecessarily narrowed the common law and threatened to undermine the goals of Federal labor law. The NPRM invited comments on these issues and on all aspects of the proposed rule, seeking input from employees, employers, and unions regarding their experience in workplaces where multiple entities have authority over the workplace.

The Board set an initial comment period of 60 days with 14 additional days allotted for reply comments. Thereafter, the Board extended these deadlines to allow interested parties to comment for an additional 30 days.[11]

D. Relevant Common Law Principles

As discussed in more detail below, the Board has concluded, after careful consideration of relevant comments, that the 2020 rule must be rescinded because it is contrary to the common-law agency principles incorporated into the Act when it was adopted and, accordingly, is not a permissible interpretation of the Act.[12] Although we believe that the Board is required to rescind the 2020 rule, we would do so even if that rule were valid because it fails to fully promote the policies of the Act, as explained below.

First, it is well established—and our dissenting colleague agrees—that the statutory terms ''employer'' and ''employee'' have their common-law meaning, and that the common law accordingly governs the Board's joint-employer analysis. See, *e.g., BFI* v. *NLRB,* 911 F.3d at 1207–1208. In the preamble to the proposed rule, the Board (quoting the District of Columbia Circuit, id. at 1208–1209) acknowledged that ''Congress has tasked the courts, and not the Board, with defining the common-law scope of 'employer' '' and that ''the common-law lines identified by the judiciary'' thus delineate the boundaries of the ''policy expertise that the Board brings to bear'' on the question of whether a business entity is a joint employer of another employer's employees under the Act. 87 FR at 54648. Accordingly, in defining the types of control that will be sufficient to establish joint-employer status under the Act, the Board looks for guidance from the judiciary, including primary articulations of relevant principles by judges applying the common law, as well as secondary compendiums, reports, and restatements of these common law decisions, focusing ''first and foremost [on] the 'established' common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947.'' Id. at 1209 (citations omitted).[13]

After consideration of relevant comments, the Board has concluded that the actual-exercise requirement reflected in the 2020 rule is (as described in relevant detail below) is contrary to the common-law agency principles that must govern the joint-employer standard under the Act and that the Board has no statutory authority to adopt such a requirement. The Board has further concluded that the policies of the Act, consistent with the common-law principles governing the Act's interpretation, make it appropriate for the Board to give determinative weight to the existence of a putative joint employer's authority to control essential terms and conditions of employment, whether or not such control is exercised, and without regard to whether any such exercise of control is direct or indirect, such as through an intermediary.[14]

1. Reserved Control

First, as previously set forth in the NPRM,[15] long before the 1935 enactment of the Act, the Supreme Court recognized and applied a common-law rule that ''the relation of master and servant exists whenever the employer *retains the right* to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.' '' *Singer Mfg. Co.* v. *Rahn,* 132 U.S. 518, 523 (1889) (emphasis added) (quoting *Railroad Co.* v. *Hanning,* 82 U.S. 649, 657 (1872)). The Court in *Singer* affirmed the holding below that a worker was an employee [16] of a company because the Court concluded that the company had contractually reserved such control over

[8] Id. at 11235.

[9] Id. at 11236.

[10] Id. at 11235–11236.

[11] The NPRM set the deadline for initial comments as November 7, 2022, and comments replying to comments submitted during the initial comment period were due November 21, 2022. 87 FR at 54641. On October 14, 2022, the Board extended the deadlines for submitting initial and reply comments for 30 days, to December 7, 2022, and December 21, 2022, respectively. 87 FR 63465 (October 19, 2022).

[12] Our dissenting colleague suggests that the 2020 rule is defensible, as a discretionary choice, to decline to exert joint-employer jurisdiction over entities who might be statutory employers by virtue of reserved but unexercised control, but who have not actually exercised their authority to control terms and conditions of employment of another entity's employees. Assuming arguendo that the Board could exercise its discretion to decline jurisdiction in this manner, the 2020 rule nowhere presents that rationale as underlying its actual-exercise requirement. Moreover, any such claim is inconsistent with our dissenting colleague's additional assertion, discussed further below, that the current final rule goes ''beyond the boundaries of the common law'' by eliminating the 2020 rule's actual-exercise requirement.

[13] Our dissenting colleague implicitly criticizes us for citing ''a plethora of decisions (including state law cases more than a hundred years old), the majority of which focus on independent contractor, workers' compensation, and tort liability matters.'' We find it entirely appropriate, however, to seek guidance on the meaning of common-law terms in the Act in judicial opinions where common-law issues most frequently arise, written by state judges primarily responsible for applying the common law, from time periods that shed light on the meaning of those terms when Congress used them.

[14] Contrary to our dissenting colleague, apart from recognizing that the Board must follow common-law agency principles in determining who is an ''employer'' and an ''employee'' under Sec. 2 of the Act, we do not conclude that the common law dictates the specific details of the joint-employer standard we articulate herein. Rather, as discussed in more detail above and below, the final rule reflects our policy choices, within the bounds of the common law, in furtherance of the policy of the United States, as set forth in Sec. 1 of the Act, to encourage the practice and procedure of collective bargaining, including by providing a mechanism by which an entity's rights and obligations under the Act may be accurately aligned with its authority to control employees' essential terms and conditions of employment.

[15] 87 FR at 54648–54650.

[16] As we explained more fully in the NPRM, a ''servant'' is an employee. 87 FR at 54645 fn. 28. See, *e.g.,* 30 C.J.S. *Employer—Employee* sec. 1 (2022) (''The terms 'servant' and 'employee' are interchangeable.''); Horace Gray Wood, *A Treatise on the Law of Master and Servant; Covering the Relation, Duties and Liabilities of Employers and Employees* (1877).

the performance of the work that it ''might, if it saw fit, instruct [the worker] what route to take, or even what speed to drive.'' Id. at 523. In reaching this conclusion, the Court relied solely on the parties' contract and did not discuss whether or in what manner the company had ever actually exercised any control over the terms and conditions under which the worker performed his work. In other words, the Court found a common-law employer-employee relationship based on contractually reserved control without reference to whether or how that control was exercised.[17]

Between the Court's decision in *Singer* and the relevant congressional enactments of the NLRA in 1935 and the Taft-Hartley amendments in 1947, Federal courts of appeals and State high courts consistently followed the Supreme Court in emphasizing the primacy of the right of control over whether or how it was exercised in decisions that turned on the existence of a common-law employer-employee relationship, including in contexts involving more than one potential employer. For example, in 1934, the Supreme Court of Missouri examined whether a worker was an ''employee'' of two companies under a State workers' compensation statute—the terms of which the court construed ''in the sense in which they were understood at common law''—and affirmed that ''the essential question is not what the companies did when the work was being done, but whether they had a right to assert or exercise control.'' [18] And, in 1945, the Court of Appeals for the District of Columbia Circuit explained that, in distinguishing employees from independent contractors, ''it is the right to control, not control or supervision itself, which is most important.'' [19]

Unsurprisingly, early twentieth century secondary authority similarly distills from the cases a common-law rule under which the right of control establishes the existence of the common-law employer-employee relationship, without regard to whether or how such control is exercised. For example, in 1922, an American Law Report (A.L.R.) annotation states as black-letter law that:

> *In every case* which turns upon the nature of the relationship between the employer and the person employed, the essential question to be determined is *not whether the former actually exercised control* over the details of the work, *but whether he had a right to exercise that control.*[20]

[17] See also *Chicago Rock Island & Pac. Ry. Co.* v. *Bond,* 240 U.S. 449, 456 (1916) (worker was not employee of railroad company where contract provided ''company *reserves and holds no control* over [worker] in the doing of such work other than as to the results to be accomplished,'' and Court found company ''did not *retain the right* to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not *retain control* not only of what should be done, but how it should be done.'') (emphasis added); *Little* v. *Hackett,* 116 U.S. 366, 376 (1886) (''[I]t is this *right to control* the conduct of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant.'') (emphasis added) (quoting *Bennet* v. *New Jersey R.R. & Transp. Co.,* 36 N.J.L. 225 (N.J. 1873)).

We are puzzled by our colleague's suggestion that *Singer* somehow fails to support the proposition that contractual authority to control can establish a joint-employer relationship because the company engaged the worker and compensated him for his work. As discussed further below, ordinary contract terms providing generally for engaging workers and setting general price terms are common features of any independent-contractor arrangement, and are, accordingly, not relevant to either the joint-employer analysis or the common-law employer-employee analysis.

[18] *Maltz* v. *Jackoway-Katz Cap Co.,* 82 SW2d 909, 912, 918 (Mo. 1934). See also *McDermott's Case,* 186 NE 231, 232–233 (Mass. 1933) (''One may be a servant though far away from the master, or so much more skilled than the master that actual direction and control would be folly, for it is the right to control, rather than the exercise of it that is the test.''); *Larson* v. *Independent School Dist No. 11J of King Hill,* 22 P.2d 299, 301 (Idaho 1933) (''It is not necessary that control be exercised, if the right of control exists.''); *Gordon* v. *S.M. Byers Motor Car Co.,* 164 A. 334, 335–336 (Pa. 1932) (''The control of the work reserved in the employer which makes the employee a mere servant . . . means a power of control, not necessarily the exercise of the power.'') (internal quotation and citation omitted); *Brothers* v. *State Industrial Accident Commission,* 12 P.2d 302, 304 (Or. 1932) (''[T]he true test of the relationship of employer and employee is not the actual exercise of control, but the right to exercise control.'') (internal quotation and citation omitted); *Murrays Case,* 154 A. 352, 354 (Me. 1931) (''Authorities are numerous and uniform that the vital test is to be found in the fact that the employer has or not retained power of control or superintendence over the employee or contractor. The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere that makes the difference between an independent contractor and a servant or agent. There is no conflict as to this general rule'') (internal quotation and citation omitted); *Van Watermeullen* v. *Industrial Commission,* 174 NE 846, 847–848 (Ill. 1931) (''One of the principal factors which determine whether a worker is an employee or an independent worker is the matter of the right to control the manner of doing the work, not the actual exercise of that right.''); *Norwood Hospital* v. *Brown,* 122 So. 411, 413 (Ala. 1929) (''[T]he ultimate question . . . is not whether the employer actually exercised control, but whether it had a right to control.'').

[19] *Grace* v. *Magruder,* 148 F.2d 679, 681 (D.C. Cir. 1945). See also *Industrial Commission* v. *Meddock,* 180 P.2d 580, 584 (Ariz. 1947) (''It is the right to control rather than the fact that the employer does control that determines the status of the parties, and this right to control is, in turn, tested by those standards applicable to the facts at hand.''); *D.M. Rose & Co.* v. *Snyder,* 206 SW 2d 897, 904 (Tenn. 1947) (internal quotations and citations omitted) (''[The] right of control is the distinguishing mark which differentiates the relation of master and servant from that of employer and independent contractor . . . . Wherever the defendant has had such right of control, irrespective of whether he exercised it or not, he has been held to be the responsible principal or master.''); *Green Valley Coop. Dairy Co.* v. *Industrial Comm'n,* 27 NW 2d 454, 457 (Wis. 1947) (citation omitted) (''It is quite immaterial whether the right to control is exercised by the master so long as he has the right to exercise such control.''); *Bobik* v. *Industrial Comm'n,* 64 NE 2d, 829, (Ohio 1946) (''[I]t is not, however, the actual exercise of the right by interfering with the work but rather the right to control which constitutes the test.''); *Cimorelli* v. *New York Cent. R. Co.,* 148 F.2d 575, 578 (6th Cir. 1945) (''The fact of actual interference or exercise of control by the employer is not material. If the existence of the right or authority to interfere or control appears, the contractor cannot be independent.''); *Dunmire* v. *Fitzgerald,* 37 A.2d 596, 599 (Pa. 1944) (in determining ''who was the controlling master of the borrowed employe[e], ... The criterion is not whether the borrowing employer in fact exercised control, but whether he had the right to exercise it.''); *Bush* v. *Wilson & Co.,* 138 P.2d 457, 461 (Kan. 1943) (''[W]hether a person is an employee of another depends upon whether the person who is claimed to be an employer had a right to control the manner in which the work was done. It has been pointed out many times that this means not actually the exercise of control, but does mean the right to control.''); *Ross* v. *Schneider,* 27 SE 2d 154, 157 (Va. 1943) (quoting *Murray's Case,* 154 A. 352, 354 (Me. 1931)) (''Authorities are numerous and uniform that the vital test is to be found in the fact that the employer has or not retained power of control or superintendence over the employee or contractor. 'The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere that makes the difference between an independent contractor and a servant or agent.' *Tuttle* v. *Embury-Martin Lumber Co.,* [158 NW 875, 879 (Mich. 1916)].''); *Jones* v. *Goodson,* 121 F.2d 176, 179 (10th Cir. 1941) (''[T]he legal relationship of employer and employee . . . exists when the person for whom services are performed has the right to control and direct . . . the details and means by which [the service] is accomplished. . . . it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.''); *S.A. Gerrard Co.* v. *Industrial Accident Comm'n,* 110 P.2d 377 (Cal. 1941) (''[T]he right to control, rather than the amount of control which was exercised, is the determinative factor.'').

[20] *General discussion of the nature of the relationship of employer and independent contractor,* 19 A.L.R. 226 at sec. 7 & fn. 1 (1922) (emphasis added) (citations omitted). A 1931 A.L.R. annotation similarly reports that ''[i]t is not the fact of actual interference or exercise of control by the employer which renders one a servant rather than an independent contractor, but the existence of the right or authority to interfere or control.'' *Tests in determining whether one is an independent contractor,* 75 A.L.R. 725 (1931).

Other, earlier secondary authority was also consistent with this view. For example, the second edition of *The American & English Encyclopedia of Law,* published over several years spanning the turn of the century, explains that ''[t]he relation of master and servant exists where the employer has *the right* to select the employee; *the power* to remove and discharge him; and *the right* to direct both what work shall be done and the way and manner in which it shall be done.'' 20 The American & English Encyclopedia of Law 12 *Master and Servant* (2d ed. 1902) (emphasis added) (citations omitted). Likewise, in 1907, the Cyclopedia of Law and Procedure defines ''master,'' inter alia, as ''[o]ne who not only prescribes the end, but directs, *or at any time may direct,* the means and methods of doing the work.'' 26 *Cyclopedia of Law and Procedure* 966 fn. 2 *Master and Servant* (1907) (emphasis added) (citations omitted). The 1925 first edition of *Corpus Juris* echoes the same definitions set forth in the

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And, the first Restatement of Agency, published in 1933, defines ''master,'' and ''servant,'' thus:

(1) A master is a principal who employs another to perform service in his affairs and who controls *or has the right to control* the physical conduct of the other in the performance of the service.

(2) A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled *or is subject to the right of control* by the master.[21]

Finally, the first edition of *American Jurisprudence,* published between 1936 and 1948, states that ''the really essential element of the [employer-employee] relationship is *the right of control*—the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done,'' and ''[t]he test of the employer-employee relation is *the right of the employer to exercise control* of the details and method of performing the work.'' [22]

The Board believes, after careful consideration of relevant comments as discussed further below, and based on consultation of this and other judicial authority, that when Congress enacted the NLRA in 1935 and the Taft-Hartley Amendments in 1947, the existence of a putative employer's reserved authority to control the details of the terms and conditions under which work was performed sufficed to establish a common-law employer-employee relationship without regard to whether or in what manner such control was exercised.

From 1947 to today, innumerable judicial decisions and secondary authorities examining the common-law employer-employee relationship have continued to emphasize the primacy of the putative employer's authority to control, without regard to whether or in what manner that control has been exercised. For example, in 2014, the Supreme Court of California affirmed that ''what matters under the common law is not how much control a hirer *exercises,* but how much control the hirer retains the *right* to exercise.'' [23] As noted above, the *Restatement (Second) of Agency* relevantly echoes the First Restatement's emphasis on the right of control.[24] *Corpus Juris Secundum* provides that ''[a]n employee/servant is a type of agent whose physical conduct is controlled *or is subject to the right to control* by the master; the servant's principal, who controls *or has the right to control* the physical conduct of the servant, is called the master.'' [25] And, the second edition of *American Jurisprudence* provides that ''the principal test of an employment relationship is whether the alleged employer has *the right to control* the manner and means of accomplishing the result desired.'' [26] Based on its examination of this and other judicial and secondary authority, the Board agrees with the District of Columbia Circuit that ''for what it is worth [the common-law rule in 1935 and 1947] is still the common-law rule today.'' [27] The Board also notes that, as set forth in greater detail above, this view is in keeping with the Board's prior treatment of reserved control in the period following the *Greyhound* decision and before the Board began imposing additional control-related restrictions in *TLI/Laerco* and their progeny.

Finally, because the facts of many cases do not require distinguishing between contractually reserved and actually exercised control, many judicial decisions and other authorities spanning the last century have articulated versions of the common-law test that do *not* expressly include this distinction. But the Board is not aware of any common-law judicial decision or other common-law authority directly supporting the proposition that, given the existence of a putative employer's

Cyclopedia, and additionally notes state high court common-law authority holding that ''*where the master has the right of control, it is not necessary that he actually exercise such control.*'' 39 C.J. Master and Servant sec. 1 Definitions 33 fn. 8 (1st ed. 1925) (emphasis added) (quoting *Tucker* v. *Cooper,* 158 P. 181 (Cal. 1916)).

[21] Restatement (First) of Agency sec. 2 (Am. Law Inst. 1933) (emphasis added). See also id. at sec. 220 (''A servant is a person employed to perform a service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control *or right to control.*'') (emphasis added). As noted above, the District of Columbia Circuit observed in *BFI* v. *NLRB,* 911 F.3d at 1211, that ''the 'right to control' runs like a *leitmotif* through the Restatement (Second) of Agency,'' which, though published in 1958, is relevantly similar to the first Restatement.

[22] 35 Am. Jur. *Master and Servant* sec. 3 (1st ed. 1941) (emphasis added).

[23] *Ayala* v. *Antelope Valley Newspapers, Inc.,* 327 P.3d 165, 169, 172 (Cal. 2014); see also, *e.g., Garcia-Celestino* v. *Ruiz Harvesting, Inc.,* 898 F.3d 1110, 1121 (11th Cir. 2018) (''We emphasize that 'it is the *right* to control, not the actual exercise of control that is significant.' ''); *Mallory* v. *Brigham Young Univ.,* 332 P.3d 922, 928–929 (Utah 2014) (''If the principal has the right to control the agent's method and manner of performance, that agent is a servant whether or not the right is specifically exercised.''); *Shatto* v. *McLeod Regional Medical Center,* 753 SE2d 416, 419, 420 (S.C. 2013) (''While evidence of actual control exerted by a putative employer is evidence of an employment relationship, the critical inquiry is whether there exists the *right and authority* to control and direct the particular work or undertaking.''); *Anthony* v. *Okie Dokie Inc.,* 976 A.2d 901, 906 (D.C. 2009) (quoting *Safeway Stores Inc.* v. *Kelly,* 448 A.2d 856, 860 (D.C. 1982)) (''The determinative factor 'is whether the employer has the *right* to control and direct the servant in the performance of his work and the manner in which the work is to be done . . . and not the actual exercise of control or supervision.' ''); *Universal Am-Can Ltd. V. WCAB,* 762 A.2d 328, 332–333 (Pa. 2000) (''[I]t is the existence of the *right* to control that is significant, irrespective of whether the control is actually exercised.''); *Reed* v. *Glyn,* 724 A.2d 464, 466 (Vt. 1998) (''It is to be observed that actual interference with the work is unnecessary—it is the right to interfere that determines.''); *JFC Temps, Inc.* v. *W.C.A.B. (Lindsay),* 620 A.2d 862, 864–865 (Pa. 1996) (''The law governing the ''borrowed'' employee is well-established. . . . The entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised.''); *Harris* v. *Miller,* 438 SE 2d 731, 735 (N.C. 1994) (''The traditional test of liability under the borrowed servant rule [provides that] a servant is the employe (sic) of the person who has the *right* of controlling the manner of his performance of the work, irrespective of whether he actually *exercises* that control or not.'') (internal quotation and citation omitted); *Beddia* v. *Goodin,* 957 F.2d 254, 257 (6th Cir. 1992) (''The test is whether the employer retained control, or the right to control, the modes and manner of doing the work contracted for. *It is not necessary that the control ever be exercised.*''); *Ex parte Curry,* 607 S.2d 230, 232 (Ala. 1992) (''In the last analysis, it is the reserved right of control rather than its actual exercise that provides the answer.''); *ARA Leisure Services, Inc. v NLRB,* 782 F.2d 456, 460 (4th Cir. 1986) (''It is the right to control, rather than the actual exercise of control, that is significant.''); *NLRB* v. *Associated Diamond Cabs, Inc.,* 702 F.2d 912, 920 (11th Cir. 1983) (''[I]t is the *right* to control, not the actual exercise of control, that is significant.''); *Glenmar Cinestate Inc.* v. *Farrell,* 292 SE2d 366, 369 (Va. 1982) (''It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent.''); *Baird* v. *Sickler,* 433 NE 2d 593, 594–595 (Ohio 1982) (''For the relationship to exist, it is unnecessary that such right of control be exercised; it is sufficient that the right merely exists.''); *Seafarers Local 777 (Yellow Cab)* v. *NLRB,* 603 F.2d 862, 874 (D.C. Cir. 1978) (quoting *Williams* v. *U.S.,* 126 F.2d 129, 132 (7th Cir. 1942)) (''[I]t is the right and not the exercise of control which is the determining element.''); *Combined Insurance Co. of America* v. *Sinclair,* 584 P.2d 1034, 1042 (Wyo. 1978) (''The base determining factor is whether [putative employer] retained [t]he right of control of the manner that [putative employee] operated his vehicle and not whether such control was in fact exercised.''); *NLRB* v. *Deaton Inc.,* 502 F.2d 1221, 1225 (5th Cir. 1974) (''It is the right and not the exercise of control which is the determining element''); *Dovell* v. *Arundel Supply Corp.,* 361 F.2d 543, 545 (D.C. Cir. 1966) (quoting *Grace* v. *Magruder,* 148 F.2d 679, 681 (D.C. Cir. 1945)) (''[I]t is the right to control, not control or supervision itself, which is most important.''); *United Ins. Co. of America* v. *NLRB,* 304 F.2d 86, 89 (7th Cir. 1962) (''[I]t is the right and not the exercise of control which is the determining element.''); *Cohen* v. *Best Made Mfg. Co.,* 169 A.2d 10, 11–12 (R.I. 1961) (''The final test is the right of the employer to exercise power of control rather than the actual exercise of such power.''); *Fardig* v. *Reynolds,* 348 P.2d 661, 663 (Wash. 1960) (''It is well settled in this state that . . . [it] is not the actual exercise of the right of interference with the work, but the right to control, which constitutes the test.'').

[24] See Restatement (Second) of Agency secs. 2, 220 (Am. Law Inst. 1958).

[25] 30 C.J.S. *Employer—Employee* sec. 1 (2022) (emphasis added) (citations omitted).

[26] 27 Am. Jur. 2d. *Employment Relationship* sec. 1 (2022) (emphasis added) (citations omitted).

[27] *BFI* v. *NLRB,* 911 F.3d at 1210 & fn. 6.

contractually reserved authority to control, further evidence of direct and immediate exercise of that control is necessary to establish a common-law employer-employee relationship.

For these reasons, the Board believes that in light of controlling common-law agency principles, it does not have the statutory authority to require a showing of actual exercise of direct and immediate control in order to establish that an entity is a joint employer of another entity's employees. We would not choose to do so, as a matter of policy, in any case.

Our dissenting colleague faults us, in turn, both for seeking authority on relevant common-law principles in sources examining the distinction between employees and independent contractors and for failing to pay sufficient attention to judicial decisions examining joint-employer issues under other federal statutes in light of common-law principles derived from independent-contractor authority. In support of the first criticism, our colleague quotes selectively from *BFI* v. *NLRB,* in which the court rejected a party's contention that the joint-employer and independent-contractor tests were ''virtually identical.'' 911 F.3d at 1213–1215. We recognize, as did the court there, that several of the factors that guide the employee-or-independent-contractor determination, as articulated in primary judicial authority like *Darden* [28] and *Reid* [29] and in secondary compendiums, reports, and restatements of the common law of agency bearing on independent-contractor determinations will ''shed no meaningful light'' on joint-employer questions, which involve workers who are clearly *some entity's* employees. 911 F.3d at 1214–1215. Nevertheless, we agree with the court that ''both tests ultimately probe the existence of a common-law master-servant relationship, [a]nd central to establishing a master-servant relationship—whether for purposes of the independent-contractor inquiry or the joint-employer inquiry—is the nature and extent of a putative master's control.'' Id. at 1214. The final rule is thus consistent with *NLRB* v. *BFI* in seeking guidance from common law material bearing on the independent-contractor determination to examine, as a threshold matter under Section 103.40(a), whether a common-law employer-employee relationship exists between a putative joint employer and particular employees.[30] Once the party seeking to demonstrate joint-employer status establishes the existence of a threshold common-law employment relationship, the final rule appropriately provides for an examination, under Section 103.40(c), of whether the character and objects of such control. *i.e.,* who may exercise it, when, and how, extends to essential terms and conditions of employment that are the central concern of the joint-employer analysis within the specific context of the NLRA.[31]

Our dissenting colleague faults us for failing to pay sufficient heed to judicial decisions examining joint-employer questions under other statutes, especially Title VII of the Civil Rights Act of 1964,[32] that he claims are materially similar to the NLRA.[33] As a threshold matter, because many of the decisions our colleague cites take independent-contractor authority as the starting point for their analysis of joint-employer questions, these cases support the Board's similar examination of articulations of common-law principles in independent-contractor authority for guidance on the joint-employer analysis under the NLRA.[34]

[28] *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318, 322–324 (1992).

[29] *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 751 (1989).

[30] Our dissenting colleague argues that judicial precedent distinguishing between independent contractors and employees is ''ill-suited to fully resolve joint-employer issues'' in part because, he contends, the principal in an independent-contractor relationship ''necessarily exercises direct control of at least two things that . . . constitute essential terms and conditions,'' by engaging the worker and deciding upon the compensation to be paid for the work. This argument proves too much, because an entity that actually determined which particular employees would be hired and actually determined the wage rates of another entity's employees would be a joint employer of those employees for the purposes of the Act under any joint-employer standard, including the 2020 rule. See 85 FR at 11235–11236. Because every contract for the performance of work includes price terms and provides for engaging at least one worker, if such provisions alone were, as our colleague asserts, the equivalent of exercising direct control over hiring and wages—essential terms and conditions of employment under the Act—then no joint-employer standard could distinguish between control sufficient to establish a joint-employer relationship and control *insufficient* to establish a common-law employment relationship when considering only a single principal and a single worker. From this it is clear that, contrary to our colleague's assertion, ordinary contract terms providing generally for engaging workers and setting general price terms do *not* constitute an exercise of direct control over the essential terms and conditions of employment of hiring and wages. As discussed further below, Sec. 103.40(f) expressly incorporates this distinction by providing that evidence of an entity's control over matters that are immaterial to the existence of a common-law employment relationship and that do not bear on the employees' essential terms and conditions of employment is not relevant to the determination of whether an entity is a joint employer. Recognizing this commonsense distinction in no way undermines our examination of independent-contractor authority for guidance on the common-law employment relationship.

[31] See *BFI* v. *NLRB,* 911 F.3d at 1195 (''[E]mployee-or-independent-contractor cases can . . . be instructive in the joint-employer inquiry to the extent that they elaborate on the nature and extent of control necessary to establish a common-law employment relationship. Beyond that, a rigid focus on independent-contractor analysis omits the vital second step in joint-employer cases, which asks, once control over workers is found, *who* is exercising that control, *when,* and *how.*'') (emphasis in original).

[32] 42 U.S.C. 2000e *et seq.*

[33] We need not decide whether the statutes our colleague refers to are ''materially similar'' to the NLRA, because, as discussed below, courts' discussion and application of common-law principles in the cases cited by our colleague fully support the Board's position. We note, however, that these statutes define ''employer'' and ''employee'' differently from the Act and examine the relationship in different contexts. For instance, Title VII excludes entities that would clearly be statutory employers under the NLRA by defining ''employer'' as ''a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person,'' subject to exclusions that also differ from the exclusions provided under Sec. 2 of the Act. Compare 42 U.S.C. 2000e(b) with 29 U.S.C. 152. Moreover, joint-employer questions under Title VII and similar statutes primarily arise in the context of assigning liability for workplace discrimination in violation of employees' individual rights. Under the NLRA, by contrast, such questions arise in an additional forward-looking context: in order to correctly allocate prospective bargaining rights and obligations in support of employees' collective right to bargain. Assuming that Title VII and similar statutes, like the Act, require reference to the content of the common-law terms ''employer'' and ''employee,'' the necessity under the Act of prospectively defining bargaining obligations may tend to focus the common-law inquiry on questions involving reserved or indirect control more frequently than is likely under primarily backward-looking individual-rights-protecting statutes.

[34] See, *e.g., Felder* v. *U.S. Tennis Assn.,* 27 F.4th 834, 843 (2d Cir. 2022) (relying, inter alia, on *Reid* and Restatement (Second) of Agency § 220); *Garcia-Celestino* v. *Ruiz Harvesting, Inc.,* 843 F.3d 1276, 1286–1287 (11th Cir. 2016) (relying on *Darden* and *Reid*); *Al-Saffy* v. *Vilsack,* 827 F.3d 85 (D.C. Cir. 2016) (relying, inter alia, on ''traditional agency law principles'' citing *Darden*); *Faush* v. *Tuesday Morning, Inc.,* 808 F.3d 208 (3d Cir. 2015) (''the common-law test outlined in *Darden* governs''); *Plaso* v. *IJKG, LLC,* 553 Fed. Appx. 199, 203–204 (3d Cir. 2015) (considering *Darden* factors).

Some of the decisions our colleague cites are less clearly relevant, because they employ an ''economic realities'' test, or a hybrid test that incorporates elements of both a common-law control test and an economic-realities test. See, *e.g., Perry* v. *VHS San Antonio, LLC,* 990 F.3d 918, 928–929 (5th Cir. 2021) (applying ''hybrid economic realities/common law control test''); *Frey* v. *Hotel Coleman,* 903 F.3d 671, 676 (7th Cir. 2018) (applying ''an 'economic realities' test which is, in essence, an application of general principles of agency law to the facts of the case''); *Al-Saffy* v. *Vilsack,* 827 F.3d at 96 (noting one of two recognized ''articulations of the test for identifying joint-employer status. . . . speaks in terms of the 'economic realities' of the work relationship''). Of course, as we note elsewhere, the Board is precluded by Supreme Court decisions interpreting the Taft-Hartley amendments from applying an economic-realities test. See, *e.g., NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256 (1968). Given that our colleague elsewhere

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Moreover, far from supporting our colleague's claim that the Board has ''gone beyond the boundaries of the common law'' by eliminating the 2020 rule's actual-exercise requirement, none of the decisions he cites articulates a common-law principle that would preclude finding a joint-employer relationship based on evidence of reserved unexercised control or indirectly exercised control. To the contrary, several of the cited cases affirmatively support the Board's conclusion that the common law permits the finding of a joint-employer relationship based solely upon reserved, unexercised control or upon control exercised indirectly, such as through an intermediary.[35]

To begin, several of the cases our colleague cites articulate a version of the joint-employer analysis that provides that an entity is a common-law employer if it ''exercises significant control'' over certain terms and conditions of workers' employment.[36] We agree that an entity's actual exercise of control may be *sufficient* to establish an employment relationship, but nothing about this formulation entails or supports our colleague's further contention that the actual exercise of control is *necessary.* As discussed above, the facts of many cases do not require distinguishing between reserved control and actually exercised control, or between control that is exercised directly or indirectly. Where no question of reserved or indirect control is presented, it is unsurprising that judges articulate the test in a manner that does not make such distinctions, and such articulations, absent a specific claim that actual exercise of control is a necessary component of the analysis, have little to say to the specific disagreement between the Board and our dissenting colleague.

Relatedly, our colleague cites *Felder* v. *U.S. Tennis Association* for its statement that, under a common-law analysis drawn from the Supreme Court's decision in *Reid,* ''the exercise of control is the guiding indicator.'' But he fails to acknowledge the *Felder* court's explanation that sharing significant control under common-law principles ''means that an entity other than the employee's formal employer *has power to* pay an employee's salary, hire, fire, or otherwise control the employee's daily employment activities, such that we may properly conclude that a constructive employer-employee relationship exists.'' 27 F.4th 834, 844 (2d Cir. 2022) (emphasis added).[37] Our colleague further asserts that *Felder* ''quoted with approval cases from other circuits requiring proof that the putative joint employer 'exercise[d] significant control.'" However, a closer examination of the cases cited by *Felder* reveals that they similarly support only the proposition that the exercise of control is *sufficient* to establish the relationship, not that the exercise of control is *necessary* to establish the relationship.[38] As we have explained, the final rule is entirely consistent with the proposition that, as these cases hold, a joint-employment relationship exists when two entities exercise significant control over the same employees.[39] Moreover, each of the cases cited in *Felder* that our colleague relies upon—and many others—*also* discussed the requisite control in terms of the putative joint-employer's ''right,'' ''ability,'' ''power,'' or ''authority'' to control terms and conditions of employment, consistent with the common-law principle consistently articulated in the primary judicial authority discussed

expresses his agreement with our view that the Board must apply common-law agency principles in making joint-employer determinations under the Act, we find his observation that *NLRB* v. *Hearst Publications,* 322 U.S. 111 (1944), involved a question of employee-or-independent-contractor status rather than a question of joint-employer status to be something of a non sequitur.

Finally, some of the cases our colleague relies upon are at best attenuated sources of authority on the content of the common law to the extent that they articulate a joint-employer standard ultimately derived from Board decisions—including Board decisions imposing an actual-exercise requirement without reference to any common-law authority. See, *e.g., Nethery* v. *Quality Care Investors, L.P.,* 814 Fed. Appx. 97 (6th Cir. 2020) (applying ''share-or-codetermine'' standard derived from *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc. (NLRB v. BFI of Pennsylvania),* 691 F.2d 1117, 1124 (3d Cir. 1982), via *Carrier Corp.* v. *NLRB,* 768 F.2d 778, 781 (6th Cir. 1985)); *Al-Saffy* v. *Vilsack,* 827 F.3d at 96 (noting one of two recognized ''articulations of the test for identifying joint-employer status. . . . borrows language from'' *NLRB* v. *BFI of Pennsylvania,* above); *Plaso* v. *IJKG, LLC,* 553 Fed. Appx. at 204 (relying in part on *NLRB* v. *BFI of Pennsylvania* for ''significant control'' formulation); *Whitaker* v. *Milwaukee County,* 772 F.3d 802, 810 (7th Cir. 2014) (discussed further below, noting ''joint employer concept derives from labor law,'' and citing post-*TLI*/*Laerco* NLRA precedent); *Graves* v. *Lowery,* 117 F.3d 723, 727 (3d Cir. 1997) (drawing guidance from Board ''cases which have found joint employment status when two entities exercise significant control over the same employees'') (citing *NLRB* v. *BFI of Pennsylvania* and post-*TLI*/*Laerco* NLRA precedent).

[35] In *Garcia-Celestino* v. *Ruiz Harvesting, Inc.,* for example, the court concluded that, under the common-law standard applicable to the joint-employer question before it—which it derived from Supreme Court independent-contractor precedent—''the proper focus is on the hiring entity's *right to control* the manner and means by which the product is accomplished.'' 843 F.3d at 1292–1293 (quotation omitted) (emphasis added). After remand to a district court to apply the common-law analysis, the court later emphasized that under the applicable common-law control test ''it is the *right* to control, not the actual exercise of control, that is significant.'' 898 F.3d 1110, 1121 (11th Cir. 2018) (quoting *NLRB* v. *Associated Diamond Cabs,* 702 F.2d 912, 919–920 (11th Cir. 1983)) (emphasis in original). See also discussion of *Butler* v. *Drive Automotive Industries of Am.,* 793 F.3d 404 (4th Cir. 2015) and *EEOC* v. *Global Horizons, Inc.,* 915 F.3d 631 (9th Cir. 2019), infra.

[36] See *Adams* v. *C3 Pipeline Constr. Inc.,* 30 F.4th 943, 961 (10th Cir. 2021) (quoting *Knitter* v. *Corvias Mil. Living, LLC,* 758 F.3d 1214, 1226 (10th Cir. 2014) (''Both entities are employers if they both exercise significant control over the same employees.'') (internal quotation and citation omitted); *Plaso* v. *IJKG, LLC,* 553 Fed. Appx. at 204 (3d Cir. 2015) (''a joint employment relationship exists when 'two entities exercise significant control over the same employees.' '') (quoting *Graves,* above); *Bristol* v. *Bd. of Cnty. Comm'rs of Cnty. of Clear Creek,* 312 F.3d 1213, 1218 (10th Cir. 2002) (''Courts applying the joint-employer test . . . look to whether both entities 'exercise significant control over the same employees.' '') (quoting *Graves,* above).

[37] Significantly, because *Felder* involved a Title VII claim of discriminatory denial of credentials necessary to perform certain work, the alleged discriminatee never performed work for the putative joint employer, and the court's analysis necessarily examined whether the putative joint employer ''*would have exerted control* over the terms and conditions of [the employee's] anticipated employment, by, for example, training, supervising, and disciplining [the employee]''—in other words, whether it had the power, though never exercised, to exert the requisite control under appropriate circumstances. Id. at 845. The court concluded that the court below had not erred in dismissing the discriminatee's Title VII claims with respect to the putative joint employer because the alleged discriminatee failed to allege that the putative joint employer ''would have significantly controlled the manner and means'' of his work so as to establish an employment relationship.

[38] See *Knitter,* above, 758 F.3d at 1226 (quoting *Bristol,* above, 312 F.3d at 1218 (''Under the joint employer test, two entities are considered joint employer . . . if they both 'exercise significant control over the same employees.' '')), and *Plaso,* above, 553 Fed. Appx. at 204 (quoting *Graves,* above, 117 F.3d at 727 (''[A] joint employment relationship exists when 'two entities exercise significant control over the same employees.' '')).

[39] As we have noted above, courts focused on particular factual records that do not turn on the precise role of reserved or indirect control have frequently and reasonably refrained from articulating versions of a common-law employer-employee or joint-employer standard that expressly address whether such control can suffice alone to establish the relationship. See, *e.g., BFI* v. *NLRB,* above, 911 F.3d at 1213 (''[B]ecause the Board relied on evidence that Browning-Ferris both had a right to control and had exercised that control, this case does not present the question whether the reserved right to control, divorced from any actual exercise of authority, could alone establish a joint-employer relationship.''). In crafting a Final Rule of general prospective applicability, however, our task is different. We must, accordingly, seek guidance from those judicial articulations of common-law standards that *have* expressly addressed the question of whether or how authority to control must be exercised in order to establish the relevant relationship. No number of cases holding only that the direct exercise of control is *sufficient* can rationally establish that the direct exercise of control is *necessary.* Conversely, though, the large body of authority expressly stating that the direct exercise of control is *not* necessary, and, in many cases finding the relevant relationship *without* any direct exercise of control, weighs heavily in favor of our conclusion that the Board may not, consistent with controlling common-law agency principles, impose such a requirement as part of a joint-employer standard.

above, that it is the authority to control that matters, without respect to whether or how such control is exercised.[40]

The single case cited by our colleague that arguably articulates a standard under which the exercise of control would be *necessary* to find a joint-employer relationship, *Whitaker* v. *Milwaukee County,* does not purport to draw this principle from the common law, but rather applies a standard derived from decisions under the NLRA at a time that the Board had, as we have explained above, adopted an actual-exercise requirement that was unsupported by and insupportable under the common law.[41] Thus, *Whitaker* drew its articulation of the standard from *G. Heileman Brewing Co.* v. *NLRB,* which enforced a Board Decision and Order that had adopted, without relevant comment, an administrative law judge's finding that two entities were joint employers under *Laerco* based on their direct negotiation of a contract that set the overall framework of terms and conditions of employment of the employees.[42] Because the Board is not a primary source of authority for the common-law of agency, and did not, in any case purport to draw the control-based restrictions imposed by *Laerco* and related decisions from the common law, *Whitaker*'s statement of the joint-employer standard has little to say regarding the common-law principles applicable to the final rule.[43]

Our dissenting colleague further seeks support from the court's statement in *Butler* v. *Drive Automotive Industries of America* that ''the [joint-employer] doctrine's emphasis on determining which entities *actually exercise control* over an employee is consistent with Supreme Court precedent interpreting Title VII's definitions.'' 793 F.3d 404, 409 (4th Cir. 2015) (emphasis added). In context, though, it is clear that the *Butler* court's discussion of which entity ''actually exercised'' control meant something entirely different from what our colleague means by the phrase. At issue in *Butler* was whether a manufacturer was a joint employer of a worker supplied to it by a temporary employment agency. The court found that the agency discharged the employee after the manufacturer requested that she be replaced. An agency manager also testified that he could not recall an instance when the manufacturer requested that an agency employee be disciplined or discharged and it was not done. Based primarily on this evidence that the manufacturer thus exercised *indirect* control over discipline and tenure of employment of the agency's employees, the court held, as a matter of law, that the manufacturer was a joint-employer of the discharged employee.[44] The court's observation, in this context, that the joint-employer doctrine emphasizes ''which entities actually exercise control'' had nothing to do with any question involving reserved, *unexercised* control, but rather with the question of whether, despite the appearance that the agency was responsible for the discharge, the manufacturer had *actually,* though indirectly, brought it about. The court observed that the joint-employer test ''specifically aims to pierce the legal formalities of an employment relationship to determine the loci of effective control over an employee . . . . Otherwise, an employer who *exercises actual control* could avoid Title VII liability by hiding behind another entity.'' 793 F.3d at 415. In other words, far from suggesting that reserved, unexercised control can never suffice to establish a joint-employment relationship under the common law, *Butler* tends rather to support the final rule's treatment of indirect control, discussed further below.

Our colleague further claims that ''[n]ot a single circuit has held or even suggested that an entity can be found to be the joint employer of another entity's employees based solely on a never-exercised contractual reservation of right to affect essential terms . . . *i.e.,* conduct other than actually determining (alone or in collaboration with the undisputed employer) employees' essential terms and conditions of employment.'' But the Court of Appeals for the Ninth Circuit did just that in *EEOC* v. *Global Horizons, Inc.,* 915 F.3d 631 (9th Cir. 2019).

Global Horizons involved an EEOC Title VII enforcement action against two agricultural employers (the Growers) alleged to be joint employers of certain foreign workers (the Thai workers) supplied to the Growers by a labor contractor, Global Horizons, under the H–2A guest worker program. Global Horizons and the Growers contracted for Global Horizons to pay the workers and provide certain nonwage benefits required under Department of Labor regulations governing the H–2A program in exchange for the Growers' agreement to compensate Global Horizons for the workers' wages and benefits and pay Global Horizons an additional fee for its services. 915 F.3d at 634–635. The workers sought to hold the Growers responsible as joint employers for alleged unlawful discrimination in Global Horizons' provision of nonwage benefits, including housing, meals, and transportation. Id. at 636.

The court analyzed the joint-employer question under a common-law agency test derived from *Darden* and *Clackamas Gastroenterology Associates, P.C.* v. *Wells,* 538 U.S. 440, 448–449 (2003). 915 F.3d at 638–639. The court

[40] See *Knitter,* 758 F.3d at 1226 (considering ''*right* to terminate'' employment, and ''*ability* to promulgate work rules and assignments, and set conditions of employment including compensation, benefits, and hours'') (emphasis added) (quotations and citations omitted); *Bristol,* 312 F.3d at 1215 (holding putative joint employer ''*lack[ed] the power* to control the hiring, termination, or supervision of [undisputed employer's] employees, or otherwise control the terms and conditions of their employment) (emphasis added); *Plaso,* 553 Fed. Appx. at 204 (considering, inter alia, putative joint employer's ''*authority* to hire and fire employees promulgate work rules and assignments, and set conditions of employment, including compensation, benefits and hours'') (emphasis added); *Graves,* 117 F.3d at 728 (''when an employer *has the right to control* the means and manner of an individual's performance . . . an employer-employee relationship is likely to exist.'') (emphasis added) (citation omitted); see also, *e.g., Adams,* 30 F.4th at 961, (considering ''*right* to terminate'' employment relationship, and ''*ability* to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours'') (quoting *Knitter,* above); *Perry,* 990 F.3d at 929 (''The *right to control* the employee's conduct is the most important component of determining a joint employer. . . . [including a] focus on the *right* to hire and fire, the *right* to supervise, and the *right* to set the employees' work schedule.'') (citations omitted).

[41] See *Whitaker* v. *Milwaukee County,* 772 F.3d 802, 810 (7th Cir. 2014) (''An entity other than the actual employer may be considered a 'joint employer' '*only if* it exerted significant control over' the employee.'') (emphasis added) (quoting *G. Heileman Brewing Co.* v. *NLRB,* 879 F.2d 1526, 1530 (7th Cir. 1989), enfg. 290 NLRB 991 (1988)).

[42] See *G. Heileman Brewing Co.,* 290 NLRB 991, 999 (1988), enfd. 879 F.2d 1256 (7th Cir. 1989).

[43] In any case, the court in *Whitaker* concluded, relying in part on an EEOC Compliance Manual, that the ultimate question of liability at issue in that case did not turn on the ''technical outcome of the joint employer inquiry,'' but on whether the putative joint employer had ''participated in the alleged discriminatory conduct or failed to take corrective measures within its control'' which the court found it had not. 772 F.3d at 811–812. The court's suggestion that liability might have been found based on the putative joint employer's failure to take corrective measures within its control supports the final rule's treatment of reserved control. For example, under the final rule, but not under the 2020 rule, an entity that had contractually reserved but never exercised a right to veto another entity's disciplinary actions could plausibly be held jointly responsible if it failed to prevent the second entity's issuance of unlawful discriminatory discipline to discourage conduct protected by the Act. Cf. *EEOC* v. *Global Horizons, Inc.,* 915 F.3d 631, 640–641 (9th Cir. 2019) (discussed further below, holding two fruit growers could be liable for discrimination in labor supplier's provision to workers of certain non-wage benefits based on growers' never-exercised authority to control the manner in which benefits were provided).

[44] As discussed further below, we disagree with our colleague and the 2020 rule's characterization of control exercised through an intermediary as direct and immediate rather than as indirect or mediated.

concluded that, while most of the factors it would typically consider in applying the common-law agency test under *Darden* did not apply on the specific facts before it, ''the common law's 'principal guidepost'—the element of control—[was] determinative.'' 915 F.3d at 640–641. Because the Growers were legally obligated, under H–2A regulations, to provide the workers with wages and the nonwage benefits at issue, the court concluded that the Growers ''possessed ultimate authority over those matters,'' and their ''power to control the manner in which housing, meals, transportation, and wages were provided to the Thai workers, *even if never exercised,* [was] sufficient to render the Growers joint employers'' of those workers. Id. at 641 (emphasis added) (citing *BFI* v. *NLRB,* 911 F.3d 1195 (D.C. Cir. 2018)).[45] *Global Horizons* is thus consistent with the large body of common-law authority discussed above in strongly supporting the Board's conclusion that the 2020 rule's actual-exercise requirement is inconsistent with the common law governing the Board's joint-employer standard.

2. Indirect Control, Including Control Exercised Through an Intermediary

After careful consideration of relevant comments, as discussed in more detail below, the Board has concluded that evidence that an employer has actually exercised control over essential terms and conditions of employment of another employer's employees, whether directly or indirectly, such as through an intermediary, also suffices to establish the existence of a joint-employer relationship. As the District of Columbia Circuit has recognized, ''[t]he common law . . . permits consideration of those forms of indirect control that play a relevant part in determining the essential terms and conditions of employment.'' *BFI* v. *NLRB,* 911 F.3d at 1199–1200. In addition, the District of Columbia Circuit has explained that the definition of ''employer'' set forth in Section 2(2) of the Act ''textually indicates that the statute looks at all probative indicia of employer status, whether exercised 'directly or indirectly' '' and therefore that the Act ''expressly recognizes that agents acting 'indirectly' on behalf of an employer could also count as employers.'' Id. at 1216.

Judicial decisions and secondary authorities addressing the common-law employer-employee relationship confirm that indirect control, including control exercised through an intermediary, can establish the existence of an employment relationship. The *Restatement (Second) of Agency* explicitly recognized the significance of indirect control, both in providing that ''the control or right to control needed to establish the relation of master and servant may be very attenuated'' and in discussing the subservant doctrine, which deals with cases in which one employer's control may be exercised indirectly, while a second entity directly controls employees.[46] As the District of Columbia Circuit explained in *BFI* v. *NLRB,* ''the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.'' [47] Similarly, as discussed in more detail above, the Fourth Circuit has held that an entity was a joint employer of another employer's employees based primarily on the entity's exercise of indirect control over the employees' discipline and discharge by recommending discipline and discharge decisions which were implemented by the employees' direct employer. *Butler,* above, 793 F.3d at 415.[48]

Consistent with these longstanding common-law principles, the Board has concluded, after careful consideration of comments as discussed further below, that evidence showing that a putative joint employer wields indirect control over one or more of the essential terms and conditions of employment of another employer's employees can establish a joint-employer relationship. Ignoring relevant evidence of indirect control over essential terms and conditions of employment would, in the words of the District of Columbia Circuit, ''allow manipulated form to flout reality,'' [49] contrary to the teachings of the common law. Under the final rule, for example, evidence that a putative joint employer communicates work assignments and directives to another entity's managers or exercises detailed ongoing oversight of the specific manner and means of employees' performance of the individual work tasks may demonstrate the type of indirect control over essential terms and conditions of employment that is sufficient to

[45] Contrary to our dissenting colleague's suggestion, the court in *Global Horizons* expressly applied a common-law agency test, not a test derived from the definition of ''employer'' in the H–2A regulation, to the Title VII joint-employer issue. See 915 F.3d at 639. The fact that the Growers' authority derived from regulation, not contract, does not undermine the impact of the court's conclusion that the existence of that authority, even if never exercised, sufficed to render the Growers joint employers. In any case, *Global Horizons* is far from unique: in fact, numerous federal and state high courts have long concluded, in non-NLRA contexts, that an entity was or could be a common-law employer of another employer's employees based solely on the entity's reserved right of control over those employees. See, *e.g., Mallory* v. *Brigham Young University,* 332 P.3d 922, 928–929 (Utah 2014) (city was common-law employer of university's employee performing traffic control, despite absence of evidence of actual exercise of control by city, where city retained right to control the manner in which workers performed city's ''nondelegable duty of traffic control'' because ''[i]f the principal has the right to control the agent's method and manner of performance, the agent is a servant whether or not the right is specifically exercised'') (citation omitted); *Rouse* v. *Pitt County Memorial Hosp., Inc.,* 470 SE 2d 44, 52–53 (N.C. 1996) (attending physicians could be found employers of resident physicians employed by hospital based on evidence that hospital contractually delegated to attending physicians its responsibility to supervise and control resident physicians' performance of duties, despite absence of evidence of specific instances of attending physicians' control of resident physicians' performance because ''[w]here the parties have made an explicit agreement regarding the right of control, this agreement will be dispositive;'') (citation omitted); *Dunn* v. *Conemaugh & Black Lick RR,* 267 F.2d 571, 577 (3d Cir. 1959) (railroad was employer of manufacturer's employee based on railroad's right to command employee's performance without reference to any instance of exercise of that right because ''the person is the servant of him who has the right to control the manner of performance of the work, regardless of whether or not he actually exercises that right;'') (citation omitted); *S.A. Gerrard Co.* v. *Industrial Accident Comm'n,* 110 P.2d 377, 378 (Cal. 1941) (landowner was joint employer of farmer's employee based on contract provision that picking should be done under the supervisions of and in accordance with landowner's direction without reference to whether such direction was ever given because ''the right to control, rather than the amount of control which was exercised, is the determinative factor.'') (citation omitted).

[46] *Restatement (Second) of Agency* sections 5(2), comments e, f, and illustration 6; 220(1), comment d; 226, comment a (1958).

[47] 911 F.3d at 1217 (citing *Nicholson* v. *Atchison, T. & S. F. Ry. Co.,* 147 P. 1123, 1126 (Kan. 1915) (use of a ''branch company'' as a ''mere instrumentality'' ''did not break the relation of master and servant existing between the plaintiff and the [putative master]''). The 2020 Rule, and our dissenting colleague, seek to avoid the District of Columbia Circuit's endorsement of considering indirect control exercised through an intermediary as probative of joint-employer status by recharacterizing such control as direct and immediate. But an action taken through an intermediary is, by definition, *mediated,* that is, *not* immediate or direct. We accordingly join the District of Columbia Circuit in characterizing such control as indirect. See 911 F.3d at 1216–1217 (''[C]ommon-law decisions have repeatedly recognized that indirect control over matters commonly determined by an employer can, at a minimum, be weighed in determining one's status as an employer or joint employer, especially insofar as indirect control means control exercised through an intermediary.'') (internal quotation and citation omitted).

[48] See also *Al-Saffy,* above, 827 F.3d 85, 97 (District of Columbia Circuit in Title VII context relying in part on evidence that officials working for putative joint-employer had recommended employee's dismissal as evidence supporting reversal of summary judgment on the joint-employer issue).

[49] *NLRB* v. *BFI,* 911 F.3d at 1219.

establish a joint-employer relationship.[50]

Our dissenting colleague contends that the final rule fails adequately to ''distinguish evidence of indirect control that bears on workers' essential terms and conditions of employment from evidence that simply documents the routine parameters of company-to-company contracting,'' as required by the D.C. Circuit in *BFI* v. *NLRB*.[51] To the contrary, Section 103.40(f) of the final rule expressly provides that evidence of an entity's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles and that do not bear on the employees' essential terms and conditions of employment is not relevant to the determination of whether the entity is a joint employer. Pursuant to this provision, the Board will, in individual cases arising under the rule, examine any proffered evidence of indirect control and determine, as necessary, whether that evidence is indicative of a kind of control that is an ordinary incident of company-to-company contracting or is rather indicative of a common-law employment relationship. If the former, the rule provides that the Board will not consider that evidence as probative of the existence of a joint-employer relationship. Specifically, pursuant to Section 103.40(f) and consistent with the court's instruction in *BFI* v. *NLRB,* the Board will not consider any evidence of indirect control that the common law would see as part of an ordinary true independent-contractor relationship as evidence of a common-law employer-employee relationship.[52] If, on the other hand, such evidence shows that a putative joint employer is actually exercising (or has reserved to itself) a kind of control that the common law takes to be indicative of an employer-employee relationship, the Board will consider such evidence in the course of its joint-employer analysis.[53]

Our colleague also criticizes us for failing exhaustively to define, ex ante, what factual circumstances will evidence indirect control that is relevant to the joint-employer analysis. But, as discussed above, the joint-employer inquiry is essentially factual and requires examining all of the incidents of a particular relationship on a particular record. Small differences in *how* control has been indirectly exercised, *when,* and *over what* will predictably determine whether the exercise of such control in individual cases counts, under the common law, as an ordinary incident of a company-to-company or true independent-contractor relationship or as evidence of the existence of a common-law employer-employee relationship. Because of the innumerable variations in the ways that companies interact with each other, and with each other's employees, it would be impossible for the Board to provide a usefully comprehensive and detailed set of examples of when an entity's exercise of indirect control over another company's employees will count as evidence of a common-law employment relationship. We decline to try to do so as part of this rulemaking.[54] Instead, we expect the contours of the Board's application of this rule in particular scenarios to be defined through the future application of the final rule to specific factual records.[55]

Finally, our colleague claims that courts which have examined the common-law employer-employee relationship in a joint-employer context in decisions under Title VII and similar statutes, discussed above, have applied a significantly more demanding standard than the final rule articulates. We disagree. Thus far, our discussion has primarily been concerned with what common-law principles have to say to the role of reserved or indirect control in the joint-employer test. Of course, however, the common-law cases are also concerned with, and provide authority about, the objects of that control. We recognize that ''whether [an entity] possess[es] sufficient indicia of control to be an 'employer' is essentially a factual issue,'' [56] that ''factors indicating a joint-employment relationship may vary depending on the case,'' and that ''any relevant factor[ ] may . . . be considered so long as [it is] drawn from the common law of agency.'' [57] Where courts articulating relevant common-law principles have identified an entity's authority to control specific elements of the working relationship as relevant to the analysis, such articulations are primary authority to which the Board will look in deciding, in individual cases, whether ''all of the incidents of the relationship'' [58] indicate that the entity is a common-law employer of particular employees.[59] Furthermore, the final rule requires the Board to inquire specifically into whether a putative joint employer possesses the authority to control or exercises the power to control one or more of the employees' essential terms and conditions of employment implicated by the Act's protection of employees' forward-looking collective right to bargain with each employer that can control their terms and conditions of employment. Thus, the final rule both incorporates the common law's broad focus on all of the incidents of the relationship in examining whether an entity is a common-law employer of particular employees and narrows the focus of the Board's inquiry to essential

[50] Cf. *Cognizant Technology Solutions U.S. Corp. & Google LLC,* 372 NLRB No. 108, slip op. at 1 (2023) (finding joint-employer relationship based in part on Google's exercise of authority over supervision through intermediary employees of Cognizant, treated as direct and immediate control under the terms of the 2020 rule).

[51] Id. at 1226. The court's discussion and its instruction to the Board to draw this distinction on remand suggests, as we conclude, that it will be possible to determine, in future adjudications on specific factual records, that an entity's exercise of certain kinds of indirect control, such a through an intermediary, would be independently probative of its joint-employer status. See id. at 1219 (''If . . . a company entered into a contract . . . under which that company made all of the decisions about work and working conditions, day in and day out, with [the workers' direct employer's] supervisors reduced to ferrying orders from the company's supervisors to the workers, the Board could sensibly conclude that the company is a joint employer.'').

[52] See *BFI* v. *NLRB,* above, 911 F.3d at 1221 (The Board's fleshing out the operation of the joint-employer standard through case-by-case adjudication ''depends on the Board's starting with a correct articulation of the governing common-law test. Here, that legal standard is the common-law principle that a joint employer's control—whether direct or indirect, exercised or reserved—must bear on the essential terms and conditions of employment and not on the routine components of a company-to-company contract.'') (internal quotation and citation omitted).

[53] Cf. *Butler,* above, 793 F.3d at 415 (considering testimony from temporary employment agency manager that he could not recall an instance when manufacturer requested an agency employee to be disciplined or terminated and it was not done as evidence that manufacturer was joint employer of agency's employees).

[54] Cf. 85 FR at 11187 (2020 rule omitting previously proposed hypothetical scenarios illustrating specific applications of the Board's joint-employer standard). For similar reasons, we decline to speculate about the application of the final rule to the various hypothetical scenarios proposed by our dissenting colleague.

[55] See *BFI* v. *NLRB,* 911 F.3d at 1221 (''In principle, there is nothing wrong with the Board fleshing out the operation of a legal test that Congress has delegated to the Board to administer through case-by-case adjudication.'') (citing *Eastex, Inc.* v. *NLRB,* 437 U.S. 556, 574–575 (1978) (''[T]he nature of the problem, as revealed by unfolding variant situations, requires an evolutionary process for its rational response, not a quick definitive formula as a comprehensive answer.'') (internal quotation and citation omitted)).

[56] *Boire* v. *Greyhound,* 376 U.S. at 481.

[57] *Felder,* above, 27 F.4th at 844 (alternations in original) (internal quotation omitted). See also *NLRB* v. *United Insurance Co.,* above, 390 U.S. at 258 (''What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.'').

[58] *NLRB* v. *United Insurance Co.,* above, 390 U.S. at 258.

[59] See, *e.g., Felder,* above 27 F.4th at 838 (''[F]actors drawn from the common law of agency, including control over an employee's hiring, firing, training, promotion, discipline, [and] supervision . . . are relevant to [the joint-employer] inquiry.'').

terms and conditions of employment in the context of the specific rights and obligations provided by the plain language of Section 8(a)(5) and 8(d) of the Act.[60]

II. Summary of Changes to the Proposed Rule

In this section, we provide a summary overview of changes to the proposed rule.

A. Overview

The final rule, like the proposed rule, recognizes that common-law agency principles define the statutory employer-employee relationship under the Act and affirms the Board's traditional definition of joint employers as two or more common-law employers of the same employees who share or codetermine those matters governing those employees' essential terms and conditions of employment. Consistent with primary judicial statements and secondary authority describing the common-law employer-employee relationship, the final rule, like the proposed rule, provides that a common-law employer of particular employees shares or codetermines those matters governing employees' essential terms and conditions of employment if the employer possesses the authority to control (whether directly, indirectly, or both) or exercises the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment, regardless of whether the employer exercises such control or the manner in which such control is exercised.

However, as described below and in response to comments, the Board has modified the proposed rule (1) to clarify the definition of ''essential terms and conditions of employment,'' (2) to identify the types of control that are necessary to establish joint-employer status and the types that are irrelevant to the joint-employer inquiry, and (3) to describe the bargaining obligations of joint employers.

B. Definition of ''Essential Terms and Conditions of Employment''

The proposed rule provided an illustrative, rather than exclusive, list of essential terms and conditions of employment. The Board has modified this definition, for the reasons discussed below and in response to comments, to provide an exhaustive list of seven categories of terms or conditions of employment that will be considered ''essential'' for the purposes of the joint-employer inquiry. These are: (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees.

C. Type of Control Sufficient To Establish Joint-Employer Status

The proposed rule provided that a common-law employer's possession of unexercised authority to control or exercise of the power to control indirectly, such as through an intermediary, one or more terms or conditions of employment would be sufficient to establish status as a joint employer. For the reasons discussed below and in response to comments, the Board has modified this provision to clarify that, in each instance, the relevant object of control must be an *essential* term or condition of employment as defined by the rule. The Board has also reformatted and streamlined this portion of the proposed rule to avoid surplusage.

D. Type of Control Not Relevant to Joint-Employer Status

The proposed rule provided that evidence of an employer's control over matters that are immaterial to the existence of a common-law employment relationship or control over matters not bearing on employees' essential terms and conditions of employment is not relevant to the joint-employer inquiry. For the reasons discussed below and in response to comments, the Board has modified this provision to make it clear that the provision excludes only evidence that is immaterial to both the common-law employment relationship *and* an employer's control over employees' essential terms and conditions of employment, and that the Board does not presuppose the ''employer'' status of an entity—such as the principal in a true independent-contractor relationship—that possesses or exercises only such immaterial forms of control.

E. Bargaining Obligations of Joint Employers

The proposed rule did not specifically address or delineate the bargaining obligations of joint employers in the proposed regulatory text.[61] For the reasons discussed below and in response to comments, the Board has modified the final rule to provide that a joint employer of particular employees must bargain collectively with the representative of those employees with respect to any term or condition of employment that it possesses the authority to control or exercises the power to control (regardless of whether that term or condition is deemed to be an essential term or condition of employment under the rule). However, such entity is not required to bargain with respect to any term or condition of employment that it does not possess the authority to control or exercise the power to control.

III. Justification for Using Rulemaking, Rather Than Adjudication, To Revise the Joint-Employer Standard

A. Authority To Engage in Rulemaking

Section 6 of the Act provides that ''[t]he Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.'' 29 U.S.C. 156. See also *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) (''[T]he choice between rulemaking and adjudication lies in the first instance within the Board's discretion.''); *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759 (1969). In the past, the Board has exercised its discretion to use the authority delegated by Congress to engage in substantive rulemaking. See *American Hospital Assn.* v. *NLRB,* 499 U.S. 606 (1991).

Section 6 authorizes the final rule as necessary to carry out Sections 2, 7, 8, 9, and 10 of the Act, 29 U.S.C. 152, 157, 158, 159, and 160, respectively. Specifically, as set forth above, Section 2(2) of the Act defines ''employer,'' and Section 2(3) defines ''employee.'' Section 7 sets forth employees' rights

[60] See 29 U.S.C. 158(a)(5) (''It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees.''); 29 U.S.C. 158(d) (''[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.'').

[61] The NPRM stated the Board's initial views in supplementary information, subject to comments, that (1) the proposed rule would only require a putative joint employer to bargain over those essential terms and conditions of employment it possesses the authority to control or over which it exercises the power to control, and (2) the Act's purposes are best served when two or more statutory employers that each possess some authority to control or exercise the power to control employees' essential terms and conditions of employment are parties to bargaining over those employees' working conditions. 87 FR at 54645 & fn. 26.

under the Act, including the right to bargain collectively through representatives of employees' own choosing, the right to engage in concerted activities for the purpose of mutual aid or protection, and the right to refrain from these activities. Section 8 of the Act defines unfair labor practices under the Act, and Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with employees' bargaining representative. Section 9 of the Act describes the Board's responsibilities when conducting representation elections. Section 10 of the Act authorizes the Board to investigate, prevent, and remedy unfair labor practices. The Board's joint-employer doctrine bears on each of these provisions of the Act, and Section 6 permits the Board to promulgate rules carrying out these provisions.

B. The Preference for Rulemaking Over Adjudication

In the NPRM, we expressed our preliminary belief that rulemaking in this area of the law is desirable for several reasons. First, the NPRM set forth the Board's preliminary view that the 2020 rule departed from common-law agency principles and threatened to undermine the goals of Federal labor law. Second, the NPRM stated that, in the Board's preliminary view, establishing a definite, readily available standard would assist employers and labor organizations in complying with the Act. Finally, the NPRM expressed the Board's view that because the joint-employer standard has changed several times in the past decade, there was a heightened need to seek public comment and input from a wide variety of interested stakeholders.[62]

After carefully considering nearly 13,000 comments, the Board believes that it is necessary and appropriate to rescind the 2020 rule, which was contrary to the Act insofar as it was inconsistent with the common law of agency. The 2020 rule's approach to defining joint-employer status again incorporated the control-based restrictions that deviated from common-law agency principles between the 1980s and the Board's 2015 decision in *Browning-Ferris.* Not only was this approach inconsistent with relevant court decisions, including the District of Columbia Circuit's 2018 decision in *Browning-Ferris Industries of California, Inc.* v. *NLRB (BFI v. NLRB),* 911 F.3d 1195 (D.C. Cir. 2018), as many commenters have persuasively argued, it also undermines the goals of Federal labor law. Accordingly, we rescind the 2020 rule in its entirety.[63] Although we believe that the Board is required to rescind the 2020 rule, we would do so even if that rule were valid because it fails to fully promote the policies of the Act.

The Board also believes that setting forth a revised joint-employer standard through rulemaking is desirable. The NPRM offered a proposal to restore the Board's focus on whether a putative joint employer possesses the authority to control or exercises the power to control particular employees' essential terms and conditions of employment, consistent with the common law and relevant judicial decisions. The Board received many helpful comments from individuals and entities with considerable legal expertise and relevant experience. Having considered those comments, the Board has refined the proposed rule in several ways, as outlined above in Section II and discussed more fully below in Sections IV and V. We believe the proposed rule, as modified, appropriately defines the essential elements of a joint-employer relationship and will reduce uncertainty and litigation over the basic parameters of joint-employer status.

IV. Response to Comments

The Board received almost 13,000 comments from interested organizations, labor unions, trade associations, business owners, United States Senators and Members of Congress, State Attorneys General, academics, and other individuals. The Board has carefully reviewed and considered these comments, as discussed below.

A. Comments Regarding the Definitions of ''Employer'' and ''Joint Employer'' and Basing These Definitions on Common-Law Agency Principles

The Board received numerous comments regarding the role of common-law agency principles in the Board's joint-employer analysis and on the development of joint-employer doctrine under the Act. In general, the comments acknowledge the accuracy of the Board's description of the role common-law agency principles have played in determining joint-employer status, as briefly summarized above in Section I.

Some commenters criticize the Board's preliminary view that the common law of agency is the primary guiding principle in its joint-employer analysis.[64] These commenters argue that because the Taft-Hartley amendments did not specify that the common law limits the joint-employer standard, Congress did not intend such a constraint, and the Board may establish a joint-employer standard guided solely by the policies of the Act. Contrary to these comments, authoritative or relevant judicial decisions establish that common-law agency principles must guide the Board's joint-employer inquiry. See, *e.g., NLRB* v. *Town & Country Electric, Inc.,* 516 U.S. 85, 92–95 (1995) (where Congress uses the term ''employee'' in a statute without clearly defining it, the Court assumes that Congress ''intended to describe the conventional master-servant relationship as understood by common-law agency doctrine''); *BFI* v. *NLRB,* 911 F.3d at 1206 (''[U]nder Supreme Court and circuit precedent, the National Labor Relations Act's test for joint-employer status is determined by the common law of agency.'').[65]

Most commenters confirm that it is appropriate and desirable for the Board to rely on common-law agency principles in defining the terms ''employer'' and ''joint employer'' under the Act.[66] Certain of these commenters note that by acting to overrule the Supreme Court's decision in *NLRB* v. *Hearst Publishing,* 322 U.S. 111 (1944), Congress evinced its intention to make

[62] 87 FR at 54644–54645.

[63] As discussed at greater length below, we note that even if we had not decided to promulgate a new standard through rulemaking, we would nevertheless have chosen to rescind the 2020 rule in its entirety because of these infirmities. See Sec. IV.C., J., K., and V, below.

[64] Comments of Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the International Brotherhood of Teamsters; Professors Sachin S. Pandya, Andrew Elmore, and Kati Griffith.

[65] See also *Clackamas Gastroenterology Associates, P.C.* v. *Wells,* 538 U.S. 440, 448–449 (2003); *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318, 322–324 (1992); *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 740, 752 fn. 31 (1989); *Kelley* v. *Southern Pacific Co.,* 419 U.S. 318, 323–324 (1974); *NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256–258 (1968).

[66] Comments of American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); Americans for Prosperity Foundation; American Federation of State, County & Municipal Employees (AFSCME); American Hotel & Lodging Association; Center for Law and Social Policy; Communications Workers of America, AFL–CIO (CWA); Congressman Robert C. ''Bobby'' Scott, Chairman of the House of Representatives Committee on Education and Labor, and 52 other Members of Congress (Congressman Scott et al.); Economic Policy Institute (EPI); General Counsel Abruzzo; Independent Bakers Association; Nicholas Crawford; McGann, Ketterman & Rioux; National Federation of Independent Business (NFIB); National Partnership for Women & Families; North Carolina Justice Center; Public Justice Center; Restaurant Law Center and National Restaurant Association; Southern Poverty Law Center (SPLC); TechEquity Collaborative; The Washington Center for Equitable Growth; United States Chamber of Commerce; Washington Legal Foundation; William E. Morris Institute for Justice.

common-law agency principles the cornerstone of the definition of ''employee'' under the Act.[67] These commenters also emphasized post-Taft-Hartley judicial decisions interpreting the term ''employee'' in statutes that do not provide more specific definitions using common-law agency principles.[68] Some commenters note that common-law agency principles play an important functional role in the Board's definition of the terms ''employer'' and ''employee,'' observing that making an agency relationship the first step of the joint-employer analysis ensures that the appropriate entities are included while properly excluding entities who neither possess nor exercise sufficient control over employees' essential terms and conditions of employment.[69] These commenters generally agree with the proposed rule's view that appropriate sources of common-law agency principles include the *Restatement (Second) of Agency* and other compendiums, reports, and restatements, along with judicial decisions applying the common law.[70]

Some commenters urge the Board to clarify what common-law sources it will consult in the final rule. Others ask the Board to limit its consideration to particular sources, arguing that because the common law is vast, amorphous, or vague, failing to impose such a limitation prevents the rule from functioning as self-contained guidance.[71] Other commenters dispute the enduring relevance of the *Restatement (Second) of Agency.*[72] In particular, some of these commenters take the position that because the *Restatement (Second) of Agency* primarily focuses on assigning liability in tort or contract matters, it is inapposite or poorly adapted to resolving questions related to the employment relationship.[73] Some commenters propose instead that the Board solely consult judicial decisions applying common-law principles,[74] or the *Restatement of Employment Law.*[75]

As we preliminarily indicated in the proposed rule, relevant sources of common-law agency principles are not difficult to find. We respond to commenters seeking more definitive guidance that some relevant sources of common-law agency principles include articulations of these principles by common-law judges, compendiums, reports, and restatements of common-law decisions, and early court decisions addressing ''master-servant relations.'' [76] Contrary to those commenters who suggest the common law is too vast or amorphous to give effect to the terms ''employer'' and ''employee'' in the final rule, we find it persuasive that the Supreme Court has viewed common-law agency principles as sufficiently familiar and tractable to assist parties in interpreting and complying with other labor and employment statutes that use these terms.[77]

Contrary to some commenters, we adhere to the view preliminarily set forth in the NPRM that the *Restatement (Second) of Agency* (1958) is a particularly persuasive source of common-law agency principles. As we explained in the NPRM, the Supreme Court has acknowledged the persuasiveness of the *Restatement (Second) of Agency* when construing the common-law definition of ''employer.'' [78] So, too, has the District of Columbia Circuit, acknowledging this controlling Supreme Court precedent.[79] Finally, we follow the District of Columbia Circuit in rejecting the view set forth by some commenters that the *Restatement* was developed to address issues of liability for tort matters and breaches of contract and is therefore inapposite.[80] Further, we dispute these commenters' premise. Many early common-law decisions that helped define the common-law relationship in *The Restatement (Second) of Agency* emerged in cases involving rights and duties under state workers' compensation laws.[81] More importantly, all common-law cases, whether involving tort or contract liability or statutory rights and obligations, focus on whether a common-law agency relationship exists, and control is the touchstone of that inquiry under the common law.

Some commenters argue that by assessing whether an entity possesses the authority to control or indirectly controls essential terms and conditions of employment, the Board's proposed definition of ''employer'' exceeds common-law boundaries.[82] While we will address commenters' arguments regarding the role reserved and indirect control play in the proposed rule's definition of ''joint employer'' at length below, at the outset we simply note our agreement with the District of Columbia Circuit's view that these forms of control bear on the common-law employer-employee inquiry, *BFI* v. *NLRB,* 911 F.3d at 1216.[83] Accordingly, we respectfully disagree with those commenters who suggest the proposed rule's definition of ''employer'' exceeds common-law boundaries.

Finally, some of these commenters argue that the proposed rule's definition of ''employer'' is inappropriate because direct supervision over an employee is a necessary prerequisite to a finding of an employment relationship for purposes of the Act, citing the Supreme Court's decision in *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157, 167–168 (1971).[84] Respectfully, we find *Allied Chemical,* which concluded that retired workers were not ''employees'' because the Act's legislative history and policies

[67] See, *e.g.,* comments of American Hotel & Lodging Association.

[68] Comments of NFIB; Washington Legal Foundation.

[69] See, *e.g.,* comments of AFSCME.

[70] See, *e.g.,* comments of General Counsel Abruzzo; Michigan Regional Council of Carpenters and Millwrights.

[71] Comments of Americans for Tax Reform; Coalition for a Democratic Workplace (CDW); Freedom Foundation; International Franchise Association (IFA); McDonald's USA, LLC; Promotional Products Association International (PPAI); Texas Public Policy Foundation.

[72] Comments of Washington Legal Foundation; IFA; U.S. Chamber of Commerce.

[73] Comments of IFA; U.S. Chamber of Commerce.

[74] Comments of Washington Legal Foundation.

[75] Comments of U.S. Chamber of Commerce.

[76] As we explained more fully in the NPRM, the employer-employee relationship under the Act is the common-law employer-employee relationship. Beginning in the late 19th century, American legal commentators began using the terms ''master-servant'' and ''employer-employee'' interchangeably. See, *e.g.,* Horace Gray Wood, *A Treatise on the Law of Master and Servant; Covering the Relation, Duties and Liabilities of Employers and Employees* (1877). The *Restatement (Second) of Agency* uses both sets of terms synonymously. We therefore refer elsewhere in the NPRM to ''employer-employee'' relations and the ''employer-employee relationship.''

[77] See, *e.g., Clackamas Gastroenterology Associates,* 538 U.S. at 448–449 (Americans with Disabilities Act); *Darden,* 503 U.S. at 322–324 (Employee Retirement Income Security Act of 1974); *Kelley,* 419 U.S. at 323–324 (Federal Employers' Liability Act).

[78] See, *e.g., Clackamas Gastroenterology Associates,* 538 U.S. at 448; *Kelley,* 419 U.S. at 323–324.

[79] See *BFI* v. *NLRB,* 911 F.3d at 1213 (''[C]ontrolling precedent makes the *Restatement (Second) of Agency* a relevant source of traditional common-law agency standards in the National Labor Relations Act context.'').

[80] See id.

[81] See, *e.g., Maltz* v. *Jackoway-Katz Cap Co.,* 82 SW2d 909, 912, 918 (Mo. 1934).

[82] Comments of American Hotel & Lodging Association; Bicameral Congressional Signatories; Council on Labor Law Equality (COLLE); Independent Bakers Association; National Lumber & Building Material Dealers Association; National Waste & Recycling Association; North American Meat Institute; Restaurant Law Center and National Restaurant Association; U.S. Chamber of Commerce.

[83] The court also stated that Sec. 2(2) of the Act ''textually indicates that the statute looks at all probative indicia of employer status'' because it ''expressly recognizes that agents acting 'indirectly' on behalf of an employer could also count as employers.'' 911 F.3d at 1216 (quoting 29 U.S.C. 152(2)).

[84] Comments of Restaurant Law Center and National Restaurant Association; Retail Industry Leaders Association (RILA).

contemplate individuals who are currently ''active'' in the workplace, inapposite. Nothing in the Court's decision in *Allied Chemical* or subsequent cases applying it suggests that the Court thereby attempted to modify ordinary common-law agency principles or engraft additional ''direct supervision'' requirements onto the statutory meaning of ''employer.''

B. Comments Regarding the Definition of ''Joint Employer''

The proposed rule set forth a definition of ''joint employer'' that, like the definition provided in the 2020 rule, would apply in all contexts under the Act, including both the representation-case and unfair-labor-practice case context. No commenter has suggested that any joint-employer standard the Board adopts should only apply in one context or the other. We therefore find it appropriate to apply the new standard set forth in the final rule in both the representation-case and unfair-labor-practice case contexts.

Our dissenting colleague and several commenters argue that, although the Board is properly guided by common-law agency principles when determining joint-employer status, the proposed rule's definition of ''joint employer'' exceeds the boundaries of the common law of agency.[85] These commenters generally contend that defining ''joint employer'' to include entities who possess but do not exercise control over essential terms and conditions of employment or entities who do not exercise direct control over essential terms and conditions of employment is beyond the permissible scope of the common law.[86] As these arguments primarily relate to the treatment of reserved and indirect control in proposed paragraphs (c), (e), and (f), we discuss them in greater detail below. However, as noted above, we agree with the District of Columbia Circuit's view that the common law requires the Board to evaluate ''all probative indicia of employer status'' in determining whether entities are ''employers'' or ''joint employers'' under the Act, including forms of indirect and reserved control.[87]

A group of United States Senators and Members of Congress suggests that by seeking to define ''joint employer'' in the manner set forth in the proposed rule, the Board is effectively legislating and thereby usurping the role of Congress.[88] This commenter also mentions that the broader definition of ''joint employer'' set forth in the Protecting the Right to Organize Act of 2021 (PRO Act), H.R. 842, failed to secure Senate approval.[89] With respect, the standard set forth in the proposed rule and the final rule we announce today represents a faithful attempt to exercise the authority Congress has delegated to the Board in Section 6 of the Act. Further, as discussed previously, we are guided by Supreme Court decisions instructing the Board to consult the common law of agency when interpreting the term ''employer'' in Section 2(2) of the Act. We do not see the definition of ''joint employer'' in the PRO Act as relevant to our task, which is to interpret the term ''employer'' that appears in the current version of the National Labor Relations Act, consistent with the guidance of relevant judicial decisions.

Some commenters specifically argue that the proposed definition of ''joint employer'' is insufficiently responsive to the District of Columbia Circuit's request that the Board ''erect some legal scaffolding'' [90] to remain within the boundaries of the common law.[91] Other commenters take the view that the proposed definitions of ''employer'' and ''joint employer'' are consistent with the District of Columbia Circuit's view of common-law agency principles and that the proposed rule establishes adequate guideposts to satisfy the court's request.[92] Again, because commenters espousing both views of this issue anchor their rationale in matters that principally relate to paragraphs (c), (e), and (f) of the proposed rule, we deal with these contentions at greater length below.

Other commenters raise industry-specific concerns regarding the proposed definition of ''joint employer.'' Some commenters contend that the proposed, generally applicable definition of ''joint employer'' stands in tension with how other sections of the Act treat building and construction industry employers and unions and how the Supreme Court has interpreted those provisions.[93] Specifically, these commenters urge that the Court's decision in *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 689–690 (1951), stands for the proposition that general contractors and subcontractors in the construction industry have separate status and identities that, from the outset, preclude the Board from treating them as joint employers.[94]

We do not read *Denver Building* so broadly. Instead, *Denver Building* held that a construction industry general contractor's overall responsibility for a project or worksite does not itself create an employment relationship between the general contractor and the employees of subcontractors working on the jobsite. See id. The proposed definition of ''joint employer,'' which we include in the final rule, requires not only a showing that the putative joint employer has a common-law employment relationship with particular employees, but also a further showing that a putative joint employer ''share or codetermine those matters governing employees' essential terms and conditions of employment.'' As a result, the proposed rule, which focuses on the particular control an entity wields over terms and conditions of employment, is consistent with *Denver Building,* which cautions the Board not to categorically treat all employees of a subcontractor as the employees of a general contractor without more specific evidence of control. We further note that nothing in the relevant provisions of the Act, including Sections 2(2), 8(a)(5), 8(d), and 9(a), suggests that the Board is required—or permitted—to adopt a joint-employer standard in the construction industry that differs from the generally applicable definition. Nor is there any historical precedent for the Board treating the construction industry differently than other industries for joint-employer purposes.[95]

[85] Comments of Americans for Prosperity Foundation; Associated Builders and Contractors (ABC); Contractor Management Services, LLC; Independent Bakers Association; Independent Lubricant Manufacturers Association; LeadingAge; The Mackinac Center for Public Policy; National Retail Federation; Taxpayers Protection Alliance.

[86] Comments of Americans for Prosperity Foundation; National Retail Federation; Washington Legal Foundation.

[87] See *BFI* v. *NLRB,* 911 F.3d at 1216.

[88] See comments of Bicameral Congressional Signatories.

[89] See id.; see also comments of RILA.

[90] *BFI* v. *NLRB,* 911 F.3d at 1220.

[91] Comments of ABC; Center for Workplace Compliance; IFA; National Association of Convenience Stores; NFIB; National Retail Federation.

[92] Comments of AFL–CIO; Center for American Progress (CAP); General Counsel Abruzzo; National Employment Law Project (NELP); Professors Pandya, Elmore, and Griffith; United Brotherhood of Carpenters & Joiners of America (UBC); U.S. Senate HELP Committee Chair Patty Murray & 21 of her Senate Democratic colleagues (Senator Murray et al.).

[93] Comments of ABC; Associated General Contractors of America (AGC); COLLE; U.S. Chamber of Commerce.

[94] Comments of ABC; AGC; American Road & Transportation Builders Association (ARTBA); National Roofing Contractors Association; U.S. Chamber of Commerce.

[95] Instead, the Board historically treated employers in the construction industry in the same manner as other employers for joint-employer purposes. See, *e.g., Tradesmen International, Inc.,* 351 NLRB 399, 403 & fn. 11 (2007) (adopting administrative law judge's finding that two construction-industry entities were joint

Continued

Some commenters state that, since the 1974 Health Care amendments extended the coverage of the Act to include nonprofit hospitals, the Board has treated hospitals differently than other employers.[96] They urge the Board to do so again in the final rule.[97] In support of the view that hospitals should be entirely excluded from the ambit of the joint-employer rule, these commenters point to the Board's 1989 health care rule, which established eight appropriate bargaining units for acute-care hospitals.[98] The commenters argue that by broadening the definition of ''joint employer,'' the Board risks authorizing a proliferation of bargaining units, contrary to the stated aims of the health care rule.

While we acknowledge the specific concerns raised by these commenters, we are not persuaded to create a hospital-specific exclusion from the joint-employer standard. First, we note that no pre-2020 Board decision involving the joint-employer standard ever created such an exclusion.[99] In keeping with the preliminary view we expressed in the NPRM, we are of the mind that the common-law agency principles that we apply in defining ''employer'' apply uniformly to all entities that otherwise fall within the Board's jurisdiction. We see no clear basis in the text or structure of the Act for exempting particular groups or types of employers from the final rule, nor do we believe that the Act's policies are best served by such an exemption. That said, we share these commenters' general views that the proper application of the final rule in particular cases will require the Board to consider all relevant evidence regarding the surrounding context.[100] Finally, we reject the suggestion, raised by commenters and our dissenting colleague, that the final rule's definition of ''joint employer'' will cause the proliferation of bargaining units or disrupt the application of the 1989 health care rule, which deals with the unrelated question of which classifications of employees constitute appropriate bargaining units for purposes of filing a representation petition pursuant to Section 9 of the Act.

We similarly decline other commenters' invitation to exempt other kinds of businesses, including cooperative businesses,[101] franchise businesses,[102] and firms and independent contractors operating in the insurance and financial advice industry,[103] from the joint-employer standard we adopt in this final rule.[104] As discussed at greater length in Section VI below, we also decline some commenters' invitation to create an across-the-board exemption for small businesses.[105] One commenter observes that many Federal labor and employment statutes exempt employers who have less than a minimum number of employees and suggests that this provides support for a similar exemption from the final rule. However, we find further support for our view that the Act requires the Board to apply its joint-employer standard uniformly to all entities otherwise covered by the Board's jurisdiction in the fact that the Act contains no similar minimum-employee threshold to those present in other labor and employment statutes. Instead, we observe that the Board has statutory jurisdiction over those private-sector employers whose activity in interstate commerce exceeds a minimal level.[106]

Finally, one commenter asks the Board to clarify that the proposed rule's definition of ''joint employer'' does not preclude the Board from adopting rebuttable presumptions to guide it in applying the joint-employer standard in the future.[107] For example, this commenter suggests, the Board could treat an entity's possession or exercise of certain forms of control over essential terms and conditions of employment as giving rise to a presumption of joint-employer status.[108] In light of our extensive discussions and guidance below regarding whether particular forms of control are material to the existence of an employment relationship under common-law agency principles, we decline the invitation to make this proposed clarification.

C. Comments About Definition of ''Share or Codetermine''

As set forth above, the proposed rule sought to codify the Board's holding, endorsed by the Third Circuit in *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1124 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), that entities are ''joint employers'' if they ''share or codetermine those matters governing essential terms and conditions of employment.'' Nearly all commenters

employers); *Ref-Chem Co.,* 169 NLRB 376 (1968) (finding that two entities were joint employers of a craft unit of construction employees performing insulation maintenance work), enf. denied on other grounds 418 F.2d 127 (5th Cir. 1969). See also *Adams & Associates, Inc.* v. *NLRB,* 871 F.3d 358, 378–379 (5th Cir. 2017) (upholding joint-employer finding where prime contractor and subcontractor jointly developed employees' wage structure, consulted with each other on human resources matters, and coordinated on hiring decisions and on-site operations).

[96] See, *e.g.,* comments of American Hospital Association (AHA).

[97] See, *e.g.,* comments of AHA; Federation of American Hospitals; U.S. Chamber of Commerce; Virginia Hospital & Healthcare Association.

Certain of these commenters suggest that the Board's failure to conduct a ''hospital-specific analysis'' violates the APA and is grounds for withdrawing the proposed rule. They also raise concerns regarding the interaction of the proposed rule with Federal healthcare reimbursement formulas or calculations. See, *e.g.,* comments of AHA. Given our discussion of the distinctive concerns of hospitals above, we respectfully disagree with these commenters' view that the Board has not sufficiently considered the effect of the proposed rule on hospitals.

[98] Comments of AHA; U.S. Chamber of Commerce; Virginia Hospital & Healthcare Association (citing 29 CFR 103.30). A few commenters also observe that Sec. 8(d) and 8(g) of the Act set forth distinctive notice requirements before the termination or modification of collective-bargaining agreements and before work stoppages at hospitals. See comments of AHA; U.S. Chamber of Commerce; 29 U.S.C. 158 (d) & (g). These commenters likewise argue that the Board has at times adapted other generally applicable doctrines for the hospital setting, including solicitation and distribution law. See comments of AHA; U.S. Chamber of Commerce.

[99] Instead, pre-2020 Board decisions applied the same standard when one putative joint employer of particular employees was a hospital. See, *e.g., Flagstaff Medical Center,* 357 NLRB 659, 666–667 (2011) (applying the *TLI/Laerco* test and finding that a hospital contractor was not a joint employer of a hospital's housekeeping employees).

[100] Our dissenting colleague also forecasts that the final rule will negatively affect hospitals and the healthcare sector. In particular, he anticipates that the final rule will make it more difficult for hospitals to rely on firms that supply travel nurses to fill staffing gaps without risking a joint-employer finding. We reject our colleague's characterization of the final rule and emphasize that in determining whether a joint-employer finding is appropriate in any given context, the Board will consider all relevant evidence regarding whether a putative joint employer possesses or exercises the requisite control over one or more essential terms and conditions of particular employees' employment.

[101] Comments of National Grocers Association.

[102] Comments of American Association of Franchisees and Dealers; IFA; Restaurant Law Center and National Restaurant Association.

[103] Comments of National Association of Insurance and Financial Advisors.

[104] Relatedly, we also decline the request of one commenter to explicitly state that the final rule covers the relationship between local unions and national or international unions. See comments of IFA.

[105] Comments of Independent Bakers Association; National Association of Home Builders (NAHB).

[106] See 29 U.S.C. 152(6) & (7); *NLRB* v. *Fainblatt,* 306 U.S. 601, 606–607 (1939). The Board also uses its discretion to decline to exercise its statutory jurisdiction over a subset of smaller employers. See, *e.g., Siemons Mailing Service,* 122 NLRB 81 (1959) (describing Board's discretionary commerce standard). The Board has historically combined the gross revenues of joint employers when applying its discretionary standard. See, *e.g., Central Taxi Service,* 173 NLRB 826, 827 (1968); *Checker Cab Co.,* 141 NLRB 583, 586–587 (1963), enfd. 367 F.2d 692 (6th Cir. 1966); see also *CID–SAM Management Corp.,* 315 NLRB 1256, 1256 (1995). The scope of this rulemaking does not encompass any changes to the Board's precedent governing application of its discretionary commerce standard.

[107] Comments of Professors Pandya, Elmore, and Griffith.

[108] See id.

agree that the basic ''share or codetermine'' formulation is the appropriate starting point for the Board's joint-employer analysis.[109] As discussed at length below, however, commenters' views regarding what forms of control suffice to establish that entities ''share or codetermine'' matters governing particular employees' essential terms and conditions of employment diverge significantly.[110]

Paragraph (c) of the proposed rule sought to define the phrase ''share or codetermine those matters governing employees' essential terms and conditions of employment'' to mean ''for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment.'' [111]

One commenter suggests that because the Third Circuit's formulation of the ''share or codetermine'' standard (and the formulation used in paragraph (c) of the proposed rule) speaks in terms of ''matters'' governing essential terms and conditions of employment, a putative joint employer must possess the authority to control or exercise control over more than one essential term or condition of employment to meet the standard.[112] We do not find this argument persuasive as an analytical or logical matter. First, we do not construe the word ''matters'' in the standard to refer to essential terms or conditions of employment themselves, but rather to the workplace issues related to those terms or conditions. Second, we disagree that control over one essential term or condition of employment is necessarily insufficient. For example, as discussed at length below, commenters are unanimous that wages are an essential term or condition of employment. Given the centrality of wages to the employment relationship, it would be difficult to argue that a common-law employer's control over wages, standing alone, is insufficient to create an employment relationship.

A number of commenters challenge the premise that possessing but not exercising the authority to control or exercising indirect control over one or more essential terms and conditions of employment can ever serve as evidence of joint-employer status.[113] Some of these commenters, especially those writing on behalf of small businesses, suggest that forms of reserved control that amount to ''contractual fine print'' that are never put into action should not result in a joint-employer finding.[114] While others appear to concede that there may be circumstances in which indirect or reserved control is probative of joint-employer status, those commenters emphasize that requiring evidence that an entity actually exercises control is preferable.[115]

Consistent with the preliminary view set forth in our NPRM, we are unpersuaded by comments suggesting that forms of indirect or reserved control can never serve as evidence of joint-employer status. In our view, this argument is undermined by both the weight of common-law authority and relevant judicial decisions, including the District of Columbia Circuit's decision in *BFI* v. *NLRB.* See 911 F.3d at 1213 & 1216 (''[T]he Board's conclusion that an employer's authorized or reserved right to control is relevant evidence of a joint-employer relationship wholly accords with traditional common-law principles of agency,'' and ''indirect control can be a relevant factor in the joint-employer inquiry.'').

Moreover, ''contractual fine print'' bearing on the allocation of authority to control the details of the manner and means by which work is performed, and the terms and conditions of employment of those performing the work, has legal force and effect without respect to whether or not contractually reserved authority to control is ever exercised. By incorporating such contractual allocations of control into the Board's joint-employer analysis, the final rule permits business entities to evaluate and control their potential status as joint employers under the Act, ex ante, based on their freely chosen contractual arrangements. By contrast, a standard that turns on an ex-post analysis of whether and to what extent a party has actually exercised contractually reserved control impedes contracting parties' ability to reliably determine ahead of time whether or not they will have obligations under the Act related to employees of another employer. This distinction may be particularly important, for example, in successorship situations involving an incumbent union, where questions about bargaining obligations may arise before sufficient time has passed for parties to reliably ascertain whether and to what extent contractually reserved authority to control will be actually exercised.[116]

Another group of commenters suggests that while an entity's indirect or reserved control over essential terms and conditions of employment may be probative, it is not sufficient, standing alone, to confer joint-employer status.[117] These commenters argue that the Board has never held that a single instance of unexercised control was sufficient to create a joint-employer relationship and generally criticize the NPRM's discussion of the Board's precedent in the two decades after *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 481 (1964), issued and before *TLI,* supra, 271

[109] See, *e.g.,* comments of CWA; National Women's Law Center; North American Meat Institute; TechEquity Collaborative; Women Employed. Other commenters implicitly approve the formulation, taking it as the starting point for their analysis of the proposed rule.

[110] Comments of American Hotel & Lodging Association; IFA; Leading Age; National Retail Federation; North American Meat Institute; Society for Human Resource Management (SHRM).

[111] 87 FR at 54663.

[112] Comments of Freedom Foundation.

[113] Comments of American Staffing Association; Independent Lubricant Manufacturers Association; QuickChek; RaceTrac, Inc.; Rio Grande Foundation.

[114] Comments of Energy Marketers of America; Independent Lubricant Manufacturers Association; M. M. Fowler, Inc.; One Energy Inc.; Ready Training Online; Reid Stores, Inc. d/b/a Crosby's.

[115] Comments of American Trucking Associations; Americans for Prosperity Foundation; ANB Bank; California Policy Center; Competitive Enterprise Institute; Goldwater Institute; Home Care Association of America; Independent Electrical Contractors; National Black McDonald's Operators Association; RaceTrac, Inc.; Rachel Greszler.

[116] For this reason, we reject our dissenting colleague's suggestion that the final rule will have an adverse effect in successorship situations. In successorship situations where a transaction is structured in such a way that more than one entity in the resulting structure could potentially be considered an employer, the final rule has the distinct advantage of permitting all parties to determine and define their NLRA rights and obligations, ex ante, by contract. Under the 2020 rule, by contrast, the rights and obligations of contracting businesses could not be ascertained at the outset of a business relationship but would instead turn on contingent facts about whether or not one party chose to exercise rights it had reserved to itself by contract.

[117] Comments of ABC; American Hotel & Lodging Association; Center for Workplace Compliance; CDW; COLLE; Competitive Enterprise Institute; Control Transportation Services, Inc.; HR Policy Association; IFA; International Foodservice Distributors Association (IFDA); NATSO & SIGMA; National Asian/Pacific Islander American Chamber of Commerce and Entrepreneurship (National ACE); National Association of Convenience Stores; National Taxpayers Union; National Waste & Recycling Association; New Civil Liberties Alliance & Institute for the American Worker; RILA; Restaurant Law Center and National Restaurant Association; SHRM; The Mackinac Center for Public Policy; U.S. Chamber of Commerce.

One of these commenters draws an analogy to the Board's treatment of primary and secondary indicia of supervisory status in cases involving Sec. 2(11) of the Act, 29 U.S.C. 152(11). Comments of COLLE. The scope of the definition of ''supervisor'' is an express exception to the definition of ''employee'' under Sec. 2(3) of the Act. See, *e.g., NLRB* v. *Kentucky River Community Care, Inc.,* 532 U.S. 706, 711 (2001). Unlike the definition of ''employee,'' then, the definition of supervisor turns on questions of statutory interpretation, not common-law agency principles. Accordingly, we find this analogy inapposite.

NLRB 798, and *Laerco,* supra, 269 NLRB 324, were decided.[118]

As set forth more fully in the NPRM, we disagree with these commenters' view of the Board's pre-*TLI/Laerco* precedent. Instead, we view cases from that time period as supportive of the view that the right to control employees' work and terms and conditions of employment is determinative in the joint-employer analysis. Cases decided during the two decades after *Boire* issued did not tend to turn on whether both putative joint employers actually or directly exercised control. For example, in *Jewel Tea Co.,* 162 NLRB 508 (1966), the Board found that an entity's contractually reserved power to set working hours and to reject or terminate workers was sufficient to establish that entity's status as a joint employer. In addition, in *Value Village,* 161 NLRB 603, 607 (1966), the Board found a joint-employment relationship where one entity reserved control over ''the manner and method of work performance'' and to terminate the contract at will in an operating agreement, emphasizing that ''the power to control is present by virtue of the operating agreement.'' [119]

Some commenters specifically criticize the proposed rule's treatment of reserved control, suggesting that it might be difficult to assess whether forms of reserved control are sufficient to give rise to liability or a bargaining obligation.[120] One commenter notes that reservations of control are often ''boilerplate'' inclusions in contracts that should not give rise to a joint-employer finding.[121] Certain of these commenters express concerns that the standard might be susceptible to outcome-driven applications or other unfair results.[122]

Many commenters agree with the NPRM's discussion of how the common law treats forms of reserved control.[123] One of these commenters cites the District of Columbia Circuit's discussion in *BFI* v. *NLRB,* 911 F.3d at 1211, of how ''the 'right to control' runs like a *leitmotif* through the *Restatement (Second) of Agency*.'' [124] In particular, some commenters cited approvingly to the NPRM's discussion of common-law judicial decisions that treat reserved control as an especially probative indication of an agency relationship.[125] See, *e.g., Dovell* v. *Arundel Supply Corp.,* 361 F.2d 543, 545 (D.C. Cir. 1966) (quoting *Grace* v. *Magruder,* 148 F.2d 679, 681 (D.C. Cir. 1945)) (''[I]t is the right to control, not control or supervision itself, which is most important.'').

The final rule also adheres to the view that reserved control is probative and that it is appropriate for the Board to find that joint-employer status is established based on a putative joint employer's reserved control over an essential term or condition of employment. As set forth more fully in the NPRM,[126] the reservation of authority to control essential terms or conditions of employment is an important consideration under common-law agency principles. We agree with the District of Columbia Circuit that common-law sources treat the right to control as central to the joint-employer inquiry and that forms of reserved control can reveal an entity's right to control essential terms or conditions of employment.[127] As discussed above, incorporating parties' contractual allocations of control into the Board's joint-employer analysis also enhances contracting parties' ability to evaluate and control their statutory obligations with respect to other employers' employees at the inception of their business relationships.

Certain commenters specifically take issue with the proposed rule's view that indirect control can establish joint-employer status.[128] A number of these commenters argue that only direct control can or should be relevant to the joint-employer inquiry.[129] They urge that control exercised through an intermediary should not itself be sufficient to establish status as a joint employer, contending that this aspect of the proposed rule threatens to interfere with parties' reliance on the use of independent contractors or vendors to perform services.[130] One of these commenters observes that courts interpreting the Fair Labor Standards Act have at times treated forms of routine indirect control as immaterial to the existence of a joint-employer relationship and urges the Board to follow suit.[131]

Other commenters, citing sources of common-law agency principles and judicial decisions applying common-law principles, stress that an entity itself need not actually exercise control over particular employees for the Board to

[118] Comments of CDW; HR Policy Association; IFA; NATSO & SIGMA; New Civil Liberties Alliance & Institute for the American Worker; RILA; Small Business & Entrepreneurship Council; Tesla, Inc.; U.S. Chamber of Commerce.

[119] Our dissenting colleague criticizes our reliance on *Jewel Tea* and *Value Village* as support for our view that pre-*TLI/Laerco* precedent did not require evidence of a putative joint employer's direct exercise of control, noting that other pre-*TLI/Laerco* precedent relied on record evidence of actually exercised or direct control. As we note in Sec. I.D. above, however, it is unsurprising that cases where the record establishes that an entity has directly exercised control have not addressed the question of whether reserved or indirect control could *also* independently suffice to establish the relationship. Our colleague cites no pre-*TLI/Laerco* precedent holding that actual exercise of direct control was *necessary,* and no number of cases holding only that the direct exercise of control is *sufficient* can rationally establish that proposition. Conversely, *Jewel Tea, Value Village,* and the many other pre-*TLI/Laerco* decisions cited above in which the Board has expressly stated that control need not be actually exercised, or exercised in any particular way, in order to establish a joint-employer relationship clearly establish that the Board's historic joint-employer standard did not include any such requirement. See also fn. 2, above.

[120] Comments of Home Care Association of America; IFA; U.S. Chamber of Commerce.

[121] Comments of IFA.

[122] Comments of AGC; American Pizza Community; Americans for Prosperity Foundation; Competitive Enterprise Institute; HR Policy Association; IFA; James Bitzonis; National Association of Manufacturers (NAM); NAHB; National Retail Federation; National Roofing Contractors Association; Restaurant Law Center and National Restaurant Association.

[123] Comments of AFL–CIO; Congressman Scott et al.; General Counsel Abruzzo; NELP. A few of these commenters suggest that the Board omit references to ''reserved'' and ''indirect'' control in the final rule to eschew any suggestion that the joint-employer analysis requires control to be taxonomized. See comments of AFL–CIO; International Union of Operating Engineers (IUOE). As we hope to make clear in our discussion of the comments we received and the final rule, our intention is for the final rule to reflect the common law's view that control is the touchstone of an agency relationship, regardless of how it is wielded. While this does not require forms of control to be categorized in any particular way, the terminology used is reflective of the language contained in the legal precedent upon which we rely.

[124] Comments of NELP.

[125] Comments of AFL–CIO.

[126] 87 FR at 54648–54650.

[127] *BFI,* 911 F.3d at 1213 (''[T]he Board's conclusion that an employer's authorized or reserved right to control is relevant evidence of a joint-employer relationship wholly accords with traditional common-law principles of agency.'').

[128] Comments of American Pizza Community; Americans for Tax Reform; American Trucking Associations; ANB Bank; Connie Cessante; Goldwater Institute; NAHB; National Roofing Contractors Association; One Energy Inc.; Ready Training Online; Reid Stores, Inc. d/b/a Crosby's; Robert Kulik; TechNet.

[129] Comments of Competitive Enterprise Institute; Energy Marketers of America; FreedomWorks Foundations; Home Care Association of America; IFA; National Retail Federation; One Energy Inc.; QuickChek; RaceTrac, Inc.; The Mackinac Center for Public Policy.

[130] Comments of American Hotel & Lodging Association; FMI—The Food Industry Association; International Bancshares Corporation; New Civil Liberties Alliance & Institute for the American Worker; Rio Grande Foundation; SHRM; Small Business & Entrepreneurship Council; U.S. Black Chambers, Inc.; U.S. Chamber of Commerce. Some commenters cite *Computer Associates International, Inc.,* 324 NLRB 285, 286 (1987), for the proposition that Sec. 8(b) of the Act reflects Congress's intention to protect employers' autonomy in their selection of independent contractors. See, *e.g.,* comments of SHRM. A number of individuals raised similar concerns, noting that they fear the proposed rule might harm their prospects of being hired as independent contractors in the future. See, *e.g.,* comments of Monica Cichosz; Gregg Micalizio.

[131] Comments of National Retail Federation.

find that an agency relationship exists.[132] Many commenters approve of the Board's discussion of the *Restatement (Second) of Agency* in the preamble to the proposed rule and cite portions of the *Restatement* contemplating that an agency relationship can be premised on indirect control.[133] Some of these commenters specifically addressed the ''subservant'' doctrine. See *Restatement (Second) of Agency,* section 5(2), cmts. e, f, and illus. 6; section 220(1), cmt. d; section 226, cmt. a (1958). One of these commenters, citing the District of Columbia Circuit's decision in *BFI* v. *NLRB,* 911 F.3d at 1218, argues that the subservant doctrine demonstrates the common law's recognition of the important role that forms of indirect control can play in an agency relationship.[134]

As noted above, because we agree with the commenters who discuss common-law precedent and the District of Columbia Circuit's statements regarding the role indirect control plays in the joint-employer analysis,[135] we respectfully reject the view of commenters who suggest that evidence of indirect control over essential terms or conditions of employment is insufficient to establish joint-employer status. The final rule adheres to the Board's preliminary view that forms of indirect control may be evidence of joint-employer status. As set forth in the NPRM, we are persuaded by the District of Columbia Circuit's view that the common-law standard requires consideration of indirect control. See *BFI* v. *NLRB,* 911 F.3d at 1216–1217 (''Common law decisions have repeatedly recognized that indirect control over matters commonly determined by an employer can, at a minimum, be weighed in determining one's status as an employer of joint employer, especially insofar as indirect control means control exercised through an intermediary.'').[136] We further agree with the views of some commenters that the 2020 rule reintroduced control-based restrictions, notably the requirement of ''substantial direct and immediate control,'' that are contrary to the common-law view of how agency relationships are created. For this reason, independent of our decision to promulgate a new rule, we rescind the 2020 rule because it is inconsistent with common-law agency principles and therefore inconsistent with the National Labor Relations Act. Moreover, we are further persuaded that there is value in codifying the principle that forms of indirect control over one or more essential terms or conditions of employment are probative of joint-employer status in the final rule text, as discussed below.

D. Comments About the Definition of ''Essential Terms and Conditions of Employment''

Paragraph (d) of the proposed rule defined ''essential terms and conditions of employment'' to ''generally include'' but not be limited to ''wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance.'' [137] In setting forth a nonexhaustive list of essential terms and conditions of employment, the proposed rule relied in part on the Board's 2015 *BFI* decision, which took the same approach.[138] As mentioned above, the phrase ''essential terms and conditions of employment'' derives from the Third Circuit's formulation of the joint-employer standard in *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1124 (3d Cir. 1982), enfg. 259 NLRB 148 (1981), where the court stated that entities are ''joint employers'' if they ''share or codetermine those matters governing essential terms and conditions of employment.''

Although some commenters approve of the proposed rule's use of an open-ended, nonexhaustive list of ''essential terms and conditions of employment,'' [139] many commenters criticize that aspect of the proposed rule.[140] Notably, the United States Small Business Administration Office of Advocacy, along with many individuals and small business owners, express concerns about how parties covered by the Act will successfully comply with their potential obligations as joint employers without more clarity regarding the scope of ''essential terms and conditions of employment.'' [141] Some commenters suggest that the Board adopt an exhaustive list of essential terms and conditions of employment and make any further refinements to that list in a future rulemaking proceeding.[142]

Another group of commenters propose that the Board modify the proposed rule by explicitly tying the definition of ''essential terms and conditions of employment'' to the concept of mandatory subjects of bargaining for purposes of Section 8(d) of the Act.[143] These commenters generally also favor a flexible approach to defining the scope of a joint

[132] Comments of American Civil Liberties Union (ACLU); AFL–CIO; Congressman Scott et al.; CWA; General Counsel Abruzzo; IUOE; Lawyers' Committee for Civil Rights Under Law; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; NELP; Restaurant Opportunities Centers United; State Attorneys General; The Leadership Conference on Civil and Human Rights; The Strategic Organizing Center; United Electrical, Radio and Machine Workers of America (UE); UNITE HERE International Union; United Steelworkers.

Among these commenters, several suggest that if the Board decides to promulgate a final rule (rather than simply rescind the 2020 rule), the Board should delete references to direct and indirect control in proposed subparagraph (c). See comments of AFL–CIO; IUOE. We address this aspect of these comments in our discussion below.

[133] Comments of CWA; General Counsel Abruzzo; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT.

[134] Comments of State Attorneys General.

[135] See *BFI* v. *NLRB,* 911 F.3d at 1216 (''[I]ndirect control can be a relevant factor in the joint-employer inquiry.'').

[136] Similarly, as one commenter observed, the Supreme Court's decision in *Boire* v. *Greyhound,* 376 U.S. 473, 481 (1964), made no distinction on the basis of whether an entity wields direct or indirect control. See comments of NELP.

[137] 87 FR at 54663.

[138] Id. at 54643 (citing *BFI,* supra, 362 NLRB at 1613).

[139] Comments of AFL–CIO; Center for Law and Social Policy; International Brotherhood of Teamsters (IBT); Lawyers' Committee for Civil Rights Under Law; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; National Partnership for Women & Families; National Women's Law Center; NELP; Public Justice Center; Restaurant Opportunities Centers United; SPLC; State Attorneys General; TechEquity Collective; The Leadership Conference on Civil and Human Rights; William E. Morris Institute for Justice; Women Employed.

[140] Comments of American Staffing Association; ANB Bank; Asian McDonald's Operators Association; ABC; California Policy Center; Center for Workplace Compliance; CDW; Energy Marketers of America; Freedom Foundation; Goldwater Institute; Home Care Association of America; HR Policy Association; International Bancshares Corporation; IFDA; IFA; LeadingAge; McDonald's USA, LLC; NATSO and SIGMA; National Association of Convenience Stores; NAHB; National Association of Insurance and Financial Advisors; NAM; National Association of Realtors; National Black McDonald's Operators Association; National Retail Federation; National Roofing Contractors Association; New Civil Liberties Alliance & Institute for the American Worker; PPAI; Rachel Greszler; RILA; Subcontracting Concepts, LLC; The Mackinac Center for Public Policy; U.S. Chamber of Commerce.

[141] Comments of Luis Acosta; Escalante Organization; Independent Electrical Contractors; M. M. Fowler, Inc.; One Energy Inc.; QuickChek; RaceTrac, Inc.; Ready Training Online; Reid Stores, Inc. d/b/a Crosby's; SBA Office of Advocacy.

[142] Comments of CDW; IFA; The Mackinac Center for Public Policy.

[143] Comments of General Counsel Abruzzo; IBT; IUOE; Jobs with Justice and Governing for Impact; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; State Attorneys General; UE. One of these commenters cites *Sun-Maid Growers of California* v. *NLRB,* 618 F.2d 56, 59 (9th Cir. 1980) in support of this view. See Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT.

employer's bargaining obligation.[144] Relatedly, some commenters request that the Board consider amending the proposed rule to incorporate a statement regarding the scope of a joint employer's bargaining obligation that appeared in the NPRM's preamble,[145] while others suggest that the Board should clarify how to allocate bargaining responsibilities between two entities that share or codetermine one or more essential terms and conditions of employment.[146]

One of these commenters observes that the Board should be careful to distinguish control over essential terms and conditions of employment that is material to the existence of a common-law employment relationship from control over matters that the Act requires parties to bargain over.[147] Another commenter acknowledges that an entity's control over certain mandatory subjects of bargaining, like cafeteria prices, see *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 498 (1979), may control a term of employment to which a bargaining duty attaches but not possess or exercise control over an essential term or condition of employment so as to be regarded as a common-law employer.[148]

We have taken these comments into consideration in revising the final rule's treatment of essential terms and conditions of employment and in adding paragraph (h) to the final rule. The final rule responds to commenters who suggest tying the definition of essential terms and conditions of employment to Section 8(d) of the Act by emphasizing that, once an entity is found to be a joint employer because it possesses the authority to control or exercises the power to control one or more essential terms or conditions of employment identified in the rule, that entity has a statutory duty to bargain over all mandatory subjects of bargaining it possesses the authority to control or exercises the power to control. That duty is common to all employers under the Act. See *Management Training,* 317 NLRB 1355 (1995). The scope of a joint employer's duty to bargain, however, is distinct from the issue of joint-employer status. As in other cases involving the scope of the duty to bargain, if a joint employer contests its duty to bargain over a particular issue, the Board will assess whether a particular subject of bargaining is mandatory on a case-by-case basis, applying familiar and longstanding precedent. However, the final rule provides the clarity and predictability other commenters sought by specifically enumerating the essential terms and conditions of employment that will, as a threshold matter, give rise to a finding that an entity is a joint employer if that entity possesses the authority to control or exercises the power to control one or more of the listed terms. Moreover, by adding paragraph (h), the final rule likewise responds to those commenters who requested that the Board include a statement of the nature of a joint employer's bargaining obligation in the text of the rule itself.[149]

As mentioned above, the final rule incorporates an exhaustive list of essential terms and conditions of employment. These essential terms and condition of employment are: ''(1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees.'' [150] Because these essential terms and conditions of employment are substantively the same as those offered as illustrations in the proposed rule, we next address commenters' particular concerns regarding the proposed rule's treatment of specific terms and conditions of employment as ''essential.''

Commenters who addressed the proposed rule's treatment of specific ''essential terms and conditions of employment'' unanimously agree that certain terms and conditions of employment are ''essential'' for purposes of the joint-employer standard. These include wages and benefits,[151] hours of work,[152] hiring, discipline, and discharge,[153] assignment,[154] and supervision.[155] Many commenters specifically state that, at a minimum, they approve of the list of essential terms and conditions of employment that was used in the 2020 rule, including scheduling, hiring, termination, discipline, assignment of work, and instruction.[156]

A number of commenters and our dissenting colleague contend that workplace health and safety should not be considered an essential term or condition of employment for purposes of the joint-employer standard.[157] These commenters emphasize the role that government regulation plays in setting minimum standards for workplace

[144] Comments of Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; NELP.

[145] See 87 FR at 54645 fn. 26. Comments of IBT; IUOE; Service Employees International Union (SEIU); U.S. Chamber of Commerce.

[146] Comments of RILA; SHRM.

[147] Comments of UNITE HERE.

[148] See reply comments of AFL–CIO.

[149] See comments of American Staffing Association; RILA; SHRM; Texas Public Policy Foundation. One commenter notes that Board precedent already addresses the contours of a joint employer's bargaining obligation and suggests that this obviates the need for a clearer articulation of the duty in the text of a final rule. Comments of AFL–CIO.

[150] The list of essential terms and conditions of employment is discussed further in Section V.D., below.

[151] Comments of Association of Women's Business Centers; Center for Law and Social Policy; General Counsel Abruzzo; IFA; Lawyers' Committee for Civil Rights Under Law; NAM; National Women's Law Center; North Carolina Justice Center; Public Justice Center; RILA; SPLC; TechEquity Collective; The Leadership Conference on Civil and Human Rights; William E. Morris Institute for Justice; Women Employed.

[152] Comments of Center for Law and Social Policy; General Counsel Abruzzo; Lawyers' Committee for Civil Rights Under Law; National Partnership for Women & Families; National Women's Law Center; North Carolina Justice Center; Public Justice Center; SPLC; TechEquity Collective; The Leadership Conference on Civil and Human Rights; RILA; William E. Morris Institute for Justice; Women Employed.

[153] Comments of California Policy Center; General Counsel Abruzzo; IBT; NAM.

Our dissenting colleague generally agrees that matters relating to particular employees' hiring and discharge are essential, but he expresses concern that the formulation used in the final rule—''tenure of employment, including hiring and discharge''—is too broad and runs the risk of ''making general contractors in the construction industry joint employers per se.'' With respect, we reject our colleague's characterization. General contractors in the construction industry will be deemed joint employers only if all requirements of the standard are established, including the threshold requirement that they have a common-law employment relationship with particular employees. We use the phrase ''tenure of employment, including hiring and discharge'' to encompass a range of actions that determine or alter individuals' employment status, offering hiring and discharge as examples. As discussed elsewhere, nothing in the final rule intends to treat general contractors in the construction industry—or, indeed, any entities—as joint employers on a per se or categorical basis.

[154] Comments of IBT; NELP.

[155] Comments of General Counsel Abruzzo; IBT.

[156] See, *e.g.,* comments of IFA; NFIB; National Women's Law Center.

[157] Comments of American Association of Port Authorities (AAPA); American Trucking Associations; Association of Women's Business Centers; FMI—The Food Industry Association; Home Care Association of America; IFA; NATSO & SIGMA; National Association of Convenience Stores; NAM; National Retail Federation; New Civil Liberties Alliance & Institute for the American Worker; North American Meat Institute; Rio Grande Foundation; Trucking Industry Stakeholders.

One of these commenters argues that workplace health and safety was not historically regarded as an essential term or condition of employment under the common law and should therefore be omitted. See comments of IFA.

health and safety,[158] especially in certain industries, including the trucking, food and consumer goods, and waste and recycling industries.[159] Other commenters strenuously urge the Board to include workplace health and safety as essential.[160] In fact, one commenter suggests that, in light of the Covid-19 pandemic, the Board should make explicit that workplace health and safety is an essential condition of all in-person employment.[161]

A few commenters express the view that scheduling should not be an essential term or condition of employment for joint-employer purposes.[162] In this regard, some commenters note that determining the hours of operation for a facility should not be treated as comparable to determining hours of work for all individuals who perform services in that facility,[163] while others characterize scheduling as related to ''routine'' contractual provisions that speak to the timing for completion of a project.[164] Certain commenters note that treating control over scheduling as indicative of a common-law employment relationship may disproportionately affect entities operating in the manufacturing and staffing industries.[165] Other commenters observe that scheduling practices are intertwined with employees' hours of work and should therefore be considered essential.[166]

Some commenters argue that work rules and directions governing the manner, means, or methods of work performance should not be essential for purposes of the joint-employer standard.[167] These commenters express concern that including work rules and directions potentially sweeps too broadly and risks exposing small business owners to substantial new liability.[168] Similarly, our dissenting colleague expresses concern that including work rules and directions on the list of essential terms and conditions of employment sweeps too broadly, potentially allowing the Board to make a joint-employer finding on the strength of ambiguous language in work rules. He also predicts that including work rules and directions as essential will lead to more frequent joint-employer findings in the staffing, healthcare, and franchise industries. Commenters who favor including work rules and directions on the list of essential terms and conditions of employment generally argue that entities reserving or exercising control over work rules and directions thereby exert considerable influence over the manner and means of particular employees' work.[169]

Several commenters propose additional terms and conditions of employment that the Board should consider essential. A few commenters propose adding practices related to surveillance and monitoring to the list.[170] One comment goes further, suggesting that the Board adopt a rebuttable presumption that an entity is a joint employer if it imposes certain requirements on another entity or that entity's employees (among others, retaining discretion to hire or fire that entity's employees and requiring that entity's employees to enter into noncompete agreements or other restraints on operating a business in the same trade or industry during or after the contract).[171]

As noted above, the Board has determined to include an exhaustive list of essential terms and conditions of employment in the final rule. While commenters broadly agree on the content of the proposed rule's list, we briefly address commenters' specific concerns about our decision to include scheduling, workplace health and safety, and work rules and directions governing the manner, means, or methods of work performance.

With respect to scheduling, we begin by noting several commenters' approval of the 2020 Rule's inclusion of scheduling along with hours of work as an essential term or condition of employment.[172] We find that Section 2 of the *Restatement (Second) of Agency* provides support for including both ''hours of work and scheduling'' on the list of essential terms and conditions of employment. We further note that Board law has long treated scheduling as probative of joint-employer status.[173] We are also persuaded by the view set forth by some commenters that scheduling practices are often intertwined with hours of work.

Having carefully considered the valuable input of commenters on the proposed rule's inclusion of workplace health and safety on our list of essential terms and conditions of employment (and the views of our dissenting colleague), we are persuaded to retain this aspect of the proposed rule. We find common-law support for including workplace health and safety as an essential term or condition of employment in references to the importance of an employer's control over ''the physical conduct'' of an employee ''in the performance of the service'' to the employer.[174] While many commenters and our dissenting colleague have observed that workplace health and safety is subject to substantive regulation by many federal, state, and local authorities, especially in certain industries, we do not seek to displace or interfere with those regulatory schemes by recognizing that control over workplace health and safety is indicative of a joint-employment relationship. As discussed further below, we do not consider contractual terms that do nothing more than incorporate regulatory requirements, without otherwise reserving authority to control or exercising power to control the performance of work or terms and conditions of employment, indicative of

[158] Comments of AAPA; American Trucking Associations; Home Care Association of America; National Association of Convenience Stores. As an example, one commenter notes that health and safety in the trucking industry is pervasively regulated by several other Federal agencies, including ''the Department of Labor's Occupational Safety and Health Administration (OSHA) and the Department of Transportation's Federal Motor Carrier Safety Administration (FMCSA).'' Comments of American Trucking Associations. Contrary to the suggestion of this commenter, the Board is aware of the expertise these regulators have in setting substantive health and safety standards and does not intend to prescribe any particular health and safety standards in the final rule.

[159] Comments of American Trucking Associations; FMI—The Food Industry Association; National Waste & Recycling Association; Trucking Industry Stakeholders.

[160] Comments of Center for Law and Social Policy; IBT; Lawyers' Committee for Civil Rights Under Law; National Partnership for Women & Families; National Women's Law Center; NELP; North Carolina Justice Center; Public Justice Center; SPLC; TechEquity Collective; The Leadership Conference on Civil and Human Rights; The Strategic Organizing Center; William E. Morris Institute for Justice; Women Employed.

[161] Comments of State Attorneys General.

[162] Comments of American Pizza Community; Association of Women's Business Centers; NAM; SBA Office of Advocacy.

[163] Comments of American Hotel & Lodging Association; FMI—The Food Industry Association; National Retail Federation.

[164] Comments of SBA Office of Advocacy.

[165] Comments of FMI—The Food Industry Association; NAM; Clark Hill PLC.

[166] Comments of General Counsel Abruzzo; IBT; National Women's Law Center.

[167] Comments of Americans for Prosperity Foundation; Americans for Tax Reform; NAM; Rio Grande Foundation.

[168] Comments of Americans for Tax Reform; Rio Grande Foundation.

[169] Comments of General Counsel Abruzzo; NELP.

[170] Comments of Center for Law and Social Policy; Jobs with Justice and Governing for Impact.

[171] Comments of Professors Pandya, Elmore, and Griffith.

[172] See comments of General Counsel Abruzzo; IBT; National Women's Law Center.

[173] See, *e.g., Continental Winding Co.,* 305 NLRB 122, 123 fn. 4 (1991).

[174] *Restatement (Second) of Agency,* sec. 2 (1958). While our colleague does not find our reference to this ''general statement'' in the *Restatement* persuasive, we believe that ''the physical conduct'' of an employee ''in the performance of the service'' to the employer encompasses workplace health and safety.

joint-employer status.[175] Finally, as noted above, many commenters confirmed our preliminary view that the experience of the Covid–19 pandemic demonstrated the importance of treating workplace health and safety as essential.

We also adhere to the view set forth in the proposed rule that work rules and directions governing the manner, means, or methods of work performance are properly included as essential terms and conditions of employment. As with our discussion of scheduling above, we note that many commenters found it appropriate for the Board to follow the 2020 rule's lead in treating work rules and directions as essential. Moreover, we find support for including work rules and directions on the list of essential terms and conditions of employment in Sections 2 and 220 of the *Restatement (Second) of Agency.*[176] In this regard, we agree with the views set forth by some commenters that possessing or exercising control over work rules or directions governing the manner, means, or methods of work performance illuminates the extent of control an employer exercises over the details of the work to be performed.[177]

Finally, in light of the clarification we make regarding the content of a joint employer's bargaining obligation in paragraph (h) of the final rule, we do not find it necessary to add other terms or conditions of employment to the final rule's list of ''essential'' terms or conditions of employment. However, we believe the final rule is responsive to commenters' insights that bargaining over certain of these subjects, like workplace surveillance, may be very important to employees who organize and seek to bargain collectively. As a result, the final rule recognizes that once an entity is found to be a joint employer on the basis of its control of one or more essential terms or conditions of employment, that entity will be subject to a duty to bargain over all mandatory subjects of employment that it controls.[178]

E. Comments About Forms of Control Sufficient To Establish Status as a Joint Employer

Proposed paragraph (e) of the proposed rule provided that whether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment is determined under common-law agency principles. Possessing the authority to control is sufficient to establish status as a joint employer, regardless of whether control is exercised. Exercising the power to control indirectly is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly. Control exercised through an intermediary person or entity is sufficient to establish status as a joint employer.[179]

Some commenters specifically request that the Board modify this paragraph of the proposed rule to specify what quantum or degree of indirect or reserved control will be sufficient to give rise to a joint-employer finding.[180] Many commenters commended the 2020 rule for returning to *TLI/Laerco's* ''substantial direct and immediate control'' formulation as the threshold that would give rise to a joint-employer finding and treating ''limited and routine'' instances of control as irrelevant to the joint-employer inquiry, with some noting the practical benefits of that standard for the construction, franchise, retail, restaurant, and staffing industries.[181] Our dissenting colleague likewise expresses his preference for the 2020 rule's treatment of the forms of control that are sufficient to establish status as a joint employer. Some commenters suggest that Congress, in enacting the Taft-Hartley amendments, implicitly contemplated that only substantial direct and immediate control could suffice to establish a joint-employer relationship.[182] In addition, some of these commenters urge that it is especially important for the Board to ascertain whether an entity will possess or exercise control on a prospective basis as a precondition to imposing a bargaining obligation.[183]

With respect, we disagree with the view of some commenters and our dissenting colleague that only ''substantial direct and immediate control'' should be relevant to the Board's joint-employer inquiry. As set forth in the NPRM, once it is shown that an entity possesses or exercises relevant control over particular employees, the Board is not aware of any common-law authority standing for the proposition that further evidence of the direct and immediate exercise of that control is necessary to establish a common-law employment relationship. While we acknowledge that some commenters found the 2020 rule's formulation beneficial, because we are bound to apply common-law agency principles, we are not free to maintain a definition of ''joint employer'' that incorporates the restriction that any relevant control an entity possesses or exercises must be ''direct and immediate.'' [184] Finally, we

[175] Contrary to our dissenting colleague's suggestion, if an employer's compliance with health and safety regulations or OSHA standards involves choosing among alternative methods of satisfying its legal obligation, a contract term that merely memorializes the employer's choice regarding how to comply with the regulation would not indicate joint-employer status. To the extent that an employer reserves further authority or discretion over health and safety matters, however, such reserved control (or control exercised pursuant to such a reservation) would bear on the joint-employer inquiry.

[176] Id., sec. 2 & 220.

[177] We reject our dissenting colleague's suggestion that the Board will seize upon ambiguous language in work rules to make a joint-employer finding. Instead, we consider work rules or directions essential because they may be especially clear indicators of a putative joint employer's authority to control or exercise of control over the details of particular employees' work. Cf. *Cognizant Technology Solutions U.S. Corp. & Google LLC,* 372 NLRB No. 108, slip op. at 1 (2023) (finding joint-employer relationship under 2020 rule based in part on entity's maintenance of '''workflow training charts' which govern[ed] the details of employees' performance of specific tasks.'').

[178] Contrary to the view of our dissenting colleague, providing an exhaustive list of essential terms and conditions of employment is not intended to address the District of Columbia Circuit's concerns about the forms of indirect control that bear on the joint-employer inquiry, but to instead respond to the court's guidance, on remand, that the Board ''explain which terms and conditions are 'essential' to permit 'meaningful collective bargaining,'" and to ''clarify what 'meaningful collective bargaining' entails and how it works in this setting.'' *BFI* v. *NLRB,* 911 F.3d at 1221–1222 (quoting *BFI,* 362 NLRB at 1600).

[179] 87 FR at 54663.

[180] Comments of American Trucking Associations; COLLE; Competitive Enterprise Institute; Escalante Organization; NAHB; SBA Office of Advocacy; SHRM. Some commenters suggest that the proposed rule is sufficiently vague that it could have negative effects on the residential construction industry, exposing homeowners who control access to job sites, working hours, and many day-to-day conditions of employment to classification as potential joint employers. See comments of NAHB; Restaurant Law Center and National Restaurant Association. Another commenter questions whether a franchisor would be deemed a joint employer by virtue of providing optional tools and resources to a franchisee. See comments of Escalante Organization.

[181] Comments of AGC; American Pizza Community; Americans for Tax Reform; American Staffing Association; California Policy Center; Escalante Organization; Independent Electrical Contractors; IFA; Michael Remick; National Association of Realtors; National Black McDonald's Operators Association; National Demolition Association; National Retail Federation; National Taxpayers Union; New Civil Liberties Alliance & Institute for the American Worker; North American Meat Institute; Restaurant Law Center and National Restaurant Association; RILA; The Mackinac Center for Public Policy; Yum! Brands. One commenter also argues that there must be a showing of regular and continuous control, not merely sporadic and de minimis control. See comments of SHRM. Another commenter likewise suggests that the Board incorporate a de minimis limitation in the final rule. See comments of UNITE HERE.

[182] Comments of American Hotel & Lodging Association; COLLE; RILA.

[183] Comments of RILA; SHRM.

[184] The District of Columbia Circuit has recently emphasized that it ''took great pains to inform the Board that the failure to consider reserved or indirect control is inconsistent with the common law of agency.'' *Sanitary Truck Drivers & Helpers Local 350, International Brotherhood of Teamsters* v. *NLRB,* 45 F.4th 38, 47 (D.C. Cir. 2022).

hope to satisfy those commenters seeking guidance regarding the quantum or type of control that is sufficient to establish status as a joint employer in the discussion that follows.

Others approve of the proposed rule's explicit recognition that control exercised through an intermediary should be sufficient to establish joint-employer status, offering examples of the role intermediaries play in sharing or codetermining essential terms and conditions of employment in certain industries, including the franchise, staffing, and temporary employment industries.[185] One commenter highlights how the proposed rule, which would find indirect control over workplace health and safety sufficient to establish joint-employer status, could benefit employees with disabilities, who it represents are overrepresented in temporary employment and often face distinctive health and safety challenges that may require multiple firms to play a role in addressing.[186]

In addition, these commenters emphasize that taking all relevant forms of control, including indirect control, into account is essential to ensuring that bargaining is effective, especially in industries characterized by the widespread use of contracting, including the property services, staffing, and construction industries.[187] Some commenters observe that making indirect control part of the joint-employer inquiry may foster compliance with labor and employment laws and encourage an appropriate sharing of responsibility among multiple firms that codetermine terms and conditions of employment.[188] Some of these commenters charge that by imposing a requirement of ''substantial direct and immediate control'' over essential terms and conditions of employment, the 2020 rule effectively rendered forms of indirect control irrelevant to the joint-employer analysis, in contravention of the common-law agency principles that must guide the Board's application of its joint-employer standard.[189] As one of these commenters adds, this error is especially pronounced in light of the District of Columbia Circuit's later statement in *Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters* v. *NLRB,* 45 F.4th 38, 46–47 (D.C. Cir. 2022), that the Board was not free to apply an analysis that effectively ignored reserved and indirect control.[190]

Certain commenters who generally agree with the Board's proposed approach to treating indirect control as probative to the joint-employer analysis argue that certain employer actions should, in general, be regarded as amounting to the exercise of indirect control over particular employees.[191] For example, one commenter proposes that the Board state that using surveillance technology amounts to indirect control over the employees being surveilled.[192] Another commenter suggests that certain forms of control that franchisors or user firms exert over the nonwage cost items in franchisees' or supplier firms' budgets are tantamount to indirect control over wages.[193] One commenter offers illustrations of forms of control she regards as material to the existence of a common-law employment relationship. One example includes a contract provision granting a user employer the right to require mandatory overtime by supplied employees.[194] Some suggest that the Board add corresponding examples or hypotheticals to the final rule to clarify that these forms of control are sufficient.[195]

While we appreciate the views set forth by commenters who illustrate why forms of indirect control are frequently relevant to the joint-employer analysis, we decline the invitation to modify the text of the proposed rule to incorporate these insights.[196] By maintaining the general language of the proposed rule, which provides that control is to be determined by reference to common-law agency principles, we aim to permit the application of the final rule to a diverse arrangement of mechanisms that grant third parties or other intermediaries authority to share or codetermine matters governing particular employees' essential terms and conditions of employment. In this regard, as we apply the final rule to new facts, we will be guided by § 103.40(e)(2) of the final rule, which is consistent with the District of Columbia Circuit's statement that ''the common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.'' [197]

Another group of comments raises concerns about situations where a putative joint employer in fact possesses the authority to control or exercises the power to control essential terms or conditions of employment only because it is required to do so by law or regulation.[198] Some of these commenters state that the Federal Government possesses reserved and indirect control over certain terms and conditions of employment of the employees of companies it contracts with.[199] For example, one commenter

[185] Comments of Jobs with Justice and Governing for Impact; Public Justice Center; The Leadership Conference on Civil and Human Rights.

[186] Comments of The Leadership Conference on Civil and Human Rights. Other commenters likewise argue that temporary employees frequently receive less safety training and are more vulnerable to retaliation for reporting injuries than their permanent-employee counterparts. See comments of North Carolina Justice Center.

[187] Comments of ACLU; AFL–CIO; BCTGM; Congressman Scott et al.; CWA; Jobs with Justice and Governing for Impact; Lawyers' Committee for Civil Rights Under Law; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; National Women's Law Center; Public Justice Center; Restaurant Opportunities Centers United; SEIU; Signatory Wall and Ceiling Contractors Alliance; TechEquity Collaborative; The Leadership Conference on Civil and Human Rights; The Strategic Organizing Center; UBC; UE; Women Employed.

[188] Comments of Bakery, Confectionary, Tobacco Workers and Grain Millers International Union (BCTGM); General Counsel Abruzzo; Public Justice Center; Richard Eiker; TechEquity Collaborative.

[189] Comments of AFL–CIO; NELP; UNITE HERE. One of these commenters makes the further suggestion that, in situations where one firm dominates another or where parties have an exclusive service relationship, the Board should consider applying a rule of per se joint-employer liability. See comments of NELP.

[190] Comments of AFL–CIO.

[191] Comments of Center for Law and Social Policy; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT.

[192] Comments of Center for Law and Social Policy. Other commenters likewise suggest that, at least in certain contexts, surveillance might demonstrate sufficient indirect control over employees' essential terms and conditions of employment to justify a joint-employer finding, but they do not recommend modifying the proposed rule to include this observation. See, *e.g.,* comments of IBT; Jobs with Justice and Governing for Impact; NELP.

[193] Comments of Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT.

[194] Comments of General Counsel Abruzzo.

[195] See, *e.g.,* comments of CWA; RILA; State Attorneys General; U.S. Chamber of Commerce.

[196] As discussed below, however, we have reformatted § 103.40(e) of the final rule to include two subsections and have streamlined its text to avoid surplusage.

[197] *BFI* v. *NLRB,* 911 F.3d at 1217. Our dissenting colleague questions our decision not to include an extensive list of examples of forms of indirect control that may be relevant to the joint-employer inquiry and asks what other forms of indirect control may be relevant. As set forth in Sec. I.D. above, we will address whether other mechanisms that grant third parties control over particular employees' terms and conditions of employment establish joint-employer status in the course of applying the rule. In so doing, we will be guided by the District of Columbia Circuit's treatment of indirect control and common-law agency principles.

[198] Comments of American Hospital Association; American Trucking Associations; CDW; Federation of American Hospitals; Home Care Association of America; Independent Bakers Association; NAHB; National Retail Federation.

[199] Comments of COLLE; Goldwater Institute; National Small Business Association; SBA Office of Advocacy; Thomas Jefferson Institute for Public Policy. One commenter provides several examples of such contract provisions. See comments of Center for Workplace Compliance.

describes the use of ''flow-down'' clauses in contracting relationships and how prime contractors are sometimes required to impose obligations under the Service Contract Act, 41 U.S.C. 351 *et seq.,* and similar local and municipal laws setting minimum wage and benefit standards on their subcontractors.[200] Similarly, some commenters suggest that control over essential terms or conditions of employment is less probative of joint-employer status if it is possessed or exercised in the service of setting basic expectations or ground rules for a third-party contractor or contracted service.[201]

In response to these commenters, we note that if a law or regulation actually sets a particular term or condition of employment (like minimum wages, driving time limits for truck drivers, or contractor diversity requirements), an entity that does nothing more than embody or memorialize such legal requirements in its contracts for goods and services, without otherwise reserving the authority to control or exercising the power to control terms or conditions of employment, does not thereby become the employer of particular employees subject to those legal requirements. This is because the embodiment of such legal requirements is not a matter within the entity's discretion subject to collective bargaining.[202] We remind commenters who express concern about the role of entities exempt from the Board's jurisdiction that, under longstanding Board precedent, if a common-law employer of particular employees lacks control over some of those employees' terms and conditions of employment because those terms and conditions are controlled by an exempt entity, that common-law employer is not required to bargain about those terms and conditions of employment.[203] Consistent with this precedent, the final rule provides that a joint employer will be required to bargain over only those mandatory subjects of bargaining that it possesses or exercises the authority to control. Finally, as discussed in more detail above and below, if an entity possesses or exercises some control over particular employees' terms and conditions of employment, including indirect control, only by the terms of a third-party contract that sets basic expectations or ground rules for the production or delivery of goods or services, without otherwise reserving the authority or exercising the power to control the details of the manner and methods by which the work is performed, the entity does not thereby become an employer of those employees. This is because such control, as a normal incident of a third-party contract, does not establish the common-law employment relationship that is the threshold requirement for finding a joint-employer relationship.[204]

Several commenters raise concerns about the possibility that, in contexts where a public entity contracts with a private entity to render a service or perform a contract, the proposed joint-employer standard risks enmeshing that public entity in the Board's jurisdiction.[205] One commenter, citing the Board's decision in *Management Training Corp.,* 317 NLRB 1355 (1995), argues that the 2020 rule would better ensure the proper application of the joint-employer standard in contracting situations.[206] One commenter expresses particular concern about the implications of a joint-employer relationship between a public charter school and third-party vendors or contractors it uses.[207]

We reject these commenters' views that the proposed rule creates any novel risks for public or private entities who contract with one another. The final rule we adopt requires, as a threshold matter, that each putative joint employer meet the definition of ''employer'' in Section 2(2) of the Act.[208] Section 2(2) excludes from the definition of ''employer'' public entities, including, in relevant part, ''the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof.'' [209] While some commenters suggest that public entities possess or exercise control over essential terms and conditions of employment, we note that these facts are insufficient to establish a joint-employment relationship for purposes of the Act because the public entity is excluded from the statutory definition of ''employer.'' Finally, we regard the Board's decision in *Management Training Corp.,* above, as persuasive in addressing some commenters' concerns that applying the joint-employer standard we adopt might cause distinctive problems for government contractors. As one commenter suggests, that case permits the Board to find one entity is an employer for purposes of Section 2(2) even if another, exempt entity also possesses or exercises control over particular employees' essential terms or conditions of employment.[210] We note that reviewing courts have broadly approved of the Board's assertion of jurisdiction over government contractors.[211]

F. Control Over Matters That Are Immaterial to the Existence of an Employment Relationship Under Common-Law Agency Principles or That Do Not Bear on Essential Terms and Conditions of Employment

Proposed paragraph (f) provided that ''[e]vidence of an employer's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles or control over matters that do not bear on the employees' essential terms and conditions of employment is not relevant to the determination of

[200] Comments of American Council of Engineering Companies.

[201] Comments of ARTBA.

[202] Of course, if an employer has discretion over how to comply with a statutory mandate, it must bargain about how to exercise that discretion. See, *e.g., Roseburg Forest Products Co.,* 331 NLRB 999, 1003 (2000) (requiring an employer to bargain with the union over how to satisfy its obligations to keep an employee's medical information confidential under the Americans with Disabilities Act, 42 U.S.C. 12101, *et seq.,* while meeting its duty to furnish requested information to the union under the NLRA).

[203] Cf. *Management Training Corp.,* 317 NLRB 1355 (1995).

[204] For these reasons, we also reject the hypotheticals our dissenting colleague puts forward to suggest that the final rule exceeds the boundaries of the common law. Our colleague downplays the importance of the final rule's threshold requirement of a common-law employment relationship and thereby concludes that entities with highly attenuated relationships to particular employees will be deemed joint employers. In applying the final rule, and consistent with the common law, we will perform the required threshold analysis.

[205] Comments of AGC; COLLE; Goldwater Institute; Home Care Association of America.

[206] Comments of COLLE.

[207] Comments of National Alliance for Public Charter Schools.

[208] 29 U.S.C. 152(2).

[209] Id. The Board uses the test approved by the Supreme Court in *NLRB* v. *National Gas Utility District of Hawkins County,* 402 U.S. 600 (1971) to determine whether an entity is a ''political subdivision'' within the meaning of Sec. 2(2) of the Act and therefore exempt from the Board's jurisdiction.

[210] See reply comments of AFL–CIO (citing *Management Training Corp.,* 317 NLRB at 1358).

[211] See *Teledyne Economic Development* v. *NLRB,* 108 F.3d 56, 59 (4th Cir. 1997) (''By its terms, section 2(2) exempts only government entities or wholly owned government corporations from its coverage—not private entities acting as contractors for the government.''). See also *NLRB* v. *YWCA,* 192 F.3d 1111, 1117 (8th Cir. 1999) (''We find ourselves in agreement with the opinions of our sister circuits on the issue of whether or not the Board can assert jurisdiction over an employer without regard to whether or not the employer's control over its ability to collectively bargain is hampered or impeded by the employer's operating agreement with the government.''); *Aramark Corp.* v. *NLRB,* 179 F.3d 872, 879 (10th Cir. 1999) (''The Board's consistent view that governmental contractors fall outside section 2(2)'s political subdivision exemption and inside that provision's definition of an employer 'is entitled to great respect.' ''); *Pikeville United Methodist Hospital of Kentucky, Inc.* v. *United Steelworkers of America,* 109 F.3d 1146, 1152–1153 (6th Cir. 1997).

whether the employer is a joint employer.'' [212] As set forth more fully above, the preamble to the proposed rule expressed agreement with the District of Columbia Circuit's view that ''routine components of a company-to-company contract'' will generally not be material to the existence of an employment relationship under common-law agency principles.[213] The proposed rule cited two examples given by the District of Columbia Circuit as potential kinds of company-to-company contract provisions that will not generally be probative of joint-employer status: a ''very generalized cap on contract costs''; or ''an advance description of the tasks to be performed under the contract.'' [214] While noting that the proposed rule did not intend to exhaustively detail the kinds of business arrangements that might bear on the existence of a common-law employment relationship, the Board specifically solicited commenters' input on other kinds of company-to-company contract provisions that might not be material to the existence of an employment relationship under common-law agency principles.[215] Many commenters accepted the Board's invitation to provide these examples, and we have carefully considered the helpful insights commenters shared, as discussed below.

First, some commenters specifically addressed the two examples identified by the District of Columbia Circuit and in the proposed rule. A few commenters appeared to suggest that a generalized cap on contract costs might in certain circumstances be probative of a common-law employment relationship, especially if such a cap is coupled with a cost-plus arrangement or other explicit limitations on employee wages and benefits.[216] But many other commenters generally expressed their agreement with the view set forth in the proposed rule and by the District of Columbia Circuit that generalized caps on contract costs typically resemble other ordinary price or quantity terms that do not have any necessary connection to the existence of a common-law employment relationship.[217]

No commenter expresses any concerns about treating advance descriptions of the tasks to be performed under the contract (including provisions setting forth objectives, ground rules, or expectations, or providing for oversight) as generally immaterial to the existence of a common-law employment relationship, while several commenters expressly indicate their approval of the proposed rule's discussion of such provisions.[218] One commenter suggests that it is common practice to include a ''statement of work'' to define a new project and that the Board should regard these types of contract provisions as akin to advance descriptions of the tasks to be performed (and therefore not material to the existence of a common-law employment relationship).[219] A few of these commenters make the further suggestion that the Board modify the text of proposed paragraph (f) to expressly reflect that descriptions of the tasks to be performed are not material to the existence of a common-law employment relationship.[220]

A number of commenters encourage the Board to modify the proposed rule to provide examples of contractual provisions that would not give rise to a finding of joint-employer status or to otherwise illustrate or give examples about how the Board will apply the joint-employer rule.[221] These commenters offer a range of suggested ''routine components of a company-to-company contract'' [222] to exclude as probative of joint-employer status. These contractual provisions include, among others, those that set forth: the objectives, basic ground rules, and expectations of the relationship; [223] instructions regarding work standards or expectations and about what work to perform, or where and when to perform work; [224] minimum staffing requirements; [225] quality, productivity, timing, and safety terms about providing a service or completing a project; [226] requirements that deliveries be made during limited windows of time; [227] requirements about monitoring or maintaining brand standards or the design, décor, logo, or image of a business; [228] uniform requirements; [229] generally applicable rules for individuals visiting a facility; [230] general price terms or terms governed by third-party or customer demand; [231] authority to cancel a contract, including at will; [232] requirements that employees undergo background checks or drug tests, comply with equal employment opportunity, nondiscrimination, and antiharassment policies, and satisfy licensure requirements; [233] authority to bar certain individuals from the premises or reject particular employees; [234] terms related to an entity's control over its property, premises, or equipment, including training and safety requirements; [235] provisions related to the nondisclosure or confidentiality of trade secrets, proprietary information, or intellectual property; [236] construction project schedule requirements or safety programs or other site-specific requirements for entities visiting marine terminals, railyards, or other supply

[212] 87 FR at 54663.

[213] Id. at 54651 (quoting *BFI* v. *NLRB,* 911 F.3d at 1221).

[214] Id.

[215] Id.

[216] See, *e.g.,* comments of General Counsel Abruzzo; IBT. We address cost-plus contract provisions below.

[217] Comments of RILA.

[218] Comments of Escalante Organization; IFDA; RILA; Tesla, Inc.; The Mackinac Center for Public Policy.

[219] Comments of Tesla, Inc.

[220] Comments of IFDA; The Mackinac Center for Public Policy.

[221] Comments of American Hotel & Lodging Association; American Staffing Association; HR Policy Association; RILA; Tesla, Inc.; U.S. Chamber of Commerce; U.S. Small Business Association; U.S. Black Chambers, Inc.

[222] *BFI* v. *NLRB,* 911 F.3d at 1220.

[223] Comments of American Hotel & Lodging Association; CDW; Contractor Management Services, LLC; International Warehouse Logistics Association; SHRM; Tesla, Inc.; The Mackinac Center for Public Policy.

[224] Comments of American Hotel & Lodging Association (citing *Service Employees International Union, Local 32BJ* v. *NLRB,* 647 F.3d 435, 443 (2d Cir. 2011); *Local 254, SEIU,* 324 NLRB 743, 746–749 (1997)); Independent Lubricant Manufacturers Association; Restaurant Law Center and National Restaurant Association; Tesla, Inc.; U.S. Chamber of Commerce.

[225] Comments of American Hotel & Lodging Association.

[226] Comments of American Hotel & Lodging Association; ARTBA; CDW; Energy Marketers of America; SHRM; Tesla, Inc.

[227] Comments of Control Transportation Services, Inc.; Energy Marketers of America; Michael Remick; M. M. Fowler, Inc.; QuickChek; U.S. Chamber of Commerce. Notably, several of these commenters raise observations regarding the timing of deliveries at retail motor fuel locations, arguing that energy marketers often dictate when fuel can be delivered safely. See, *e.g.,* comments of Energy Marketers of America.

[228] Comments of American Hotel & Lodging Association; Home Care Association of America; IFA; Independent Lubricant Manufacturers Association; M. M. Fowler, Inc.; McDonald's USA, LLC; National Association of Convenience Stores; SHRM; U.S. Chamber of Commerce; Yum! Brands.

[229] Comments of American Hotel & Lodging Association; IFA.

[230] Comments of American Hotel & Lodging Association; CDW; Contractor Management Services, LLC; Home Care Association of America; National Association of Convenience Stores; Restaurant Law Center and National Restaurant Association; SHRM.

[231] Comments of Restaurant Law Center and National Restaurant Association; SHRM.

[232] Comments of RILA; SHRM.

[233] Comments of Center for Workplace Compliance; Home Care Association of America; National Retail Federation; RILA; SHRM; U.S. Chamber of Commerce.

[234] Comments of American Hotel & Lodging Association; Energy Marketers of America; Independent Lubricant Manufacturers Association; National Retail Federation; Tesla, Inc.

[235] Comments of SHRM; Tesla, Inc.; U.S. Chamber of Commerce.

[236] Comments of U.S. Chamber of Commerce.

chain hubs;[237] parties' obligations under law or regulations;[238] provisions requiring hospitals to superintend contract employees as part of their patient-care mission;[239] goals related to diversity, equity, inclusion, and access (DEIA), corporate social responsibility (CSR), or environmental, social, and governance (ESG);[240] cost-plus arrangements;[241] minimum compensation requirements as determined by public contracting rules or regulations, including the Davis-Bacon Act, 40 U.S.C. 3141 *et seq.*[242]

Some commenters helpfully responded to the Board's request for comment on this issue by providing sample or actual contractual language that they argue correspond to some of the categories of company-to-company contract provisions listed above.[243] After reviewing the wide range of contract provisions commenters shared with the Board, we are persuaded that the approach taken in the proposed rule, which did not attempt to categorize company-to-company contract provisions ex ante, is the most prudent path forward.[244] Because the language used in contract provisions that ostensibly address the same subject matter may vary widely, we believe that case-by-case adjudication applying the joint-employer standard is a better approach. To do otherwise might risk problems of both over- and under-inclusion and overlook important context that might be relevant to the Board's analysis.

In addition to contractual provisions, other commenters suggest that the Board modify the proposed rule to recognize certain business practices as aspects of routine company-to-company dealings that are not material to the existence of a common-law employment relationship. For example, several commenters urge the Board to specify that monitoring a third party's performance for the purposes of quality assurance or auditing for compliance with contractual obligations will not be viewed as probative of joint-employer status.[245] A few others urge the Board to clarify that the mere communication of work assignments, delivery times, or other details necessary to perform work under a contract is not material to the joint-employer inquiry if it is not accompanied by other evidence showing a common-law employment relationship.[246] We decline to modify the proposed rule as suggested by these commenters for largely the same reasons we decline to offer an ex ante categorization of company-to-company contract provisions. Given the diversity of business practices these commenters describe, we believe that case-by-case adjudication applying the joint-employer standard will be the soundest approach.

Another group of commenters urge the Board not to provide specific examples of contractual provisions that are immaterial to the existence of a common-law employment relationship, emphasizing that it is very difficult to assess the effect of such provisions absent consideration of the surrounding context.[247] Others take issue with particular examples of company-to-company contractual provisions that other commenters suggest should not be considered material to the existence of a common-law employment relationship.[248] For example, one commenter notes that, in its experience, provisions authorizing an entity to remove or reject an employee are sometimes used to retaliate against individuals who engage in union and protected concerted activities.[249] One commenter suggests that the Board modify proposed paragraph (f) to clearly identify that decisions made as an exercise of ''entrepreneurial control'' are generally not probative of the existence of a common-law employment relationship.[250] For the same reasons set forth above, we are not inclined to adopt these commenters' suggestions that we specifically categorize contractual provisions or business practices in the final rule. Instead, we are persuaded that it would be most prudent to consider whether certain contractual provisions or business practices are probative of a common-law employment relationship when applying the final rule.

Additionally, some commenters argue that the Board should treat employment relationships in the construction industry in a distinctive manner for purposes of analyzing what forms of control are material to the existence of a common-law employment relationship.[251] While these commenters acknowledge that multiple firms reserve and exercise control over construction jobsites, citing *Denver Building,* supra, 341 U.S. at 689–690, they explain that this shared control is inherent in the industry and should not be probative of joint-employer status.[252] As discussed above, we agree that the Supreme Court's decision in *Denver Building* precludes treating a general contractor as the employer of a subcontractor's employees solely because the general contractor has overall responsibility for overseeing operations on the jobsite. And, absent evidence that a firm possesses or exercises control over particular employees' essential terms and conditions of employment, that firm would not qualify as a joint employer under the standard adopted in this final rule.[253]

[237] Comments of ABC; AGC; ARTBA; Trucking Industry Stakeholders. Several commenters identify AIA Document A201–2017, a standard form document setting forth the general conditions for construction projects, and the Federal Acquisition Regulation and other contracting laws and regulations, as important sources of contract terms that memorialize employers' respective duties and obligations on construction jobsites. See comments of AGC. Others point to TSA requirements, marine terminal operators' rules, and the requirements of the Uniform Intermodal Interchange Agreement (UIIA) as playing a role in defining terms and conditions of employment for employees who work at job sites governed by those rules and agreements. See, *e.g.,* comments of AAPA; Trucking Industry Stakeholders.

[238] Comments of ABC; American Trucking Associations; CDW; Center for Workplace Compliance; Home Care Association of America; IFA; Independent Bakers Association; IFDA; NAHB; National Retail Federation; SBA Office of Advocacy; SHRM; Tesla, Inc.; U.S. Chamber of Commerce.

One of these commenters specifically observes that provisions that do no more than memorialize parties' existing obligations to adhere to legally imposed minimum standards should not be material to the existence of a common-law employment relationship. See comments of CDW.

[239] Comments of AHA; Federation of American Hospitals; U.S. Chamber of Commerce.

[240] Comments of Center for Workplace Compliance; CDW; HR Policy Association; IFA; Retail Industry Leaders Association; Tesla, Inc.; U.S. Chamber of Commerce.

[241] Comments of RILA; SHRM; U.S. Chamber of Commerce. However, as noted above, one commenter identified cost-plus contracting as potentially probative of a user employer's indirect control over the wages of a supplier employee. Comments of General Counsel Abruzzo.

[242] Comments of ABC; ARTBA.

[243] Comments of CDW; U.S. Chamber of Commerce.

[244] See *BFI* v. *NLRB,* 911 F.3d at 1221 (''In principle, there is nothing wrong with the Board fleshing out the operation of a legal test that Congress has delegated to the Board to administer through case-by-case adjudication.'').

[245] Comments of IFA; RILA; SHRM; U.S. Chamber of Commerce.

[246] Comments of National Home Delivery Association; SHRM.

[247] Comments of AFL–CIO; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; State Attorneys General.

[248] Comments of General Counsel Abruzzo; SEIU.

[249] Comments of SEIU.

[250] Comments of AFL–CIO.

[251] Comments of ABC; AGC.

[252] Comments of ABC; AGC. Our dissenting colleague similarly argues that the final rule risks treating general contractors in the construction industry as joint employers on a per se basis.

[253] For this reason, as mentioned above, we reject our dissenting colleague's suggestion that the final rule will disrupt existing relationships and norms on construction sites. As mentioned above, we believe our colleague errs in downplaying the requirement in the final rule that a party asserting that an entity is a joint employer establish that that entity has a common-law employment relationship with particular employees. We are confident that

Others seek recognition of industry-specific business practices that warrant special consideration. A number of commenters raise concerns about whether the proposed rule pays adequate heed to franchisors' need to protect their brands and their trade or service marks.[254] Some of these commenters note that the 2020 rule acknowledged franchisors' needs to maintain brand-recognition standards by providing that control over brands or trademarks is not probative of joint-employer status. The commenters urge the Board to include a similar acknowledgment in the final rule.[255] Relatedly, a number of commenters argue that the proposed rule risks a conflict with federal trademark law, including the Lanham Act, 15 U.S.C. 1051 *et seq.,* and cognate state laws inasmuch as they require franchisors to retain control over their franchisees to protect their brand standards.[256] A bipartisan group of six United States Senators expresses similar concerns regarding the need to protect franchise brands, noting their support for the Trademark Licensing Protection Act of 2022, S.4976.

We are mindful of franchisors' need to protect their brands and their trade or service marks and of the need to accommodate the NLRA with the Lanham Act and federal trademark law more generally. That said, we view the likelihood of conflict as minimal under the standard adopted in this final rule. Many common steps franchisors take to protect their brands have no connection to essential terms and conditions of employment and therefore are immaterial to the existence of a common-law employment relationship. While we are not inclined to categorically state that all forms of control aimed at protecting a brand are immaterial to the existence of a common-law employment relationship, we stress that many forms of control that franchisors reserve to protect their brands or trade or service marks (like those dealing with logos, store design or décor, or product uniformity) will typically not be indicative of a common-law employment relationship.[257] Further, by making the list of ''essential terms and conditions of employment'' in the final rule exhaustive, we also aim to respond to the substance of these commenters' concerns by offering clearer guidance to franchisors about the forms of control that the Board will find relevant to a joint-employer inquiry.

Another commenter urges the Board to state that making a payment as part of a contract to provide payroll services is not sufficient to demonstrate control over wages sufficient to support a joint-employer finding.[258] One commenter argues that the proposed rule should clarify that, for joint-employer purposes, motor carriers are the customers, not employees or contractors, of marine terminals.[259] As set forth above, we are not inclined to modify the text of the final rule to specifically address these situations. However, we hope that we have satisfied these commenters' desires for greater clarity regarding their obligations by describing our view of the forms of control that will be relevant to the joint-employer inquiry and by cabining the list of essential terms and conditions of employment that the Board will treat as material to the existence of a common-law employment relationship.

Some commenters argue that because decisions to modify or terminate joint employment relationships are entrepreneurial decisions between businesses, they are not susceptible to decisional bargaining under *First National Maintenance Corp.* v. *NLRB,* 452 U.S. 666 (1981).[260] Other commenters note that a range of other company-to-company contracting practices would not be subject to bargaining under *First National Maintenance* and its progeny and should therefore not be considered probative of joint-employer status.[261]

As discussed above, the Board has determined to modify the final rule to clarify the nature of joint employers' bargaining obligations. The final rule explains that, once an entity is found to be a joint employer because it shares or codetermines matters governing one or more of particular employees' essential terms or conditions of employment, it is obligated to bargain over any mandatory subjects of bargaining it possesses or exercises the authority to control. As some commenters helpfully note, the Supreme Court has held that core entrepreneurial decisions ''involving a change in the scope and direction of the enterprise'' are not mandatory subjects of bargaining.[262] In applying the final rule, we will adhere to this binding precedent when determining the scope of joint employers' bargaining obligation.

G. Comments About the ''Meaningful Collective Bargaining'' Step of the Board's 2015 Browning-Ferris Decision

Several commenters urge the Board to modify the text of the proposed rule to incorporate the ''meaningful collective bargaining'' step of the Board's 2015 *BFI* decision or to otherwise embrace that portion of the *BFI* analysis.[263] Others, including our dissenting colleague, take the position that the Board's proposal should be withdrawn or modified in some other manner, as the proposed rule fails to cast light on questions the District of Columbia Circuit raised regarding ''once control is found, who is exercising that control, when, and how.'' [264] Some commenters specifically suggest that using a nonexhaustive list of ''essential terms and conditions of

this threshold requirement will ensure the Board's analysis of whether an entity is a joint employer when it applies the rule is appropriately focused. Further, to the extent that our colleague relies on language in *Denver Building* indicating that a general contractor's ''supervision over the subcontractor's work'' precludes a joint-employer finding, 341 U.S. at 689–690, we respectfully disagree with his interpretation. *Denver Building* was a case involving Sec. 8(b)(4) of the Act, not the joint-employer standard, and it did not address whether the general contractor possessed or exercised control over particular employees' essential terms and conditions of employment, whether by supervising their work or otherwise. Instead, the case focused on the general contractor's supervision of the project as a whole.

[254] Comments of IFA; McDonald's USA, LLC; Restaurant Law Center and National Restaurant Association; U.S. Chamber of Commerce; Yum! Brands. Our dissenting colleague also expresses concern about how the proposed rule will affect franchise businesses.

[255] Comments of IFA.

[256] Comments of IFA; U.S. Chamber of Commerce; Yum! Brands.

[257] In this regard, we also note that such matters are unlikely to constitute mandatory subjects of bargaining. See *First National Maintenance Corp.* v. *NLRB,* above, 452 U.S. at 676–677 (''Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship.'').

[258] Comments of Subcontracting Concepts, LLC.

[259] Comments of American Association of Port Authorities.

[260] Comments of RILA; SHRM; Tesla, Inc. These commenters acknowledge the possible need for effects bargaining in these circumstances but urge the Board to require such bargaining to occur on an expedited basis. See id.

Another commenter also cites *Plumbers Local No. 447,* 172 NLRB 128 (1968) (''*Malbaff*'') for the proposition that an employer should not have a bargaining obligation under Sec. 8(a)(5) before terminating its relationship with a subcontractor or other business entity, which is not a violation of Sec. 8(a)(3). Comments of COLLE.

[261] Comments of General Counsel Abruzzo.

[262] *First National Maintenance,* 452 U.S. at 677.

[263] Comments of AGC; AHA; American Staffing Association; Americans for Tax Reform; Freedom Foundation; IFA; International Foodservice Distributors Association; NAM; National Retail Federation; National Waste & Recycling Association; Subcontracting Concepts, LLC; Thomas Jefferson Institute for Public Policy; U.S. Chamber of Commerce.

[264] 911 F.3d at 1215. See comments of Americans for Prosperity Foundation; Independent Bakers Association; Modern Economy Project; National Association of Convenience Stores; National Waste & Recycling Association; North American Meat Institute; SHRM; Subcontracting Concepts, LLC; The Thomas Jefferson Institute for Public Policy; U.S. Chamber of Commerce.

employment'' is problematic without a limiting principle akin to the ''meaningful collective bargaining'' step of *BFI* or some other ''guardrails.'' [265]

Similarly, a group of commenters urge the Board to include in the final rule text a statement that encapsulates or describes a joint employer's duty to bargain.[266] Some of these commenters suggest that the Board state that if a putative joint employer does not have at least ''co-control'' over the range of potential outcomes regarding an essential term or condition of employment, it is not required to bargain over that subject.[267] Some of these commenters encourage the Board to modify the rule text to incorporate a principle that appeared in the preamble to the proposed rule about the scope of a joint employer's bargaining obligation.[268] A few commenters ask the Board to clarify that a joint employer does not have a bargaining obligation except as to matters that are divisible and limited to those employees represented by the union.[269]

Other commenters contend that, by making a common-law employment relationship the prerequisite to a joint-employer finding, the proposed rule contains adequate limits, as the Board will not find that entities with insufficient control over essential terms and conditions of employment are joint employers.[270] These commenters take the position that there is no need to incorporate the ''meaningful collective bargaining'' step of *BFI* in the final rule.[271]

After carefully considering the comments raising concerns about the need for a limiting principle to ensure that the appropriate parties are brought within the ambit of the Board's joint-employer standard, we have decided to modify the definition of ''essential terms and conditions of employment'' in the final rule, as described above. As several commenters observe, limiting the list of essential terms and conditions of employment is responsive to the District of Columbia Circuit's request that the Board incorporate a limiting principle to ensure the joint-employer standard remains within common-law boundaries.[272] By clearly identifying and limiting the list of essential terms and conditions of employment that an entity may be deemed a joint employer if it possesses the authority to control or exercises the power to control, the final rule responds to these criticisms and helps provide clear guidance and a more predictable standard to parties covered by the Act. Moreover, because all of the essential terms and conditions of employment as defined by the final rule involve matters that lie at the core of workplace issues appropriate for collective bargaining, a joint employer's control over any of these matters ensures that there is a basis for meaningful collective bargaining over at least the essential term or condition that is subject to that employer's control.[273]

H. Comments About Independent-Contractor Precedent

The proposed rule cites certain common-law agency decisions that apply independent-contractor precedent. Some commenters appear to approve of the Board's reliance on these cases and cite independent-contractor precedent in support of their own arguments.[274] Other commenters and our dissenting colleague criticize the proposed rule's reliance on precedent geared toward distinguishing between statutory employees and independent contractors.[275] These commenters, citing the District of Columbia Circuit's decision in *BFI* v. *NLRB,* 911 F.3d at 1213–1214, argue that the common-law independent-contractor standard and joint-employer standard are different. In particular, these commenters and our dissenting colleague urge that the joint-employer standard requires an analysis of ''*who* is exercising . . . control, *when,* and *how.*'' [276] Other commenters, also citing the District of Columbia Circuit's *BFI* decision, answer that independent-contractor cases ''can still be instructive in the joint-employer inquiry'' to the extent that they speak to the common law's view of employment relationships.[277]

As discussed in more detail above, while we do not quarrel with commenters' and our dissenting colleague's observation that the common-law independent-contractor standard and joint-employer standard are distinct, we do not agree that the differences between the standards preclude us from relying on precedent from the independent-contractor context, inasmuch as that precedent illuminates the common law's view of control, which is common to both inquiries. As a result, while we are mindful of the need to carefully distinguish between independent-contractor and joint-employer precedent, we believe it is appropriate to continue treating independent-contractor cases as relevant where they speak about ''the nature and extent of control necessary to establish a common-law employment relationship.'' [278]

I. Burden of Establishing Joint-Employer Status

Proposed paragraph (g) provides that the party asserting joint-employer status has the burden of proving, by a preponderance of the evidence, that a putative joint employer satisfies the requirements of proposed paragraphs (a) through (f).[279]

No commenter argues that the Board should allocate the burden differently than suggested in proposed paragraph (g). And no party argues that the Board should omit proposed paragraph (g) from the final rule. Several commenters state that the proposed rule's articulation of the burden of proof does

[265] Comments of CDW; COLLE; National Association of Convenience Stores; National Retail Federation; U.S. Chamber of Commerce.

[266] See, *e.g.,* comments of American Staffing Association; SHRM.

[267] Comments of RILA; SHRM.

[268] Comments of American Staffing Association; SEIU; SHRM; U.S. Chamber of Commerce. As mentioned previously, the NPRM provided in supplementary information that the proposed rule would only require a putative joint employer to bargain over those essential terms and conditions of employment it possesses the authority to control or over which it exercises the power to control. 87 FR at 54645 fn. 26.

[269] Comments of RILA; SHRM (citing *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 64 (1975) for the proposition that the process and outcome of collective bargaining cannot lawfully be imposed on employees who have not chosen union representation).

[270] Comments of AFL–CIO; SEIU.

[271] Comments of General Counsel Abruzzo; SEIU.

[272] Comments of National Retail Federation.

[273] We note that the second element of the Board's *Browning-Ferris* analysis, the inquiry into ''whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining,'' is self-imposed. *BFI,* 362 NLRB at 1600; see *BFI* v. *NLRB,* 911 F.3d at 1205 (noting that in *Browning-Ferris,* ''the Board *announced for the first time* that it would subdivide the inquiry . . . . '') (emphasis added). It is neither a requirement under the common law of agency nor under the Act. As our dissenting colleague concedes, ''[a]bsent any rule whatsoever, joint-employer status would be determined through case-by-case adjudication applying the common law of agency.'' Accordingly, although we are not required to incorporate the ''meaningful collective bargaining'' step of the Board's 2015 *BFI* decision in our current articulation of the joint-employer standard, we nevertheless find that § 103.40(c) of the final rule, providing for an examination of whether the character and objects of a purported employer's control extend to essential terms and conditions of employment within the specific context of the Act, amply satisfies the District of Columbia Circuit's instructions that the Board, on remand, ''explain which terms and conditions are 'essential' to permit 'meaningful collective bargaining,' '' and what such bargaining ''entails and how it works in this setting.'' Id. at 1221–1222 (quoting *BFI,* 362 NLRB at 1600).

[274] See, *e.g.,* comments of RILA.

[275] Comments of North American Meat Institute.

[276] Id. (quoting *BFI* v. *NLRB,* 911 F.3d at 1215 (emphasis in original)).

[277] Comments of State Attorneys General (quoting *BFI* v. *NLRB,* 911 F.3d at 1215).

[278] *BFI,* 911 F.3d at 1215.

[279] 87 FR 54663.

not provide sufficient guidance as to how a party can successfully carry its burden.[280] Some of them suggest that the Board clarify what kind or amount of evidence a party asserting joint-employer status must put forward to meet its burden.[281]

The final rule incorporates the assignment of the burden of proof from paragraph (g). While some commenters urge the Board to clarify how a party asserting joint-employer status can successfully carry its burden in the rule text itself, we find it unnecessary to do so in light of the final rule's statement that the burden must be satisfied on the basis of a preponderance of the evidence. This familiar evidentiary threshold is embodied in the Act itself,[282] has been endorsed by the Supreme Court in similar administrative proceedings,[283] and should satisfy the commenters' desire for guidance regarding the amount of evidence necessary to carry the burden. While these commenters also express a desire for guidance regarding what kinds or types of evidence will be probative of joint-employer status, because we have addressed this question at length in the preceding discussion, we do not find it necessary to modify the proposed rule's treatment of the burden of proof or otherwise alter the text of the final rule in response to these comments.

J. Severability

Proposed paragraph (h) set forth the Board's preliminary view that the provisions of the joint-employer rule should be treated as severable.[284] Proposed paragraph (h) explains that ''[i]f any paragraph of this section is held to be unlawful, the remaining paragraphs of this section not deemed unlawful shall remain in effect to the fullest extent permitted by law.'' [285]

The Board specifically invited commenters to address severability, and several took the opportunity to do so. No commenter suggests that the Board should not generally treat the provisions of the proposed rule as severable. Several commenters agree with the Board's preliminary view of the severability of the provisions of the proposed rule.[286] One commenter takes the view that proposed paragraphs (a) through (c) are interconnected and cannot be severed from one another but that proposed paragraphs (d), (e), (f), and (g) are fully severable.[287] Another commenter agrees that proposed paragraphs (a), (b), and (c) are logically intertwined and so would not be severable from one another.[288] Another group of commenters suggested that the Board promulgate a separate rescission of the 2020 rule and new rule setting forth a new joint-employer standard.[289]

The final rule includes a severability provision modeled after proposed paragraph (h). Paragraph (i) recites that: the ''provisions of this section are intended to be severable'' and that ''[i]f any paragraph of this section is held to be unlawful, the remaining paragraphs and subparagraphs of this section not deemed unlawful are intended to remain in effect to the fullest extent permitted by law.'' As explained below, while the Board believes that the final rule in its entirety is consistent with the National Labor Relations Act and promotes its policies, the Board would adopt the separate portions of the final rule independently, were some other portion or portions held to be invalid.

We note that some commenters urge the Board to make clear that the rescission of the 2020 rule and the promulgation of the final rule's joint-employer standard are intended as separate actions and make a specific finding that the Board views these two actions as severable.[290] The Board's intention is that the two actions be treated as separate and severable. In the Board's view, the 2020 rule is contrary to common-law agency principles and therefore inconsistent with the Act. The Board thus believes it is required to rescind the 2020 rule, as it does today. Even if the 2020 rule were consistent with the Act, the Board would still choose to rescind that rule as failing to fully promote the policies of the Act.

The Board's decision to rescind the 2020 rule is intended to be independent of its promulgation of a new final rule today. If the final rule promulgated here were deemed invalid, the Board would nevertheless adhere to its decision to rescind the 2020 rule. In that event, the Board's view is that the joint-employer standard would revert to the joint-employer standard established in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB 1599 (2015), which immediately preceded the 2020 rule, unless and until that standard were revised through adjudication. In *NLRB* v. *Bell Aerospace Co.,* the Supreme Court recognized the Board's authority, in the first instance, to determine whether to engage in policymaking through rulemaking or adjudication.[291] Consistent with this authority, the Board will proceed to determine joint-employer issues through adjudication, rather than rulemaking, should a reviewing court (1) find that the draft rule properly rescinds the 2020 rule, but (2) proceeds to invalidate the new joint-employer standard.[292]

K. Other Policy and Procedural Arguments [293]

The proposed rule set forth the Board's preliminary view that

[280] Comments of SHRM; Tesla, Inc. As discussed below, some of these commenters argue that the proposed rule's failure to more clearly describe how a party can carry its burden means the rule should also fail on the basis of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* See, *e.g.,* comments of Tesla, Inc. Other commenters approve of the proposed rule's discussion of the burden of proof, noting that the APA requires the Board to assign the burden of proof in the manner proposed. See, *e.g.,* comments of Freedom Foundation; UNITE HERE. We discuss these contentions separately below.

[281] Comments of RILA; SHRM. One commenter makes the related suggestion that the Board clarify that a putative joint employer exercises the requisite level of control if it is in a position to ''influence the primary employer's labor policies.'' Comments of IBT.

[282] 29 U.S.C. 10(c).

[283] *Steadman* v. *SEC,* 450 U.S. 91, 101 (1981).

[284] 87 FR at 54663.

[285] Id.

[286] Comments of AFL–CIO; General Counsel Abruzzo; CWA; SEIU; State Attorneys General; UNITE HERE.

[287] Comments of General Counsel Abruzzo.

[288] Comments of State Attorneys General. This commenter further observes that if paragraphs using the term ''essential terms and conditions of employment'' were stricken, proposed subparagraph (d) would be unnecessary. Id.

[289] Comments of CWA; SEIU. These commenters also suggest that if the Board is inclined to issue the rescission and the new standard in one document, the Board should make clear that these are separate actions and intended to be severable. Id.

[290] See, *e.g.,* comments of AFL–CIO; CWA; SEIU.

[291] 416 U.S. 267, 294 (1974).

[292] The Board recognizes that there are certain outstanding issues regarding the standard for determining joint employers under the Act following the District of Columbia Circuit's remand, as discussed above at fn. 5. The Board will resolve these issues through adjudication as presented in cases not governed by an applicable rule, including cases that arose before the effective date of the 2020 rule.

[293] Two commenters express concerns regarding the participation of Member Wilcox and Member Prouty in this rulemaking proceeding, suggesting that their submission of comments opposing the 2020 Rule while they were in private practice creates, at a minimum, the appearance of a conflict of interest. See comments of IFA; U.S. Chamber of Commerce. Members Wilcox and Prouty reject this challenge. Relevant precedent regarding decisionmakers' participation in rulemaking proceedings confirms that ''an individual should be disqualified from rulemaking only when there has been a clear and convincing showing'' that the official ''has an unalterably closed mind on matters critical to the disposition of the proceeding.'' *Air Transportation Ass'n of America, Inc.* v. *NMB,* 663 F.3d 476, 487 (D.C. Cir. 2011) (quoting *C & W Fish Co.* v. *Fox,* 931 F.2d 1556, 1564 (D.C. Cir. 1991)). Members Wilcox and Prouty find that these commenters' general and speculative suggestions fall short of the clear and convincing showing that either Member Wilcox or Member Prouty ''has an unalterably closed mind'' on matters relevant to this rulemaking proceeding, as the law requires. Id. Further, although the commenters do not specifically argue that the participation of Member

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grounding the joint-employer standard in common-law agency principles would serve the policies and purposes of the Act, including the statement in Section 1 of the Act that one of the key purposes of the Act is to ''encourage the practice and procedure of collective bargaining.'' 29 U.S.C. 151. Several commenters specifically note their approval of the Board's view that the proposed rule will better serve the policies of the Act than did the 2020 rule, with several specifically citing Section 1 of the Act as providing support for the proposed rule.[294] Notably, several commenters writing on behalf of Senators and Members of Congress agree that the proposed rule would further Congressional intent and advance the purposes of the Act.[295] Others argue that the proposed joint-employer standard will advance the Act's purpose of eliminating disruptions to interstate commerce by increasing the possibility that effective collective bargaining will forestall strikes or other labor disputes.[296]

A number of commenters contend that the proposed rule is at odds with the Act because it exceeds the boundaries of the common law.[297] Others argue that the proposed rule threatens to delay employees' remedies because of the need for extensive litigation over joint-employer issues or to otherwise undermine the effective enforcement of other provisions of the Act.[298] A few commenters argue that adopting a broader joint-employer standard increases the risk of enmeshing entities as primary employers in what would otherwise be secondary labor disputes.[299] Some of these commenters specifically urge that the proposed rule could stand in the way of the effective enforcement of portions of the Act that deal specifically with the building and construction industry.[300]

Some commenters disagree that the Act is intended to encourage the practice and procedure of collective bargaining.[301] Others, including our dissenting colleague, agree that encouraging the practice and procedure of collective bargaining is a central goal of the Act but disagree with the Board's view that the proposed rule is appropriately tailored to serve that goal or that the proposed rule is likely to ''achiev[e] industrial peace by promoting stable collective-bargaining relationships.'' [302] Certain of these commenters observe that the proposed joint-employer standard may make it harder for the Board to make appropriate bargaining-unit determinations or protect bargaining-unit boundaries.[303]

Other commenters observe that because the joint-employer standard will only be applied to entities that are found to possess or exercise control over employees' essential terms and conditions of employment, there is no serious risk that the proposed rule would have the effect of enmeshing neutral parties in labor disputes.[304] One commenter adds that employees in industries characterized by pervasive contracting are sometimes hesitant to engage in collective action or exercise their Section 7 rights for fear of inadvertently violating the provisions of Section 8(b)(4) of the Act, 29 U.S.C. 158(d)(4).[305]

As we preliminarily expressed in our NPRM, we are persuaded that rescinding the 2020 Rule is a necessary step toward effectuating the policies of the Act. By unduly narrowing the definition of ''joint employer,'' the 2020 Rule undermined the Act's protections for employees who work in settings where multiple firms possess or exercise control over their essential terms or conditions of employment. We believe that, consistent with the common-law agency principles that must guide the Board in this area, it advances the Act's purposes to ensure that, if they choose, all employees have the opportunity to bargain with those entities that possess the authority to control or exercise the power to control the essential conditions of their working lives. In this regard, we view the joint-employer standard adopted in this final rule as an important effort to ensure the uniform enforcement of the Act in all industries. And, as many commenters represent, our revised standard may particularly benefit vulnerable employees who are overrepresented in workplaces where multiple firms possess or exercise control, including immigrants and migrant guestworkers, disabled employees, and Black employees and other employees of color.

We also wish to address comments we received regarding the interaction between the joint-employer standard and the Act's prohibitions on secondary activity. As one commenter mentioned, the 2020 rule may have risked chilling employees' willingness to exercise their statutory rights for fear of inadvertently running afoul of the prohibitions on secondary activity set out in Section 8(b)(4) of the Act.[306] We hope that the standard adopted in the final rule will provide the necessary clarity to ensure that employees do not fear engaging in protected concerted activity or raising workplace concerns with any entities

Wilcox or Member Prouty in this rulemaking proceeding would violate Executive Order 13989 (Jan. 20, 2021) (the Biden Ethics Pledge), to the extent their argument about an appearance of a conflict of interest is rooted in the Ethics Pledge, Members Wilcox and Prouty reject it because this rulemaking is not a ''particular matter involving specific parties that is directly and substantially related to'' Member Wilcox or Member Prouty's former employers or former clients within the meaning of the Executive Order. They further note that one commenter shares their view, stating that the instant rulemaking ''lacks even the appearance of a conflict of interest.'' Comments of Congressman Scott, et al.

[294] Comments of AFSCME; CAP; CWA; EPI; General Counsel Abruzzo; Lawyers' Committee for Civil Rights Under Law; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; McGann, Ketterman & Rioux; Michigan Regional Council of Carpenters and Millwrights; National Women's Law Center; NELP; State Attorneys General; UBC; UE.

[295] Comments of Senator Murray et al.; Congressman Scott et al. One of these commenters makes the further observation that the proposed rule would better comport with the United States' obligations under international law. See comments of Congressman Scott et al.

[296] Comments of General Counsel Abruzzo; SEIU.

[297] Comments of RILA; Texas Public Policy Foundation.

[298] Comments of McDonald's USA, LLC; North American Meat Institute; RILA.

[299] Comments of Center for Workplace Compliance; COLLE; Home Care Association of America; National Waste & Recycling Association; RILA. Our dissenting colleague likewise argues that the final rule will undermine the enforcement of Sec. 8(b)(4) of the Act.

[300] Comments of ABC; AGC.

[301] Comments of Competitive Enterprise Institute. This commenter argues that the purpose of the Act is narrower: to encourage collective bargaining, but only in those instances where ''certain substantial obstructions'' to interstate commerce ''have occurred'' already. Id. (quoting 29 U.S.C. 151).

We disagree with this commenter's suggestion that a strike or other labor dispute must have already occurred for the Act's policy favoring collective bargaining to come into play. We find support for the broader view of the Act's purposes in Sec. 7, 8, and 9 of the Act, which, respectively: set forth employees' rights to ''self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing,'' 29 U.S.C. 157; make it an unfair labor practice for an employer to refuse to bargain collectively with representatives designated or selected by employees, id. 158(a)(5), 158(d), & 159(a)(5); and direct the Board to conduct representation elections upon the filing of a petition supported by a substantial number of employees who wish to be represented for the purposes of collective bargaining, id. 159. None of these sections states or implies that a labor dispute or strike is a precondition to any of these rights or duties.

[302] *Auciello Iron Works, Inc.* v. NLRB, 517 U.S. 781, 790 (1996). See comments of CDW; COLLE; HR Policy Association; IFDA; Libertas Institute; National Waste & Recycling Association; RILA; Trucking Industry Stakeholders. Because many of these commenters advance empirical arguments or discuss their experience with bargaining when multiple firms are involved, we discuss these comments at greater length below.

[303] Comments of Home Care Association of America; SHRM.

[304] Comments of General Counsel Abruzzo.

[305] Comments of Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; UE.

[306] 29 U.S.C. 158(b)(4).

that possess or exercise control over their essential terms and conditions of employment. Of course, we will continue to vigorously enforce the Act's prohibitions on secondary activity in situations where multiple firms do not share or codetermine those matters governing particular employees' essential terms and conditions of employment.[307]

Certain commenters raise arguments regarding whether the proposed rule meets the requirements of the Constitution or the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Some commenters suggest that, pursuant to the major-questions doctrine, as summarized in *West Virginia* v. *EPA,* 597 U.S. __, 2022 U.S. LEXIS 3268 (2022), the Board should ''hesitate before concluding that Congress'' conferred authority on it to define ''joint employer'' because of the concept's ''economic and political significance.'' [308]

Other commenters argue that the major-questions doctrine does not present an obstacle to the current rulemaking effort.[309] One commenter notes that, since the earliest days of the Act, the Board has, with Supreme Court and other reviewing courts' approval, applied the Act to cover joint-employment relationships, eliminating any doubt that Congress intended for the ambit of the Act to extend to joint employers.[310]

Based on the Board's long history of analyzing joint-employment relationships and regulating entities it finds to be joint employers, we find that the major-questions doctrine does not foreclose our decision to put forward a new interpretation of the definition of ''employer'' in Section 2(2) of the Act. Not only has the Board historically defined ''joint employer'' through case-by-case adjudication, section 6 of the Act provides clear authority to the Board to promulgate rules to ''carry out the provisions of [the] Act.'' 29 U.S.C. 156. We therefore see no constitutional impediment to continuing the Board's decades-long effort to clarify and refine its joint-employer standard.

A group of commenters argue that the proposed rule is arbitrary and capricious because it does not sufficiently analyze why the standard set forth in the 2020 rule was inadequate or because it fails to provide adequate guidance.[311] Some of these commenters, quoting *Motor Vehicle Manufacturers Association of the United States, Inc.* v. *State Farm Automobile Insurance Co.,* 463 U.S. 29, 43 (1983), contend that the Board has either ''relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'' [312] Our dissenting colleague similarly criticizes the majority for failing to justify its departure from the 2020 rule and for providing insufficient guidance to regulated parties.

Some commenters suggest that the proposed rule will lead to excessive litigation of joint-employer issues,[313] potentially diminishing the value of proceeding through rulemaking and suggesting that case-by-case adjudication might be a better approach. Some commenters who are generally supportive of the proposed rule's approach to the joint-employer inquiry also express reservations about the proposal to promulgate a new standard through rulemaking.[314]

Some commenters criticize the Board for abandoning the 2020 rule prematurely, arguing that because the Board had not yet had occasion to apply the rule, the Board cannot find fault with it and should not rescind it.[315] A few commenters suggest that the Board should await federal court review of the 2020 rule before rescinding it or consider other alternatives before proceeding further.[316] Certain

[307] Contrary to our dissenting colleague, we see little risk of enmeshing neutral employers in labor disputes. When more than one entity jointly employs particular employees, those entities are not neutral, and the prohibitions on secondary activity do not apply, regardless of what joint-employer standard is applied.

[308] Comments of ABC; CDW; COLLE; IFA; Independent Bakers Association; International Warehouse Logistics Association; RILA; U.S. Chamber of Commerce.

Several of these commenters also advance an argument based on the nondelegation doctrine. See comments of COLLE; IFA. One such commenter specifically argues that Sec. 6 of the Act does not delegate sufficiently clear authority to the Board to define ''joint employer'' for purposes of the Act. See comments of IFA. As discussed in Section III above, we are confident that the Board has authority to ''carry out'' the many provisions of the Act that are affected by how the Board defines ''joint employer'' through rulemaking. The Supreme Court has never cast doubt on the breadth of the Board's rulemaking authority. Instead, it has repeatedly endorsed the Board's use of rulemaking as a policymaking tool, including in contexts involving the scope and nature of bargaining obligations. See, *e.g., American Hospital Assn.* v. *NLRB,* 499 U.S. 606 (1991).

[309] Comments of CWA; UNITE HERE; reply comments of AFL–CIO.

[310] Comments of AFL–CIO (citing *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 481 (1964)); *Long Lake Lumber Co.,* 34 NLRB 700, 717 (1941), enfd. *NLRB* v. *Long Lake Lumber Co.,* 138 F.2d 363 (9th Cir. 1943); *Franklin Simon & Co.,* 94 NLRB 576, 579 (1951)).

[311] Comments of ABC; CDW; COLLE; IFA; IFDA; International Bankshares Corporation; National Association of Convenience Stores; North American Meat Institute; Restaurant Law Center and National Restaurant Association; U.S. Chamber of Commerce.

Several commenters make the specific observation that the proposed rule is arbitrary because it does not impose an express requirement that joint-employer status be proven by ''substantial evidence.'' See comments of CDW; RILA; SHRM; Tesla, Inc. As discussed above, we reject the view that the proposed rule failed to impose a ''substantial evidence'' obligation or was otherwise arbitrary. These commenters, effectively reading discrete subparagraphs of the proposed rule in isolation, suggest that ''any evidence'' of control will be sufficient to establish status as a joint employer under the proposed rule. However, as discussed more fully above, this view overlooks the proposed rule's allocation of the burden of proof and requirement that a party asserting joint-employer status must demonstrate that an entity is a joint employer by a ''preponderance of the evidence.''

Another commenter urges that the Board's statements in the preamble to the proposed rule regarding the importance of workplace health and safety during the Covid-19 pandemic are unsupported and therefore render the inclusion of health and safety as an essential term or condition of employment, and implicitly the rule as a whole, arbitrary and capricious. See comments of North American Meat Institute. As addressed extensively in our discussion of essential terms and conditions of employment above and in our discussion of the final rule below, the Board has benefited from the input of stakeholders and organizations that confirmed the Board's preliminary views that workplace health and safety should be treated as an essential term or condition of employment and that the Covid-19 pandemic exacerbated certain employees' health and safety concerns at work. We therefore reject this commenter's view that it was arbitrary or capricious for the Board to take these significant real-world developments into account when considering how to modify its approach to defining ''joint employer.''

[312] Comments of COLLE; Independent Bakers Association; U.S. Chamber of Commerce.

[313] Comments of American Hospital Association; American Staffing Association; Bicameral Congressional Signatories; Center for Workplace Compliance; HR Policy Association; IFA; International Bancshares Corporation; McDonald's USA, LLC; Modern Economy Project; North American Meat Institute; The Mackinac Center for Public Policy.

[314] Comments of AFL–CIO; IUOE; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry; United Steelworkers.

[315] Comments of COLLE; Elizabeth Boynton; FreedomWorks Foundation; Goldwater Institute; Job Creators Network Foundation; National Association of Convenience Stores; North American Meat Institute; The Thomas Jefferson Institute for Public Policy; U.S. Chamber of Commerce; Wyoming Bankers Association. We note that in the time since the comment period closed, the Board has applied the 2020 rule. See *Cognizant Technology Solutions U.S. Corp. & Google LLC,* 372 NLRB No. 108 (2023).

[316] Comments of Bicameral Congressional Signatories; Bipartisan Senators; CDW; IFA; Independent Bakers Association; U.S. Chamber of Commerce.

Some commenters suggest that there is no need to promulgate a new joint-employer standard through rulemaking if the Board's goal is to return to the preexisting common-law standard. See, *e.g.,* comments of CDW; IFA. As described above, while we believe the final rule is firmly grounded in common-law agency principles, we see a

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commenters point to reliance interests related to the 2020 rule, with some suggesting that the Board delay the effective date of the final rule to accommodate these concerns.[317] For example, one commenter states that many staffing agencies entered into contracts using the 2020 rule as their guide.[318] Others question whether any material legal or factual change has occurred since the 2020 rule was promulgated that would justify the proposed changes to the joint-employer standard or otherwise suggest that the proposed rule failed to offer a reasoned explanation for a policy change.[319] A significant number of these commenters propose that the Board withdraw the proposed rule entirely and leave the 2020 rule intact.[320] Some of these commenters suggest, in the alternative, that the Board solely rescind the 2020 rule.[321]

Other commenters, citing *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009), observe that the Board is permitted to advance new interpretations of the Act so long as it demonstrates good reasons for its new policy.[322] One commenter argues that any reliance interests associated with the 2020 rule must be highly attenuated, given that the Rule has not yet been applied and because the NPRM put the public on notice that the Board was considering rescinding and/or replacing the 2020 rule.[323]

First, we reject the argument that it is premature to rescind the 2020 rule or to promulgate a new joint-employer standard. As noted above, so long as the Board sets forth good reasons for its new policy and sets forth a reasoned explanation for the change, Supreme Court precedent permits the Board to offer new interpretations of the Act.[324] We have done so throughout our discussion of our justifications for rescinding the 2020 rule and promulgating a new standard. In addition, as one commenter points out,[325] the APA does not impose any requirement that an agency apply a rule prior to replacing it, provided that the agency otherwise identifies problems with the rule and explains why it resolves the issue in the manner it does. Another commenter notes that the 2020 rule is likewise vulnerable on APA grounds, as its definition of ''joint employer'' is ''not in accordance with law.'' [326]

Next, while some commenters encourage the Board to await judicial review of the 2020 rule before taking further action, we remain of the view that the 2020 rule introduced control-based restrictions that are inconsistent with common-law agency principles, as reflected in the District of Columbia Circuit's statements in *BFI* v. *NLRB,* 911 F.3d at 1211–1215, and in *Sanitary Truck Drivers,* 45 F.4th at 46–47. For this reason, we prefer to proactively rescind the 2020 rule and to articulate a new standard that better comports with the requirements of the common law.

Further, while we recognize that some parties may have relied on the 2020 rule in structuring their business practices, we do not find such reliance interests sufficiently substantial to make us reconsider rescinding the 2020 rule and promulgating a new standard. We agree with the view of one commenter that at least as of the date of the NPRM, any such reliance on the 2020 rule cannot be deemed reasonable, as the Board indicated its preliminary view that rescinding or replacing that standard would be desirable as a policy matter.[327] Moreover, because we think that the final rule accurately aligns employers' statutory obligations with their control of essential terms and conditions of employment of their own common-law employees, we conclude that to the extent that business entities may have structured their contractual relationships under prior, overly restrictive versions of the joint-employer standard, any interest in maintaining such arrangements is not sufficiently substantial or proper as a matter of law.

One commenter charges that the Board is not free to promulgate a standard defining the terms ''employer'' and ''employee,'' arguing that both the 2020 rule and the proposed rule trench on the federal courts' authority to interpret these terms.[328] We respectfully disagree with this commenter's view of the Board's role in carrying out the provisions of the Act pursuant to Section 6 of the Act. We further note that, apart from this procedural disagreement, the final rule is consistent with the spirit of this commenter's argument, as the final rule seeks to ground the Board's analysis in the common-law agency principles that federal courts have instructed the Board to apply in construing the statutory definitions contained in section 2 of the Act. As explained above, the Board will draw on the Supreme Court's binding, authoritative statements regarding the common law of agency and look to other judicial common-law precedent as primary sources of authority governing the Board's interpretation. Of course, the Board's joint-employer determinations in individual cases are

determinate advantage in replacing the 2020 rule with a new standard that, like it, provides a definite and readily available standard. We note that by modifying the final rule to provide for an exhaustive list of essential terms and conditions of employment, we also introduce a new limiting principle that was not a feature of the Board's joint-employer doctrine, which is responsive to one of these commenter's core concerns regarding the proposed rule. See comments of IFA. Announcing this new limiting principle therefore provides another justification for promulgating a new rule rather than simply rescinding the 2020 rule.

[317] Comments of Costa Enterprises; IFA; McDonald's USA, LLC; New Civil Liberties Alliance & Institute for the American Worker; Restaurant Law Center and National Restaurant Association; Texas Public Policy Foundation; U.S. Chamber of Commerce; Yum! Brands. Certain of these commenters do not specifically identify reliance interests related to the 2020 Rule, but instead more generally suggest they structured their businesses in reliance on Board law prior to *BFI.* See, *e.g.,* comments of Costa Enterprises; McDonald's USA, LLC. With respect to the request to delay the effective date of the final rule, we note that, as some other commenters urge, see, *e.g.,* comments of the U.S. Chamber of Commerce, the rule is subject to Congressional review and that, as a result, the effective date will await the culmination of that process.

[318] See comments of Texas Public Policy Foundation.

[319] Comments of California Policy Center; COLLE; Empire Center for Public Policy; North American Meat Institute; Subcontracting Concepts, LLC; U.S. Chamber of Commerce; Wyoming Bankers Association.

[320] Comments of ABC; AGC; American Hotel & Lodging Association; Americans for Fair Treatment; Americans for Prosperity Foundation; American Staffing Association; ANB Bank; Bicameral Congressional Signatories; CDW; Center for Workplace Compliance; COLLE; Competitive Enterprise Institute; HR Policy Association; Home Care Association of America; IFA; IFDA; Independent Electrical Contractors; Independent Women's Forum; International Bancshares Corporation; International Warehouse Logistics Association; LeadingAge; McDonald's USA, LLC; Modern Economy Project; NAHB; NAM; NATSO & SIGMA; National ACE; National Alliance for Public Charter Schools; National Association of Convenience Stores; National Waste & Recycling Association; NFIB; Pacific Legal Foundation; Restaurant Law Center and National Restaurant Association; RILA; Rio Grande Foundation; Senator James M. Inhofe; Taxpayers Protection Alliance; Texas Public Policy Foundation; The Mackinac Center for Public Policy; U.S. Chamber of Commerce; Yum! Brands.

[321] Comments of CDW; HR Policy Association; McDonald's USA, LLC; Pacific Legal Foundation.

[322] Comments of State Attorneys General.

[323] Comments of General Counsel Abruzzo.

[324] See *Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 221 (2016); *FCC* v. *Fox Television Stations,* 556 U.S. at 515.

[325] Comments of CWA.

[326] Comments of State Attorneys General (citing 5 U.S.C. 702(2)(A)). Another commenter makes a similar observation, noting that leaving the 2020 rule intact is not an option the Board can properly consider in light of the District of Columbia Circuit's decisions in *BFI* v. *NLRB* and *Sanitary Truck Drivers.* See AFL–CIO reply comments.

[327] See comments of General Counsel Abruzzo.

[328] Comments of Pacific Legal Foundation. This commenter also appears to suggest that it is unconstitutional for the Board to interpret the Act through rulemaking, though it does not cite any precedent in support of that view. Id.

ultimately reviewable by the federal courts.

Other commenters urge that the proposed rule is overly vague, that it does not meet its stated goal of providing a ''definite, readily available standard,'' [329] or that it does not meet the requirements of fair notice and due process because the proposal is not clear enough that parties can reasonably ascertain to whom it applies.[330] Many of these commenters specifically pointed to the open-ended list of essential terms and conditions of employment as a feature of the proposed rule that renders it impermissibly vague.[331] Some commenters argue that because *BFI* created a vague definition of joint employer, they fear the proposed rule, which codifies key elements of that test regarding the significance of forms of indirect and reserved control, would likewise create ambiguities and uncertainty.[332] Others explain their view that the absence of practical guidance, illustrative examples, hypothetical questions, or other interpretive aids in the proposed rule undermines the proposal's effectiveness and will fail to provide stakeholders with the guidance they need to meet their compliance obligations.[333]

Other commenters take the contrary view, arguing that the flexibility and adaptability of the proposed rule is one of its greatest strengths.[334] Some of these commenters argue that the Board should avoid adopting too rigid a definition of joint employer, noting that changing workplace conditions will require refinement of the standard as it is applied in new factual situations.[335]

We have carefully considered the many comments we received seeking modifications to the proposed rule geared toward ensuring greater clarity and predictability in the Board's joint-employer determinations. As mentioned elsewhere, while we acknowledge some commenters' position that the 2020 rule fostered greater predictability and certainty in the Board's joint-employer determinations, we have determined that rule is not in accordance with the common-law agency principles we are bound to apply in analyzing whether entities are joint employers under the Act. As a result, we cannot maintain that standard. However, we believe that the modifications to the text of the proposed rule, along with the comprehensive responses we offer in response to the helpful input we received during the public-comment process, will facilitate parties covered by the Act in understanding and meeting their compliance obligations and reduce uncertainty and litigation.

Some commenters argue that the Board's proposed standard will create inconsistencies with other regulators' joint-employer standards.[336] As discussed in Section I.D. above, our dissenting colleague contends that federal courts have applied different standards when determining joint-employer status under other statutes that define ''employer'' in common-law terms. Other commenters observe that joint-employer standards similar to the one set forth in the proposed rule are commonplace in the context of other labor and employment statutes.[337] One commenter describes the Equal Employment Opportunity Commission (EEOC)'s approach to analyzing whether multiple firms jointly employ particular employees as taking forms of indirect and reserved control into account in much the same manner as does the proposed rule.[338] A number of commenters discuss the Department of Labor's approach to defining ''joint employer'' for purposes of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203 *et seq.*,[339] though several commenters observe that the definition of ''employee'' under FLSA is broader than the common-law standard used in the NLRA.[340]

Although we agree with the view of several commenters that certain other Federal agencies' joint-employer standards are broadly consistent with the Board's proposed rule, we are guided here by the statutory requirement that the Board's standard be consistent with common-law agency principles and the policies of the National Labor Relations Act.[341] Contrary to our dissenting colleague's suggestion, our standard is rooted in common-law agency principles, not the economic-realities test used to interpret ''employer'' for purposes of the Fair Labor Standards Act. Cf. *NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256 (1968) (discussing limiting impact of Taft-Hartley amendments on the interpretation of the Act).

Other commenters raise concerns regarding the possibility that the proposed joint-employer standard will stand in tension with state-law definitions of ''joint employer.'' One commenter argues that state authorities with responsibility for administering state-law equivalents of the Act make joint-employer determinations on different grounds than those set forth in the proposed rule.[342]

State labor and employment law interpretations of ''joint employer'' also

[329] 87 FR 54645.

[330] Comments of CDW; California Policy Center; Colorado Bankers Association; Competitive Enterprise Institute; HR Policy Association; IFA; International Bancshares Corporation; National Small Business Administration; PPAI; Reid's, Inc. d/b/a Crosby's; Restaurant Law Center and National Restaurant Association; Tesla, Inc.; Yum! Brands.

[331] See, *e.g.,* comments of Americans for Prosperity Foundation; HR Policy Association; Independent Women's Forum; International Bancshares Corporation; LeadingAge; Libertas Institute; McDonald's USA, LLC; NAM; National Grocers Association; National Roofing Contractors Association; Restaurant Law Center and National Restaurant Association; The Thomas Jefferson Institute for Public Policy; U.S. Chamber of Commerce. Some of these commenters make the further point that the vagueness of the proposed rule will require small businesses to retain counsel or bear other compliance, legal, and administrative costs. See, *e.g.,* comments of Energy Marketers of America; National Lumber & Building Material Dealers Association; The Buckeye Institute; Yankee Institute for Public Policy.

[332] Comments of American Pizza Community; Energy Marketers of America; International Warehouse Logistics Association; National Alliance for Public Charter Schools; NATSO & SIGMA; National Taxpayers Union; PPAI; The Buckeye Institute; Yanxu Yang.

[333] Comments of Asian McDonald's Operators Association; NAHB; National Black McDonald's Operators Association; U.S. Black Chambers, Inc.; U.S. Chamber of Commerce.

[334] Comments of McGann, Ketterman & Rioux.

[335] Comments of McGann, Ketterman & Rioux.

[336] Comments of New Civil Liberties Alliance & Institute for the American Worker.

[337] Comments of National Partnership for Women & Families; The Leadership Conference on Civil and Human Rights.

[338] Comments of AFL–CIO (''[A]ll of the circumstances in the worker's relationship with each business should be considered to determine if either or both should be deemed [their] employer.'') (quoting EEOC Notice No. 915.002, *Enforcement Guidance: Applications of EEO Law to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms at Coverage Issues* (Dec. 3, 1997), available at *https://www.eeoc.gov/laws/guidance/enforcement-guidance-application-eeo-laws-contingent-workers-placed-temporary*).

[339] One commenter cites approvingly to the four-factor joint-employer test the Department of Labor adopted in 2020 and encourages the Board to look to that test for guidance in modifying the proposed rule. See comments of National Demolition Association. We observe that on July 30, 2021, the Department of Labor issued a final rule rescinding the joint-employer standard this commenter references. See *Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule,* 86 FR 40939 (July 30, 2021).

See also comments of National Retail Federation (discussing *Singh* v. *7-Eleven, Inc.,* 2007 U.S. Dist. LEXIS 16677 (N.D. Cal. Mar. 7, 2007), and *Wright* v. *Mountain View Lawn Care, LLC,* 2016 U.S. Dist. LEXIS 31353 (W.D. Va. Mar. 11, 2016), two federal court decisions finding that brand-recognition standards at franchise businesses did not create a joint employment relationship for purposes of the FLSA or Title VII of the Civil Rights Act of 1964, respectively).

[340] Comments of New Civil Liberties Alliance & Institute for the American Worker.

[341] In this regard, we confirm that, contrary to a concern one commenter raises, the final rule solely relates to the definition of ''joint employer'' under the NLRA. See comments of American Health Care Association & National Center for Assisted Living.

[342] Comments of Modern Economy Project; National Alliance for Public Charter Schools; Subcontracting Concepts, LLC.

vary. Some commenters find parallels to the proposed rule in certain state definitions of ''joint employer.'' [343] One commenter in particular observes that Illinois Department of Labor regulations incorporate similar common-law principles to those set out in the proposed rule.[344] By contrast, one commenter notes that New York State uses a standard for determining joint-employer status for purposes of public-sector labor relations that more closely corresponds to the 2020 rule.[345]

We are not persuaded that these commenters' concerns about the possibility of tension with state-law definitions of ''joint employer'' provide a sufficient reason to abandon our rulemaking effort. Certain of these commenters appear to suggest the possibility for a state-by-state patchwork of interpretations of the joint-employer standard if state courts apply or interpret the Board's joint-employer standard. We respectfully note that, under principles of federal labor law preemption, the Board has exclusive jurisdiction to administer the Act. See *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 245 (1959) (''When an activity is arguably subject to [section] 7 or [section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.''). A group of 18 State Attorneys General argues that it relies on the Board's enforcement of private-sector labor law to protect employees in their States.[346]

L. Empirical Arguments

As stated above, one of the goals of the proposed rule is to reduce uncertainty and litigation over questions related to joint-employer status. Some commenters challenge the premise of the proposed rule, predicting that the proposed rule will fuel time-consuming and costly litigation.[347] One of these commenters points to data that it represents shows that after the Board's *BFI* decision in 2015, petitions and unfair labor practice charges raising joint employer issues increased dramatically at the Board.[348] Some respond to this contention by noting that findings of joint-employer status remained constant during this period.[349]

While we have carefully considered parties' arguments that the 2020 rule fostered predictability and reduced litigation, we nevertheless conclude that we are foreclosed from maintaining the joint-employer standard set forth in that rule because it is not in accordance with the common-law agency principles the Board is bound to apply in making joint-employer determinations. That said, we note one commenter's view that findings of joint-employer status did not markedly increase following the Board's decision in *BFI.* In addition, we hope to have minimized the risk of uncertainty or increased litigation of joint-employer questions by comprehensively addressing the comments we received in response to the proposed rule and by modifying the proposed rule in several respects to enhance its clarity and predictability.

Some commenters argue that the 2020 rule encouraged business cooperation and led to partnerships that benefit small businesses.[350] These commenters take the view that the proposed rule would diminish these beneficial practices or make it harder for companies to communicate or cooperate without risking a finding that they are joint employers.[351] Our dissenting colleague also argues that changing the joint-employer standard will make it more difficult for businesses to cooperate and share resources. In particular, some commenters predict that the Board's proposed joint-employer standard will disincentivize conduct that tends to improve the workplace, like training, safety and health initiatives, and corporate social responsibility programs.[352] Others suggest that the proposed rule will lead to uncertainty about obligations, creating a business climate of risk and increasing costs, especially in the third-party logistics industry.[353] Some commenters predict that the proposed rule could discourage larger companies from entering into contracts with third parties to perform work.[354] Others specifically note that the proposed rule could make it more difficult for companies to seek temporary employees to address labor shortages or deal with fluctuating seasonal demand for labor.[355]

We have seriously considered commenters' concerns, especially those of individuals and small business owners, regarding how the joint-employer standard we adopt today might influence their business relationships. Insofar as the Act itself requires the Board to conform to common-law agency principles in adopting a joint-employer standard, these concerns seem misdirected. Nevertheless, we hope that the modifications to the proposed rule and clarifications we offer today will alleviate some of these concerns. We also note that the Board's definition of joint employer, which implements common-law agency principles, does not preclude or intend to preclude any particular kinds of business arrangements or relationships.

A number of commenters, including many individuals, argue that the proposed rule would negatively affect the franchise industry.[356] In particular, some individuals express the view that a broader joint-employer standard may inhibit franchisors' abilities to help them develop the skills necessary to manage successful businesses.[357] Others suggest that one benefit of the franchise model is the independence it affords franchisees. They argue that the proposed rule might encourage franchisors to take a more active role in the day-to-day operation of franchise businesses, undermining franchisees'

[343] See, *e.g.,* comments of State Attorneys General.

[344] Comments of State Attorneys General.

[345] Comments of Empire Center for Public Policy.

[346] Comments of State Attorneys General. We note that the signatories of this comment included the Attorneys General of California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, and Washington.

[347] Comments of IFA; McDonald's USA, LLC; North American Meat Institute. Our dissenting colleague also anticipates that the final rule will lead to more extensive litigation of joint-employer questions.

[348] Comments of IFA.

[349] See, *e.g.,* reply comments of AFL–CIO.

[350] Comments of CDW; COLLE; International Warehouse Logistics Association; NAHB; National Association of Convenience Stores; NFIB; National Retail Federation.

[351] Comments of CDW; COLLE; NAHB; NAM; National Retail Federation; National Small Business Association; Washington Legal Foundation.

[352] Comments of American Trucking Associations; HR Policy Association; NAM; National Waste & Recycling Association.

[353] Comments of International Warehouse Logistics Association.

[354] Comments of National Lumber & Building Materials Dealers Association; National Small Business Association.

[355] Comments of AHA; National Taxpayers Union. Certain commenters stress that labor shortages have been acute in hospital and healthcare industries since the onset of the Covid-19 pandemic, making reliance on contract labor especially important. See, *e.g.,* comments of AHA.

[356] See, *e.g.,* comments of Americans for Tax Reform; Mauro Alvarez; Kermit Begly; Rachel Greszler; Nichole Holles; Illinois Policy Institute; Jean Johns; Job Creators Network Foundation; Neil Kellen; McDonald's USA, LLC; Daniel Miller; Russell Moss; NATSO & SIGMA; The James Madison Institute; The Mackinac Center for Public Policy; Emily Wiechmann; Yankee Institute for Public Policy. One commenter argues that the franchise business model has expanded access to home care services in the United States and expresses concerns about whether the proposed rule could harm access to home care services. See comments of Home Care Association of America.

[357] See, *e.g.,* comments of Costa Enterprises; Linda Bowin; David Denney; Ali Nekumanesh; Shelley Nilsen.

autonomy and creativity.[358] A number of groups writing on behalf of Black franchisees, franchisees of color, veteran franchisees, and women and LGBTQ franchisees argue that the franchise model has been especially successful in improving their members' lives and economic prospects.[359] They, and other commenters, express concerns about the effect of the proposed rule on franchisees and small business owners of color.[360] Groups representing franchisors, a bipartisan group of United States Senators and Members of Congress, and the United States Small Business Administration Office of Advocacy echo these concerns.[361] A number of commenters cite an economic analysis commissioned by the International Franchise Association that sought to demonstrate the cost of the Board's 2015 *BFI* standard on the franchise business model.[362] Others, including some individuals and franchisees, make similar arguments, stating that the proposed rule could increase costs for franchise business owners if franchisors engage in ''distancing behaviors'' and are no longer willing to provide franchisees with training and recruitment materials, employee handbooks, or educational materials on new regulations.[363]

By contrast, other commenters dispute the contention that the proposed rule will negatively affect the franchise business model.[364] Several commenters specifically address the IFA study regarding the costs associated with the 2015 *BFI* standard.[365] One of these commenters disputes the methodology used in preparing the analysis, noting that there were ''serious concerns about the survey design and statistical analysis.'' [366] Another argues that, in 2015 and 2016, following *BFI* and the Department of Labor's promulgation of a broader joint-employer standard, franchise employment grew by 3 percent and 3.5 percent, outpacing growth in other private, nonfarm employment, undermining the argument that the proposed rule would slow job growth in franchise businesses.[367]

We have seriously considered the arguments by commenters advancing different views regarding the accuracy and explanatory force of the IFA study. We do not believe that the study provides an appropriate or sufficient basis to abandon our effort to rescind the 2020 rule and promulgate a new joint-employer standard. There is no suggestion in the Act's text or legislative history that the Board has the authority to depart from common-law agency principles in adopting and applying a joint-employer standard because of its predicted effect on a particular industry or industries, irrespective of statutory policy or Congressional intent.

Other commenters make qualitative empirical arguments regarding the proposed rule's potential positive effect on franchise businesses. These commenters argue that the proposed rule might improve operations at franchise businesses and make franchise businesses better and safer workplaces.[368] Several commenters are employees who work for franchise businesses, and they argue that franchisors exercise significant control over the day-to-day details of their working lives.[369] These comments arguably illuminate how forms of reserved and indirect control can implicate essential terms and conditions of employment, but the final rule is not based on the Board's assessment of the new standard's effect—negative or positive—on franchise businesses, as that consideration has no clear basis in the Act.

A group of commenters argue that the proposed rule will increase compliance and administrative costs for general contractors, subcontractors, and other construction industry employers.[370] Some of these commenters raise concerns that these increased costs will diminish opportunities for growth for vendors or smaller contractors.[371] Several commenters also raise concerns about the possibility that the Board will find that individuals who provide services to other entities as independent contractors are joint employers with those entities.[372] They also argue that the proposed rule risks destabilizing longstanding multiemployer bargaining practices in the construction industry and could potentially create new withdrawal liability in the context of multiemployer defined-benefit pension plans.[373] Certain of these commenters take the view that the 2020 rule did not adversely affect labor peace and implicitly suggest that the proposed rule might lead to an increase in labor

[358] Comments of Escalante Organization; National Taxpayers Union; The Buckeye Institute; Yanxu Yang. We note in particular that some individuals express concerns that instead of being treated as independent business owners, the joint-employer rule will cause larger firms to treat them as employees or micromanage their work. See, *e.g.,* comments of Amber Niblock; Kerry Stone; Tom Webster.

[359] Comments of Association of Women's Business Centers; IFA; National Black McDonald's Operators Association; U.S. Black Chambers, Inc.

[360] Comments of COLLE; IFA; U.S. Black Chambers, Inc.

[361] Comments of Bicameral Congressional Signatories; Bipartisan Senators; IFA; McDonald's USA, LLC; National ACE; National Retail Federation; SBA Office of Advocacy; Yum! Brands. As some of these commenters note, recent Census data shows that 30.8 percent of franchise businesses are minority owned, compared to 18.8 percent of nonfranchised businesses. See, *e.g.,* comments of Bicameral Congressional Signatories. The comments of McDonald's USA, LLC note that ''31% of [its] U.S. franchisees are minority-owned businesses, and that 29% are women-owned businesses.''

In particular, the SBA Office of Advocacy expresses concern that the proposed rule could violate ''a new federal mandate to bolster the ranks of underserved small business federal contractors, including women-owned, Black-owned, Latino-owned, and other minority-owned small businesses.'' Comments of SBA Office of Advocacy (citing Press Release, The White House, Statements and Releases, FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners, (Dec. 2, 2021)). Other commenters echo the SBA Office of Advocacy's concern regarding the possibility of conflicts between the proposed rule and federal contracting law and practice. Comments of CDW; COLLE; National Retail Federation; Thomas Jefferson Institute for Public Policy; U.S. Black Chambers, Inc. One individual commenter expresses a concern that the proposed rule might make it more difficult for small businesses to bid for and win government contracts. See comments of Sherri Smalling.

[362] Comments of Bipartisan Senators; Costa Enterprises; FreedomWorks Foundations; IFA; Libertas Institute; McDonald's USA, LLC; North American Meat Institute; Senator Inhofe; U.S. Black Chambers, Inc.; U.S. Chamber of Commerce.

[363] Comments of Asian McDonald's Operators Association; Escalante Organization; FreedomWorks Foundations; Goldwater Institute; IFA; Job Creators Network Foundation; McDonald's USA, LLC; NFIB; National Black McDonald's Operators Association; National Association of Convenience Stores; National Retail Federation; Restaurant Law Center and National Restaurant Association; SBA Office of Advocacy; The Mackinac Center for Public Policy. See also, *e.g.,* comments of Neil Kellen; Carole Montgomery; Deborah Robart; James Weaver; Yanxu Yang.

[364] Comments of Center for Law and Social Policy; General Counsel Abruzzo.

[365] Comments of EPI; reply comments of AFL–CIO. These commenters cross-reference a set of reply comments submitted by EPI in response to the Board's 2018 joint-employer notice of proposed rulemaking, available at *https://www.regulations.gov/comment/NLRB-2018-0001-29072.*

[366] Comments of EPI.

[367] Comments of CAP.

[368] Comments of Center for Law and Social Policy; Daniel Struckhoff.

[369] Comments of Richard Eiker.

[370] Comments of ABC; AGC; National Demolition Association; Rachel Greszler. Some of these commenters suggest that the rule will require parties to renegotiate or revise contracts, resulting in significant transaction costs. See comments of American Trucking Associations; Rachel Greszler.

[371] Comments of ANB Bank; CDW; Competitive Enterprise Institute; Independent Electrical Contractors; International Warehouse Logistics Association; Job Creators Network Foundation; NFIB; National Taxpayers Union. One commenter suggests that these dynamics may cause consolidation in the grocery market, harming independent grocers and consumers alike. See comments of National Grocers Association.

[372] Comments of Andrea Karns; National Association of Realtors.

[373] Comments of ABC; AGC.

disputes.[374] Our dissenting colleague likewise takes the position that changing the joint-employer standard may adversely affect certain businesses, including by discouraging ''efforts to rescue failing businesses'' through successorship.

As expressed elsewhere, we are sensitive to commenters' concerns that the joint-employer standard we adopt in this final rule might have unwanted effects on their businesses. In particular, we have thoroughly reviewed submissions from individuals and small business owners raising such concerns. However, we are not persuaded that these concerns reflect considerations that, as a statutory matter, may determine the Board's choice of a joint-employer standard. As we have explained, the Board must adhere to common-law agency principles. These commenters have failed to explain how, consistent with the Act's requirements and statutory policy, the Board could treat their concerns as determinative. In addition, to the extent some of these commenters explain that they prefer the 2020 rule to the proposed rule, we reiterate our view that we are foreclosed from maintaining the 2020 rule because it is inconsistent with common-law agency principles and does not advance the policies of the Act.

Other commenters raise practical objections to the proposed joint-employer standard, urging the Board to consider the potentially harmful effect of enmeshing multiple firms in collective bargaining. These commenters generally argue that bargaining with more than one firm will be cumbersome, unworkable, or otherwise undesirable.[375] Our dissenting colleague similarly argues that bargaining involving multiple firms may be stymied by conflicts among the firms and will be less likely to culminate in workable collective-bargaining agreements. Others, including some individuals, small business owners, and groups that represent the interests of women small business owners and small business owners of color, express concern that the joint-employer standard will limit opportunities for new business or job creation or otherwise diminish their economic opportunities or harm consumers.[376]

By contrast, certain commenters suggest that a broad joint-employer standard will ensure that the proper parties are present for bargaining and may help smaller entities bear only their share of the liability for conduct that violates the Act.[377] Others note that some commenters' criticisms of the proposed rule would apply to any joint-employer standard, since they principally relate to the dynamics of bargaining that involves more than one firm.[378] In this regard, they contend, the criticisms are not unique to the proposed rule and should not weigh against the Board's rescission of the 2020 rule or promulgation of a new joint-employer standard.

Other commenters argue that ensuring the appropriate entities are recognized as joint employers is essential to deterring practices in certain industries, including staffing, temporary warehouse work, and food processing, that they represent have led to the underpayment of wages, worker misclassification, and unsafe working conditions.[379] Several of these commenters observe that these harmful practices disproportionally affect Black employees, Latinx employees, immigrant employees and migrant guestworkers, women and LGBTQ employees, and employees of color.[380] A number of organizations also commented on the use of ''labor broker'' arrangements in the construction industry and how the proposed joint-employer standard might ensure that all entities who possess the authority to control or exercise control over construction industry employees' essential terms and conditions of employment fully comply with their obligations under the Act and other labor and employment statutes.[381]

Specifically, some commenters discuss the ''fissuring'' of the workplace and note that modern business practices often result in multiple firms sharing control over aspects of employees' terms and conditions of employment, making it important to define the joint-employer standard in a manner that brings all necessary parties to the bargaining table.[382] Certain of these commenters note that an unduly cramped joint-employer standard might hinder the efficacy of the Board's remedial orders by targeting an entity that cannot, by itself, make employees whole or engage in the kind of effective collective bargaining that the Act contemplates.[383] Several individual employees and commenters with experience representing employees in industries characterized by extensive subcontracting represent that a joint-employer standard that brings the proper parties to the bargaining table could help make jobs in those industries safer, especially for Black and immigrant workers and women workers.[384]

[374] Comments of Empire Center for Public Policy.

[375] Comments of AHA; ABC; CDW; COLLE; Federation of American Hospitals; HR Policy Association; IFDA; International Bancshares Corporation; National Waste & Recycling Association; New Jersey Food Council; Rachel Greszler; Restaurant Law Center and National Restaurant Association; U.S. Chamber of Commerce; Wyoming Bankers Association. Some of these commenters liken the proposed rule to government-mandated multiemployer bargaining. Comments of ABC; COLLE; Tesla, Inc. As set forth above, we reject this characterization. Under the final rule, businesses remain free to structure their business operations however they wish. The rule creates no mandate to engage in bargaining on a multifirm basis whatsoever.

[376] See, *e.g.,* comments of Americans for Tax Reform; IFA; Independent Women's Forum; National Grocers Association; North American Meat Institute; Rachel Greszler; Stephen Clark; Yankee Institute for Public Policy.

A few of these commenters express concerns that the proposed rule will adversely affect particular state economies. See, *e.g.,* comments of California Policy Center (California); Goldwater Institute (Arizona); Libertas Institute (Utah); Rio Grande Foundation (New Mexico); The Buckeye Institute (Ohio); Thomas Jefferson Institute for Public Policy (Virginia).

Some commenters, especially individuals and small business owners, argue that the proposed rule is poorly timed in light of larger macroeconomic trends, including inflation, and the lingering effects of the Covid-19 pandemic on supply chains. See, *e.g.,* comments of Daniel Amare; Marlo Andeersen; Hugh Blanchard; Jon Clegg; Harold Heller; Justin Hood; Catherine Parker; Larry Verlinden.

[377] Comments of American Federation of Musicians Local 47; Congressman Scott et al.; General Counsel Abruzzo; National Women's Law Center.

[378] Comments of AFL–CIO; General Counsel Abruzzo.

[379] Comments of ACLU; BCTGM; Center for Law and Social Policy; Southern States Millwright Regional Council, UBC and Central South Carpenters Regional Council, UBC; District Council of New York City & Vicinity of the UBC; NELP; Restaurant Opportunities Centers United; Signatory Wall and Ceiling Contractors Alliance; The Leadership Conference on Civil and Human Rights; UBC; United for Respect.

[380] Comments of ACLU; Lawyers' Committee for Civil Rights Under Law; NELP; National Black Worker Center; National Partnership for Women and Families; NELP; SPLC; TechEquity Collaborative.

[381] Comments of District Council of New York City & Vicinity of the UBC; McGann, Ketterman & Rioux; Signatory Wall and Ceiling Contractors Alliance; Southern States Millwright Regional Council, UBC and Central South Carpenters Regional Council, UBC; UBC.

[382] Comments of American Federation of Musicians Local 47; AFSCME; Asian Pacific American Labor Alliance, AFL–CIO; EPI; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; National Women's Law Center; SEIU; The Strategic Organizing Center; The Washington Center for Equitable Growth; UE; UNITE HERE.

[383] Comments of American Federation of Musicians Local 47; General Counsel Abruzzo; Hawaii Regional Council of Carpenters; Jobs with Justice and Governing for Impact; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT; National Women's Law Center; NELP; SEIU; Texas RioGrande Legal Aid, Inc; UNITE HERE.

[384] Comments of NELP; National Women's Law Center; National Black Workers Center; Richard Eiker; SPLC; The Strategic Organizing Center; William E. Morris Institute for Justice; Women Employed. In addition, one commenter notes its long history of successful multiemployer and other

Other commenters argue that the proposed rule would lead to positive economic outcomes for employees. For example, one commenter notes that by ensuring that the proper parties are brought to the bargaining table, unions will be able to bargain effectively, creating a positive ''spillover'' effect that will raise the floor for wages, benefits, and working conditions.[385] This commenter estimates that the proposed rule ''will result in a boost of pay to workers of $1.06 billion annually or $20.4 million per week.'' [386] Several other commenters likewise argue that the benefits of the proposed rule will have a broad effect on the economy given the high concentration of employees in industries marked by extensive contracting practices.[387]

A number of commenters raise concerns about the specter of litigation and eventual liability if their businesses are deemed joint employers with other entities.[388] Others respond that an overbroad joint-employer standard risks exposing other entities, like lead firms or franchisors, solely because those entities are viewed as having the ability to satisfy a judgment.[389] Some of these commenters suggest that principles of joint liability might suffice to ensure that the Board's make-whole remedies are effective, rendering a joint-employer finding unnecessary in such circumstances.[390]

Contrary to these commenters, while the final rule establishes a joint-employer standard that will apply in unfair-labor-practice cases, it does not purport to assign liability or otherwise depart from well-established principles regarding how to apportion responsibility for unlawful conduct among multiple parties. Likewise, we disagree with commenters who argue that principles of joint liability might foreclose the need for a revised joint-employer standard, as the joint-employer standard serves important functions beyond those related to assigning liability. Similarly, principles of joint liability sometimes come into play in circumstances where there is no dispute that entities are joint employers. One commenter, citing *Capitol EMI Music, Inc.,* 311 NLRB 997, 1000 (1993), notes that the Board imposes certain unfair labor practice liability for the actions of one joint employer on another entity only if that other entity knew of the action and did nothing to protest it.[391] We agree that this longstanding Board precedent discussing how to assign liability to joint employers will continue to guide the Board in making these determinations. Additionally, business entities remain free under this joint-employer standard, as before, to structure their contractual relationships according to their chosen allocation of both authority to control and unfair labor practice liability, including by the use of indemnification clauses.

V. The Final Rule

The joint-employer doctrine plays an important role in the administration of the Act. The doctrine determines when an entity that exercises control over particular employees' essential terms and conditions of employment has a duty to bargain with those employees' representative. It also determines such an entity's potential liability for unfair labor practices. The joint-employer analysis set forth in this final rule is based on common-law agency principles as applied in the particular context of the Act. In our considered view, the joint-employer standard that we adopt today removes artificial control-based restrictions with no foundation in the common law that the Board has previously imposed in cases beginning in the mid-1980s discussed above, and in the 2020 rule. By incorporating common-law agency principles, as the Act requires, the final rule appropriately aligns employers' responsibilities with respect to their employees with their authority to control those employees' essential terms and conditions of employment and so promotes the policy of the United States, as articulated in Section 1 of the Act, to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

A. Definition of an Employer of Particular Employees

Section 103.40(a) of the final rule provides that an employer, as defined by Section 2(2) of the Act, is an employer of particular employees, as defined by Section 2(3) of the Act, if the employer has an employment relationship with those employees under common-law agency principles. This provision expressly recognizes the Supreme Court's conclusion that Congress's use of the terms ''employer'' and ''employee'' in the NLRA was intended to describe the conventional employer-employee relationship under the common law.[392] Because ''Congress has tasked the courts, and not the Board, with defining the common-law scope of 'employer,''' the Board—in evaluating whether a common-law employment relationship exists—looks for guidance from the judiciary, including primary articulations of relevant principles by judges applying the common law, as well as secondary compendiums, reports, and restatements of these common law decisions, focusing ''first and foremost [on] the 'established' common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947.'' [393] By explicitly grounding the Board's joint-employer analysis in common-law agency principles, this provision recognizes that the existence of a common-law employment relationship is a necessary prerequisite to a finding

multifirm bargaining as support for the Board's preliminary view that the proposed joint-employer rule would facilitate effective bargaining. See comments of IUOE.

[385] Comments of EPI.

[386] Id. Several other commenters cite approvingly to EPI's economic analysis. See, *e.g.,* comments of National Women's Law Center. Based on its assessment that the Bureau of Labor Statistics Contingent Worker Supplement (CWS) to the Current Population Survey likely underestimates how many workers work for contract firms and temporary help agencies, this commenter offers revised estimates over the total workforce in these settings. See comments of EPI. This commenter likewise offers a revised estimate of the number of franchise employees and employees of contractors or temporary staffing agencies who it represents would benefit from the proposed rule. Id.

[387] Comments of ACLU; General Counsel Abruzzo.

[388] Comments of LeadingAge; National ACE; Trucking Industry Stakeholders.

[389] Comments of James Bitzonis; COLLE.

[390] Comments of COLLE. One commenter also expresses concern that the proposed rule might interfere with single-employer doctrine under the Act. See comments of U.S. Chamber of Commerce. With respect, we note that questions of joint-employer and single-employer status under the Act are distinct. See generally *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 256 (1965) (approving the Board's single-employer analysis based on a four-factor test considering entities' ''interrelation of operations, common management, centralized control of labor relations and common ownership'').

[391] See reply comments of AFL–CIO.

[392] See *NLRB* v. *Town & Country Electric, Inc.,* 516 U.S. 85, 92–95 (1995) (where Congress has used the term ''employee'' in a statute without clearly defining it, the Court assumes that Congress ''intended to describe the conventional master-servant relationship as understood by common-law agency doctrine''). See also *Clackamas Gastroenterology Associates, P.C.* v. *Wells,* 538 U.S. 440, 448–449 (2003); *Nationwide Mutual Insurance Co.* v. *Darden,* 503 U.S. 318, 322–324 (1992); *Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 740, 752 fn. 31 (1989); *Kelley* v. *Southern Pacific Co.,* 419 U.S. 318, 323–324 (1974); *NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256–258 (1968). As noted above, many sources refer to the common-law employer-employee relationship using the terms ''master'' and ''servant.''

[393] *BFI* v. *NLRB,* 911 F.3d at 1208–1209.

that an entity is a joint employer of particular employees.

B. Definition of Joint Employers

Section 103.40(b) provides that, for all purposes under the Act, two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment. The provision thus first recognizes, as did the 2020 rule, that joint-employer issues may arise (and the same test will apply) in various contexts under the Act, including both representation and unfair labor practice case contexts.[394] The provision goes on to codify the longstanding core of the joint-employer test, consistent with the formulation of the standard that several Courts of Appeals (notably, the Third Circuit and the District of Columbia Circuit) have endorsed.[395] By providing that a common-law employer of particular employees must also share or codetermine those matters governing the employees' essential terms and conditions of employment in order to be considered a joint employer, the provision recognizes and incorporates the principle from *BFI* that ''the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status.'' [396]

C. Definition of ''*share or codetermine*''

Section 103.40(c) of the final rule provides that to ''share or codetermine those matters governing employees' essential terms and conditions of employment'' means for an employer to possess the authority to control (whether directly, indirectly, or both) or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment. This provision incorporates the view of the Board and the District of Columbia Circuit in *BFI* that evidence of the authority or reserved right to control, as well as evidence of the exercise of control (whether direct or indirect, including control through an intermediary, as discussed further below) is probative evidence of the type of control over employees' essential terms and conditions of employment that is necessary to establish joint-employer status. After careful consideration of comments, as reflected above, the Board has concluded that this definition of ''share or codetermine'' is consistent with common-law agency principles and best serves the policy of the United States, embodied in the Act, to encourage the practice and procedure of collective bargaining by ensuring that employees have the ability to negotiate the terms and conditions of their employment, through representatives of their own choosing, with all of their employers that possess the authority to control or exercise the power to control those terms and conditions.

D. Definition of ''*essential terms and conditions of employment*''

Section 103.40(d) defines ''essential terms and conditions of employment'' as (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees. The Board has decided, after careful consideration of comments as reflected above, to modify the proposed rule's definition of ''essential terms and conditions of employment'' by setting forth an exclusive, closed list of terms and conditions of employment that may serve as the objects of control necessary to establish joint-employer status.

Terms and conditions of employment falling in these seven categories are not simply common across employment relationships, they represent the core subjects of collective bargaining contemplated by the Act, as illuminated by the Board's administrative experience. Thus, Section 8(d) of the Act expressly provides that the collective-bargaining obligation encompasses a duty to confer with respect to wages and hours, subjects falling within categories (1) and (2). Categories (3), (4), and (5) similarly include terms involving the assignment, supervision, and detailed control of employees' performance of work duties—and the grounds for discipline of employees who fail to perform as required—all common across employment relationships and subjects of central concern to employees seeking to improve their terms and conditions of employment through collective bargaining. Terms and conditions in Category (6), addressing the conditions for the formation and dissolution of the employment relationship itself, are clearly essential conditions of employment. Finally, as many commenters have observed, terms setting working conditions related to the safety and health of employees—encompassed in category (7)—are basic to the employment relationship and lie at or near the core of issues about which employees would reasonably seek to bargain. By providing that a common-law employer of particular employees will be considered a joint employer of those employees only if it possesses the authority to control or exercises the power to control one or more terms and conditions of employment falling into one of these seven categories, this provision ensures that such an employer will be in a position to engage in meaningful bargaining over an issue of core concern to the employees involved. This provision thus effectively incorporates the second step of the Board's joint-employer test set forth in *BFI,* above, as described by the District of Columbia Circuit in *BFI* v. *NLRB,* and addresses that court's concern that the Board had failed, in *BFI,* adequately to delineate what terms and conditions are ''essential'' to make collective bargaining ''meaningful.'' [397]

E. Control Sufficient To Establish Joint-Employer Status

Section 103.40(e) provides, consistent with § 103.40(a) and (c), that whether an employer possesses the authority to control or exercises the power to control one or more of the employees' essential terms and conditions of employment is determined under common law-agency principles. Thus, this provision explains that, subject to the terms of the preceding provisions, (1) possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer regardless of whether the control is exercised; and (2) exercising the power to control indirectly (including through an intermediary) one or more essential terms and conditions of employment is sufficient to establish status as a joint

[394] Compare *BFI,* above, 362 NLRB 1599 (considering whether two entities were joint employers for purposes of petition for representation election), and *Browning-Ferris Industries of Pennsylvania, Inc.,* 259 NLRB 148 (1981) (considering whether two entities were joint employers for purposes of liability for employee discharges in violation of section 8(a)(3) of the Act), enfd. 691 F.2d 1117 (1982).

[395] See *BFI* v. *NLRB,* 911 F.3d at 1209 (citing *Dunkin' Donuts Mid-Atlantic Distribution Center* v. *NLRB,* 363 F.3d 437, 440 (D.C. Cir. 2004)); *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1124 (3d Cir. 1982). See also *3750 Orange Place Limited Partnership* v. *NLRB,* 333 F.3d 646, 660 (6th Cir. 2003); *Holyoke Visiting Nurses Assn.* v. *NLRB,* 11 F.3d 302, 306 (1st Cir. 1993).

[396] *BFI,* above, 362 NLRB at 1610.

[397] See *BFI* v. *NLRB,* above, 911 F.3d at 1221–1222.

employer, regardless of whether the control is exercised directly.

As discussed above, the Board has modified this provision from the version set forth in the NPRM by clarifying that, in every case, the object of a common-law employer's control that is relevant to the question of whether it is also a joint employer under the Act must be an essential term and condition of employment as defined in § 103.40(d). In combination with the Board's limitation of ''essential'' terms and conditions of employment to matters that lie near the core of the collective-bargaining process, this change is intended to address the concerns of commenters (discussed above) that the standard should not require the Board to find a joint-employer relationship based on an entity's attenuated, insubstantial, or unexercised control over matters that—while they may be mandatory subjects of bargaining—are actually peripheral to the employment relationship or to employees' terms and conditions of employment. The version of § 103.40(e) that appears in the final rule is reformatted to include two subsections and has been streamlined to avoid surplusage.

F. Control Immaterial to Joint-Employer Status

Section 103.40(f) provides that evidence of an entity's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles and that do not bear on the employees essential terms and conditions of employment is not relevant to the determination of whether the employer is a joint employer.[398] As discussed above, many commenters have expressed a concern that the proposed rule could result in the Board finding joint-employer relationships based on kinds of control that are not indicative of a common-law employment relationship or that do not form a proper foundation for collective bargaining or unfair-labor practice liability. Similarly, the District of Columbia Circuit in *BFI* v. *NLRB* criticized the Board's *BFI* decision for failing, in its articulation and application of the indirect-control element of the standard, to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships and indirect control over essential terms and conditions of employment.[399] This provision addresses these concerns by expressly recognizing that some kinds of control, including some of those commonly embodied in a contract for the provision of goods or services by a true independent contractor, are not relevant to the determination of whether the entity possessing such control is a common-law employer of the workers producing or delivering the goods or services, and that an entity's control over matters that do not bear on workers' essential terms and conditions of employment are not relevant to the determination of whether that entity is a joint employer.

G. Burden of Proof

Section 103.40(g) provides that a party asserting that an employer is a joint employer of particular employees has the burden of establishing, by a preponderance of the evidence, that the entity meets the requirements set forth above. This allocation of the burden of proof is consistent with the 2020 Rule, *BFI,* and pre-*BFI* precedent. See 85 FR 11227; *BFI,* 362 NLRB at 1616.

H. Bargaining Obligations of a Joint Employer

Section 103.40(h) provides that a joint employer of particular employees must bargain collectively with the representative of those employees with respect to any term and condition of employment that it possesses the authority to control or exercises the power to control, regardless of whether that term and condition is deemed to be an essential term and condition of employment under the definition above, but is not required to bargain with respect to any term and condition of employment that it does not possess the authority to control or exercise the power to control.

As discussed above, some commenters have requested that the Board provide a concise statement of joint employers' bargaining obligations in order to clarify both that a joint employer—like any other employer—must bargain over any mandatory subject of bargaining that is subject to its control, and that a joint employer—again, like any other employer—is not required to bargain about workplace conditions that are not subject to its control. Particularly in light of the Board's determination, discussed above, to adopt a closed list of ''essential terms and conditions of employment,'' as objects of control relevant to the joint-employer determination, the Board has concluded, after careful consideration of the comments, that it is desirable to expressly provide that a joint employer's bargaining obligations are not limited to those ''essential terms and conditions'' of employment that it controls, but extend to any ordinary mandatory subject of bargaining that is also subject to its control. Clarifying a joint employer's bargaining obligation in this way further ensures that collective bargaining involving the joint employer will be meaningful, because such bargaining will be able to address not only the core workplace issues the control of which establishes the employer's status as a joint employer but also any other matters subject to the joint employer's control that sufficiently affect the terms and conditions of employees' employment to permit or require collective bargaining under section 8(d) of the Act.[400]

On the other hand, the Board has also concluded that it serves a useful clarifying purpose to expressly provide, consistent with extant Board precedent not affected by the final rule, that where two or more entities each control terms and conditions of employment of particular employees, an employer is not required to bargain over any such terms and conditions which are in no way subject to its own control.[401]

I. Severability

Section 103.40(i) provides that the provisions and subprovisions of the final rule are intended to be severable, and that if any part of the rule is held to be unlawful, the remainder of the rule is intended to remain in effect to the fullest extent permitted by law. The Board believes, on careful consideration, that the final rule in its entirety flows from and is consistent with common-law principles as we have received them from judicial authority; reflects a permissible exercise of the Board's congressionally delegated authority to interpret the Act; and best effectuates the Board's statutory responsibility to prevent unfair labor practices and to encourage the practice

[398] As noted above, the Board has modified this provision from the version set forth in the NPRM for clarity.

[399] 911 F.3d at 1219–1220.

[400] See, *e.g., Ford Motor Co., Chicago Stamping Plant* v. *NLRB,* 441 U.S. 488, 501–503 (1979) (affirming Board's conclusion that manufacturer was required to bargain over in-plant food service and prices because manufacturer contractually reserved right to review and control services and prices directly set by a third-party contractor).

[401] Cf., *e.g., Management Training Corp.,* 317 NLRB 1355, 1358 & fn. 16, 1359 (1995) (holding that an entity that controls sufficient matters relating to the employment relationship to make it a statutory employer may be required to bargain over terms and conditions of employment within its control, but certification of representative does not obligate an employer to bargain concerning mandatory subjects of bargaining controlled exclusively by a distinct entity that is exempt from the Board's statutory jurisdiction).

and procedure of collective bargaining. However, the Board necessarily acknowledges the possibility that a reviewing body might disagree with our conclusion in some respect, and, in that event, the Board desires to preserve so much of the rule as such a body approves. Separately, as noted above, the Board intends the action of rescinding the 2020 Rule in itself to be severable from any of the terms of the final rule, so that if a reviewing body were to disapprove the final rule in its entirety, the Board's action in rescinding the 2020 Rule should still be given effect.

VI. Response to Dissent

Our dissenting colleague advances several reasons for declining to join the majority in rescinding and replacing the 2020 Rule. We have addressed some of these arguments above. Here, we offer additional responses to several of our colleague's contentions.

First, our dissenting colleague contends that common-law agency principles do not compel the Board to rescind the 2020 Rule, and, further, actually preclude the Final Rule's elimination of the 2020 Rule's actual-exercise requirement.[402] He also criticizes us for seeking relevant common-law principles in authority relating to the distinction between employees and independent contractors, and for failing to pay sufficient attention to judicial articulations of relevant common-law principles in decisions involving joint-employer questions under other federal statutes, including Title VII of the Civil Rights Act of 1964.[403]

To the contrary, as set forth more fully above, both the District of Columbia Circuit's discussion of independent-contractor authority in *BFI* v. *NLRB,* and the approach taken by many other courts examining joint-employer questions in other contexts, fully support the Board's reference to independent-contractor authority to shed light on the common-law employer-employee relationship and the joint-employer relationship under the Act.[404] To the extent that the other federal cases relied upon by our colleague articulate joint-employer standards drawn from common-law principles, those cases at best support the proposition that an entity's actual exercise of control over appropriate terms and conditions of employment of another employer's employees is *sufficient* to establish that it is a joint-employer—a proposition with which we agree—but not our colleague's further claim that such exercise of control is *necessary* to find a joint-employer relationship. Rather, numerous federal courts of appeals and state high courts have concluded, in non-NLRA contexts, that entities were common-law employers of other employers' employees based solely on the entities' unexercised power or authority to control.[405] These decisions fully support our conclusion that the common law does not require an entity's actual exercise of a reserved authority to control in order to establish a joint-employer relationship. Judicial decisions and secondary authorities addressing the common-law employer-employee relationship and the joint-employer relationship further confirm that indirect control, including control exercised through an intermediary,[406] can establish the existence of an employment relationship, including a joint-employer relationship.[407]

We note, moreover, that the District of Columbia Circuit not only upheld the Board's recognition of this point in *BFI* v. *NLRB,* but also reprimanded the Board that issued the 2020 rule for neglecting it. In *International Brotherhood of Teamsters* v. *NLRB,* 45 F.4th 38 (D.C. Cir. 2022), in rejecting the Board's decision not to apply the *BFI* standard retroactively, the court reaffirmed its previous holding, noting that it had ''held that '[t]he Board [in *Browning-Ferris I*] . . . correctly determined that the common-law inquiry is not woodenly confined to indicia of direct and immediate control;''' [and that] ''[I]n *Browning-Ferris II*—a decision issued just five months after the Board announced the 2020 Rule—the Board inexplicably overlooked the longstanding role of indirect control in the Board's joint-employer inquiry . . . . Our court's 2018 decision made clear that 'the right-to-control element of the Board's joint-employer standard [discussed in *Browning-Ferris I*] has deep roots in the common law [citation omitted],' and that the common law rule is that 'unexercised control bears on employer status . . . . ' Further, we held that 'there is no sound reason that the . . . joint-employer inquiry would give [indirect control] a cold shoulder.' [911 F.3d] at 1218 ('[The] argument that the

[402] As noted above and discussed more fully below, while we have concluded that the 2020 rule's actual-exercise requirement is impermissible under the Act as contrary to common law agency principles, and apart from recognizing that the Board must follow common-law agency principles in determining who is an ''employer'' and an ''employee'' under Sec. 2 of the Act, we do not conclude, as our colleague suggests, that the common law dictates the specific details of the final rule's joint-employer standard. Rather, the final rule reflects our policy choices, within the bounds of the common law, in furtherance of the policy of the United States, as set forth in Sec. 1 of the Act, to encourage the practice and procedure of collective bargaining, including by providing a mechanism by which an entity's rights and obligations under the Act may be accurately aligned with its authority to control employees' essential terms and conditions of employment.

[403] 42 U.S.C. 2000e *et seq.*

[404] See Sec. I.D., above, and cases discussed there. See also *BFI* v. *NLRB,* 911 F.3d at 1195 (''[E]mployee-or-independent-contractor cases can . . . be instructive in the joint-employer inquiry to the extent that they elaborate on the nature and extent of control necessary to establish a common-law employment relationship.'').

[405] See, *e.g., EEOC* v. *Global Horizons,* 915 F.3d 631, 640–641 (9th Cir. 2019) (two entities were joint employers with a direct employer based on entities' ''power to control the manner in which [benefits] and wages were provided to the . . . workers, *even if never exercised.*''); *Mallory* v. *Brigham Young University,* 332 P.3d 922, 928–929 (Utah 2014) (city was employer of university's employee because ''[i]f the principal has the right to control the agent's method and manner of performance, the agent is a servant whether or not the right is specifically exercised'') (citation omitted); *Rouse* v. *Pitt County Memorial Hosp., Inc.,* 470 SE 2d 44, 52–53 (N.C. 1996) (attending physicians could be found employers of resident physicians employed by hospital absent evidence of actual exercise of control because ''[w]here the parties have made an explicit agreement regarding the right of control, this agreement will be dispositive;'') (citation omitted); *Dunn* v. *Conemaugh & Black Lick RR,* 267 F.2d 571, 577 (3d Cir. 1959) (railroad was employer of manufacturer's employee based on railroad's right to command employee's performance without reference to any instance of exercise of that right because ''the person is the servant of him who has the right to control the manner of performance of the work, regardless of whether or not he actually exercises that right;'') (citation omitted); *S.A. Gerrard Co.* v. *Industrial Accident Comm'n,* 110 P.2d 377, 378 (Cal. 1941) (landowner was joint employer of farmer's employee based on contract provision that picking should be done according to landowner's direction without reference to whether such direction was ever given because ''the right to control, rather than the amount of control which was exercised, is the determinative factor.'') (citation omitted).

[406] As noted above, we agree with the District of Columbia Circuit's common-sense characterization of control exercised through an intermediary as indirect control, rejecting our colleague and the 2020 Rule's counterintuitive characterization of such control as direct and immediate. See *BFI* v. *NLRB,* 911 F.3d at 1216–1217.

[407] See id. at 1217 (''[T]he common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.'') (citing *Nicholson* v. *Atchison, T. & S. F. Ry. Co.,* 147 P. 1123, 1126 (Kan. 1915) (use of a ''branch company'' as a ''mere instrumentality'' ''did not break the relation of master and servant existing between the plaintiff and the [putative master]''); *Butler* v. *Drive Automotive Industries of America,* 793 F.3d 404, 415 (4th Cir. 2015) (the joint-employer test ''specifically aims to pierce the legal formalities of an employment relationship to determine the loci of effective control over an employee . . . . Otherwise, an employer who exercises actual control could avoid Title VII liability by hiding behind another entity.''); *Al-Saffy* v. *Vilsack,* 827 F.3d 85 (D.C. Cir. 2016) (relying in part on evidence that officials working for putative joint employer had recommended employee's dismissal as evidence supporting reversal of summary judgment on the joint-employer issue). See also discussion and sources cited in Sec. I.D., above.

common law of agency closes its mind to evidence of indirect control is unsupported by law or logic.'); see id. at 1216 (a 'rigid distinction between direct and indirect control has no anchor in the common law') . . . . [W]e took great pains to inform the Board that the failure to consider reserved or indirect control is inconsistent with the common law of agency.'' [408]

In sum, the Board's careful examination of relevant common-law principles as articulated in a voluminous body of primary judicial authority and secondary compendiums, reports, and restatements of these common-law decisions has persuaded us that the controlling common-law agency principles do not permit the Board to require that an entity that possesses authority to control also exercise that control, or exercise it in any particular way, in order to be found a joint employer under the Act.[409]

Next, our colleague contends that the final rule unjustifiably expands the list of essential terms and conditions of employment. Specifically, our colleague takes issue with our inclusion of three specific terms and conditions of employment in the exhaustive list set forth in Section 103.40(d): ''work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline''; ''the tenure of employment, including hiring and discharge''; and ''working conditions related to the safety and health of employees.''

As discussed more extensively above,[410] we find our colleague's concerns regarding the final rule's treatment of these terms and conditions of employment as essentially unfounded. With respect to ''the tenure of employment, including hiring and discharge,'' our colleague seems to take issue with the form rather than the substance. Indeed, the 2020 rule treated hiring and discharge as essential, making it even more evident that our colleague's quarrel with our formulation is principally semantic. As we indicated previously, the phrase we have chosen to include in the final rule is meant to encompass the range of actions that determine an individual's employment status. We reject the suggestion that our framing of this term of employment is overbroad. Similarly, our colleague does not seriously contend that an entity's reservation or exercise of control over the manner, means, and methods of the performance of duties or the grounds of discipline are not essential.[411] Instead, he focuses on our description of ''work rules or directions'' that address these aspects of particular employees' performance of work, arguing that ambiguous language in an employee handbook may be used to justify a joint-employer finding. We find this concern misplaced and emphasize that in applying the final rule, we will take a functional approach to assessing whether a putative joint employer who meets the threshold requirement of having a common-law employment relationship with particular employees possesses or exercises the requisite control over essential terms and conditions of employment.

Lastly, we part company with our colleague when it comes to including workplace health and safety as an essential term or condition of employment. In our view, it is appropriate to regard an entity that possesses or exercises control over workplace health and safety as a joint employer. As set forth above, to the extent an entity solely memorializes its compliance with legal obligations pertaining to health and safety, it will not for that reason alone be regarded as a joint employer. However, and contrary to our colleague, we believe that entities that exercise discretion over particular employees' workplace health and safety are properly treated as joint employers. We believe that common-law employers of particular employees that have authority to exercise discretion over those employees' workplace health and safety are properly treated as joint employers because employees' ability to bargain with all of the entities that may exercise such control is central to the Act's protection of employees' collective rights.

Our colleague argues that setting forth an exhaustive list of essential terms and conditions of employment in the final rule nevertheless fails to address the District of Columbia Circuit's concerns in *BFI* about the Board's treatment of forms of indirect control when applying the joint-employer standard. Our colleague misstates our rationale for closing the list of essential terms and conditions of employment. After carefully considering the views of commenters, we have included an exhaustive list of essential terms and conditions of employment in the final rule to ensure that any required bargaining would be meaningful. By contrast, we incorporate the District of Columbia Circuit's views regarding the forms of indirect control that bear on the joint-employer inquiry in § 103.40(e) and (f) of the final rule. In this regard, the final rule is faithful to the District of Columbia Circuit's guidance regarding the need for a limiting principle to ensure the joint-employer standard remains within common-law boundaries.

The dissent next argues that the majority does not set forth a substantial policy justification for rescinding and replacing the 2020 rule. The dissent argues that because the majority focuses on the common-law shortcomings of the 2020 rule, it pays insufficient heed to commenters' policy-based objections to the final rule.

As noted at the outset, while we are persuaded that the 2020 rule should be rescinded because it is at odds with common-law agency principles, we have stated repeatedly that we would nevertheless rescind the 2020 rule and replace it with the final rule for policy reasons.[412] We reiterate that position here. In our view, the joint-employer standard we adopt today is more consistent with Section 1 of the Act and will better facilitate effective collective bargaining than the standard set forth in the 2020 rule. Our colleague's contention that we have not made a policy-based decision for changing our approach to determining joint-employer status under the Act is therefore unfounded.

In addition, the dissent contends that the majority does not offer a satisfactory response to those commenters who take the view that the final rule will adversely affect employers in particular industries or sectors, including the building and construction industry, the franchise industry, the staffing industry, and the healthcare sector. As discussed more extensively in Section IV.D., above, we are of the view that the Act—by referring generally to ''employers'' and ''employees'' and by effectively incorporating the common-law definition of those terms—requires the Board to apply a uniform joint-employer standard to all entities that fall within

[408] 45 F.4th at 42, 44, 46–47.

[409] As noted above, we reject any suggestion that the 2020 rule recognized that an entity's contractually reserved but unexercised control is sufficient to establish a common-law employer-employee relationship but declined, as a discretionary matter, to exercise joint-employer jurisdiction over statutory employers who did not actually exercise such control—a rationale nowhere presented in the text or preamble of the 2020 rule.

[410] See discussion in Sec. IV.D., above.

[411] Indeed, the 2020 rule treated both work directions and discipline as essential. See 85 FR at 11225 & 11236 (citing *Laerco Transportation,* 269 NLRB at 325). See also, *e.g., Cognizant Technology Solutions U.S. Corp. & Google LLC,* 372 NLRB No. 108, slip op. at 1 (2023) (finding joint-employer relationship under 2020 rule based in part on entity's maintenance of '' 'workflow training charts' which govern[ed] the details of employees' performance of specific tasks.'').

[412] Accordingly, as noted above, we reject our colleague's suggestion that we take common-law agency principles to dictate the precise contours of the final rule.

the Board's jurisdiction. For this reason, we have declined several commenters' requests for the Board to exempt certain industries from the coverage of the final rule. However, we are mindful that applying the final rule will require sensitivity to industry-specific norms and practices, and we will take any relevant industry-specific context into consideration when considering whether an entity is a joint employer.

Our dissenting colleague also takes the position that the final rule will frustrate bargaining and undermine the policies of the Act favoring the resolution of labor disputes and the promotion of stable bargaining relationships. In this regard, he offers several hypotheticals that he suggests illustrate the potential for the final rule to be applied in a manner that will frustrate effective collective bargaining by extending joint-employer obligations to entities whose control over terms and conditions of employment is too attenuated to warrant their participation in bargaining.

We respectfully disagree with our dissenting colleague's view of how the final rule will operate. In reciting the standard set forth in the final rule, our colleague elides the threshold significance of § 103.40(a), which requires a party seeking to demonstrate the existence of a joint-employment relationship to make an initial showing that the putative joint employer has a common-law employment relationship with particular employees. Because the application of the final rule will be limited to entities who are common-law employers, many of the hypothetical scenarios our colleague suggests will give rise to a joint-employer finding cannot arise. For example, as noted above, an entity may control a term of employment to which a bargaining duty attaches but not possess or exercise the requisite control over the performance of the work to be regarded as a common-law employer. For example, while the Supreme Court has recognized that an employer has a duty to bargain over in-plant food service and prices,[413] that fact alone will not support a finding that the third-party contractor who supplies the food, and codetermines pricing, is a joint employer. Instead, § 103.40(a) of the final rule establishes a threshold requirement that a putative joint employer must be the common-law employer of particular employees. Absent evidence that an entity is the common-law employer of particular employees, then, there is no basis for a joint-employer finding under the final rule. Accordingly, there is no risk that the final rule will be applied broadly to encompass entities whose relationship to the performance of the work is clearly too attenuated to support finding that they are common-law employers, as our dissenting colleague fears.

In addition to these hypotheticals concerning the application of the final rule, our colleague makes several predictions about how the final rule will affect particular businesses. Our colleague repeats the contention raised by several commenters (and addressed more fully above) that the possibility of conflict among joint employers will complicate bargaining and lead to worse outcomes for employees. As an initial matter, we question our colleague's suggestion that the final rule will make it more difficult for parties to reach agreements. Instead, we are persuaded that a standard that ensures that those entities who possess or exercise control over particular employees' essential terms and conditions of employment are present for bargaining will help avoid fruitless negotiations. In our view, aligning employers' responsibilities under the Act with their authority to control terms and conditions of employment will lead to better outcomes overall. Ensuring that the necessary parties may all have a seat at the bargaining table will also empower entities who have chosen to contractually retain or exercise control over particular employees' essential terms and conditions of employment to formalize their responsibilities and protect their interests in collective-bargaining agreements they also negotiate and sign.[414] Further, we observe that, even assuming arguendo that our colleague's concern about the potential difficulties associated with joint-employer bargaining were valid, such difficulties would arise under any joint-employer standard, and accordingly do not support specific criticism of the current final rule.

Finally, our dissenting colleague contends that the final rule is arbitrary and capricious under the Administrative Procedure Act for several reasons. First, he argues that the majority has failed to respond to significant points urged by commenters. We reject this characterization and note our extensive discussion of the points urged by commenters in Section IV.D., above. Not only did we respond to commenters' significant arguments, we also made adjustments to the text of the final rule in response to commenters' valuable input. We are confident that the final rule is stronger and will provide better guidance to regulated parties because of the helpful public input we received and the changes we made in light of commenters' views.

Next, our colleague argues that the final rule ''offers no greater certainty or predictability than adjudication, and it will not reduce litigation.'' As discussed in Section IV.D. above, we are of the view that the final rule will reduce uncertainty by codifying the general principles that will guide the Board in making joint-employer determinations. While the final rule does not purport to anticipate the myriad arrangements under which entities possess or exercise control over particular employees' essential terms and conditions of employment, it offers a framework for analyzing such questions that is rooted in common-law agency principles and ensures greater predictability by offering an exhaustive list of the essential terms and conditions of employment that may give rise to a joint-employer finding and detailing the forms of control that the Board will treat as probative of joint-employer status. In this regard, we respectfully disagree with our colleague's suggestion that ''[t]his is precisely how the determinations would be made if there were no rule at all.'' Finally, to the extent our colleague's criticism amounts to an observation that the final rule will need to be applied on a case-by-case basis moving forward, we observe that the same can be said for the 2020 rule, which also required the Board to apply the joint-employer standard in diverse contexts based on the particular evidence put forward by a party seeking to establish joint-employer status. Moreover, as the District of Columbia Circuit has observed, it is appropriate for the Board to ''flesh out the operation of a legal test that Congress has delegated to the Board to administer'' on an ongoing, case-by-case basis.[415]

Ultimately, our colleague concludes that the final rule must be arbitrary and capricious because, given his view that common-law agency principles do not compel the Board to rescind and replace the 2020 rule, the final rule is ''legally erroneous.'' As we have discussed in detail above, the great weight of common-law authority supports our conclusion that the 2020 rule is contrary to common-law agency principles in requiring that an entity actually exercise control over another employer's employees in order to be found to be a joint employer. In any case, as we have

[413] *Ford Motor Co., Chicago Stamping Plant* v. *NLRB,* 441 U.S. 488, 501–503 (1979).

[414] In this respect, the final rule will help avoid the scenario our colleague describes where courts bind entities later found to be joint employers to collective-bargaining agreements they ''neither negotiated nor signed.''

[415] *BFI* v. *NLRB,* 911 F.3d at 1221.

also explained above, we would rescind and replace the 2020 rule for policy reasons even if we had not concluded that its actual-exercise requirement were precluded by the Act's incorporation of common-law agency principles. We accordingly respectfully disagree with our colleague's contention that the final rule is arbitrary and capricious under the Administrative Procedure Act.

VII. Dissenting View of Member Kaplan

My colleagues have accomplished something truly remarkable. They have come up with a standard for determining joint-employer status that is potentially even more catastrophic to the statutory goal of facilitating effective collective bargaining, as well as more potentially harmful to our economy, than the Board's previous standard in *Browning-Ferris Industries.*[416] As the dissent noted in *Browning-Ferris,* the joint-employer standard the Board adopted in that decision not only ''affect[ed] multiple doctrines central to the Act'' but had ''potentially massive economic implications.'' [417] The final rule the majority issues today, concerningly, goes beyond *BFI* in several ways. *BFI* went no further than to assert that the ''direct and immediate control'' standard of pre-*BFI* precedent is not compelled by the National Labor Relations Act (NLRA or the Act); the majority now claims that it is statutorily impermissible.[418] *BFI* held that contractually reserved but unexercised control and indirect control are probative of joint-employer status; [419] the majority now makes them dispositive of that status. *BFI* recognized that ''of course,'' the ''existence, extent, and object of a putative joint employer's control . . . all may present material issues'' in a joint-employer determination; [420] the majority removes the term ''extent.'' Under their final rule, joint-employer status is established if control *exists* (even if only potentially or indirectly) and if the *object* of control is an essential term and condition of employment of another entity's employees, regardless of the *extent* of that control. Put differently, the final rule eliminates the second step of the *BFI* standard, which required the Board to determine whether the extent of a putative joint-employer's control over the terms and conditions of employment of another business's employees was sufficient ''to permit meaningful collective bargaining.'' [421]

As explained below, the majority's final rule effects an unprecedented and unwarranted expansion of the Board's joint-employer doctrine. The majority misapprehends common-law agency principles in holding that those principles *compel* the Board to rescind its 2020 Rule on Joint Employer Status Under the National Labor Relations Act (the 2020 Rule) [422] and replace it with a joint-employer standard not seen anywhere else in the law. My colleagues dispense with any requirement that a company has actually exercised any control whatsoever (much less substantial control) over the essential terms and conditions of another company's employees. Under the final rule, an entity's mere possession of a never-exercised contractual reservation of right to control a single essential term and condition of employment of another business's employees makes that entity a joint employer of those employees. So does its ''indirect'' control of an essential term and condition, a term my colleagues fail to define or otherwise cabin. As I will show, these standards (in the words of the United States Court of Appeals for the District of Columbia Circuit) ''oversho[o]t the common-law mark.'' [423]

My colleagues claim that their final rule effectuates ''the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining,'' [424] but in reality it will frustrate national labor policy by placing at the bargaining table a second ''employer'' that has never exercised any control over the employment terms of another entity's employees. Indeed, it may place many more than just two such ''employers'' at the bargaining table. To borrow a hypothetical from the *BFI* dissent, suppose CleanCo is in the business of supplying maintenance employees to clients to clean their offices. Suppose further that CleanCo supplies employees to one hundred clients, and that each CleanCo-client contract contains a provision that gives the client the right to prohibit, on health and safety grounds, CleanCo's employees from using particular cleaning supplies. Because the clients possess a contractually reserved authority to control ''working conditions related to the safety and health of employees''—an essential employment term newly invented by my colleagues—each of those one hundred clients would be a joint employer of CleanCo's employees. Now, suppose a union wins an election in an employer-wide unit of CleanCo's maintenance employees. Because all one hundred clients jointly employ those employees, all one hundred would be compelled to participate in collective bargaining. As the dissenters in *BFI* put it, ''no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority's new standards.'' [425]

My colleagues repeatedly insist that their approach—specifically, eliminating the requirement of proof that an entity has actually exercised control over another entity's employees before it can be deemed their joint employer—is the only permissible one under the common law and the Act. In response to commenters who point out the significant negative effects that an expanded joint-employer standard will have on businesses in wide variety of sectors, they repeatedly say that it cannot be helped because their approach is statutorily compelled. Accordingly, they provide no substantive response to these commenters' weighty objections. Moreover, because my colleagues insist that their hands are tied and fail to acknowledge that common-law agency principles, and therefore the Act, permit the 2020 Rule, they fail to engage in any real policy-based choice between competing alternatives. Consequently, the final rule must stand or fall on the majority's assertion that their position is compelled by the common law and hence the only permissible construction of the Act. It falls. Indeed, not only is their position—*i.e.,* that the actual-exercise requirement is impermissible—not compelled by the common law, it results in a final rule that exceeds the limits of the common law, as I will show. In any event, the courts have made clear that the Board may adopt a joint-employer standard under the NLRA that does not extend to the outermost limits of the common law. Even accepting for argument's sake that

[416] *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery,* 362 NLRB 1599 (2015) (*BFI*).

[417] Id. at 1647 (Members Miscimarra and Johnson, dissenting).

[418] Id. at 1609 (stating the *BFI* majority's view that requiring direct and immediate control ''is not mandated by the Act'').

[419] Id. at 1614 (''The right to control . . . is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.'').

[420] Id.

[421] Id.

[422] 85 FR 11184 (Feb. 26, 2020) (codified at 29 CFR 103.40).

[423] *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d 1195, 1216 (D.C. Cir. 2018).

[424] NLRA Sec. 1.

[425] *BFI,* 362 NLRB at 1619 (Members Miscimarra and Johnson, dissenting). Moreover, because joint-employer status makes an otherwise neutral business primary for purposes of Sec. 8(b)(4) of the Act, the union that represents CleanCo's maintenance employees would not be limited to picketing CleanCo's headquarters but could lawfully picket all one hundred clients.

the majority's rule does not exceed the common law's boundaries, compelling policy considerations counsel against its promulgation and in favor of leaving the 2020 Rule in place. Because I would retain that rule, I dissent.

Background

In determining, under the Act, whether an employment relationship exists between an entity and employees directly employed by a second entity, common-law agency principles are controlling.[426] Under those principles, the Board will find that two separate entities are joint employers of employees directly employed by only one of them if the evidence shows that they share or codetermine those matters governing the employees' essential terms and conditions of employment.[427]

For many years, the Board, with court approval, held that a determination that two or more entities share or codetermine such matters requires proof that a putative joint employer has actually exercised substantial direct and immediate control over one or more essential terms and conditions of employment of another entity's employees. See *Summit Express, Inc.,* 350 NLRB 592, 592 n.3 (2007) (finding that the General Counsel failed to prove direct and immediate control and therefore dismissing joint-employer allegation); *Airborne Express,* 338 NLRB 597, 597 n.1 (2002) (holding that ''the essential element'' in a joint-employer analysis ''is whether a putative joint employer's control over employment matters is direct and immediate'') (citing *TLI, Inc.,* 271 NLRB 798, 798–799 (1984)); *Laerco Transportation,* 269 NLRB 324, 325–326 (1984) (dismissing joint-employer allegation where user employer's supervision of supplied employees was limited and routine); see also *NLRB* v. *CNN America, Inc.,* 865 F.3d at 748–751 (finding that the Board erred by failing to adhere to its ''direct and immediate control'' standard); *SEIU Local 32BJ* v. *NLRB,* 647 F.3d 435, 442–443 (2d Cir. 2011) ('''An essential element' of any joint employer determination is 'sufficient evidence of immediate control over the employees.' '') (quoting *Clinton's Ditch Co-op Co.* v. *NLRB,* 778 F.2d 132, 138 (2d Cir. 1985)). Under this precedent, an entity's unexercised contractual reservation of a right to control or indirect control/influence was insufficient to establish joint-employer status.

In 2015, a divided Board significantly lowered the bar for proving a joint-employer relationship in *BFI,* 362 NLRB at 1599. There, a Board majority retained the ''share or codetermine'' standard but eliminated the preexisting requirement of proof that a putative joint employer had exercised direct and immediate control over essential terms and conditions of employment. Id. at 1613–1614. The *BFI* majority created a new two-step standard. At step one, the inquiry was ''whether there is a common-law employment relationship with the employees in question.'' Id. at 1600. If so, the analysis proceeded to a second step, where the Board was to determine ''whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.'' Id. In addition, the *BFI* majority held that a joint-employer relationship could be based solely on an unexercised contractual reservation of right to control and/or indirect control. In other words, the *BFI* majority expanded the joint-employer doctrine to potentially include in the collective-bargaining process an employer's independent business partner that has an indirect or merely potential impact on the employees' essential terms and conditions of employment, even where the business partner has not itself actually established any of those essential employment terms or collaborated with the undisputed employer in setting them.

The defining feature of the Board's *BFI* standard was its elimination of the preexisting requirement of proof that a putative joint employer actually exercised substantial direct and immediate control over the essential terms and conditions of another company's employees. The Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) did not uphold that defining feature. It expressly left undecided whether indirect control or contractually-reserved-but-unexercised authority to control could, standing alone, establish joint-employer status. As the court stated, ''because the Board relied on evidence that Browning-Ferris both had a 'right to control' and had 'exercised that control,' this case does not present the question whether the reserved right to control, divorced from any actual exercise of that authority, could alone establish a joint-employer relationship.'' *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d at 1213 (internal citation omitted). Similarly, the court said that ''whether indirect control can be 'dispositive' is not at issue in this case because the Board's decision turned on its finding that Browning-Ferris exercised control 'both directly and indirectly.' '' Id. at 1218.

After canvassing common-law agency principles, the D.C. Circuit upheld ''as fully consistent with the common law the [*BFI*] Board's determination that both reserved authority to control and indirect control can be *relevant factors* in the joint-employer analysis.'' Id. at 1222 (emphasis added). Although the court held that contractually reserved control and indirect control can contribute to a joint-employer finding, it declined to reach the question of whether either one could independently establish joint-employer status.

The D.C. Circuit made several other important points that subsequently informed the 2020 Rule. First, the court made clear that the common law sets the outer limit of a permissible joint-employer standard under the Act, without suggesting in any way that the Board's standard must or should be coextensive with that outer limit. ''The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers *is bounded by* the common-law's definition of a joint employer. The Board's rulemaking, in other words, *must color within the common-law lines* identified by the judiciary.'' Id. at 1208 (emphasis added). Hence, while it is clear that the Board is precluded from adopting a more expansive joint-employer doctrine than the common law permits, it may adopt a narrower standard that promotes the Act's policies. This is a point that was recognized by the Board majority in *BFI* itself. *BFI,* 362 NLRB at 1613 (''The common-law definition of an employment relationship establishes the outer limits of a permissible joint-employer standard under the Act.''). Indeed, the Board, with court approval, has long made policy choices not to exercise the full extent of its jurisdiction, including as to particular classes of employment relationships.[428]

[426] *NLRB* v. *United Insurance Co. of America,* 390 U.S. 254, 256 (1968).

[427] *CNN America, Inc.,* 361 NLRB 439, 441 (2014) (citing *TLI, Inc.,* 271 NLRB 798, 798 (1984)), enf. denied in part 865 F.3d 740 (D.C. Cir. 2017). The ''share or codetermine'' standard was first stated by the United States Court of Appeals for the Third Circuit in *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d 1117, 1123 (3d Cir. 1982). As the D.C. Circuit observed in its 2018 decision reviewing *BFI,* after the Third Circuit formulated the ''share or codetermine'' standard, the Board and the courts began coalescing around it. *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d at 1201.

[428] See *Northwestern University,* 362 NLRB 1350, 1352 (2015) (declining to assert jurisdiction over Northwestern University football players who receive grant-in-aid scholarships, even assuming they are statutory employees, due to the nature and structure of the NCAA Division I Football Bowl Subdivision); *Brevard Achievement Center,* 342 NLRB 982, 983–985 (2004) (declining to exercise

Second, the D.C. Circuit made clear that, under the common law, the standard for determining independent-contractor status, with its emphasis on the right to control the manner and means of performance, is different from the joint-employer standard: ''[T]he independent-contractor and joint-employer tests ask different questions. The independent-contractor test considers who, if anyone, controls the worker other than the worker herself. The joint-employer test, by contrast, asks how many employers control individuals who are unquestionably superintendent.'' 911 F.3d at 1214. In this regard, the court explained that ''a rigid focus on independent-contractor analysis omits the vital second step in joint-employer cases, which asks, once control over the workers is found, *who* is exercising that control, *when,* and *how.*'' Id. at 1215; see also *Redd* v. *Summers,* 232 F.3d 933, 937–938 (D.C. Cir. 2000) (expressing doubt that independent-contractor precedent is well suited to address issues of joint employment). Accordingly, ''the vital second step'' of a common-law joint-employer analysis does indeed focus on the *exercise* of control, including its form, frequency, and extent.

Third, the D.C. Circuit held that the *BFI* decision's treatment of the indirect-control factor contravened the common law. *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d at 1221. Specifically, the court concluded that the *BFI* decision had ''overshot the common-law mark'' by failing to distinguish evidence of indirect control that bears on workers' essential terms and conditions of employment from evidence that simply documents the routine parameters of company-to-company contracting. Id. at 1216. The court explained that, for example, it would be inappropriate to give any weight in a joint-employer analysis to the fact that Browning-Ferris had controlled the basic contours of a contracted-for service, such as by requiring four lines' worth of employee sorters plus supporting screen cleaners and housekeepers. Id. at 1220–2221.

Finally, and importantly, the court held that the Board had erred by failing to apply the second step of its two-step standard: whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit *meaningful* collective bargaining. The court rebuked the Board for ''never delineat[ing] what terms and conditions of employment are 'essential,' '' for adopting an ''inclusive'' and ''non-exhaustive'' approach to the meaning of ''essential terms,'' and for failing to clarify what ''meaningful collective bargaining'' might require. Id. at 1221–1222. The court remanded the case to the Board for further proceedings consistent with the court's opinion.[429]

The 2020 Joint-Employer Rule

Against this background, the Board in 2020 promulgated a joint-employer rule that was clear and consistent with common-law agency principles. The 2020 Rule provided much needed guidance to the regulated community. It adopted the universally accepted general formulation of the joint-employer standard that an entity may be considered a joint employer of a separate entity's employees only if the two entities share or codetermine the employees' essential terms and conditions of employment. The 2020 Rule then further defined that standard in a manner that eliminated the unjustified features introduced in *BFI.* The 2020 Rule explained that to show that an entity shares or codetermines the essential terms and conditions of another employer's employees, ''the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees.' '' 85 FR at 11186 & 11236. The Board defined ''substantial direct and immediate control'' to mean ''direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees.'' Id. at 11203–11205 & 11236. The 2020 Rule also specified that control is not ''substantial'' if it is ''only exercised on a sporadic, isolated, or de minimis basis.'' Id. at 11236.

The 2020 Rule recognized that certain other forms of control and authority to control play an appropriately limited role in the joint-employer analysis. It deemed probative of joint-employer status evidence of an entity's indirect control over essential terms and conditions of employment of another employer's employees, the entity's contractually reserved but never exercised authority over the essential terms and conditions of employment of another employer's employees, and the entity's control over mandatory subjects of bargaining other than the essential terms and conditions of employment. Id. But those types of control could tend to support a finding of joint-employer status ''only to the extent [they] supplement[ed] and reinforce[d] evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment.'' Id. They could not, standing alone, establish joint-employer status.

The Board also made clear that the 2020 Rule was not intended to immunize an entity from joint-employer status through use of an intermediary to exercise control, explaining that ''[d]irect and immediate control exercised through an intermediary remains direct and immediate.'' Id. at 11209 (citing *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d at 1217 (''[T]he common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.'')).

In response to the court's criticism of the Board's failure to define what constitutes ''essential terms and conditions of employment'' in *BFI,* the 2020 Rule defined a closed set of terms and conditions of employment: wages,

jurisdiction over disabled workers whose relationship with an employer is ''primarily rehabilitative'' as opposed to ''typically industrial'' because ''Congress did not intend that the Act govern'' the former); *Brown University,* 342 NLRB 483, 493 (2004) (dismissing representation petition based on the ''belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act''), overruled on policy grounds by *Columbia University,* 364 NLRB 1080 (2016); *Siemons Mailing Service,* 122 NLRB 81 (1959) (describing Board's discretionary commerce standard).

In sum, even if the majority's final rule does not exceed the bounds of the common law, the Board possesses discretion to adopt, for sound policy reasons, a standard that excludes from joint-employer status entities that have never actually exercised control over the terms and conditions of employment of another employer's employees. Moreover, although my colleagues and I agree that the joint-employer standard is bounded by the common law, they point to no authority (nor can they) for the proposition that the Act *compels* the Board to extend joint-employer status to the outermost limits permissible under the common law.

[429] On remand, the Board found that retroactive application of any refined standard would be manifestly unjust. The Board therefore dismissed the complaint and amended the certification of representative to remove BFI as a joint employer. *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery,* 369 NLRB No. 139, slip op. at 1 (2020). Thereafter, a divided Board denied the union's motion for reconsideration. *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery,* 370 NLRB No. 86 (2021).

On further review, the D.C. Circuit found the Board's retroactivity analysis erroneous, granted the union's petition for review, vacated the Board's order dismissing the complaint and amending the certification of representative, and remanded the case to the Board for further proceedings consistent with the court's opinion. *Sanitary Truck Drivers & Helpers Local 350, International Brotherhood of Teamsters* v. *NLRB,* 45 F.4th 38 (D.C. Cir. 2022). The case is presently pending before the Board.

benefits, hours of work, hiring, discharge, discipline, supervision, and direction. 29 CFR103.40(b).[430] The 2020 Rule further specified how direct and immediate control would be determined with respect to each essential term, providing concrete examples. Id. § 103.40(c)(1) through (8). For example, with respect to hiring, the 2020 Rule provided that ''[a]n entity exercises direct and immediate control over hiring if it actually determines which particular employees will be hired and which employees will not. An entity does not exercise direct and immediate control over hiring by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation.'' Id. § 103.40(c)(4). And with respect to supervision, ''[a]n entity exercises direct and immediate control over supervision by actually instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals,'' but it does not do so by providing ''instructions [that] are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it.'' Id. § 103.40(c)(7).

Taken together, the features of the 2020 Rule were intended to ensure that an entity would be found to be a joint employer of another employer's employees if (and only if) it had played an active and substantial role in hiring, supervising, or directing those employees, in setting their work hours, wages or benefits, and/or in disciplining or discharging them. Of course, an entity could be found to be a joint employer if it had taken only one of these actions (either on its own or in collaboration with the employees' undisputed employer), but there was a substantiality requirement, a threshold of extent of control that had to be crossed. In this way, the Board addressed the court's concern that the Board had failed in *BFI* to ensure that the extent of the purported joint employer's control over the terms and conditions of employment of the direct employer's employees was sufficient to make that entity's participation in collective bargaining necessary for meaningful bargaining to take place.

The Board explained that the 2020 Rule was consistent with common-law agency principles and promoted the Act's policies by imposing bargaining obligations only on entities that actually control essential working conditions and by establishing a ''discernible and predictable'' standard to guide regulated parties, stating as follows:

> The Board believes a standard that requires an entity to possess and exercise substantial direct and immediate control over essential terms and conditions of employment is consistent with the purposes and policies of the Act . . . . The Act's purpose of promoting collective bargaining is best served by a joint-employer standard that places at the bargaining table only those entities that control terms and conditions that are most material to collective bargaining. Moreover, a less demanding standard would unjustly subject innocent parties to liability for others' unfair labor practices and coercion in others' labor disputes. A fuzzier standard with no bright lines would make it difficult for the Board to distinguish between arm's-length contracting parties and genuine joint employers. Accordingly, preserving the element of direct and immediate control over essential terms and conditions draws a discernible and predictable line, providing ''certainty beforehand'' for the regulated community.

85 FR 11205.

The Majority's Final Rule

The 2020 Rule was promulgated a mere three-and-a-half years ago, and since it took effect, the Board has applied it exactly once. See *Cognizant Technology Solutions U.S. Corp.,* 372 NLRB No. 108 (2023) (denying Google's request for review of a regional director's determination under the 2020 Rule that it is the joint employer of a subcontractor's employees based on its exercise of substantial direct and immediate control over their supervision, benefits, and hours of work). Nevertheless, my colleagues have plowed ahead with this rulemaking, even though ''[i]t is common knowledge that the Board's limited resources are severely taxed by undertaking a rulemaking process.''[431] And they have done so despite the fact that one member of the current majority sharply criticized a prior Board majority for changing the joint-employer standard under strikingly similar circumstances.[432]

The final rule promulgated today makes extreme and troubling changes to Board law, including but not limited to the following revisions. The rule makes contractually reserved but unexercised control and indirect control not merely probative of joint-employer status (as did *BFI*), but independently sufficient to establish that status. It scraps what it characterizes as ''artificial control-based restrictions'' in the 2020 Rule.[433] And it jettisons the second step of *BFI*'s joint-employer standard, which required proof that a putative joint employer ''possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.'' 362 NLRB at 1600.

The final rule starts off mundanely enough, declaring in paragraph (a) of newly revised Section 103.40 of the Board's Rules & Regulations that an entity is an ''employer'' of particular employees ''if the employer has an employment relationship with those employees under common-law agency principles.'' Paragraph (b) provides that two employers of the same employees ''are joint employers'' if ''they share or codetermine those matters governing employees' essential terms and conditions of employment.''

Paragraph (c), which defines the ''share or codetermine'' standard, is where the trouble really starts. It provides that ''[t]o 'share or codetermine those matters governing employees' essential terms and conditions of employment' means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment.'' The effect of this subsection is dramatic. It mandates a finding of joint-employer status based on the *mere possession* of authority to control, directly *or indirectly,* a *single* essential term (*e.g.,* hours of work). The majority has eliminated any need for proof of actual exercise, much less substantial exercise, of control over employees' essential

[430] Citations in this paragraph to the Code of Federal Regulations refer to the regulations in place before the amendments made by the majority's final rule.

[431] ''The Standard for Determining Joint Employer Status,'' 83 FR 46681, 46688 (2018) (then-Member McFerran, dissenting).

[432] See *Hy-Brand Industrial Contractors, Ltd. & Brandt Construction Co.,* 365 NLRB No. 156, slip op. at 40 (2017) (Member Pearce and then-Member McFerran, dissenting) (''What is the justification for overruling *BFI* after just [two] years[?] . . . . [A]fter a mere [two] years, any accounting of *BFI*'s effects would be premature; indeed, before it was overruled today, *BFI* has been applied by the Board in only one other Board decision. The complete absence of relevant experience under *BFI* underscores the essentially reflexive nature of today's exercise.''), vacated 366 NLRB No. 26 (2018).

[433] The majority states that ''the joint employer standard that [they] adopt today removes artificial control-based restrictions with no foundation in the common law that the Board has previously imposed in cases beginning in the mid-1980s discussed above, and in the 2020 Final Rule.'' In its 2022 Notice of Proposed Rulemaking (NPRM), the majority identified those control-based restrictions as ''restrictions requiring (1) that a putative joint employer 'actually' exercise control, (2) that such control be 'direct and immediate,' and (3) that such control not be 'limited and routine.' '' 87 FR 54641, 54643.

terms. Moreover, paragraph (c) refers broadly to ''authority to control,'' without limiting it to contractually reserved authority. A ''user'' business possesses authority to indirectly control the hours of work of employees supplied to it by a ''supplier'' employer merely by virtue of the fact that it decides when it is open for business. If that is sufficient to make ''user'' businesses joint employers of supplied employees, then paragraph (c) of revised § 103.40 makes *every* ''user'' business a joint employer.

The final rule's treatment of indirect control is similarly problematic. Given that possession or exercise of indirect control will establish a joint-employer relationship under § 103.40(b) and (c) of the final rule, it seems critically important for the majority to explain what constitutes ''indirect control.'' They do not do so. The final rule identifies control exercised through an intermediary as an *example* of ''indirect control,'' [434] but this necessarily implies that the exercise of ''indirect control'' is not *limited* to control exercised through an intermediary. What else might count as the exercise of indirect control? My colleagues do not say, but they take note of comments contending that certain circumstances should be regarded as demonstrating indirect control,[435] including that franchisors necessarily have indirect control because they ''are the parties with meaningful profit margins that could be redistributed to the workforce during bargaining'' and because most franchisees' revenue and cost variables ''greatly constrain franchisees' practical ability to offset concessions to their workers.'' [436] The same commenter suggests that businesses that engage service contractors necessarily have indirect control because ''service contractors rarely have room to grant wage increases without renegotiating their own contracts with clients and thus the clients effectively control the economic terms of employment for the contractors' employees.'' [437] Are these the kinds of circumstances that my colleagues have in mind as evidencing ''indirect control''? We do not know because they do not say.[438]

Further, the final rule does not adequately ''distinguish evidence of indirect control that bears on workers' essential terms and conditions from evidence that simply documents the routine parameters of company-to-company contracting.'' *Browning-Ferris Industries of California* v. *NLRB,* 911 F.3d at 1226. According to the majority, ''limiting the list of essential terms and conditions of employment is responsive to the District of Columbia Circuit's request that the Board incorporate a limiting principle to ensure the joint-employer standard remains within common-law boundaries.'' [439] But closing the list of essential terms and conditions is not enough because routine components of company-to-company contracts may indirectly impact essential terms. For example, a widely used standard contract in the construction industry [440] includes a provision that makes the general contractor ''responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the [c]ontract.'' That clause—a routine component of company-to-company contracting in the construction industry—evidences the general contractor's indirect control (at least) of ''working conditions related to the safety and health of employees'' of each of its subcontractors, an essential term and condition of employment under § 103.40(d)(7) of the final rule.[441]

Additionally, my colleagues perform some sleight of hand regarding the final rule's treatment of what was *BFI*'s second step: proof that ''the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining.'' 362 NLRB at 1600. In the 2022 NPRM, my colleagues straightforwardly acknowledged that their proposed rule ''d[id] not incorporate'' *BFI*'s second step, dubiously declaring that ''any required bargaining under the new standard will necessarily be meaningful.'' 87 FR at 54645 n. 26. Accordingly, they repudiated the *BFI* majority's recognition that in some cases, a putative joint employer's extent of control over the terms and conditions of employment of the employees of an undisputed employer will be

[434] Under the 2020 Rule, control exercised through an intermediary could establish joint-employer status if it was otherwise sufficient. ''Direct and immediate control exercised through an intermediary remains direct and immediate.'' 85 FR at 11209 (citing *Browning-Ferris Industries of California* v. *NLRB,* 911 F.3d at 1217 (''[T]he common law has never countenanced the use of intermediaries or controlled third parties to avoid the creation of a master-servant relationship.'')). My colleagues and I disagree about whether to characterize control exercised through an intermediary as direct control or indirect control. In my view, an intermediary (*e.g.,* a supervisor employed by the undisputed employer) who operates as a mere conduit of the putative joint employer's commands functions as its agent. The putative joint employer there is exercising control even more directly than when it engages in collaborative decision-making with the undisputed employer, which is direct control. The majority's reclassification of control exercised through an intermediary as indirect control makes little sense. Moreover, because the majority does not limit ''indirect control'' to that example, they leave the door open to finding other kinds of indirect control. The important question, which my colleagues do not answer, is, what else will count as ''indirect control''?

[435] Comments of Center for Law and Social Policy; Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT.

[436] Comment of Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT (internal citation and quotations omitted).

[437] Comment of Los Angeles County Federation of Labor AFL–CIO & Locals 396 and 848 of the IBT (internal citation and quotations omitted).

[438] In response to my criticism, the majority states that they ''deci[ded] not to include an extensive list of examples of forms of indirect control that may be relevant to the joint-employer inquiry.'' I am not, however, criticizing my colleagues for failing to provide ''an extensive list of examples.'' Rather, I observe that the majority does not identify *even one example* of such indirect control other than control exercised through an intermediary. Given that the majority makes indirect control sufficient to establish joint-employer status, this lack of guidance is a serious shortcoming. As with much else in the final rule, the majority leaves the fleshing out of ''indirect control'' to be determined case by case—and this leaves businesses affected by the new rule, and facing the complicated task of planning for its impact, utterly at sea.

Relatedly, my colleagues are wrong in asserting that the role I give (and the 2020 Rule gave) to indirect control somehow conflicts with the D.C. Circuit's opinion in *Browning-Ferris Industries of California* v. *NLRB.* In remanding that case to the Board to elucidate the distinction between indirect control that bears on essential employment terms and the routine parameters of business-to-business contracting, the court did not imply that indirect control could independently establish a joint-employer relationship. The court expressly withheld judgment on that issue. The court simply instructed the Board to explain the difference between control that is *relevant* to a joint-employer analysis and that which carries no weight at all.

[439] My colleagues say that their decision to close the set of ''essential'' terms and conditions of employment is *not* intended to address the D.C. Circuit's criticism of *BFI*'s failure to distinguish indirect control that bears on joint-employer status from routine aspects of company-to-company contracting but rather responds to the court's instruction to ''explain which terms and conditions are 'essential' to permit 'meaningful collective bargaining,'" and to ''clarify what 'meaningful collective bargaining' entails and how it works in this setting.'' *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d at 1221–1222 (quoting *BFI,* 362 NLRB at 1600). But this clarification is at odds with their simultaneous claim that a closed set of terms and conditions heeds the D.C. Circuit's request for a limiting principle ''to ensure the joint-employer standard remains within common-law boundaries.'' The D.C. Circuit's directive that the standard remain within common-law boundaries flows directly from its finding that *BFI* ''overshot the common-law mark'' by failing to distinguish between indirect control that bears on the joint-employer inquiry and the routine components of company-to-company contracting. Accordingly, I do not mischaracterize their position when I point out that closing the set of essential terms and conditions fails to provide the ''legal scaffolding'' the D.C. Circuit called for.

[440] AIA Document A201–2017 (cited in comment of Associated General Contractors of America).

[441] The majority also says that Sec. 103.40(f) of the final rule responds to the D.C. Circuit's instruction that the Board separate indirect control that bears on the joint-employer inquiry from routine components of company-to-company contracting. I address this claim below.

insufficient to warrant placing that entity at the bargaining table, and that in those circumstances, it would be contrary to the policies of the Act to find joint-employer status. 362 NLRB at 1610–1611; id. at 1614 (''The existence, *extent,* and object of a putative joint employer's control, of course, all may present material issues.'') (emphasis added). In the final rule, the majority takes a different route than they took in the NPRM, but they arrive at the same destination. The majority says that the final rule ''effectively incorporates the second step of the Board's joint-employer test set forth in *BFI*'' because the final rule (unlike the proposed rule) makes the list of ''essential'' terms and conditions of employment exhaustive. But *BFI*'s second step addresses the *extent* of a putative joint employer's control over essential terms and conditions. What constitutes essential terms and conditions pertains to what is controlled, *i.e.,* the *object* of control—and as *BFI* makes clear, extent of control and object of control present distinct issues in the joint-employer analysis. Plainly, the final rule does *not* ''incorporate[ ] the second step'' of the *BFI* standard, and this is made all the more apparent by newly revised § 103.40(e), which provides that merely ''[p]ossessing the authority to control is sufficient to establish status as a joint employer,'' and so is ''[e]xercising the power to control,'' without any requirement that there be a sufficient *amount* of control to permit meaningful collective bargaining.

My colleagues dismiss this concern by saying that § 103.40(a) of the final rule will prevent the rule from being applied overbroadly ''to encompass entities whose relationship to the performance of the work is clearly too attenuated.'' They say that my criticism of their rule ''elides the threshold significance of § 103.40(a), which requires a party seeking to demonstrate the existence of a joint-employment relationship to make an initial showing that the putative joint employer has a common-law employment relationship with particular employees.'' But it is my colleagues who have failed to explain how § 103.40(a) functions in the joint-employer analysis. They do not explain what, if any, limitations it imposes on joint-employer determinations. They do not convey that it establishes some minimum level of control (in terms of extent of control over a particular term or condition of employment or breadth of control across multiple terms or conditions) that must be reached before joint-employer status is found. But even accepting that some unstated minimum quantum of authority to control is implicit in the threshold requirement of § 103.40(a), nothing in their rule enlightens the regulated community what that minimum quantum might be. Like ''indirect control,'' that is left to be determined case by case, with the majority here saying, in effect, ''trust us, we'll be reasonable,'' even though nothing in the text of the rule constrains the Board from drawing the line unreasonably. And my colleagues certainly do not suggest that § 103.40(a) implicitly sneaks an actual-exercise requirement in through the back door. Any hope in that regard is laid to rest by their insistence, in discussing § 103.40(c), that exercise of control is unnecessary under the common law. In short, my colleagues have not blunted my criticism of their abandonment of the actual-exercise requirement by pointing to § 103.40(a) and its nebulous threshold requirement.[442]

In short, the combined effect of all these features of the final rule results in a dramatic expansion of the Board's joint-employer doctrine compared with the 2020 Rule and even compared with the Board's holding in *BFI.* At least it will do so if the final rule survives one or more of the inevitable court challenges it is destined to face. A betting person might hesitate to put money on its chances because, as demonstrated below, the final rule is wrong as a matter of law and unadvisable as a matter of policy.

Common-Law Agency Principles Do Not Compel or Even Support the Final Rule

My colleagues repeatedly and emphatically declare that common-law agency principles, and therefore the Act itself, preclude the 2020 Rule and compel their final rule. Among the statements they make are the following:

- ''After carefully considering nearly 13,000 comments, the Board believes that it is necessary and appropriate to rescind the 2020 rule, which was contrary to the Act insofar as it was inconsistent with the common law of agency.''
- ''[W]e believe that the Board is required to rescind the 2020 rule . . . .''
- ''[W]e rescind the 2020 rule because it is inconsistent with common-law agency principles and therefore inconsistent with the National Labor Relations Act.''
- ''[B]ecause we are bound to apply common-law agency principles, we are not free to maintain a definition of 'joint employer' that incorporates the restriction that any relevant control an entity possesses or exercises be 'direct and immediate.' ''
- ''[T]he 2020 rule introduced control-based restrictions that are inconsistent with common-law agency principles.''
- ''[W]e are foreclosed from maintaining the joint-employer standard set forth in [the 2020 rule] because it is not in accordance with the common-law agency principles the Board is bound to apply in making joint-employer determinations.''
- ''[T]he Board has concluded that the actual-exercise requirement reflected in the 2020 rule is . . . contrary to the common-law agency principles that must govern the joint-employer standard under the Act and that the Board has no statutory authority to adopt such a requirement.''

A reader might reasonably expect the majority to follow up those assertions with citations to judicial decisions, involving the NLRA and other materially similar statutes, in which the courts have found joint-employer status based *exclusively* on a never-exercised contractual right to control and/or indirect control of an essential term and condition of employment. Such readers will be sorely disappointed. The majority fails to cite a single judicial decision, much less a body of court precedent rising to the level of establishing the common law, that bases a joint-employer finding solely on a never-exercised contractual reservation of right to control or on indirect control of employees' essential terms and conditions. As I will show, judicial precedent addressing joint-employer status under both the NLRA and materially similar statutes requires that control be actually exercised. And as the following discussion will demonstrate, so does Board precedent, with narrow exceptions. Accordingly, the majority is mistaken when they claim that requiring the exercise of substantial direct and immediate control to establish joint-employer status is inconsistent with ''prior Board and judicial decisions.''

[442] As noted above, the majority also denies that their rule fails adequately to distinguish evidence of indirect control that bears on the joint-employer inquiry from evidence that simply documents the routine parameters of company-to-company contracting, as mandated by the D.C. Circuit, by pointing to § 103.40(f) of the final rule. Sec. 103.40(f) provides that evidence of an entity's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles and that do not bear on the employees' essential terms and conditions of employment is not relevant to the determination of whether the entity is a joint employer. In other words, § 103.40(f) is mostly just the inverse of Sec. 103.40(a) and, as such, furnishes no more guidance than does § 103.40(a). And to the extent that it is not the inverse of § 103.40(a), it is the inverse of § 103.40(b), which confirms that my colleagues do indeed take the position that by defining a closed set of essential terms and conditions, they have responded to the D.C. Circuit's mandate.

The 2020 Rule was not inconsistent with the majority of Board precedent addressing joint-employer status under the Act.

A survey of Board decisions addressing the issue of joint-employer status reveals that, with narrow exceptions, the Board has relied, at least in part, on the putative joint-employer's *actual* exercise of direct control over terms and conditions of employment. Accordingly, the majority's decision to make never-exercised authority to control or indirect control independently sufficient to establish joint-employer status represents a sharp break from Board precedent.

Contrary to my colleagues' suggestion, *Greyhound Corp.,* 153 NLRB 1488 (1965), does not support finding joint-employer status based exclusively on a never-exercised right to control or indirect control. There, the Board found that Greyhound was a joint employer of its cleaning contractor's employees based in part on Greyhound's actual exercise of substantial direct and immediate control over the employees' essential terms and conditions of employment. Specifically, the Board relied on the fact that Greyhound had actually engaged in ''detailed supervision'' of the contractor's employees on a day-to-day basis regarding the manner and means of their performance. Id. at 1496. The Board also relied on evidence that Greyhound had actually prompted the discharge of one of the contractor's employees whom Greyhound deemed unsatisfactory. Id. at 1491 n. 8. To be sure, the Board also gave some weight to provisions in the contract between Greyhound and the contractor, which granted Greyhound the right to specify the ''exact manner and means'' through which the employees' work would be accomplished, to control their wages, to set their schedules, and to assign employees to perform the work. Id. at 1495–1496. But the Board specifically stated that ''[t]he joint employer finding herein is premised on the common control *exercised* by Greyhound and [the cleaning contractor] over the employees.'' Id. at 1492 (emphasis added). And the Board explained that Greyhound had ''reserved to itself, both as a matter of express contractual agreement *and in actual practice,* rights over these employees which are consistent with its status as their employer along with [the cleaning contractor].'' Id. at 1495 (emphasis added). In short, *Greyhound* is consistent with both subsequent Board joint-employer precedent and the 2020 Rule. It does not support the majority's final rule.[443]

The majority mischaracterizes Board precedent during the two decades following *Greyhound,* implying that it reflects a ''traditional'' approach under which proof that an entity exercised control over the terms and conditions of employment of another employer's employees was unnecessary to establish joint-employer status.[444] The majority asserts that ''Board precedent from this time period generally did not require a showing that both putative joint employers actually or directly exercised control.'' But they fail to acknowledge that the Board has *never* based a joint-employer finding solely on ''indirect control,'' and most of the Board cases my colleagues cite as demonstrating a ''traditional'' reliance on a contractual reservation of right to control are limited to a single category of cases involving department stores with licensed departments.[445] These cases do not bear the weight the majority gives them.[446]

In fact, during the two decades following *Greyhound,* the Board regularly found no joint-employer status where the putative joint employer possessed some reserved contractual authority to control essential terms, and even where it actually exercised control but to too limited an extent to warrant a joint-employer finding. For example, in *Hychem Constructors, Inc.,* 169 NLRB 274, 276 (1968), the Board found no joint-employer status despite a putative employer's reserved right to approve wage increases and overtime, its policy of consulting on proposed layoffs, and its ''as yet unexercised prerogative to remove an undesirable . . . employee.'' Similarly, in *S. G., Tilden, Inc.,* 172 NLRB 752, 753 (1968), the Board found a franchisor was not a joint employer of its franchisees' employees despite its specification of the franchisees' hours of operation and its requirement that they adhere to certain pricing and housekeeping standards. Echoing the standard applied in the department-store cases, the Board in *S. G. Tilden* found ''no clear indication . . . that Respondent Tilden intended to, or in fact did, *exercise direct control* over the labor relations of [the franchisees].'' Id. (emphasis added); see also *Furniture Distribution Center, Inc.,* 234 NLRB 751, 751–752 (1978) (evidence that ''user'' business and ''supplier'' business conferred and jointly decided on the number of supplied employees and the number of hours those employees would work each week deemed insufficient to create a joint-employer relationship); *Cabot Corp.,* 223 NLRB 1388, 1389, 1390 n.10, 1392 (1976) (no joint-employer status despite putative joint employer reserving the right to inform direct employer of the specific

[443] In an earlier case related to *Greyhound,* the Supreme Court held that a federal district court lacked subject-matter jurisdiction to enjoin the Board from conducting a representation election based on the plaintiff's challenge to the Board's joint-employer determination in the representation proceeding. *Boire* v. *Greyhound Corp.,* 376 U.S. 473 (1964). Although the Court did not rule on the joint-employer issue, it did not criticize the Board's finding that Greyhound and the cleaning contractor constituted a joint employer ''because they had *exercised* common control over the employees.'' Id. at 475 (emphasis added).

[444] The issue here is not whether an unexercised contractual right of control and/or indirect control is or are relevant considerations in a joint-employer analysis. They are, as the 2020 Rule recognized. The issue is whether either one can independently establish joint-employer status.

[445] As these department-store cases demonstrate, licensed departments were seamlessly integrated with the department store as a whole, and employees of the licensee were indistinguishable from the department store's employees. See, *e.g., Spartan Department Stores,* 140 NLRB 608, 610 (1963) (observing that the agreement between the department store and the licensee was ''in furtherance of Spartan's intention of creating the appearance of a single, integrated department store''). Indeed, in one such case, the parties' contract expressly provided that employees in the licensed department ''shall be the employees of'' the department store. *Taylor's Oak Ridge Corp.,* 74 NLRB 930, 932 (1947).

[446] In the department-store cases, the Board did not purport to apply common-law agency principles, much less cite common-law cases finding joint-employer status based on reserved authority to control alone. When the Board stated any standard at all, it relied on whether the department store was in a position to influence the licensee's labor relations policies. See, *e.g., United Mercantile, Inc. d/b/a Globe Discount City,* 171 NLRB 830 (1968); *Buckeye Mart,* 165 NLRB 87 (1967), enfd. mem. 405 F.2d 1211 (6th Cir. 1969); *Value Village,* 161 NLRB 603 (1966). These cases do not support the majority's view that the common law compels a conclusion that contractually reserved authority to control is sufficient to make an entity a joint employer of another entity's employees. Indeed, in *Buckeye Mart,* it was found that the department store (Buckeye) was *not* the joint employer of the employees of the licensee (Manley) despite possessing contractually reserved authority to require Manley to discharge employees that Buckeye deemed objectionable. 165 NLRB at 88 (''Although Buckeye may compel the discharge of any Manley employee . . . . Buckeye is not in a position to 'influence' Manley's labor policies and . . . is not a joint employer with Manley . . . .''). Accordingly, the majority's reliance on Board cases involving licensing relationships in the department-store industry is misplaced. The majority also cites two cases—*General Motors Corp. (Baltimore, MD),* 60 NLRB 81 (1945), and *Anderson Boarding & Supply Co.,* 56 NLRB 1204 (1944)—where the issue was whether an industrial facility was the joint employer of employees working in its cafeteria. In neither case did the Board mention the common law of agency, and even if the common law was implicit in its analysis, two cases do not amount to a ''traditional'' practice. Moreover, as the D.C. Circuit forcefully reminded the Board in *Browning-Ferris Industries of California, Inc.* v. *NLRB,* ''Congress has tasked the courts, and not the Board, with defining the common-law scope of 'employer.' '' 911 F.3d at 1208. The Board, as an administrative agency, has no power to do so.

work to be performed and the equipment and personnel used, maintaining the right to ''inspect, test, approve, and disapprove of work and services,'' requiring all employees to follow its safety regulations, and retaining the right to remove employees it deemed incompetent), affd. sub nom. *International Chemical Workers Local 483* v. *NLRB,* 561 F.2d 253 (D.C. Cir. 1977); *Westinghouse Electric Corp.,* 163 NLRB 914, 914–915 (1967) (no joint-employer status despite putative joint employer's occasional direct supervision of supplier employer's employees, review of supplied employees' timesheets for auditing purposes, and reservation of the right to request removal of ''disorderly, incompetent, or objectionable persons from working at the site . . . . [S]uch conduct is clearly consistent with that of a contractor seeking to police its subcontract.''); *Space Services International Corp.,* 156 NLRB 1227, 1232–1233 (1966) (no joint-employer status where putative joint employer ''[reserved] the right to require removal from the work of any employee it deems incompetent, careless, or insubordinate'' and exercised this right on at least one occasion with respect to a management official). Accordingly, contrary to the majority's assertion, Board precedent prior to the 1984 joint-employer decisions in *TLI* and *Laerco Transportation* did not make indirect control independently sufficient to establish joint-employer status, and cases relying solely on contractually reserved authority to control do not apply a common-law test and therefore do not support the majority's claim that *TLI* and *Laerco* abandoned a ''traditional, common-law based standard'' for determining joint-employer status.[447]

Nor do the last forty years of relevant Board precedent support the majority's characterization of that period as marked by a radical departure from a prior ''traditional'' joint-employer standard. To begin, *TLI* and *Laerco Transportation* merely clarified the appropriate legal standard by echoing the United States Court of Appeals for the Third Circuit's articulation in *NLRB* v. *Browning-Ferris Industries of Pennsylvania, Inc.,* 691 F.2d at 1123: ''The basis of the [joint-employer] finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment'' (internal citations omitted) (emphasis in original). Importantly, the Third Circuit equated this ''share or codetermine'' standard with the exertion—*i.e.,* exercise—of significant control: ''[W]here two or more employers *exert significant control* over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment—they constitute 'joint employers' within the meaning of the NLRA.'' Id. at 1124. The Third Circuit's ''share or codetermine'' standard is consistent (with narrow exceptions) with the Board's pre-*TLI* and pre-*Laerco* joint-employer decisions. As shown below, it is also consistent with *TLI, Laerco,* and the Board's subsequent joint-employer decisions—until, of course, *BFI* took joint-employer doctrine in an entirely unprecedented direction. But it flatly contradicts the definition of that standard that my colleagues adopt today.[448]

In *TLI, Inc.,* 271 NLRB at 798–799, the Board reversed a judge's finding of joint-employer status, noting that the putative joint employer did not *sufficiently* affect the terms and conditions of employment of the supplier employer's drivers: the ''supervision and direction exercised by [the putative joint employer] on a day-to-day basis [was] both limited and routine.'' Id. at 799.[449] Similarly, in *Laerco Transportation,* 269 NLRB at 325, the Board found that the putative joint employer did not possess ''sufficient indicia of control'' over a supplier employer's drivers to create a joint-employer relationship. The Board found evidence that the putative joint employer gave drivers directions on which routes to follow and attempted to resolve personality conflicts to constitute merely ''minimal and routine'' supervision, and that most other terms and conditions of employment of the drivers were effectively controlled by their direct employer. Id. at 326. Thus, in *TLI* and *Laerco,* the Board faithfully applied the Third Circuit's standard—requiring ''two or more employers [to] *exert significant control* over the same employees'' in order to satisfy the ''share or codetermine'' standard and create a joint-employer relationship under the Act—to the facts of those cases, contrary to the majority's assertion that these decisions lacked ''a clear basis in established common-law agency principles or prior . . . judicial decisions.''

Subsequent joint-employer decisions were similarly consistent with both the

[447] For example, in *Floyd Epperson,* cited by the majority, the Board noted anecdotal evidence of the putative joint employer's indirect control over wages and discipline, but its joint-employer finding was largely based on evidence of direct and immediate supervision of the employees involved. 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974). In *Lowery Trucking Co.,* also cited by the majority, the Board noted the putative joint employer's unexercised right to reject a supplier employer's driver, but it highlighted the putative joint employer's actual exercise of detailed supervision, participation in the hiring process, discharge of two drivers, and discipline of a third. 177 NLRB 13, 15 (1969), enfd. sub nom. *Ace-Alkire Freight Lines* v. *NLRB,* 431 F.2d 280 (8th Cir. 1970). Similarly, in *Carrier Corp.* v. *NLRB,* 768 F.2d 778 (6th Cir. 1985), the court of appeals relied in part on the putative joint employer's reserved authority to reject drivers that did not meet its standards and to direct the primary employer to remove drivers for improper conduct, but in finding that substantial evidence supported the Board's joint-employer finding, the court primarily relied on evidence that Carrier ''exercised substantial day-to-day control over the drivers' working conditions'' and consulted with the undisputed employer over wages and benefits. Id. at 781; see also *International Chemical Workers Local 483* v. *NLRB,* 561 F.2d 253, 257 (D.C. Cir. 1977) (affirming Board's finding of no joint-employer status in part because the putative joint employer ''did not have authority to, *and did not actually,* direct [the primary employer's] employees in the details of their work'') (emphasis added). Moreover, most of the cases my colleagues rely on to support their claim that the Board adhered to a ''traditional, common-law based'' joint-employer standard prior to *TLI* and *Laerco* involved department stores with licensed departments, where, as explained above, the Board stated and applied a test that asked whether the store was in a position to influence the licensee's labor policies—and *Buckeye Mart* reveals the difference between that standard and a common-law based standard as my colleagues construe it.

[448] As noted above, the final rule incorporates the ''share or codetermine'' standard in newly revised Sec. 103.40(b). However, in Sec. 103.40(c), the final rule defines the ''share or codetermine'' standard to include indirect control of, and possession of a never-exercised authority to control, any essential term or condition of employment. This is not how the standard has been understood or applied historically, and it is contrary to the understanding of the very court that announced it, which defined the ''share or codetermine'' standard as a shared ''exert[ion]'' of ''significant control'' over a group of employees. *NLRB* v. *Browning-Ferris Industries of Pennsylvania,* 691 F.2d at 1124.

[449] The Board in *TLI* reached this conclusion notwithstanding the language of the applicable contract, which provided that the putative joint employer ''will solely and exclusively be responsible for maintaining operational control, direction and supervision'' over the supplier's drivers. Id. at 798. As explained above, this is consistent with the historical treatment of reserved authority to control as generally being insufficient to support joint-employer status absent evidence of substantial direct control. The Board also noted that the presence of the putative joint employer's representative at two bargaining sessions did not alter the outcome, as ''there [was] no evidence that he demanded specific reductions or that he made particular proposals.'' Id. at 799.

Third Circuit's definition of the ''share or codetermine'' standard and, in general, the Board's pre-1984 joint-employer decisions. In *AM Property Holding Corp.,* 350 NLRB 998, 1001 (2007), the Board explained that it has ''generally found supervision to be limited and routine where a supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.'' It further explained that ''[i]n assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of . . . contractual provisions [governing the right to approve hiring], but rather looks to the actual practice of the parties.'' Id. at 1000.

In *Airborne Express,* 338 NLRB 597 (2002), the Board adopted the judge's finding that there was no joint-employer relationship, based in part on evidence that the putative joint employer entered into contracts that explicitly afforded the independent contractors full and complete control over hiring, firing, discipline, work assignment, and other terms and conditions of employment. Id. at 605. The Board noted that ''the essential element in this analysis is whether a putative joint employer's control over employment matters is direct and immediate.'' Id. at 597 n.1;[450] see also *Flagstaff Medical Center,* 357 NLRB 659, 667 (2011) (''[T]he evidence regarding Sodexho's role in hiring, discharging, disciplining, supervising, and evaluating housekeepers does not establish that Sodexho shared or codetermined essential terms and conditions of employment.'').

During this time period, no appellate court criticized the Board's formulation of the joint-employer standard. As the *BFI* dissenters observed, if it were true that *TLI, Laerco,* and subsequent decisions departed without explanation from the Board's prior joint-employer precedent, *some* court of appeals would have taken issue: ''It is simply impossible that all the courts of appeals would have missed this train wreck.'' *BFI,* 362 NLRB at 1633 (Members Miscimarra and Johnson, dissenting).

The final rule's reliance on independent-contractor precedent to support their standard for determining joint-employer status is misplaced.

The majority's legal justification for abandoning the requirement that a putative joint employer actually exercise some control over at least one term or condition of employment of another employer's employees boils down to a misplaced reliance on broad statements in cases where the issue presented is whether certain individuals are employees or independent contractors. Based on a review of judicial decisions and compendiums of law addressing common-law principles pertinent to deciding that issue, my colleagues say that they are ''not aware of any common-law judicial decision or other common-law authority directly supporting the proposition that, given the existence of a putative employer's contractually reserved authority to control, further evidence of direct and immediate exercise of that control is necessary to establish a common-law employer-employee relationship.'' They miss my point, however, by conflating separate and distinct points. The issue here is not whether actual exercise of control by a putative employer is required to make a worker an employee of that employer and not an independent contractor. The issue is whether a worker who is undisputedly an employee of one entity is jointly employed by a second entity. My colleagues acknowledge that these are distinct issues. They must do so, as the D.C. Circuit has emphatically rejected any attempt to equate them. See *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d at 1213 (''Browning-Ferris cites no case in which we have applied an employee-or-independent-contractor test to resolve a question of joint employment, and we have found none.'') Yet, immediately following the statement quoted above—which, again, is based on precedent that addresses the employee-or-independent-contractor issue—my colleagues leap to the conclusion that they are statutorily precluded from requiring actual exercise of control to establish that an entity is a joint employer. In other words, the majority acknowledges the distinction between the employee-or-independent-contractor issue and the joint-employer issue and erases the distinction practically in the same breath. To stay within the boundaries of the common law as regards joint-employer status, they should not—indeed, must not—promulgate a rule that permits that status to be predicated solely on a never-exercised contractual reservation of right to control and/or indirect control where judicial decisions in joint-employer cases do not go that far—and as I explain below in the section after this one, they do not.

Moreover, my colleagues' reliance on independent-contractor precedent to set the standard for determining joint-employer status depends on equating ''right to control'' for purposes of deciding employee-or-independent-contractor issues with contractually reserved authority to control the terms and conditions of employment of another business's employees—but the equation does not hold. As the majority emphasizes, courts have explained that workers are employees rather than independent contractors if the putative employer possesses a right to control their manner and means of performance, regardless of whether that right is exercised. However, the independent-contractor cases make clear that in that context, a finding of ''right to control'' is a legal conclusion based on a totality-of-the-circumstances analysis applying twelve factors culled from the federal common law of agency to the facts of the case. See, *e.g., Community for Creative Non-Violence* v. *Reid,* 490 U.S. 730, 751–752 (1989) (listing the relevant factors).[451] And, as the Supreme Court recognized, ''no one of these factors is determinative.'' Id. at 752. If, on balance, an analysis of the facts of a case in light of these multiple factors supports a finding that the hiring party has the right to control the manner and means of the worker's performance, then the hiring party is the worker's employer regardless of whether it exercises its right to control her manner and means of performance by directing the details of her work. In short, the ''right to control manner and means of performance'' under independent-contractor precedent is one thing, and a never-exercised contractual reservation of right to affect one or more essential terms and conditions of employment of another employer's employees is quite another. The majority simply errs in treating these two distinct legal doctrines as equivalent.[452]

[450] In *Airborne,* the Board said that about twenty years earlier, it had ''abandoned its previous test in this area, which had focused on a putative joint employer's *indirect* control over matters relating to the employment relationship.'' Id. (emphasis in original). Frankly, I believe this statement mischaracterized the Board's earlier joint-employer precedent. As shown above, that precedent did not focus on indirect control. Those cases ascribed some significance to indirect control, but they did not find indirect control to be outcome-determinative absent evidence of direct control.

[451] Those factors are (1) the skill required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party. Id.

[452] One reason that judicial precedent distinguishing between independent contractors and employees is ill-suited to fully resolve joint-employer issues is that independent-contractor

Continued

This was made clear by the D.C. Circuit's opinion in *Browning-Ferris Industries of California* v. *NLRB.* As noted above, the court of appeals made clear that ''a rigid focus on independent-contractor analysis omits the vital second step in joint-employer cases, which asks, once control over the workers is found, *who* is exercising that control, *when,* and *how*.'' 911 F.3d at 1215 (emphasis in original). As the court explained, ''using the independent-contractor test exclusively to answer the joint-employer question would be rather like using a hammer to drive in a screw: it only roughly assists the task because the hammer is designed for a different purpose.'' Id. Today's final rule simply disregards the second step of the common-law joint-employer standard identified by the D.C. Circuit. It eliminates any requirement of actual exercise of control and thus renders immaterial ''how'' control is exercised (directly or indirectly) or ''when'' (never, rarely, occasionally, or frequently). Further, the D.C. Circuit's pointed decision to avoid answering whether a joint-employer finding could ever be based solely on an unexercised contractual reservation of authority to control, 911 F.3d at 1213, or on indirect control, id. at 1218, undermines my colleagues' assertion that the common-law of agency compels affirmative answers to those two questions.[453]

The final rule is inconsistent with the common-law joint-employer standard applied by the courts under other federal statutes.

The majority minimizes federal court precedent specifically analyzing joint-employer issues under materially similar federal statutes, *i.e.,* statutes that, like the NLRA, contain a definition of ''employee'' that may not be interpreted to exceed the boundaries established by common-law agency principles.[454] These statutes include Title VII of the Civil Rights Act of 1964,[455] the Age Discrimination in Employment Act,[456] and Section 504 of the Rehabilitation Act of 1973.[457] Applying common-law agency principles in these joint-employer cases, federal appellate courts have considered the extent to which a putative joint employer has *exercised* control over the essential terms and conditions of employment of another company's employees. Courts have considered a host of factors (*e.g.,* control exercised over hiring, firing, and day-to-day supervision), drawing guidance from Supreme Court precedent distinguishing between independent contractors and employees, but tailoring the analysis to account for the joint-employer context, *i.e.,* workers who are undisputedly an employee of one employer but who may have a second, joint employer. Courts consider the totality of the circumstances, with no one factor being determinative, in ascertaining whether the putative joint employer has exerted a sufficient amount of control over the workers at issue to be deemed their joint employer. Generally speaking, they have emphasized the extent of the putative joint employer's active role in hiring and firing the workers at issue and in supervising their manner and means of performance.

Applying common-law principles, every circuit court that has decided joint-employer issues under statutes materially similar to the NLRA applies a significantly more demanding joint-employer standard than the one promulgated by my colleagues today.[458]

cases *necessarily* involve exercise of control by the sole putative employer over the putative employee. That entity has engaged the worker (*i.e.,* hired her to perform work), has decided upon the compensation to be paid (*i.e.,* determined her wages), and has actually paid her that compensation. This is seen in *Singer Mfg. Co.* v. *Rahn,* 132 U.S. 518, 523 (1889), a case my colleagues rely on heavily to support their proposition that exercise of control is unnecessary under the common law, not only in the independent-contractor context but in the joint-employer context as well. In *Singer Mfg. Co.* v. *Rahn,* the Court held that a worker was an employee, not an independent contractor, based on the written terms of a contract between the worker and the company. There, the company engaged (*i.e.,* hired) an individual to sell its sewing machines and decided upon his compensation, which, along with other terms, was set forth in a contract between the two parties. To be sure, the Court's analysis focused on the terms of the contract, but to conclude that this compels the conclusion that joint-employer status likewise may be based solely on a never-exercised contractual right to control ignores that in the independent-contractor context, where there is only one alleged employer, that entity necessarily exercises direct control of at least two things that my colleagues and I agree constitute essential terms and conditions. Even if it exercises control of nothing else, it engages—*i.e.,* hires—the worker, and it compensates—*i.e.,* pays—the worker. Notably, it may do so and the individual thus hired and paid may *still* be an independent contractor, yet my colleagues would make a joint employer of businesses that *never* exercise direct control over *any* essential term or condition. Precedent like *Singer* does not support the proposition that a court (or the Board) must or should find that one entity is a joint employer of another entity's employees based exclusively on a never-exercised contractual reservation of right to control.

[453] My colleagues cite a plethora of decisions (including state law cases more than a hundred years old), the overwhelming majority of which focus on independent contractor, workers' compensation, and tort liability matters. Although these cases are informative regarding the contours of the master-servant doctrine with respect to individuals alleged to have an employment relationship with a single entity, they have limited utility where workers are unquestionably employees of one entity, and the issue is whether a second entity jointly employs them. My view here is fully consistent with that of the D.C. Circuit in *Browning-Ferris Industries of California, Inc.* v. *NLRB.* As the court there stated, ''Browning-Ferris's contention that the joint-employer and independent-contractor tests are virtually identical lacks any precedential grounding. Browning-Ferris cites no case in which we have applied an employee-or-independent-contractor test to resolve a question of joint employment, and we have found none.'' 911 F.3d at 1213.

[454] See, *e.g., Hurst* v. *McDonough,* 2022 U.S. App. LEXIS 9725 (10th Cir. Apr. 12, 2022); *Felder* v. *U.S. Tennis Assn.,* 27 F.4th 834 (2d Cir. 2022); *Perry* v. *VHS San Antonio, LLC,* 990 F.3d 918 (5th Cir. 2021); *Nethery* v. *Quality Care Investors, L.P.,* 814 Fed. Appx. 97 (6th Cir. 2020); *EEOC* v. *Global Horizons, Inc.,* 915 F.3d 631 (9th Cir. 2019); *Frey* v. *Hotel Coleman,* 903 F.3d 671 (7th Cir. 2018); *Garcia-Celestino* v. *Ruiz Harvesting, Inc.,* 843 F.3d 1276 (11th Cir. 2016); *Al-Saffy* v. *Vilsack,* 827 F.3d 85 (D.C. Cir. 2016); *Faush* v. *Tuesday Morning, Inc.,* 808 F.3d 208 (3d Cir. 2015); *Casey* v. *Dep't of Health & Human Services,* 807 F.3d 395 (1st Cir. 2015); *Butler* v. *Drive Automotive Industries of Am.,* 793 F.3d 404 (4th Cir. 2015).

[455] 42 U.S.C. 2000e *et seq.*

[456] 29 U.S.C. 621 *et seq.*

[457] 29 U.S.C. 794. In contrast, under the Fair Labor Standards Act, 29 U.S.C. 621 *et seq.,* the joint-employer doctrine is not limited by common-law agency principles. See, *e.g., Salinas* v. *Commercial Interiors, Inc.,* 848 F.3d 125, 137 (4th Cir. 2017) (''[T]he FLSA's definition of 'employee' encompass[es] a broader swath of workers than would constitute employees at common law.'') (citing *Nationwide Mutual Ins. Co. of America* v. *Darden,* 503 U.S. 318, 326 (1992)).

[458] The First Circuit examines fifteen factors, which ''are to be weighed in their totality,'' with a stated emphasis on the extent to which the putative joint employer controls the manner and means by which the worker completes her tasks. *Casey,* 807 F.3d at 405 (finding no joint-employer relationship where the putative joint employer ''did not exert such control over [the employee's] performance of her job duties as to establish an employment relationship''). The Second Circuit asks whether two or more entities ''share significant control'' over the same employees, examining thirteen non-exhaustive factors, with no single factor being decisive, and focusing on the extent to which control was exercised. *Felder,* 27 F.4th 843–844 (finding no joint-employer relationship despite fact that putative joint employer exercised control by preventing its subcontractor from referring a particular worker for assignment). The Third Circuit focuses on which entity paid workers' salaries, hired and fired them, and had control over their daily employment activities. *Faush,* 808 F.3d at 216 (holding that district court erred in granting summary judgment in favor of putative joint employer that had given employee assignments, directly supervised him, provided site-specific training, furnished necessary equipment and materials, and verified the number of hours he had worked on a daily basis). The Fifth Circuit applies a ''hybrid'' test that focuses on the right to hire, fire, supervise, and set work schedules, and on which entity paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment. *Perry,* 990 F.3d at 928–929 (finding that hospital was not joint employer of physician supplied to it by professional association despite fact that hospital had exercised its ''limited contractual right to 'fire' [him] by requesting that [the professional association] terminate his professional services agreement''). The Sixth Circuit asks whether two entities share or codetermine those matters governing essential terms and conditions of employment, examining a putative joint employer's exercise of its ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance. *EEOC* v. *Skanska USA Building, Inc.,* 550 Fed. Appx. 253, 256 (6th Cir. 2013) (finding that general contractor was joint employer of

Not a single circuit has held or even suggested that an entity can be found to be the joint employer of another entity's employees based solely on a never-exercised contractual reservation of right to affect essential terms or on ''indirect control,'' *i.e.,* conduct other than actually determining (alone or in collaboration with the undisputed employer) employees' essential terms and conditions of employment.[459]

Illustrative is *Felder* v. *U.S. Tennis Assn.,* 27 F.4th at 842–844. In that case, the Second Circuit articulated for the first time its standard for analyzing joint-employer status under Title VII. After surveying the legal landscape, the court explained that it will find a joint-employer relationship ''when two or more entities, according to common law principles, share significant control of the same employee.'' Importantly, the court quoted with approval cases from other circuits requiring proof that the putative joint employer ''exercise[d] significant control.''[460] The court explained that, ''[*b*]*ecause the exercise of control is the guiding indicator,* . . . any relevant factor may be considered so long as [it is] drawn from the common law of agency'' synthesized in *Community for Creative Non-Violence* v. *Reid,* 490 U.S. at 730. Id. at 844 (emphasis added). Broadly, those factors include whether the putative joint employer '' 'paid [the employees'] salaries, hired and fired them, and had control over their daily activities.' '' Id. at 843 (quoting *Faush* v. *Tuesday Morning, Inc.,* 808 F.3d at 214 (3d Cir. 2015) (alteration in *Felder*)). Applying this standard, the *Felder* court held that a lower court had properly granted the putative joint employer's motion to dismiss the complaint because the plaintiff had failed to allege that the putative joint employer ''would have exerted significant control'' over his terms and conditions of employment had it not rejected a subcontractor's attempt to refer him to it. Id. at 845.

Similarly, in *Butler* v. *Drive Automotive Industries of America,* the Fourth Circuit explained that ''the [joint-employer] doctrine's emphasis on determining which entities *actually exercise control* over an employee is consistent with Supreme Court precedent interpreting Title VII's definitions.'' 793 F.3d at 409 (emphasis added). See also *Adams* v. *C3 Pipeline Constr. Inc.,* 30 F.4th at 961 (10th Cir. 2021) (''Both entities are [joint] employers if they both exercise significant control over the same employees.'') (internal quotation marks and citations omitted); *Whitaker* v. *Milwaukee County,* 772 F.3d 802, 810 (7th Cir. 2014) (''An entity other than the actual employer may be considered a 'joint employer' 'only if it exerted *significant* control over' the employee.'') (quoting *G. Heileman Brewing Co.* v. *NLRB,* 879 F.2d 1526, 1530 (7th Cir. 1989) (emphasis added));[461] *Gulino* v. *N.Y. State Educ. Dept.,* 460 F.3d 361, 379 (2d Cir. 2006) (''The *Reid* factors countenance a[n employment] relationship where the level of control is direct, obvious, and concrete, not merely indirect or abstract.'').[462]

The standard promulgated today, which does not require proof of *any* exercise of control, is strikingly inconsistent with the standards applied by the federal courts of appeals when applying common-law agency principles to determine joint-employer status. As summarized above, federal appellate courts have repeatedly focused on the extent to which a putative joint employer has *exercised* control. In contrast, the standard my colleagues promulgate resembles the substantially easier-to-satisfy standard applicable under the Fair Labor Standards Act, where ''economic reality . . . is to be the test of employment.'' *Goldberg* v. *Whitaker House Co-op., Inc.,* 366 U.S. 28, 33 (1961) (internal quotation marks omitted). ''Because of the uniqueness of the FLSA, a determination of joint employment [under that statute] 'must be based on a consideration of the total employment situation and the economic realities of the work relationship.' '' *In re Enterprise Rent-A-Car Wage & Employment Practices Litigation,* 683 F.3d 462, 469 (3d Cir. 2012) (quoting *Bonnette* v. *California Health & Welfare Agency,* 704 F.2d 1465, 1470 (9th Cir. 1983)). Application of a control-based test ''would only find joint employment where an employer had direct control over the employee, but the FLSA designates those entities with sufficient *indirect* control as well.'' Id. at 469.

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subcontractor's elevator-operator employees because it had ''supervised and controlled the operators' day-to-day activities without any oversight from [the subcontractor],'' ''routinely exercised its ability to direct and supervise the operators' performance,'' and ''set the operators' hours and daily assignments''). The Seventh Circuit applies five factors: (1) the extent of the putative joint employer's control and supervision of the worker, including scheduling and manner and means of performance of work; (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace; (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations; (4) method and form of payment and benefits; and (5) length of job commitment and/or expectations. *Frey,* 903 F.3d at 676. The Seventh Circuit explained that in applying its five-factor test, it ''looks to see whether the putative employer exercised sufficient control.'' Id. at 678. The Ninth Circuit focuses on ''the extent of control that one may exercise over the details of the work of the other,'' ''with no one factor being decisive.'' *Global Horizons, Inc.,* 915 F.3d at 638. The Tenth Circuit applies the ''share or codetermine'' standard and looks to whether both entities ''exercise[d] significant control.'' *Adams* v. *C3 Pipeline Constr. Inc.,* 30 F.4th 943, 961 (10th Cir. 2021).

[459] The majority disputes this statement, citing *EEOC* v. *Global Horizons, Inc.,* 915 F.3d at 631. That case does not support my colleagues' position, for reasons explained below.

[460] The court in *Felder,* id. at 843–844, cited *Knitter* v. *Corvias Mil. Living, LLC,* 758 F.3d 1214, 1226 (10th Cir. 2014) (quoting *Bristol* v. *Bd. of Cnty. Comm'rs of Cnty. of Clear Creek,* 312 F.3d 1213, 1218 (10th Cir. 2002) (''Under the joint employer test, two entities are considered joint employer . . . if they both 'exercise significant control over the same employees.' '')), and *Plaso* v. *IJKG, LLC,* 553 Fed. Appx. 199, 204 (3d Cir. 2015) (quoting *Graves* v. *Lowery,* 117 F.3d 723, 727 (3d Cir. 1997) (''[A] joint employment relationship exists when 'two entities exercise significant control over the same employees.' '')).

[461] The majority dismisses the Seventh Circuit's decision in *Whitaker* because, they say, the court ''drew its articulation of the [joint-employer] standard from a Board decision'' applying *Laerco.* What my colleagues fail to acknowledge, however, is that the court adopted that standard as circuit law. Moreover, the Seventh Circuit in *Whitaker* did *not* rely on Board precedent for its holding that joint-employer status requires that an entity must exercise control to be deemed a joint employer. See *Whitaker,* 772 F.3d at 810–811 (''We . . . have held, however, 'that for a joint-employer relationship to exist, each alleged employer must *exercise* control over the working conditions of the employee, although the ultimate determination will vary depending on the specific facts of each case.' *Moldenhauer* v. *Tazewell-Pekin Consol. Commc'ns Ctr.,* 536 F.3d 640, 644 (7th Cir. 2008) (emphasis added). . . .'').

[462] My colleagues' overly selective reading of the Title VII cases is unpersuasive. Despite their best efforts, my colleagues' parsing of isolated words or phrases does not detract from the primary theme in the Title VII cases that exercise of control is the ''guiding indicator.'' *Felder,* 27 F.4th at 844; id. at 847 (''Absent further allegations that the USTA *would have significantly controlled the manner and means of Felder's work* as a security guard, the complaint does not cross the line from speculative to plausible on the essential Title VII requirement of an employment relationship.'') (emphasis added).

Additionally, my colleagues say that in some of the Title VII cases I cite above, the courts applied a standard that incorporates an ''economic realities'' test, and those cases cannot inform the Board's formulation of a joint-employer standard under the NLRA because Congress, in the Taft-Hartley Act, repudiated the ''economic realities'' test the Supreme Court applied in *NLRB* v. *Hearst Publications,* 322 U.S. 111 (1944). Once again, the majority is crossing its wires between independent-contractor law and joint-employer law. In *Hearst,* the Court applied an ''economic realities'' standard to determine employee-or-independent-contractor status under the NLRA. In Title VII cases, circuit courts apply an ''economic realities'' test to discern whether a putative joint employer actually exercised control over essential terms and conditions of employment of another employer's employees. See, *e.g., Perry* v. *VHS San Antonio, LLC,* 990 F.3d at 929 (''The economic-realities component of the 'hybrid economic realities/common law control test' focuses on who paid the employee's salary, withheld taxes, provided benefits, and set the terms and conditions of employment.''). Here again, my colleagues' insistence on basing a joint-employer standard on independent-contractor precedent leads them astray.

Notably, in contrasting the breadth of the FLSA's economic-realities standard with the common-law test, the Third Circuit quoted its earlier—and leading—decision on the joint-employer standard under the NLRA, writing that under the Act, ''the alleged [joint] employer must exercise 'significant control.' '' Id. at 468 (quoting *Browning-Ferris Industries of Pennsylvania,* 691 F.2d at 1124).[463]

As the preceding discussion demonstrates, in eliminating the requirement that a putative joint employer must be shown to have exercised substantial direct and immediate control over the essential terms and conditions of employment of another entity's employees, my colleagues have gone beyond the boundaries of the common law.[464] They fail to support their repeated declarations that common-law agency principles compel the Board to adopt a standard that does not require proof that an entity *actually* exercised control over the employment terms and conditions of another employer's employees before it will be found to be their joint employer. This is fatal to the majority's final rule. In enacting the Taft-Hartley Act, Congress made clear that under the NLRA, the common law of agency is the controlling standard,[465] and '' 'an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress' judgment that such [a regulation is] desirable' or required.'' *Transitional Hospitals Corp. of La.* v. *Shalala,* 222 F.3d 1019, 1029 (D.C. Cir. 2000) (quoting *Prill* v. *NLRB,* 755 F.2d 941, 948 (D.C. Cir. 1985)). Today's final rule is based on such an unjustified assumption.

The Final Rule Is Unsound as a Matter of Policy

In a couple of paragraphs, my colleagues do very briefly pay lip service to a backup position that, even assuming the 2020 Rule is permissible under the Act, they would rescind it and promulgate their final rule for policy reasons. In this regard, my colleagues assert that the final rule ''advances the Act's purposes to ensure that, if they choose, all employees have the opportunity to bargain with those entities that possess the authority to control or exercise the power to control the essential conditions of their working lives,'' and that the final rule ''may particularly benefit vulnerable employees who are overrepresented in workplaces where multiple firms possess or exercise control, including immigrants and migrant guestworkers, disabled employees, and Black employees and other employees of color.'' But these are mere conclusory remarks. My colleagues do not support their assertions; they dismiss commenters' weighty policy-based criticisms of the rule as ''misdirected''; and they fail to grapple with the reality that their joint-employer standard is likely to frustrate collective bargaining and erect barriers to reaching collective-bargaining agreements. It is not clear to me how the vulnerable employees cited by my colleagues are benefited by a rule that makes it more difficult for their representatives to obtain a collective-bargaining agreement and, in turn, for them to gain the statutory protections afforded by such an agreement.

Even assuming for argument's sake that the final rule does not exceed the limits established by common-law agency principles and therefore is not impermissible under the Act, I would still dissent from my colleagues' decision to promulgate the final rule because the 2020 Rule better promotes the Act's policy of encouraging collective bargaining as a means to reduce obstacles to the free flow of commerce. It bears repeating that the common law sets the outer limit of a permissible joint-employer standard under the Act and that the Board may adopt a more demanding standard for policy reasons.[466] In my view, joint-employer status under the Act should be imposed only on entities that play a significant, active role in hiring, supervising, or directing another employer's employees, in setting their wages, benefits, or hours of work, and/or in disciplining or discharging them. Only upon such a showing should the Board find joint-employer status and, accordingly, impose on the joint employer a duty to bargain in good faith with a union representing the jointly employed employees. That approach, requiring proof of *exercise* of control, is reflected in the 2020 Rule.

In contrast, I believe that today's final rule, rather than making bargaining more ''meaningful,'' will prove detrimental to productive collective

[463] Even under the economic-realities standard applicable under the FLSA, the Third Circuit in *Enterprise Rent-A-Car* held that Enterprise Holdings, Inc. was not a joint employer of the employees of its wholly owned subsidiaries (rental-car facilities), despite its potential impact on their essential terms and conditions of employment. Among other significant actions, the parent corporation recommended salary ranges for the subsidiaries' branch employees and provided a standard performance-review form, job descriptions, and best practices. Id. at 466. Each subsidiary had discretion to adopt or disregard the parent's recommended employment practices. In finding that such indirect influence did not render the parent a joint employer under the FLSA, the court emphasized that the record failed to show ''that [the parent's] actions at any time amounted to mandatory directions rather than mere recommendations.'' Id. at 470.

[464] Contrary to my colleagues' assertion, the final rule's elimination of the actual-exercise requirement finds no support in *EEOC* v. *Global Horizons.* In that case, it was undisputed that two companies operating orchards (the ''Growers'') were joint employers of workers from Thailand supplied by Global Horizons under the federal H–2A guest worker program. 915 F.3d at 634 (''All parties agree that the Growers and Global Horizons were joint employers of the Thai workers with respect to orchard-related matters.''). The only issue presented in *EEOC* v. *Global Horizons* was ''whether the EEOC plausibly alleged that the Growers were also joint employers with respect to non-orchard related matters.'' Id. The court's analysis of that issue was shaped, as it had to have been, by federal regulations governing the H–2A guest worker program. First, under those regulations, an ''employer'' is required to provide H–2A guest workers certain benefits, including housing, meals, and transportation. ''The H–2A program thus expands the employment relationship between an H–2A 'employer' and its workers to encompass housing, meals, and transportation, even though those matters would ordinarily fall outside the realm of the employer's responsibility.'' Id. at 640. Second, H–2A regulations define the term ''employer'' as an entity that, among other things, ''has an employer relationship with respect to employees . . . as indicated by the fact that it *may* hire, pay, fire, supervise or otherwise control the work of any such employee.'' Id. (quoting 20 CFR 655.100(b)) (emphasis added). In other words, H–2A regulations define employer status with reference to *authority* to control essential terms and conditions of employment. It was in this unique context that the court stated that ''[t]he power to control the manner in which housing, meals, transportation, and wages were provided to the Thai workers, even if never exercised, is sufficient to render the Growers joint employers as to non-orchard-related matters.'' Id. at 641. Importantly, the court did not rely on a contractual reservation of right to control as the basis for its joint-employer finding. Rather, the court held that the Growers were joint employers by virtue of their regulatory obligations, and their ''contractual delegation [of those duties to Global Horizons] did not absolve the Growers of their legal obligations as 'employers' under H–2A regulations.'' Id. at 640.

[465] See *NLRB* v. *United Insurance Co. of America,* 390 U.S. at 256.

[466] See *Browning-Ferris Industries of California* v. *NLRB,* 911 F.3d at 1208 (''The policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer. The Board's rulemaking, in other words, must color within the common-law lines identified by the judiciary.''). Additionally, the Board has authority to define the duty to bargain in good faith under Sec. 8(a)(5) and 8(d). See *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 496 (1979) (''It is thus evident that Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language [of Sec. 8(a)(5) and 8(d)] and of the statutory duty to bargain.''). This authority includes the authority to define that duty in the joint-employer context—provided, of course, that the Board stays within common-law limits—in such a way as to trigger a joint employer's bargaining obligation only upon its actual exercise of substantial direct and immediate control over the essential terms and conditions of employment of another entity's employees.

bargaining.[467] Imagine a scenario in which an undisputed employer has exercised complete control over every aspect of its employees' essential terms and conditions and that a second entity possesses, but has never exercised, a contractual reservation of right to codetermine the employees' wages. Under the majority's final rule, that second entity will be deemed a joint employer, but given that it has never *exercised* its contractually reserved authority, it makes little if any sense to seat it at the bargaining table. Doing so will have little if any benefit, while creating a substantial risk of frustrating agreement between the undisputed employer and the union because the interests of the undisputed employer and the second entity might well be in conflict.[468] What if the two employer-side entities were each to insist, in good faith, on different wage rates? What if an agreement were held up by the second entity's refusal to agree to wage proposals that were agreeable to the union and the undisputed employer? Would that prevent the formation of a collective-bargaining agreement? If not, is the second entity bound by the agreement's wage terms despite its refusal to agree to them? How will the rules of impasse and implementation upon impasse apply in this scenario? My colleagues fail to consider the implications of their final rule for collective bargaining.[469]

It is difficult to imagine a better recipe than today's final rule for injecting chaos into the practice and procedure of collective bargaining that the majority claims to promote. Accordingly, the final rule is contrary to the national labor policy Congress established, which is to ''achiev[e] industrial peace by promoting *stable* collective-bargaining relationships.'' *Auciello Iron Works, Inc.* v. *NLRB,* 517 U.S. 781, 790 (1996) (emphasis added).[470] Moreover, collective bargaining was intended by Congress to be a process that could conceivably produce agreements. See, *e.g., NLRB* v. *Insurance Agents' International Union,* 361 U.S. at 485 (Congress intended collective bargaining to be ''a process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract.''); *H.J. Heinz Co.* v. *NLRB,* 311 U.S. 514, 523 (1941) (The object of collective bargaining under the Act is ''an agreement between employer and employees as to wages, hours and working conditions.''). There is nothing stable about the collective-bargaining relationships the final rule will predictably create, and the final rule will frustrate rather than facilitate reaching agreements.[471]

Its predictable adverse effect on the practice and procedure of collective bargaining is far from the only policy-based objection to the final rule. I am also concerned about its impact on small businesses that, on their own, fall below the Board's discretionary jurisdiction thresholds. Under extant law, the Board combines the gross revenues of joint employers when applying its discretionary jurisdictional standards.[472] That historic practice was acceptable under the more rigorous joint-employer standard the Board applied both before and after *TLI* and *Laerco* and codified in the 2020 Rule. But now that my colleagues have lowered the bar, significantly greater numbers of small businesses never before subject to the Board's jurisdiction will be swept within it. As a result, they will be saddled with costs they can ill afford, particularly the expense of hiring an attorney to represent them in collective bargaining. I'm concerned that the final rule will impose significant economic hardships on these small entities, without any countervailing benefit to collective bargaining that would outweigh this burden.

Additionally, the final rule undermines Section 8(b)(4)'s protection of neutral employers against picketing and boycotts. That provision was designed to ''shield[ ] unoffending employers and others from pressures in controversies not their own.'' *NLRB* v. *Denver Building Trades Council,* 341 U.S. 675, 692 (1951). By expanding the universe of joint employers to include entities that exercise an undefined indirect control or that merely possess but have never exercised authority to control, the final rule will convert heretofore neutral employers into primary employers, subjecting them to lawful picketing. This result will be particularly unjust where the labor dispute involves an essential term or condition of employment over which the joint employer has no control.[473]

[467] I do not agree that making it more difficult for parties to reach agreement through collective bargaining advances the concept of ''meaningful'' bargaining.

[468] See, *e.g.,* Comments of the National Waste and Recycling Association and the American Hospital Association.

[469] Federal courts have indicated that a non-signatory joint employer may be bound by a collective-bargaining agreement signed by the direct employer and a labor union representing the jointly-employed workers. See *Armogida* v. *Jobs with Justice, Inc.,* 2022 U.S. Dist. LEXIS 174658 at *13 (S.D. Ind. Sept. 26, 2022) (''[A] party may be bound by a labor contract by virtue of its status as a 'joint employer' with a signatory of the contract.''); *Mason Tenders Dist. Council* v. *CAC of N.Y., Inc.,* 46 F. Supp. 3d 432, 438 n.11 (S.D.N.Y. 2014) (''Since joint employer status functions, in cases like the one at bar, to bind a *non-signatory* to the terms of an otherwise-operative collective bargaining agreement, the typical scenario would focus on whether that non-signatory . . . could properly be treated as a joint employer.'') (emphasis in original); *Newmark & Lewis, Inc.* v. *Local 814, Teamsters,* 776 F. Supp. 102, 106 (E.D.N.Y. 1991) (federal court jurisdiction under LMRA Sec. 301 includes determining whether a non-signatory to a collective-bargaining agreement is contractually obligated to arbitrate under joint-employer theory); *Central States, Southeast & Southwest Areas Pension Fund* v. *International Comfort Products, LLC,* 787 F. Supp. 2d 696, 702 (M.D. Tenn. 2011) (''*J.E. Hoetger* makes it clear that § 301 of the LMRA binds a joint employer to the terms of a collective bargaining agreement signed by a co-joint employer. Phrased another way, § 301 creates an ongoing duty for a joint employer to abide by the terms of its employees' collective bargaining agreement, regardless of whether that employer signed the agreement.'') (citing *Metropolitan Detroit Bricklayers District Council* v. *J.E. Hoetger & Co.,* 672 F.2d 580, 583 (6th Cir. 1982) (''We recognize that courts have generally held that [Sec. 301] creates federal jurisdiction only over parties to the contract being sued upon. However, since the primary issue in this case was whether Hoetger was a 'joint employer' such that it could be bound by the collective bargaining agreement, we conclude that the district court had jurisdiction under § 301(a) to decide this claim.'')).

The possibility that a joint employer could be bound to a collective-bargaining agreement that it neither negotiated nor signed strongly counsels against the majority's decision to permit a joint-employer finding to be made absent any exercise of control whatsoever over the covered employees. Indeed, given that the final rule is to be applied retroactively, it is all but certain that countless employers—that have never been identified as a joint employer nor exercised any control over another employer's employees—will now be required to adhere to the terms of other parties' collective-bargaining agreements.

[470] See also *Colgate-Palmolive-Peet Co.* v. *NLRB,* 338 U.S. 355, 362 (1949) (''To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act.'').

[471] It is evident that the final rule is likely to create significant delay for parties as they endeavor to reach final collective-bargaining agreements. For example, should a labor union insist on the participation of a putative joint employer that has never directly exercised any control over any essential term and condition of employment of another employer's employees, and that entity refuses to bargain based on its conviction that it is not a joint employer, bargaining between the undisputed employer and the union will be delayed while the union files an unfair labor practice charge and the issue is litigated to a final determination, possibly including litigation in the courts. It is self-evident that such delay to the collective-bargaining process could be substantial.

[472] See, *e.g., Central Taxi Service,* 173 NLRB 826, 827 (1968); *Checker Cab Co.,* 141 NLRB 583, 586–587 (1963), enfd. 367 F.2d 692 (6th Cir. 1966); see also *CID—SAM Management Corp.,* 315 NLRB 1256, 1256 (1995).

[473] My colleagues say that they ''see little risk of enmeshing neutral employers in labor disputes'' because ''[w]hen more than one entity jointly employs particular employees, those entities are not neutral, and the prohibitions on secondary activity do not apply, regardless of what joint-employer standard is applied.'' Obviously, however, the point I am making and that my colleagues do not dispute is that, by eliminating the actual-exercise requirement, the majority's relaxed standard will

Continued

The majority's final rule will also discourage efforts to rescue failing businesses. Suppose a unionized company that supplies employees to ''user'' businesses is going under and seeks a buyer to acquire its assets. If that supplier is independent of the user businesses it supplies, the usual rules of successorship would apply. A prospective buyer would understand that if a majority of its post-acquisition workforce consists of former employees of the seller, it would have to recognize and bargain with the incumbent union (and it would also understand that it cannot discriminate in hiring to avoid that duty), but it would not have to assume the seller's collective-bargaining agreement, and it would be free to set its own initial terms and conditions of employment unilaterally. See *NLRB* v. *Burns International Security Services, Inc.,* 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp.* v. *NLRB,* 482 U.S. 27 (1987). The Supreme Court created this framework based in part on the public policy of facilitating the rescue of ''moribund'' businesses. *Burns,* 406 U.S. at 287–288 (''A potential employer may be willing to take over a moribund business only if he can make changes . . . . Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.'').

All this changes, however, if user businesses are deemed joint employers of the supplier's employees, a scenario the final rule will make far more common. For the sake of simplicity, assume that only one such joint-employer user business exists. (In the real world, there would likely be multiple joint employers, upping the complications.) If a user business is a joint employer of the supplier's employees, it will likely be a joint employer of the supplier's successor's employees, and its ongoing duty to bargain bridging the two supplier employers would prevent the successor from setting initial terms and conditions of employment different from those of the predecessor. See *Whitewood Maintenance Co.,* 292 NLRB 1159, 1168–1169 (1989) (holding that contractor that substituted one subcontractor for another jointly employed both the old and new subcontractors' employees, so the new subcontractor could not set its own initial terms), enfd. 928 F.2d 1426 (5th Cir. 1991). Moreover, it is no answer to say that the user business could prevent this ''bridging'' by subcontracting the work performed by the supplier's employees to the employees of a different supplier because, as the joint employer of the employees of its existing supplier, it would have a duty to bargain with their union representative over that subcontracting decision and its effects. See *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964). Accordingly, by making scenarios like this far more likely than under the 2020 Rule, the majority's final rule will discourage attempts to rescue failing businesses.

In short, policy considerations militate against the majority's radical expansion of the joint-employer doctrine. Any purported benefit of eliminating the requirement that control actually be directly exercised is nominal at best and is outweighed by the detrimental consequences outlined above. In my view, retaining the 2020 Rule would better promote the policies of the Act and public policy generally. But in this section of my dissent, I have barely scratched the surface of the adverse consequences that predictably will flow from the final rule, consequences that commenters have brought to the Board's attention, to no avail. To these, I turn next.

The Majority Fails Adequately To Respond to Public Comments

My colleagues briefly describe, but proceed to disregard as irrelevant, a variety of public comments regarding the new rule's likely impact on businesses generally and on those in specific sectors of the economy where the joint-employer issue frequently arises. For example, some commenters predict that the Board's new joint-employer standard will disincentivize conduct that tends to improve the workplace, like providing training sessions; undertaking safety and health initiatives; and developing corporate social responsibility programs, including diversity, equity, and inclusion initiatives. Others predict that the new rule will discourage larger companies from entering into contracts with smaller third parties to perform work, which would tend to harm business owners from underrepresented communities. Still others say that the new rule will make it more difficult for companies to seek temporary employees to address labor shortages or deal with fluctuating seasonal demand for labor.

What is the majority's response to these and other legitimate objections to their rule? My colleagues brush them aside, stating that ''insofar as the Act itself requires the Board to conform to common-law agency principles in adopting a joint-employer standard, these concerns seem misdirected.''

The majority similarly disregards the effects of the new rule on businesses in specific sectors of the economy. Although my colleagues express an awareness of ''commenters' concerns that the joint-employer standard we adopt in this final rule might have unwanted effects on their businesses,'' they conclude that there is ''no clear basis in the text or structure of the Act for exempting particular groups or types of employers from the final rule.'' More decisively, they believe ''that these concerns reflect considerations that, as a statutory matter, may [not] determine the Board's choice of a joint-employer standard.''

When the majority dismisses commenters' objections as ''misplaced'' or says that they may not determine the choice of a joint-employer standard ''as a statutory matter,'' they mean, of course, that the common law of agency, and therefore the Act itself, precludes the standard the Board implemented in the 2020 Rule and compels the standard they promulgate today. But as I have shown, they are mistaken: the final rule is *not* compelled by the common law of agency and the Act. Accordingly, the majority has no valid basis for refusing to respond to the substance of the comments and therefore has failed to fulfill its statutory duty under the Administrative Procedure Act to provide a reasoned response to these comments.[474]

Moreover, the question here is not whether the Board should craft industry-specific joint-employer standards or exceptions.[475] Rather, the point is that, in crafting a single, generally applicable joint-employer

render many more businesses joint employers despite them never having played any role in actually exercising control over any term or condition of employment of another employer's employees. By drawing such businesses into labor disputes not their own, the final rule diminishes Sec. 8(b)(4)'s protection against picketing and boycotts.

[474] ''[I]n reviewing rules promulgated under the notice and comment rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553 ('APA'), courts must assure that the agency has provided a reasoned explanation for its rule. In particular, a reasoned explanation for agency action must be based on a consideration of relevant factors . . . . [A]n agency decision may not be reasoned if the agency ignores vital comments regarding relevant factors, rather than providing an adequate rebuttal.'' *Western Coal Traffic League* v. *U.S.,* 677 F.2d 915, 927 (D.C. Cir. 1982) (citations omitted); see also *Alternate Fuels, Inc.* v. *Lujan,* 1992 U.S. Dist. LEXIS 15785 (D. Kan. Sept. 22, 1992) (''An agency should rebut vital relevant comments. The opportunity to comment is meaningless unless the agency responds to significant points raised by the public.'') (citations omitted).

[475] Indeed, the 2020 Rule does not include industry-specific carveouts.

standard within the boundaries of the common law, the Board should—indeed, must—consider the substance of vital comments opposing as well as supporting the proposed rule. Having dismissed those comments on the erroneous ground that their hands are tied by the common law, my colleagues have conspicuously failed to do that here. And the legitimate objections to the proposed rule articulated in numerous major comments further persuade me that the final rule, in addition to being statutorily precluded, is unsound as a matter of policy.

One illustrative example is the negative impact of the rule on the construction industry. As several commenters note, due to the particular nature of this industry, multiple employers typically operate on a given project.[476] Multi-employer worksites are common in the construction industry, where a general contractor coordinates the work of multiple subcontractors, sometimes in multiple tiers. Each of these parties typically remains the sole employer of its own employees. But a general contractor must exert a degree of control over subcontractors and their employees to ensure that work on a given project meets efficiency, quality, and safety benchmarks. In fact, project owners routinely require general contractors to sign standard-form agreements, which obligate the general to reserve and exercise some level of control over their subcontractors' employees, arguably impacting essential terms and conditions of employment. Illustrative are several provisions in two standard contracts[477] widely used in the construction industry:

- ''The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the [w]ork. The Contractor shall not permit employment of unfit persons or persons not properly skilled in tasks assigned to them.''
- ''The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the [c]ontract.''
- ''Unless the Contract Documents instruct otherwise, [the general contractor] shall be responsible for the supervision and coordination of the [w]ork, including the construction means, methods, techniques, sequences, and procedures utilized.'' [478]

Under the final rule, there is a significant risk that these and similar standard contract provisions will be found to vest in the general contractor reserved authority to control hiring, supervision, discipline, and discharge of its subcontractors' employees—not to mention authority to control ''working conditions related to the safety and health of employees''—making the general contractor a joint employer of every single employee who performs work on the project.

This puts the final rule at odds with the Supreme Court's decision in *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. at 689–690. There, the Court stated that ''the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor *or make the employees of one the employees of the other.* The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so'' (emphasis added). My colleagues address *Denver Building Trades* by construing it narrowly, but this will not do. The Court held that the general contractor was not the joint employer of its subcontractor's employees simply because it exercised ''some supervision over the subcontractor's work,'' but under the final rule, a general contractor will be the joint employer of its subcontractors' employees where it exercises *no* supervision over subcontractors' work but merely possesses a contractually reserved authority to affect subcontractors' employees' terms and conditions of employment. If *Denver Building Trades* precludes finding a general contractor a joint employer where it exercises *some* supervision over work performed by employees of the subcontractors, it must also preclude finding a general contractor a joint employer where it exercises *no* supervision over work performed by employees of the subcontractors. The final rule cannot be reconciled with *Denver Building Trades.*

The majority has similarly afforded insufficient attention to the impact of the final rule on the franchise industry. As numerous commenters note, the majority's rule compromises the viability of franchises nationwide in key respects.[479] Unsurprisingly, commenters warn the Board that the rule's vast reach creates a significant risk that many franchisors will be held liable as joint employers of their franchisees' employees. For example, McDonald's LLC informs us that all its franchisees have unfettered discretion to hire, assign work, set wages, benefits, and schedules, and carry out day-to-day supervision. Yet McDonald's franchise system—typical of countless others—requires franchisees to adhere to strict brand standards. The majority says that ''many forms of control that franchisors reserve to protect their brands or trade or service marks . . . will typically not be indicative of a common-law employment relationship,'' but they decline to ''categorically state that all forms of control aimed at protecting a brand are immaterial to the existence of a common-law employment relationship.'' And it is entirely foreseeable that franchisors' monitoring of franchisees' cleanliness and hygiene protocols to protect brand standards would make franchisors joint employers of their franchisees' employees under either or both of two newly adopted essential employment terms: ''work rules and directions governing the manner, means, or methods of work performance'' and/or ''working conditions related to the safety and health of employees.'' Commenters predict that franchisors will respond in one of two ways. Some will exert much greater control over their franchisees, effectively turning previously independent owners of franchisees into glorified managers; others will distance their franchisees by denying them guidance—particularly with respect to human resources—previously furnished, forcing franchisees to incur the expense of obtaining that guidance from other sources, *i.e.,* labor and employment attorneys. Both outcomes are bad. Many commenters also highlight the disproportionate impact that the final rule will have on members of minority groups.[480]

Several commenters warn the Board that the staffing industry will be

[476] See, *e.g.,* Comments of U.S. Chamber of Commerce; Associated Builders and Contractors; Associated General Contractors of America; U.S. Small Business Administration Office of Advocacy.

[477] AIA Document A201–2017 (cited in comment of Associated General Contractors of America).

[478] For additional examples of frequently used standard-form provisions, see Comment of Associated General Contractors of America.

[479] See, *e.g.,* Comments of International Franchise Association; Bicameral Congressional Signatories; Bipartisan Senators; U.S. Chamber of Commerce; U.S. Small Business Administration Office of Advocacy; McDonald's USA, LLC; McDonald's USA LLC Reply.

[480] See, *e.g.,* Comment of Bicameral Congressional Signatories (citing census data showing that 30.8 percent of franchise businesses are minority owned, compared to 18.8 percent of non-franchise businesses); Comment of International Franchise Association (predicting that the proposed rule, if enacted, would be especially harmful to minority, female, and LGBTQ franchise operators).

severely impaired by the final rule.[481] Staffing firms play a significant role in the economy by recruiting and hiring employees and placing them in temporary assignments with a wide range of clients on an as-needed basis.[482] Under the final rule, virtually every client of a staffing firm predictably will be the joint employer of that firm's supplied employees. The client will at least reserve authority to control and/or indirectly control at least one essential employment term, and probably more than one (*e.g.,* hours of work and scheduling; tenure of employment; possibly ''work rules and directions governing . . . the grounds for discipline''). I have already described the deleterious consequences the final rule predictably will have in the user employer/supplier employer setting, and staffing firms are a subset of the broader ''supplier employer'' category. Those consequences, particularly the prospect of getting trapped in a contractual relationship from which it cannot readily extricate itself, will incentivize user businesses to avoid contracting with staffing firms altogether, whether or not those firms are unionized. Contracting with a firm whose employees are unrepresented is no guarantee of protection, since there's always the risk that those employees will choose representation. Rather than run the risk of incurring joint-employer status of a staffing firm's employees—a risk that the final rule increases dramatically—user businesses might well decide to bring their contracted-out work in-house, to the detriment of staffing firms generally and the broader economy. Moreover, where the costs to the (former) user business of bringing work in-house exceed the costs of contracting out that work, the impact may be felt by the (former) user businesses' own employees. As one commenter cautions, ''[a]s in any case where a business is forced to incur unexpected costs, it will be forced to look for other ways to remain profitable. Often this leads to reduced headcount or other cost-saving measures that could impact workers.'' [483]

In addition, the final rule will negatively impact the healthcare sector. As several commenters point out, the rule's unprecedented elevation of indirect control and reserved authority to control to dispositive status in the joint-employer analysis risks encroaching on a host of business relationships that hospitals rely on to provide lifesaving patient care.[484] For instance, since the onset of the Covid–19 pandemic, many hospitals have utilized contracted labor in the form of travel nurses to fill critical staffing gaps.[485] Travel nurses typically sign a contract with a staffing agency to occupy a temporary position at a hospital that can range in duration from several days to a few months.[486] Under the final rule, a hospital that maintains (or merely has the authority to maintain) work rules and schedules for travel nurses on its premises will be their joint employer and duty-bound to bargain with the union that represents nurses directly employed by the staffing agency. Moreover, travel nurses are required to comply with the health and safety policies of the hospital where they work, which may impose more stringent requirements than those mandated by law. Again, under the final rule, the maintenance of these policies will make the hospital the joint employer of those nurses. The problematic consequences are not difficult to imagine. Among other things, all the adverse consequences discussed above with respect to businesses in the user employer/supplier employer context apply here as well, and coming to grips with those takes time and costs money. As one commenter accurately observes, hospitals will be forced ''to spend time and resources that could be devoted to patient care on administrative and management issues as it works to understand the scope of its joint employer liability [and] revises policies, practices, and contracts to address that liability . . . .'' [487]

Furthermore, although my colleagues assert that the final rule is ''unrelated to'' the Board's 1989 health care rule, I respectfully disagree. It is true that the text of the final rule does not directly impact bargaining units in any particular hospital. But a foreseeable consequence of the final rule will be a proliferation of bargaining units in hospitals, contrary to policy concerns embedded in the 1974 Health Care amendments.[488]

The net benefit of the final rule to unions in the healthcare sector is also questionable. As I explain above, the impact of the rule on collective bargaining is murky at best and disastrous at worst. With increasing regularity, representatives of businesses that have never exercised control over any essential term or condition of employment of other businesses' employees will crowd around the bargaining table with one another and the direct employer's representatives, and they will have competing interests and motives, complicating the prospects of securing an agreement. As one commenter observes, ''[c]ollective bargaining is difficult enough when just one employer sits across the table and approaches issues and proposals with a unitary perspective. When a union must simultaneously bargain with two, three, or four employers whose interests and priorities do not align, finalizing an agreement will be orders of magnitude more difficult.'' [489] This observation applies to any industry but is particularly troubling in the healthcare space. The potential adverse consequences of the final rule on critical patient care warrant the most serious consideration,[490] and my colleagues do not give them that attention because, they say, it cannot be helped because the common law and the Act leave them no other choice. For reasons already explained, they are wrong.

[481] See, *e.g.,* Comments of American Staffing Association; U.S. Chamber of Commerce; American Hospital Association; FMI—Food Industry Association; National Association of Manufacturers; Clark Hill PLC.

[482] The importance of staffing firms to the health of the economy is difficult to overstate. As one commenter explains, they are crucial to ensuring that food is delivered to consumers in a timely fashion despite the persistence of significant supply chain disruptions. See Comment of FMI—Food Industry Association.

[483] See Comment of Clark Hill PLC.

[484] See, *e.g.,* Comments of U.S. Chamber of Commerce; American Hospital Association.

[485] See Bertha Coombs, *With travel nurses making $150 an hour, hospital systems are forced to innovate,* CNBC (Mar. 28, 2023), *https://www.cnbc.com/2023/03/28/with-travel-nurses-making-150-an-hour-hospital-systems-innovate.html.*

[486] *What Is a Travel Nurse? Job Description and Salary,* St. Catherine University, *https://www.stkate.edu/academics/women-in-leadership-degrees/what-is-a-travel-nurse#:~:text=Travel%20nurses%20sign%20a%20contract,a%20new%20destination%20and%20opportunity* (last visited Oct. 19, 2023).

[487] See Comment of American Hospital Association.

[488] See the Board's Second Notice of Proposed Rulemaking on Collective-Bargaining Units in the Health Care Industry, 53 FR 33900, 33909 (1988): ''In view of Congressional concern in the health care amendments with the ability of health care institutions to deliver uninterrupted health services, it is relevant to consider whether multiple units increase costs to health care institutions so as to disrupt the stability of the institutions.''

[489] Comment of American Hospital Association.

[490] The role of increased work stoppages, which will likely occur as a result of the rule, is easy to glean from recent events. See, *e.g., Nurses end nearly 10-month strike at Tenet Healthcare-owned hospital,* Dallas Morning News (Jan. 5, 2022), *https://www.dallasnews.com/business/local-companies/2022/01/05/nurses-end-nearly-10-month-strike-at-tenet-healthcare-owned-hospital/* (noting that a dozen inpatient behavioral health beds were closed due to staffing challenges presented by the strike).

The Majority Erroneously, and Unreasonably, Expands and Modifies the List of ''Essential'' Terms and Conditions of Employment

The Board should not make ''working conditions related to the safety and health of employees'' an essential term and condition of employment.

I disagree with several of the changes my colleagues make to the list of essential terms and conditions of employment, but the most problematic of the bunch is their decision to make ''working conditions related to the safety and health of employees'' a newly essential term and condition. Doing so is not compelled or supported by common-law agency principles, and it is unwise as a matter of policy. The majority fails to cite a single court case identifying working conditions related to employees' health and safety as an essential term and condition of employment.[491] Further, in light of the significant federal regulatory obligations in the area of workplace safety, cited by many commenters, the majority fails to explain why, in their view, an entity's exercise of control over or reservation of authority to control the workplace health and safety of another entity's employees should create joint-employer status.

The Occupational Safety and Health Act, 29 U.S.C. 654, obligates employers to protect the safety and health of not only their own employees but also the employees of other entities in the workplace. Under section 654:

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

To be sure, an employer's duty under subsection (a)(1)—known as the general duty clause—is owed only to its own employees. However, subsection (a)(2) ''does not limit its compliance directive to the employer's own employees, but requires employers to implement the Act's safety standards for the benefit of all employees in a given workplace, even the employees of another employer.'' *Universal Construction Co.* v. *OSHRC,* 182 F.3d 726, 728 (10th Cir. 1999). In short, federal law *requires* employers to exert control over the workplace health and safety of workers employed by other employers—and in complying with its statutory and regulatory obligations, an employer might need to exercise discretion.[492]

Additionally, an employer/property owner who adopts certain safety rules to satisfy its general-duty obligation to its own employees under section 654(a)(1) is also likely to require others on its premises to abide by these safety rules, and doing so has been found not to create joint-employer status. *Knitter* v. *Corvias Military Living, LLC,* 758 F.3d at 1230 (finding no joint-employer status despite company's exercise of control over workplace safety because company ''naturally would be concerned about [vendor's employees'] safety, even if only for liability purposes, just as they would for any employee or non-employee on premises.''). Businesses are required by law to protect the safety of their own employees, and my colleagues say that measures required by law will not evidence joint-employer status—but the court's reasoning in *Knitter* exposes the inadequacy of that carveout. As the court points out, a business will apply its workplace safety measures to everyone on its property, for liability purposes if for no other reason, regardless of whether it is compelled to do so by statute or regulation. And by doing so it will become, under the final rule, the joint employer of everyone on its property that is employed by another entity.[493]

The majority's decision to make ''working conditions related to the safety and health of employees'' an essential term and condition of employment is also at odds with the Occupational Safety and Health Administration's guidance on the duties owed by employers on multi-employer worksites.[494] That guidance does not contemplate that one company is or becomes the joint employer of another company's employees by virtue of the control it possesses or exercises over workplace safety measures.

OSHA's guidance identifies four types of employers on a multi-employer worksite: the creating employer, the exposing employer, the correcting employer, and the controlling employer. Id. The creating employer is an employer that caused a hazardous condition that violates an OSHA standard. The exposing employer is an employer whose own employees have been exposed to the hazard. The correcting employer is an employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting the hazard. And the controlling employer is an employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Each type of employer owes duties to employees. The extent of an employer's duties depends on its proper categorization, and an employer may have multiple roles. Id.

In *Universal Construction Co.* v. *OSHRC,* 182 F.3d at 726, the court held that a general contractor in the construction industry (Universal) was citable for hazardous conditions created by a subcontractor where only the subcontractor's employees had been exposed to the danger. The court explained that under 29 U.S.C. 654(a)(2), a general contractor—the controlling employer in the foregoing schema—is responsible for safety violations that it could reasonably have been expected to prevent or abate by reason of its supervisory capacity,

[491] In support of its position, the majority merely cites the general statement in the Restatement (Second) of Agency, section 2, that a servant is an agent employed by a master to perform service in his affairs whose ''physical conduct in the performance of the service'' is controlled by the master. That citation is insufficient to justify the majority's decision. And as numerous commenters point out, a variety of courts have rejected the notion that an entity's control over workplace safety tends to prove a joint-employer relationship. See, *e.g.,* Comment of New Civil Liberties Alliance and the Institute for the American Worker (citing cases).

[492] For example, a number of OSHA standards establish alternative methods by which an employer can satisfy its duties, which, as explained above, are owed to other entities' employees on a multi-employer worksite. See, *e.g.,* 29 CFR 1926.55 (''*Gases, vapors, fumes, dusts, and mists.* To achieve compliance with paragraph (a) of this section, administrative or engineering controls must first be implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section.''); 29 CFR 1926.652(c) (''*Design of support systems, shield systems, and other protective systems.* Designs of support systems, shield systems, and other protective systems shall be selected and constructed by the employer or his designee and shall be in accordance with the requirements of paragraph (c)(1); or, in the alternative, paragraph (c)(2); or, in the alternative, paragraph (c)(3); or, in the alternative, paragraph (c)(4) as follows: . . . .''). The fact that an employer has discretion in this regard arguably makes the majority's carveout for measures that are legally *required* inapplicable.

[493] Curiously enough, because the property owner (or lessee) would become an employer of everyone on its property directly employed by other employers, it would arguably incur the same duties to them that it owes to its own directly employed employees under the Occupational Safety and Health Act and its implementing regulations! However, I doubt that the property owner would be heard to contend that its joint-employer status is negated the very instant it is created by virtue of the final rule's carveout for workplace safety measures compelled by law. Whether or not such an argument, strictly speaking, would be circular, it would certainly be given to rotation.

[494] See Occupational Safety and Health Administration, U.S. Department of Labor, CPL 02–00–124, OSHA Instruction: Multiemployer Citation Policy (Dec. 10, 1999), *https://www.osha.gov/enforcement/directives/cpl-02-00-124* (last visited Oct. 19, 2023).

regardless of whether it created the hazard or whether its own employees had been exposed to the hazard. Id. at 732. Under the final rule my colleagues promulgate today, which renders ''working conditions related to the safety and health of employees'' an essential term and condition of employment, a general contractor in Universal's shoes would become the joint employer of the employees directly employed by the ''exposing employer'' subcontractor—and possibly employees directly employed by every subcontractor on the project—if it exercised discretion in responding to the hazardous condition or went beyond the minimum required by law. This is not consistent with Supreme Court precedent. See *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. at 689–690 (''[T]he fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other'').[495]

Additionally, a number of commenters point out that treating ''working conditions related to the safety and health of employees'' as an essential term and condition of employment creates a perverse incentive for companies to avoid protecting the employees of other employers or to avoid maintaining safety standards or applying safety measures that are any more protective than legally-mandated minimums.[496] As stated by one commenter, ''[p]lacing the regulated community in a position where they must choose between robust workplace health and safety standards contractually mandated and monitored on the one hand and, on the other hand, a potential joint employer classification over individuals whom all involved considered to be employees of only one employer, is bad public policy.'' [497]

[495] See Comment of Associated Builders and Contractors.

[496] See, *e.g.,* Comments of American Trucking Association and National Association of Manufacturers.

[497] See Comment of the American Trucking Associations. Indeed, in the 2015 *BFI* decision, the Board majority found the presence of a joint-employer relationship in part because the user employer noticed the supplier's employees committing several safety violations. The BFI official ''witnessed two Leadpoint employees passing a pint of whiskey at the jobsite'' and reported it. 362 NLRB at 1602. The facility in question used conveyor belts, a type of powered haulage, to move materials to be sorted for recycling. Id. at 1600. It is obvious that consuming alcohol near powered haulage is inherently hazardous. With all due respect to my colleagues, I genuinely wonder whether a potential joint employer will flag blatant safety violations like this with as much urgency after their final rule takes effect. These comments, which resonate with me, are not satisfactorily addressed by the majority.

Other changes to the list of essential terms and conditions invite mischief.

I also disagree with the majority's decision to add ''work rules and directions governing the manner, means, or methods of the performance of duties and the grounds for discipline'' to the list of essential terms and conditions of employment. My concern is with the phrase ''work rules . . . governing . . . the grounds for discipline,'' which brings to mind the Board's history of policy oscillation regarding the proper analysis of workplace rules that allegedly interfere with protected activity. See *Stericycle, Inc.,* 372 NLRB No. 113 (2023) (Member Kaplan, dissenting). The final rule's incorporation of this phrase invites unions to comb through a putative joint employer's manuals in search of ambiguous language, argue that workers employed by another entity (*i.e.,* supplied employees performing work for a putative-joint-employer user business) ''could'' reasonably interpret the language to interfere with protected activity, and rely on it to support a joint-employer finding. Such an argument would have legs regardless of whether the user employer actually applied its workplace rules to employees of a supplier employer because even if it did not (which seems unlikely), it would possess the authority to do so.

Finally, I believe that my colleagues' substitution of ''hiring'' and ''discharge'' as essential terms and conditions of employment under the 2020 Rule with ''the tenure of employment, *including* hiring and discharge'' (emphasis added) will be used to make general contractors in the construction industry joint employers per se. As is well known to those in the regulated community, a wide variety of unionized businesses in the construction industry employ a comparatively small complement of permanent employees, and then, when they are awarded a subcontract on a construction site, ''staff up'' from the union hiring hall with employees whose employment lasts only for the duration of the project for which they are hired. It could easily be argued that the general contractor, which ultimately determines the duration of each part of the construction project—every stage from excavation through interior finishing work—indirectly controls ''the tenure of employment'' of every employee hired only for the duration of his or her employer's subcontracted part of the project, and is therefore the joint employer of every single one of those employees.[498]

For these reasons, I disagree with the majority's decision to rescind and revise the 2020 Rule's appropriate determination of the terms and condition of employment that should be considered ''essential'' for purposes of determining joint-employer status.

The Final Rule Is Arbitrary and Capricious Under the Administrative Procedure Act

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* establishes standards that federal agencies must follow when engaged in notice-and-comment rulemaking. Specifically, the APA prohibits administrative agencies from acting arbitrarily and capriciously. In this regard, the Supreme Court has explained that the APA requires the agency to ''provide reasoned explanation for its action . . . . And of course the agency must show that there are good reasons for the new policy.'' *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (internal citation omitted). More recently, the Supreme Court succinctly held that ''[t]he APA's arbitrary-and-capricious standard requires that agency action be

[498] Contrary to my colleagues' assertion, my disagreement here is not ''principally semantic.'' As I explained, the majority's inclusion of ''the tenure of employment, *including* hiring and discharge'' significantly broadens the potential scope of essential terms and conditions of employment compared to the 2020 Rule's more clearly defined set. The majority's statement that it refers to ''the range of actions that determine or alter an individual's employment status'' provides no further definition, and does not foreclose the possibility that this essential term could be used to make general contractors in the construction industry the joint employer of every single one of its subcontractors' employees. I leave it to those more deeply conversant with the workings of the construction industry to flesh out the implications of such a scenario. I will note, however, that under *John Deklewa & Sons,* 282 NLRB 1375, 1377–1378 (1987), enfd. sub nom. *Iron Workers, Local 3* v. *NLRB,* 843 F.2d 770 (3d Cir. 1988), employers that are party to a Sec. 8(f) collective-bargaining agreement can withdraw recognition from the union and change their employees' terms and conditions of employment upon the expiration of the 8(f) agreement. But a general contractor that, by virtue of its indirect control over ''tenure of employment,'' becomes a joint employer of employees of subcontractors that are party to Sec. 8(f) agreements is not *itself* party to a Sec. 8(f) agreement. Would it stand in the shoes of its subcontractors? Or would the fact that it is not itself signatory to its subcontractors' 8(f) agreements disrupt the applicability of *Deklewa's* rules? Would *it* be permitted to withdraw recognition when the subcontractor's 8(f) agreement expires? Could it do so if the *subcontractor* does not withdraw recognition when the 8(f) agreement expires? I do not envy employers who will need to navigate such uncharted—and complicated—legal waters in light of my colleagues' final rule.

reasonable and reasonably explained.'' *FCC* v. *Prometheus Radio Project,* __U.S. __, 141 S. Ct. 1150, 1158 (2021). The final rule fails this test.

I have already pointed out one respect in which the final rule contravenes the APA—namely, that the final rule fails to respond to significant points urged in vital comments. But the reason it fails to do so portends a more fundamental problem for my colleagues' final rule. The majority has taken the position that common-law agency principles, and therefore the NLRA itself, *compel* the Board both to rescind the 2020 Rule and to promulgate a final rule that does not require proof that an entity has exercised any control whatsoever before it may be found to be a joint employer of another entity's employees. For reasons explained at length above, that position is legally erroneous, and since it is the very foundation of the final rule—again, the rule barely mentions policy grounds—it renders the final rule arbitrary and capricious in its entirety. The majority misconstrues common-law agency principles applied in the joint-employer context, ignores judicial precedent addressing joint-employer status under statutes materially similar to the NLRA—*i.e.,* statutes that, like the NLRA, define ''employee'' in such a manner as to make the common law of agency govern the interpretation—and refuse to acknowledge that the Board, for policy reasons unique to the NLRA, may adopt a joint-employer standard that does not extend to the outermost limits of the common law. Because the majority erroneously deems the 2020 Rule statutorily precluded and their final rule statutorily compelled, they dismiss as ''misdirected'' the many public comments that point out the ways in which the proposed rule—implemented with minor changes in the final rule—would harm businesses and destabilize labor relations. For these reasons, the majority's final rule is neither reasonable nor reasonably explained.

Further, my colleagues fail adequately to justify their decision to engage in this rulemaking by claiming that the final rule, among other things, establishes ''a definite and readily available standard'' that will assist employers and labor organizations in complying with the Act and ''reduce uncertainty and litigation over the basic parameters of joint-employer status'' compared to determining that status through case-by-case adjudication. These claims are simply untrue. The final rule fails to achieve these things. It offers no greater certainty or predictability than adjudication, and it will not reduce litigation, because it expressly contemplates that joint-employer status will be determined through adjudication under the common law, not under the provisions of the final rule, in most if not all cases. In this respect, it will also provide markedly less guidance to parties than did the 2020 Rule.

Absent any rule whatsoever, joint-employer status would be determined through case-by-case adjudication applying the common law of agency.[499] Rather than specify how common-law principles will be applied in determining joint-employer status, however, the final rule simply incorporates the common law of agency by reference in no fewer than three places. Section 103.40(a) of the final rule provides that ''an employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), is an employer of particular employees, as defined by Section 2(3) of the Act, if the employer has an employment relationship with those employees under common-law agency principles.'' Section 103.40(e) of the final rule provides that ''[w]hether an employer possesses the authority to control or exercises the power to control one or more of the employees' terms and conditions of employment is determined under common-law agency principles.'' And Section 103.40(f) of the final rule provides that ''[e]vidence of an employer's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles or control over matters that do not bear on the employees' essential terms and conditions of employment is not relevant to the determination of whether the employer is a joint employer.'' Determinations of joint-employer status under each of these provisions will require adjudication under the common law (which the majority has mischaracterized), since the final rule by its terms provides no other guidance. This is precisely how the determinations would be made if there were no rule at all.

The final rule is a step backward from the 2020 Rule in all these respects. As noted above, the 2020 Rule specified the factors to be considered in making a joint-employer determination and explained how they relate to each other. This permitted parties to determine whether a joint-employer relationship would be found based on the text of the rule itself, without any need to resort to Restatements of Agency, precedent applying the common law, or any other source to make that determination because the 2020 Rule itself reflected (and remained within) the boundaries established by the common law. For all these reasons, the 2020 Rule indisputably provided parties with greater certainty and predictability than they would have if joint-employer status were decided by adjudication. The final rule, on the other hand, does not.

Although administrative agencies have the authority to revise or amend previously promulgated rules, the APA requires the agency to ''provide reasoned explanation for its action . . . . [and] show that there are good reasons for the new policy.'' *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. at 515 (internal citation omitted). Here, the majority fails to acknowledge that today's final rule provides less guidance for the regulated community than did the 2020 Rule. Nor have they shown that there are ''good reasons'' for replacing a clear, well-defined, and comprehensive rule with one that simply sets employers, employees, and unions adrift in a sea of common-law cases, just as if there were no joint-employer rule at all. Most of all, they fail to show that there are good reasons for the final rule because their primary supporting rationale—that the final rule is compelled as a matter of law—is wrong, and their alternative supporting rationale—that the final rule is superior to the 2020 Rule as a matter of policy—is cursory at best and fails to reckon with the substance of vital comments that attack the rule on policy grounds. For all these reasons, the final rule is arbitrary and capricious.

The Majority's Final Regulatory Flexibility Analysis Is Arbitrary and Capricious

My colleagues err in asserting that their final joint-employer rule will not have a significant economic impact on a substantial number of small entities. In their view, ''[t]he only direct compliance cost for any of the 6.1 million American business firms (both large and small) with employees is reading and becoming familiar with the text of the new rule.'' They peg that familiarization cost at $227.98, representing their estimate of the cost of an hour-long review of the rule by a

[499] See *NLRB* v. *United Insurance Co. of America,* 390 U.S. at 256 (holding that the Board must ''apply general agency principles in distinguishing between employees and independent contractors under the Act''); *Browning-Ferris Industries of California* v. *NLRB,* 911 F.3d at 1214–1215 (''[E]mployee-or-independent-contractor cases can still be instructive in the joint-employer inquiry to the extent that they elaborate on the nature and extent of control necessary to establish a common-law employment relationship. Beyond that, a rigid focus on independent-contractor analysis omits the vital second step in joint-employer cases, which asks, once control over the workers is found, *who* is exercising that control, *when,* and *how.*'') (emphasis in original).

human resources specialist or labor relations specialist and an hour-long consultation between that specialist and an attorney. As the public comments make clear, the majority grossly underestimates the actual costs that small businesses will incur to familiarize themselves with the final rule. It is not clear how a human resources specialist will be able to read the rule, which nearly 63,000 words in length, in an hour, let alone comprehend the full ramifications of its changed legal standard in this complicated area of the law.

More importantly, my colleagues erroneously deem irrelevant (for purposes of a regulatory flexibility analysis) certain direct costs of compliance that the rule imposes on small businesses. The final rule will transform many small businesses that were not joint employers under the 2020 Rule into joint employers, with an entirely new duty to engage in collective bargaining. This will impose direct compliance costs in two ways. First, to determine whether they would be subject to that duty, small businesses will have to review their existing business contracts and practices to determine whether they possess any reserved authority to control or exercise any indirect control over any essential term and condition of employment of another business's employees, neither of which could alone establish joint-employer status under the 2020 Rule but either of which will make an entity a joint employer of another business's employees under the majority's final rule. Second, small businesses whose joint-employer status has been changed by the final rule and that contract with an employer whose employees are unionized will be required to participate in collective bargaining, as mandated by new Section 103.40(h).

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601–612, ''obliges federal agencies to assess the impact of their regulations on small businesses.'' *United States Cellular Corp.* v. *FCC,* 254 F.3d 78, 88 (D.C. Cir. 2001). Among other things, the Regulatory Flexibility Act requires that a federal agency issuing a rule under the Administrative Procedure Act publish an initial regulatory flexibility analysis, consider the comments received in response, and publish a final regulatory flexibility analysis (FRFA) when promulgating its final rule. See 5 U.S.C. 603, 604. An agency's FRFA must meet certain statutory requirements. It must state the purpose of the final rule and, if possible, the estimated number of small businesses that it will affect. Additionally, each FRFA must summarize comments filed in response to the agency's initial regulatory flexibility analysis, along with the agency's assessment of those comments. Finally, each FRFA must include ''a description of the steps the agency has taken to minimize the significant economic impact'' that its rule will have on small businesses, ''including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.'' 5 U.S.C. 604(a)(6). An agency is excused from conducting a FRFA only if ''the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605(b).

Although the requirements of the Regulatory Flexibility Act are ''purely procedural,'' *National Telephone Cooperative Assn.* v. *FCC,* 563 F.3d 536, 540 (D.C. Cir. 2009), the Administrative Procedure Act, 5 U.S.C. 553, prohibits agency actions that are arbitrary and capricious, and ''the APA together with the Regulatory Flexibility Act require that a rule's impact on small businesses be reasonable and reasonably explained.'' Id. A regulatory flexibility analysis is, for APA purposes, part of an agency's explanation of its rule. Id. (citing *Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506, 539 (D.C. Cir. 1983)); see also *Thompson* v. *Clark,* 741 F.2d 401, 405 (D.C. Cir. 1984) (''[I]f data in the regulatory flexibility analysis—or data anywhere else in the rulemaking record—demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, the rule cannot stand.''). Further, the Regulatory Flexibility Act specifically provides for judicial review and authorizes a reviewing court to take corrective action, including remanding the rule to the agency and deferring enforcement of the rule against small entities (unless the court finds that continued enforcement of the rule is in the public interest). 5 U.S.C. 611(a)(4).

According to numerous commenters, the Board's initial regulatory flexibility analysis ignored significant direct compliance costs and drastically underestimated the costs that small businesses will incur to familiarize themselves with the rule.[500] My colleagues fail to correct the defects identified by the commenters, and their assessment of the rule's costs is so unreasonable as to render their FRFA arbitrary and capricious.

In its FRFA, the majority acknowledges that the Regulatory Flexibility Act requires agencies to consider ''direct compliance costs.'' But the majority asserts that ''the RFA does not require an agency to consider speculative and wholly discretionary responses to the rule, or the indirect impact on every stratum of the economy,'' and it treats bargaining expenses as falling into this category. The majority is wrong on this point. The final rule will dramatically increase the number of entities that will be deemed joint employers by changing the status of entities that merely possess an unexercised contractual right to control one or more essential terms and conditions of employment of another company's employees, as well as entities that have exercised some amorphous ''indirect control,'' a term the final rule neither defines nor cabins. Such entities, which were not joint employers under the 2020 Rule, now will be and, under Section 103.40(h), will be obligated to bargain with unions representing their business partners' employees. Reviewing existing contracts and practices is not a ''discretionary response'' to the rule because a business must determine whether it has a duty to bargain. And for those that have that duty, placing an agent at the bargaining table also will not be a ''discretionary response'' to the rule. They will have to participate in collective bargaining as set forth in Section 103.40(h) of the final rule, on pain of violating Section 8(a)(5) if they fail to do so. Good-faith bargaining for a collective-bargaining agreement can take months, even years, and can entail hundreds of hours of negotiations.[501] The cost of paying a representative to be at the table, bargaining in good faith, will be substantial. These compliance costs will be especially difficult to bear for small businesses that do not independently meet the discretionary monetary standards for the Board to assert jurisdiction but will become subject to its jurisdiction by virtue of the Board's

[500] See comments of the U.S. Small Business Administration Office of Advocacy, Wyoming Bankers Association, National Federation of Independent Business; National Association of Convenience Stores; McDonald's USA, LLC, and The Colorado Bankers Association.

[501] One study found that it takes an average of 409 days for an employer and a union to reach a first contract. Robert Combs, *ANALYSIS: How Long Does It Take Unions to Reach First Contracts?* (Bloomberg Law News, June 1, 2021), available at *https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-long-does-it-take-unions-to-reach-first-contracts* (last visited Oct. 19, 2023).

practice of combining gross revenues of joint employers for jurisdictional purposes. My colleagues err in ignoring these direct compliance costs for purposes of their FRFA.

In deeming these direct costs of compliance irrelevant, my colleagues cite a quartet of cases: *Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985); *White Eagle Cooperative Assn.* v. *Conner,* 553 F.3d 467 (7th Cir. 2009); *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855 (D.C. Cir. 2001); and *Colorado State Banking Board* v. *Resolution Trust Corp.,* 926 F.2d 931 (10th Cir. 1991). These cases do not support the majority's position. In three of them, the court held that under the Regulatory Flexibility Act, an agency must consider direct compliance costs imposed by the rule on small entities subject to its regulation but need not consider the costs imposed on *unregulated* entities. See *Mid-Tex Electric,* 773 F.2d at 342 (holding that FERC need not consider indirect impact of its regulation, which governed electrical utilities, on those utilities' small wholesale and retail customers because the latter were not subject to the rule); *White Eagle Cooperative Assn.,* 553 F.3d at 478 (holding that USDA need not consider the indirect impact that a rule governing milk handlers would have on small milk producers not subject to the rule); *Cement Kiln Recycling Coalition,* 255 F.3d at 869 (rule more stringently regulated emissions for hazardous waste combustors; no need to consider indirect impact of the rule on generators of hazardous waste not subject to the rule). In the fourth case, *Colorado State Banking Board,* the court held that a federal agency had properly certified that the rule at issue, which authorized banks to operate failed savings and loans, imposed no direct compliance costs on regulated parties. 926 F.2d at 948. Here, in contrast, it is beyond dispute that small businesses subject to the Board's jurisdiction are governed by the final rule, unlike the challengers in *Mid-Tex Electric, White Eagle Cooperative Association,* and *Cement Kiln Recycling Coalition.* And unlike in *Colorado State Banking Board,* it is equally beyond dispute that the final rule, by converting small businesses that were not joint employers under the 2020 Rule into joint employers and imposing a bargaining obligation on them, will impose direct compliance costs on those entities as described above.

Unlike the inapposite cases on which the majority relies, *AFL–CIO* v. *Chertoff,* 552 F. Supp. 2d 999 (N.D. Cal. 2007), speaks directly to the issue at hand. In that case, the court issued a preliminary injunction against the Department of Homeland Security (DHS) based on serious concerns that it had violated the Regulatory Flexibility Act by failing to consider certain costs of compliance imposed on small businesses. As shown below, *AFL–CIO* exposes the inadequacy of my colleagues' FRFA analysis.

Before the district court was a final rule promulgated by DHS that defined ''knowing'' for purposes of the statutory prohibition on knowingly hiring or continuing to employ an unauthorized alien under the Immigration Reform and Control Act, 8 U.S.C. 1324a (IRCA). The rule provided that ''knowing'' includes constructive knowledge and that receipt of a no-match letter from the Social Security Administration could contribute to a finding of constructive knowledge. However, the rule included a safe-harbor provision that precluded DHS from relying on an employer's receipt of a no-match letter to prove constructive knowledge where the employer had taken certain steps. Specifically, the no-match letter could not be used to establish constructive knowledge if the employer checked its records for error within 30 days of receipt of the letter and, if no error was found, if it asked the employee to confirm her information and advised the employee to resolve the discrepancy with the Social Security Administration within 90 days of receipt of the letter. The Secretary of Homeland Security certified that the rule would not have a significant economic impact on a substantial number of small entities, and therefore DHS did not conduct a FRFA. Id. at 1012.

A consortium of unions and business groups moved for a preliminary injunction, contending among other things that the rule was promulgated in violation of the Regulatory Flexibility Act because DHS had failed to consider significant compliance costs that the rule imposed on small businesses. The court granted the plaintiffs' motion, finding that small businesses could ''expect to incur significant costs associated [with] complying with the safe harbor rule.'' Id. at 1013. Those costs included the cost of dedicating human resources staff to track and resolve mismatches within the 90-day time limit, of hiring ''legal and consultancy services'' to help employers comply with the safe-harbor provision, and of training in-house counsel and human resources staff. Id. The court rejected DHS's claim that the safe-harbor provision would impose no costs on small entities because compliance was ''voluntary'':

> It is true that the safe harbor rule does not mandate compliance. This Court's ''concern, however, is with the practical effect . . . of the rule, not its formal characteristics.'' *Chamber of Commerce of the United States* v. *United States DOL,* 174 F.3d 206, 209 (D.C. Cir. 1999). Because failure to comply subjects employers to the threat of civil and criminal liability, the regulation is ''the practical equivalent of a rule that obliges an employer to comply or to suffer the consequences; the voluntary form of the rule is but a veil for the threat it obscures.'' Id at 210. The rule as good as mandates costly compliance with a new 90-day timeframe for resolving mismatches. Accordingly, there are serious questions whether DHS violated the RFA by refusing to conduct a final flexibility analysis.

AFL–CIO v. *Chertoff,* 552 F. Supp. 2d at 1013–1014.

Here, the compliance costs imposed on small businesses by the majority's final rule are even more direct than some of the compliance costs imposed by the safe-harbor provision of the final rule at issue in *AFL–CIO.* Under the DHS rule, an employer would not have to assign human resources staff to deal with no-match letters within safe-harbor time limits until it actually received a no-match letter following the effective date of the rule. Accordingly, the costs of doing so were not imposed by issuance of the DHS rule without more. Under my colleagues' final rule, in contrast, the compliance costs described above *are* imposed by issuance of the rule without more. This is so because the final rule *immediately* makes joint employers of many small businesses that were not joint employers under the 2020 Rule. And these new joint employers include some that *immediately* incur a duty to bargain and are *immediately* exposed to unfair labor practice liability if they fail to comply with that duty. The majority is simply wrong in suggesting that the costs of determining whether that duty exists and of complying with it if it does are the result of discretionary choices.[502]

[502] My colleagues unpersuasively attempt to distinguish *AFL–CIO* v. *Chertoff* on the ground that the agency in that case made a ''*procedural* error'' (emphasis added) by certifying the rule as not having a significant impact on a substantial number of small entities instead of conducting an initial or final regulatory flexibility analysis. My colleagues point out that they have performed that analysis. But they concede that, in *AFL–CIO* v. *Chertoff,* the agency's error was its failure to consider certain direct compliance costs imposed by the rule at issue, and my colleagues commit the same error. They fail to acknowledge that their final rule imposes certain direct compliance costs on regulated entities. My colleagues incorrectly treat the costs of evaluating business contracts and practices and the expense of placing a bargaining representative at the table as ''indirect costs'' and deem them irrelevant to a regulatory flexibility analysis. It is immaterial whether one characterizes

Continued

Further, the majority underestimates the final rule's familiarization costs. In its FRFA, the majority estimates that small businesses will take ''at most one hour to read the text of the rule and the supplementary information published in the **Federal Register**,'' and they unjustifiably assume that all small businesses *have* human resources or labor relations personnel to carry out this task. The majority also estimates that one hour will suffice for a consultation between a small employer and an attorney. Citing hourly wage figures from the Bureau of Labor Statistics (BLS), the majority assesses the total compliance costs to be between $208.60 and $227.98.

In my view, the majority's estimate is absurdly low. The length of time it would take an employer's representative to read the rule and its accompanying supplemental information and adequately absorb it, even with the assistance of an attorney, will surely exceed the two hours the majority allocates to this complex endeavor. The final rule and its supplementary information is nearly 63,000 words long and replete with dense legal analysis that will challenge all but the most experienced specialist in traditional labor law, let alone non-specialist attorneys and small businesspersons.[503] As one commenter wrote in response to the proposed rule:

> The Board claims businesses will only spend one hour reading the rulemaking and one hour speaking with counsel. These estimates are frankly astounding. The Proposed Rule is 70 pages long, and a final rule would likely be similar in length. [Wishful thinking.] Additionally, no legal counsel would require only one hour to analyze a contractual relationship or business operations and provide a legal and/or risk analysis for a business entity. Such analyses are comprehensive and do not take one hour whether a business has in-house counsel or must look to hire a firm. Risk analyses take several hours, if not days or weeks, to review a program, analyze it, and compile a report. Furthermore, program and/or operational changes may be needed to protect the business from any potential liability. This would involve even more time from counsel. All in all, businesses will assuredly take more than one hour to read the standard and one hour to speak with counsel.[504]

The majority also underestimates the cost to a small business of paying for a consultation. Citing the most recent BLS statistics, my colleagues say that the average hourly *wage* for an attorney is $78.74. But the average hourly wage earned by a lawyer is not the average rate that a client will be billed for an hour of a lawyer's services. The average *billable* rate for an hour of an attorney's services—*i.e.,* the rate at which a client is billed—is substantially higher. According to Clio's 2022 Legal Trends Report, the national average billable rate for a labor and employment attorney is currently $341.[505] Various surveys list even higher average billable rates nationwide. See, *e.g.,* Andrew Maloney, *Associate Billing Rates Are Growing Faster Than Partner Rates,* THE AMERICAN LAWYER (Feb. 3, 2022), available at *https://www.bloomberglaw.com/document/X9IS07HG000000?jcsearch=hdi45mllfg#jcite* (last visited Oct. 19, 2023) (indicating that as of 2021, the average rate billed for legal services by partners was $728 per hour, and for legal services by associates, $535 per hour). [506]

To determine the amount to seek for awards of attorneys' fees, federal agencies—including the Board—refer to the Laffey Matrix, available at *http://www.laffeymatrix.com/see.html,* which sets forth hourly rates for attorneys practicing civil law in the Washington, DC metropolitan area. See, *e.g., Newport News Shipbuilding & Dry Dock Co.* v. *Holiday,* 591 F.3d 219, 229 (4th Cir. 2009) (characterizing the Laffey Matrix as ''a useful starting point to determine fees''); *NLRB* v. *Cobalt Coal, Ltd.,* 2018 U.S. Dist. LEXIS 183276, at *2 (W.D. Va. Oct. 25, 2018) (awarding the Agency attorneys' fees based on a modified version of the Laffey Matrix); *Frankl ex rel. NLRB* v. *HGH Corp.,* 2012 U.S. Dist. LEXIS 66761, at *18 (D. Haw. Apr. 23, 2012) (considering the Laffey Matrix but declining to apply it to determine rates for out-of-District attorneys). A cursory examination of the Laffey Matrix (and the other sources cited above) shows how out of sync the BLS-identified average wage rate for lawyers is with actual costs a small employer will incur to have an outside lawyer consult on a matter. For the most recent calendar year, the Laffey Matrix lists the hourly rate for an attorney with one to three years of legal experience as $413, and the hourly rate for a paralegal or law clerk as $225. The BLS average wage rate the majority relies on is just over one-third of the Laffey Matrix average billable rate for a *paralegal.* Even taking into consideration that billable-hour rates for attorneys who practice in the District of Columbia are higher than in many parts of the country, it is all but certain that the BLS wage rate of $78.74 is far less than small businesses will have to pay for an hour of legal

that error as ''procedural'' or ''substantive'' and equally immaterial whether an agency commits that error when certifying a rule as having no significant impact on a substantial number of small entities or when, as here, it conducts a FRFA and reaches the exact same conclusion. Simply put, by misclassifying direct costs as indirect costs, my colleagues have sidestepped their statutory obligation to give ''a description of the steps the agency has taken to minimize the significant economic impact on small entities'' imposed by their rule. 5 U.S.C. 604(a)(6).

There is also no merit to my colleagues' position that *AFL–CIO* v. *Chertoff* is distinguishable on the ground that the rule there exposed regulated parties to civil and criminal liability where here, they say, their rule does neither. More specifically, they say that ''[b]eing a joint employer imposes a duty to bargain in good faith, but it is Sec. 8(a)(5) of the Act, and not the joint-employer rule, that imposes civil liability for refusing to bargain.'' That may be, but it misses the point, which is that the final rule dramatically expands the universe of entities that are exposed to civil liability under Sec. 8(a)(5). Moreover, even though Sec. 8(a)(5) is the ultimate source of potential liability, a statute—the IRCA, which makes it unlawful to knowingly employ an unauthorized alien—was similarly the ultimate source of liability in *AFL–CIO* v. *Chertoff.*

Further, my colleagues' position finds no support in the Board's statement in the 2020 Rule that ''[u]nfair labor practice liability is the cost of not complying with the NLRA, not the cost of compliance with the Board's joint-employer rule.'' 85 FR 11230. The Board made that statement when rejecting certain public comments asserting that the 2020 Rule imposed direct costs insofar as ''liability and liability insurance costs may increase for small entities [that are undisputed employers of the employees at issue] because they may no longer have larger entities [that were joint employers under *BFI* but would no longer be under the 2020 Rule] with which to share the cost of any NLRA backpay remedies ordered in unfair labor practice proceedings.'' A possible increase in the cost of liability insurance for undisputed employers was plainly an indirect (not to mention speculative) cost of the 2020 Rule. In contrast, by imposing a duty to bargain on businesses that heretofore have had no such duty, the majority's final rule imposes on those entities, necessarily and therefore directly, the unavoidable costs of collective bargaining.

[503] For two reasons, I am unpersuaded by my colleagues' attempt to justify their one-hour reading estimate by pointing to an estimate contained in the 2020 Rule's FRFA for the reading of that rule. First, the 2020 Rule returned Board law to the familiar and easy-to-understand pre-*BFI* standard. In contrast, the majority's final rule breaks new legal ground—going well beyond even *BFI*—and injects significant uncertainty into the joint-employer analysis. Second, in the 2020 rulemaking, the Board received no public comments that would have provided a basis for departing from the estimate contained in the 2018 NPRM's initial regulatory flexibility analysis. Here, in contrast, public comments indicate that my colleagues' estimate is unreasonably low.

[504] See Comment of Modern Economy Project.

[505] The full report is available at *https://www.clio.com/wp-content/uploads/2022/09/2022-Legal-Trends-Report-16-02-23.pdf* (last visited Oct. 19, 2023). Billable-hour rates broken down by practice area appear on page 72 of the report.

[506] Contrary to my colleagues' assertion, the Maloney article contains an adequate explanation of the methodology used: ''ELM [*i.e.,* ELM Solutions, a legal analytics company and source of the data used by the author] uses anonymized legal spend data from law firms' e-billing and time management software to compile national average billing rates for partners, associates and paralegals, as well as rate data for specific markets, practices and types of matters. ELM said all the data in the report is derived 'from the actual rates charged by law firm professionals as recorded on invoices submitted and approved for payment.' ''

services.[507] And it is also all but certain that an attorney will need far more than one hour to analyze, and help her client understand, the impact of the final rule on her client's business.

For these reasons, the majority's FRFA is arbitrary and capricious.

Conclusion

For all the above reasons, I dissent from the majority's decision to promulgate the final rule.

VIII. Other Statutory Requirements

A. The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601–612, requires an agency promulgating a final rule to prepare a Final Regulatory Flexibility Analysis (FRFA) when the regulation will have a significant impact on a substantial number of small entities. An agency is not required to prepare a FRFA if the Agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). Although the Board believed that this rule would not have a significant economic impact on a substantial number of small entities, in the NPRM the Board issued its Initial Regulatory Flexibility Analysis (IRFA) to provide the public the fullest opportunity to comment on the proposed rule. See 87 FR 54659. The Board solicited comments from the public that would shed light on potential compliance costs that may result from the rule that it had not identified or anticipated.

The RFA does not define either ''significant economic impact'' or ''substantial number of small entities.'' [508] Additionally, ''[i]n the absence of statutory specificity, what is 'significant' will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations.'' [509] After reviewing the comments, the Board continues to believe that the only cost of compliance with the rule is reviewing and understanding the substantive changes to the joint-employer standard. Given that low cost, detailed below, the Board finds that this final rule will not have a significant economic impact on any small entity. Nevertheless, the Board publishes this FRFA to acknowledge and respond to the comments received in response to the proposed rule.

1. Statement of the Need for, and Objectives of, the Rule

The final rule establishes the standard for determining, under the NLRA, whether a business is a joint employer of a group of employees directly employed by another employer. This rule is necessary to explicitly ground the joint-employer standard in established common-law agency principles and provide guidance to parties covered by the Act regarding their rights and responsibilities when more than one statutory employer possesses the authority to control or exercises the power to control employees' essential terms and conditions of employment.

The guidance furnished by the final rule will enable regulated parties to determine in advance whether their actions are likely to result in a joint-employer finding, which may result in a duty to bargain collectively, exposure to what would otherwise be unlawful secondary union activity, and unfair labor practice liability. Accordingly, a final rule setting forth a comprehensive and detailed standard is important to businesses covered by the NLRA, employees of those businesses, and labor organizations that represent or seek to represent those employees. The final rule accomplishes these objectives by defining critical elements of the joint-employer standard and by enumerating the factors that will determine whether an entity is a joint employer.

2. Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of any Changes Made in the Proposed Rule as a Result of Such Comments

a. Response to Comments Concerning the Direct Cost of Compliance

The only direct compliance cost for any of the 6.1 million American business firms (both large and small) with employees is reading and becoming familiar with the text of the new rule. That cost is too low to be considered ''significant'' within the meaning of the RFA. NPRM, 87 FR at 54662 (estimating compliance costs of $151.51 to small employers and $99.64 to small labor unions).[510]

Some commenters address the direct compliance costs that the Board estimated in its IRFA. Some of those comments criticize the Board's assumption that reviewing the rule would only require one hour of reading time for a human resources specialist and that understanding the rule would only require a one-hour consult with an attorney.[511] One comment argues that the one hour of reading time does not account for reviewing the materials referenced in the proposed rule, such as the Restatement of Agency, which would be necessary to determine whether an entity is a joint employer.[512] Yet, without any empirical evidence to demonstrate that reading the text of the rule or meeting with an attorney to gain greater understanding of the rule would require more than one hour, the Board declines to change its estimates of the length of time it will take to do so. To the extent that comments are arguing that it will take longer than one hour for an attorney to analyze the application of

[507] The Laffey Matrix is a useful but imperfect guide as it primarily focuses on the costs of civil rights and environmental litigation in the Washington, DC metropolitan area, not labor and employment counseling nationwide. Nevertheless, this database and others like it (including the Fitzpatrick Matrix, which the Department of Justice uses to calculate attorneys' fees and is available at *https://www.justice.gov/usao-dc/page/file/1189846/download*) provide useful data points illustrating the inadequacy of the majority's estimates. Relatedly, the majority notes that ''[w]hile some commenters asserted that the wage rates for an attorney were at least $300/hour, none of the comments provided any evidence to which the Board could cite.'' I believe that by identifying relevant sources of average billable rates nationwide, I have refuted my colleagues' contention that small businesses will be able to secure a lawyer for about $78.74 per hour.

[508] 5 U.S.C. 601.

[509] U.S. Small Business Administration (SBA) Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act (SBA Guide) 18 (Aug. 2017), *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf*.

[510] As stated in the Board's IRFA, this minimal compliance cost does not increase for the small number of businesses that are alleged to be joint employers in Board proceedings. 87 FR 54661. Such allegations are not a consequence of the rule, but a consequence of members of the public filing charges that initiate Board investigations. In any event, they are rare. Between 2018 and 2021, only 0.15% of all 6.1 million American businesses were alleged to be joint employers in Board proceedings.

[511] Comments of Independent Bakers Association; Job Creators Network; Modern Economy Project; National Association of Convenience Stores; U.S. Chamber of Commerce. The U.S. Chamber of Commerce also asserts that large business firms will need even more time to read and review the rule and that a larger number of managers and professionals will be involved in the review, but the comment does not explain why this is so, which additional job classifications would be involved in reviewing the rule, how much more time would be required, or how many additional employees would have to read the rule. See comments of U.S. Chamber of Commerce.

[512] Comments of Freedom Foundation.

the rule to an employer's workforce,[513] that is an issue of indirect cost, which is not considered under the RFA but will be discussed below.

The dissent also disagrees with our estimate of one hour to read the rule, but it does not support its assertion that such a determination is arbitrary or unreasoned. The estimate is consistent with the familiarization time estimated in prior Board rules. In 2018, the Board's IRFA estimated that a labor compliance employee at a small employer could review the rule—approximately 60,185 words—in ''at most one hour.'' 83 FR 46695. Receiving no evidence contradicting this estimate, the Board's FRFA contained the same estimate. 85 FR 11234. No public comments have provided any empirical basis for an assertion that one hour would be insufficient to read this final rule (including preamble), which is approximately 61,476 words. Moreover, one hour is an average estimated amount of reading time for the approximately 6,119,657 entities the Board assumes would be subject to the rule. As discussed below, the Board has reason to believe that many small employers will not read the rule at all because they do not have any business relationships that would make this rule applicable to them, and others with a history of joint-employment relationships may spend more time reviewing the rule. One hour is simply a reasonable average.

In addition to criticizing the amount of time the Board estimates it will take to read and understand the rule, several commenters assert that the Board's estimate of the cost of a human resources specialist and an attorney are too low.[514] These commenters, however, provide no cost estimates for a human resources specialist.[515] The current rule uses the figure from the Department of Labor's Bureau of Labor Statistics (BLS) for a labor relations specialist, even though some small businesses may not have such a credentialed and experienced employee, because the national average wage rate for that position is comparable to that of all private sector employees. The average hourly wage for a labor relations specialist was last reported at $42.05; the average hourly wage for a private industry employee was last reported at $41.03.[516]

Some commenters argue, without any evidence, that the cost of legal counsel is at least $300 per hour.[517] The dissent attempts to buoy this argument, criticizing the Board for using the most recent data from the BLS. For each of the alternative methods that the dissent suggests, it does not explain why those sources are so superior to the BLS as to render the majority's analysis arbitrary and capricious. The Bloomberg article claims to have compiled national average billing rates but only cites rates in atypically expensive markets—New York, Washington, DC, Chicago, and San Francisco—and provides little information on its survey subjects and research methodology. The Clio Legal Trends Report claims that the 1,168 consumers surveyed are representative of the U.S. population but does not provide any evidence of that or make the same claim for the 1,134 legal professionals who responded to the survey. In fact, in its detailed methodology, it acknowledges that the only customers included were paid subscribers to Clio, not those using a free trial or the Academic Access Program. Further, the report excluded data from customers who opted out of aggregate reporting. Finally, even though the dissent references the Laffey Matrix, which is guided by ''the reasonably hourly rate prevailing *in the community* for similar work,'' it also acknowledges that the rate is only applicable to attorneys in the D.C. area. *Laffey* v. *Nw. Airlines, Inc.,* 572 F. Supp. 354, 371 (D.D.C. 1983), aff'd in part, rev'd in part, 746 F.2d 4 (D.C. Cir. 1984). It is not arbitrary or capricious for the Board to rely on the national average attorney wage rates calculated by a federal agency with responsibility for compiling data on national labor costs.

Another commenter argues that the Board should have included the cost of hiring an unknown number of management consultants in order to comply with the rule.[518] And yet another comment presumes that compliance with the proposed rule could require hiring a dedicated staffer, who would cost thousands of dollars per year.[519] Other commenters fault the Board for undervaluing a small business owner's time at just $151.51 per hour and for not taking into account the ''full opportunity cost of lost overhead and profit contribution entailed by the diversion of labor from normal productive activity'' to reading the rule.[520]

None of these comments justify changes to the Board's initial assumptions regarding the job classifications that would be involved in reading the final rule or the cost of that time. None of the comments provide evidence that the Board could use to reevaluate its estimated costs, which are derived from wage and benefit figures provided by the Department of Labor's BLS.

Comments regarding the ''full opportunity cost of lost overhead and profit contribution entailed by the diversion of labor from normal productive activity'' misunderstand the Board's calculus. The Board does not assume that these job functions are already being performed by a small business's owner or employees. That is why the Board identifies the time spent reading and consulting about the rule as an additional cost of compliance rather than assuming that keeping abreast of changes in employment and labor law is already a part of a human resources specialist's or in-house counsel's job function. However, these comments have persuaded the Board to add to its assessment of direct compliance costs an additional hour of time for a human resources or labor relations specialist to meet with the attorney, rather than assuming that the one-hour consult is already part of that human resources or labor relations specialist's job function. That addition is reflected in Section VI.A.5 below.

Other comments generally assert that the Board's estimated compliance costs are inaccurate, and a new assessment of costs is required.[521] They provide no detail or evidence to support their assertions.

b. Response to Comments Concerning Indirect or Speculative Cost of Compliance

The remaining comments regarding the Board's estimated compliance costs

[513] Comments of Modern Economy Project; National Association of Convenience Stores; Rachel Greszler.

[514] Comments of Independent Bakers Association; Job Creators Network Foundation; Modern Economy Project; National Association of Convenience Stores; U.S. Chamber of Commerce.

[515] The dissent calls the assumption that all small businesses have human resources or labor relations personnel to read the rule ''unjustifiable.'' This is the same assumption, however, that the Board made in its 2018 IRFA and reaffirmed in its 2020 FRFA. Compare 83 FR 46695 with 85 FR 11234. The Board has received no public comments suggesting that the assumption is unreasonable.

[516] Compare Occupational Employment and Wages, May 2022, 13–1075 Labor Relations Specialists, found at *https://www.bls.gov/oes/current/oes131075.htm* (last visited Oct. 19, 2023), with Employer Costs for Employee Compensation—June 2023, found at *https://www.bls.gov/news.release/pdf/ecec.pdf* (last visited Oct. 19, 2023).

[517] Comments of Independent Bakers Association; Rachel Greszler; U.S. Chamber of Commerce.

[518] Comments of U.S. Chamber of Commerce.

[519] Comment of SBA Office of Advocacy.

[520] Comments of National Association of Convenience Stores; U.S. Chamber of Commerce.

[521] Comments of Colorado Bankers Association; National Association of Insurance and Financial Advisors; RaceTrac, Inc.; Restaurant Law Center; Rio Grande Foundation; U.S. Black Chambers, Inc.

concern indirect or speculative costs that are not direct costs of the rule.

Avoidance Costs. The majority of the remaining comments focus on the cost associated with avoiding a joint-employer relationship.[522] For example, two commenters argue that the proposed rule increases the ''price'' for an employer to avoid joint-employer status because businesses that structured their relationships to avoid joint-employer liability under the 2020 rule will have to change existing policies, procedures, and contracts to achieve the same end under this final rule.[523] Some commenters fear that the proposed rule will cause larger businesses to cancel contracts with smaller entities to avoid joint-employer status and the liability that comes with it.[524] Other commenters count as compliance costs the cost of regularly hiring legal counsel to ensure that any change in supplier or contracts does not inadvertently create a joint-employer relationship.[525] In the building industry, one commenter notes, there are several potential joint-employment relationships between builders and a multitude of subcontracted businesses that vary by jobsite.[526] The increased number of business relationships at play, the commenter states, will make it more costly to obtain legal counsel to determine which entities will be classified as joint employers under the final rule.

Other comments focus on the possibility that larger companies and franchisors will provide less support to smaller companies, subcontractors, and franchisees to avoid liability for the smaller entities' labor violations.[527] These commenters predict that the proposed rule will result in a decrease in entrepreneurial opportunities for small businesses and contractors,[528] which would result in economic inefficiencies as larger businesses and general contractors would supplant the work of smaller ones and no longer focus on their core competencies.[529]

Conversely, one commenter notes, the proposed rule could result in a franchisor seeking to exert more control over its franchises. For example, in response to a single franchisee unionizing or engaging in collective bargaining, the franchisor could impose a standardized minimum wage at all its franchise locations.[530]

Potential Legal Expenses. Commenters also assert that the proposed rule will increase an employer's exposure to allegations of unfair labor practices, which will in turn increase insurance and legal costs for small businesses.[531] Some commenters believe the costs will come from new or increased liability under the new rule.[532] Other comments focus on the supposed vagueness of the proposed rule, arguing that it increases the likelihood of litigation over whether a business is a joint employer. Accordingly, these comments argue that the Board should have included as a compliance cost the cost of participating in a Board case.[533] In support of this position, two comments note that, after *Browning-Ferris* issued, some franchisors claimed to experience a significant increase in joint-employer claims across all spectrums of the law and some franchisees incur increased costs because they were compelled to seek outside guidance through attorneys or other consultants on matters in which the franchisor used to assist.[534] Some commenters also note that every contract their companies enter into will need additional legal scrutiny for its possible exposure to a joint-employer finding[535] or to determine whether they are required to be a party to another business's collective-bargaining process.[536]

Potential Costs If Entities Are Joint Employers Under the New Rule. If a party is determined to be a joint employer, it will have to allocate time and resources to collective bargaining and other costs associated with unionization efforts and elections, some commenters assert.[537] The dissent also contemplates reviewing existing business contracts and participating in collective bargaining as direct compliance costs. Another commenter adds that unions will seek to exploit collective bargaining with franchisors to impose higher wages on small business franchisees.[538] Yet another comment states that the Board failed to consider costs associated with revising or outsourcing training materials, such as training regarding operational best practices, guidance on employee handbooks or other personnel policies, and sample policies or best practices regarding workplace civil rights issues.[539]

Respectfully, neither the dissent nor the foregoing comments raises direct economic impacts under the RFA. How a small entity structures its business relationships is discretionary. The rule sets forth no requirement that employers embrace or avoid joint-employer status. It merely brings the Board's test for determining joint-employer status back in line with the common law, as interpreted by the District of Columbia Circuit in *Browning-Ferris Industries of California, Inc.* v. *NLRB,* 911 F.3d 1195 (D.C. Cir. 2018). If a regulated entity chooses to reevaluate its contractual or business relationships in light of the rule's return to the common-law standard, that is a choice within its discretion, but it is not a direct compliance cost of the rule. Similarly, if an entity chooses to accept or dispute an allegation of joint-employer status in litigation or elsewhere, that is a discretionary choice. It is not required to do so under the rule. Moreover, the implications of that choice are entirely speculative. No commenter provided any quantifiable evidence demonstrating that a joint-employer finding inevitably increases costs on small businesses.

Our conclusion that the RFA requires agencies to consider only direct compliance costs finds support in the RFA, its caselaw, and guidance from the SBA's Office of Advocacy. The RFA does not require an agency to consider speculative and wholly discretionary responses to the rule, or the indirect impact on every stratum of the economy. Section 603(a) of the RFA states that if an IRFA is required, it ''shall describe the impact of the

[522] Comments of Elizabeth Boynton; Job Creators Network Foundation; Modern Economy Project; National Association of Convenience Stores.

[523] Comments of Colorado Bankers Association; U.S. Chamber of Commerce.

[524] Comments of Modern Economy Project; Rio Grande Foundation; SBA Office of Advocacy; U.S. Chamber of Commerce.

[525] Comments of Elizabeth Boynton; Goldwater Institute; Independent Electrical Contractors; One Energy; Reid Stores, Inc. d/b/a Crosby's.

[526] Comments of NAHB.

[527] Comments of IFA; Job Creators Network Foundation; McDonald's USA, LLC; National Association of Convenience Stores; NFIB; Rachel Greszler; SBA Office of Advocacy; U.S. Black Chambers, Inc.

[528] Comments of IFA; Independent Bakers Association; Job Creators Network Foundation; McDonald's USA, LLC; Modern Economy Project; National Association of Convenience Stores; NFIB; Rachel Greszler; SBA Office of Advocacy; U.S. Black Chambers, Inc.

[529] Comments of NFIB; SBA Office of Advocacy.

[530] Comments of U.S. Black Chambers, Inc.

[531] Comments of Job Creators Network Foundation; National Association of Convenience Stores; NFIB; SBA Office of Advocacy; U.S. Chamber of Commerce.

[532] Comments of Colorado Bankers Association; Rio Grande Foundation; SBA Office of Advocacy.

[533] Comments of Goldwater Institute; Independent Electrical Contractors; Independent Lubricant Manufacturers Association; Modern Economy Project; One Energy; Reid Stores Inc. d/b/a Crosby's; U.S. Chamber of Commerce.

[534] Comments of IFA; Rachel Greszler.

[535] Comments of Independent Lubricant Manufacturers Association; Modern Economy Project.

[536] Comments of Elizabeth Boynton.

[537] Comments of Elizabeth Boynton; Rachel Greszler.

[538] Comments of NFIB.

[539] Comments of Modern Economy Project.

proposed rule on small entities.'' 5 U.S.C. 603(a). Although the term ''impact'' is undefined, its meaning can be gleaned from Section 603(b), which recites the required elements of an IRFA. One such element is ''a description of the projected *reporting, recordkeeping and other compliance requirements* of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.'' 5 U.S.C. 603(b)(4) (emphasis added). Section 604 further corroborates the Board's conclusion, as it contains an identical list of requirements for a FRFA (if one is required). 5 U.S.C. 604(b)(4).

The courts, too, have recognized that the statute only requires that the regulatory agency consider the direct burden that compliance with a new regulation will likely impose on small entities. *See Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985) (''[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities.''); accord *White Eagle Cooperative Assn.* v. *Conner,* 553 F.3d 467, 478 (7th Cir. 2009); *Colorado State Banking Board* v. *Resolution Trust Corp.,* 926 F.2d 931, 948 (10th Cir. 1991).

Additional support for confining the regulatory analysis to direct compliance costs is found in an authoritative guide published by the SBA Office of Advocacy. The SBA Guide explains that ''other compliance requirements'' under section 603 include the following examples:

> (a) capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures to comply with the proposed rule; (c) lost sales and profits resulting from the proposed rule; (d) changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; (e) extra costs associated with the payment of taxes or fees associated with the proposed rule; and (f) hiring employees dedicated to compliance with regulatory requirements.

SBA Guide at 37. These are all direct, compliance-based costs.

In the IRFA, the Board noted that the only identifiable compliance cost imposed by the proposed rule is reviewing and understanding the substantive changes to the joint-employer standard. 87 FR at 54659. Otherwise, there will be no ''reporting, recordkeeping and other compliance requirements'' for these small entities. See 5 U.S.C. 603(b)(4), 604(b)(4). The same is true of the final rule. The final rule imposes no mandatory capital costs or mandatory costs of modifying existing processes, results in no lost sales or profits, and creates no appreciable changes in market competition. See SBA Guide at 37. Lastly, there are no costs associated with taxes or fees and no costs for additional employees dedicated to compliance, as no compliance requirements exist. See id.

Consistent with these principles, the Board rejects the view that it must include as direct compliance costs employers' discretionary responses to the rule, as suggested by the comments discussed above. See *Mid-Tex Electric Cooperative,* 773 F.2d at 343 (''Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.''). ''[R]equir[ing] an agency to assess the impact on all of the nation's small businesses possibly affected by a rule would be to convert every rulemaking process into a massive exercise in economic modeling, an approach we have already rejected.'' *Cement Kiln Recycling Coalition* v. *EPA,* 255 F.3d 855, 869 (D.C. Cir. 2001) (citing *Mid-Tex Electric Cooperative,* 773 F.2d at 343). The rule does not require contracting parties to alter their arrangements now or in the future. It therefore cannot be said that actions taken by employers to avoid a joint-employer relationship, or any costs associated with those actions or passed on to other entities because of that attempt at avoidance, is a direct cost of compliance with the rule.

Commenters also ask the Board to count as a direct compliance cost of the rule the cost of actions that other entities might take in response to the rule without any indication that those actions are required for compliance with the rule. These comments about what larger companies or franchisors might do to avoid joint-employer liability are speculative and too attenuated to be incorporated into the Board's analysis of compliance costs with the rule. Many of these concerns are not even specific to joint-employer relationships. For example, the costs associated with opposing unionization efforts, participating in Board elections, and bargaining with employees' duly elected representatives can exist even where no joint-employer relationship does.

The dissent takes issue with our citations to four cases, which were also cited in the FRFA of the 2020 rule: *Mid-Tex Electric Cooperative, White Eagle Cooperative Assn., Cement Kiln Recycling Coalition,* and *Colorado State Banking Board,* and instead suggests that *AFL–CIO* v. *Chertoff,* 552 F. Supp. 2d 999 (N.D. Cal. 2007) is more instructive. The problem with the dissent's objection to these cases is twofold. First, it mischaracterizes their use: the rule cites these cases because they hold that the RFA only requires an agency to consider the direct burden that compliance imposes on small entities, not every indirect effect that regulation might have on any other business, regardless of size and whether the entity is directly regulated by the rule. Compare 83 FR 46695 and 85 FR 11229 with 87 FR 54662.

Second, the dissent's reliance on *Chertoff* is misplaced because, in that case, the agency made a procedural error by certifying the rule instead of conducting an initial or final regulatory flexibility analysis. 552 F. Supp. 2d at 1013.[540] The agency's rationale was that the rule did not place any new burdens on the employer or impose any new or additional costs because its new safe harbor procedure was voluntary. Id. But the court took exception with the agency's refusal to consider the direct compliance costs raised by the plaintiffs. Id. Here, no such procedural error exists because the Board has conducted an initial and final regulatory flexibility analysis, considered and engaged with all comments regarding the rule's direct compliance costs, and found no evidence, only unsupported argument, contradicts its findings.[541]

c. Response to Comments Concerning Potential Conflicts With Other Federal Laws

Some comments contend that the Board has failed to identify all relevant

[540] Contrary to the dissent, it is material, if not dispositive, that *Chertoff*'s holding is limited to finding procedural error in DHS's failure to conduct a regulatory flexibility analysis. In the context of a motion for a preliminary injunction, the court in *Chertoff* held only that, ''there are serious questions whether DHS violated the RFA'' by failing ''to conduct a final flexibility analysis'' that evaluated possible direct costs. 552 F. Supp. 2d at 1013. The Court never decided whether the proffered costs were actually direct costs under the Regulatory Flexibility Act.

[541] Moreover, the agency's argument in *Chertoff* that there were no compliance costs because the rule was voluntary is distinct from the voluntary nature of the joint employer rule. In that case, an employer's failure to voluntarily comply with the regulation's safe harbor procedure could have exposed the employer to criminal and civil liability. But the Board has no authority to impose criminal liability, and the joint-employer rule imposes no civil liability. Being a joint employer imposes a duty to bargain in good faith, but it is Sec. 8(a)(5) of the Act, and not the joint-employer rule, that imposes civil liability for refusing to bargain. As the Board noted in the 2020 joint-employer rule, ''[u]nfair labor practice liability is the cost of not complying with the NLRA, not a cost of compliance with the Board's joint-employer rule.'' 85 FR 11230.

rules and regulations that may ''conflict with the proposed rule,'' as section 603(b)(5) of the RFA requires, but those comments do not specifically identify any potential conflicts.[542] One commenter argues that the proposed rule directly undermines the Lanham Act's requirements that franchisors maintain control over the use of their marks and would penalize franchisors who maintain that control by labeling them joint employers.[543] Another asserts that businesses will now need to reconcile the differences between how the Board and the Internal Revenue Service view employer relationships.[544] And other comments argue that the proposed rule conflicts with the federal law requiring prime contractors to have indirect and reserved control over their subcontractors' compliance with federal laws such as the Occupational Safety and Health Act, the Fair Labor Standards Act, the Davis-Bacon Act, and the prohibition of discrimination in hiring administered by the Department of Labor's Office of Federal Contract Compliance Programs.[545] These comments further argue that these required terms, which are also present in many third-party contracts, should be considered routine and not indicative of a joint-employer relationship.

According to the SBA Guide, at 40, rules are conflicting when they impose two conflicting regulatory requirements on the same classes of industry.[546] None of the comments demonstrate a conflict under this definition. The comments do not cite the purportedly conflicting authorities (such as the Federal Acquisition Regulation or the Internal Revenue Code). In any event, it is axiomatic that the same term may have different meanings in different statutes, based on each law's text, purpose, and legislative history.[547] As we state above, the rule applies only to the NLRA,[548] and commenters have not shown that, to the extent they exist, any dissimilar requirements would not be workable. Finally, because the final rule does not mandate that employers structure their business relationships in any particular manner, the final rule does not directly expose regulated entities to conflicting obligations. While entities may choose to rearrange their business relationships to avoid joint-employer status, that is distinct from a regulation obligating entities to engage in a particular business relationship.

3. Response of the Agency to any Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration in Response to the Proposed Rule, and a Detailed Statement of any Change Made to the Proposed Rule in the Final Rule as a Result of the Comments

The SBA Office of Advocacy submitted a comment that expresses four main concerns: that the proposed rule is so ambiguous and broad that it does not provide guidance on how to comply or avoid joint-employer liability, and that the Board should resolve purported conflicts with existing federal requirements, reassess the cost of compliance with the proposed rule, and consider significant alternatives that would accomplish the objectives of the NLRA while minimizing the economic impacts to small entities as required by the RFA.

As discussed in Section II.B above, the final rule heeds the SBA Office of Advocacy's request for more specific guidance in three ways: (1) § 103.40(d) of the final rule provides an exhaustive list of the seven categories of terms and conditions of employment that will be considered essential for the joint-employer inquiry; (2) § 103.40(e) of the final rule clarifies that, to establish joint-employer status, the common-law employer must possess exercised or unexercised authority to control, or exercise the power to control indirectly, such as through an intermediary, an *essential* term or condition of employment; and (3) § 103.40(f) of the final rule clarifies that evidence of an entity's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles *and* that do not bear on the employees' essential terms and conditions of employment is not relevant to the determination of joint-employer status.

Contrary to the SBA Office of Advocacy's second criticism, the final rule does not contain any conflicts with existing federal requirements. The SBA Office of Advocacy's first asserted conflict is with federal requirements that require prime contractors to have indirect and reserved control over their subcontractor's terms and conditions of employment, such as wages, safety, hiring, and firing, which is discussed in Section VI.A.2.c. above. The SBA Office of Advocacy's second asserted conflict is that the proposed rule may conflict with a recent Presidential initiative to bolster the ranks of underserved small business contractors by discouraging mentorship and guidance from larger prime contractors.[549] The NLRB strongly supports efforts to increase diversity and inclusion in federal contracting. The SBA Office of Advocacy's comment, however, does not identify any way in which the final rule would prohibit larger contractors from offering mentorship and guidance to smaller contractors from underserved populations. Nor does its comment explain, as it implicitly suggests, how a larger contractor's provision of mentorship and guidance to a smaller contractor could create a joint-employer relationship under the rule.

The SBA Office of Advocacy's comment also asserts that the Board has underestimated the compliance costs of the final rule. However, the comment did not identify any direct compliance costs that the Board has overlooked and only mentioned indirect or speculative costs, which were raised by other commenters and addressed by the Board in Section VI.A.2.b above.

Finally, the comment twice encourages the Board to consider significant alternatives that would accomplish the objectives of the statute while minimizing the economic impacts on small entities, as required by the RFA, but provides no suggestions to that end. Consistent with the RFA's mandate, the Board has considered such alternatives in Section VI.6 below.

4. Description and Estimate of Number of Small Entities to Which the Rule Applies

In order to evaluate the impact of the proposed rule, the Board first identified the entire universe of businesses that could be impacted by a change in the joint-employer standard. According to the United States Census Bureau, there were 6,140,612 business firms with

[542] Comments of Goldwater Institute; IFA; National Association of Insurance and Financial Advisors; SBA Office of Advocacy.

[543] Comments of IFA.

[544] Comments of Elizabeth Boynton.

[545] Comments of Goldwater Institute; SBA Office of Advocacy.

[546] SBA Guide, at 40.

[547] *Yates* v. *United States,* 574 U.S. 528, 537 (2015) (''Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things.''); *Environmental Defense* v. *Duke Energy Corp.,* 549 U.S. 561, 574 (2007) (''We also understand that '[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section.' '') (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427, 433 (1932)). For example, the term ''employee'' has different meanings under the NLRA and the Fair Labor Standards Act. See supra fn. 338.

[548] See supra fn. 340.

[549] Press Release, The White House, Statements and Releases, FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners, (Dec. 2, 2021).

employees in 2020.[550] Of those, the Census Bureau estimates that about 6,119,657 were firms with fewer than 500 employees.[551] While this final rule does not apply to employers that do not meet the Board's jurisdictional requirements, the Board does not have the data to determine the number of excluded entities (nor were data or comments received on this particular issue).[552]

The final rule will only be applied as a matter of law when businesses are alleged to be joint employers in a Board proceeding. Therefore, the frequency with which the issue comes before the Board is indicative of the number of entities of any size most directly impacted by the final rule. A review of the Board's representation petitions and unfair labor practice charges provides a basis for estimating the frequency with which the joint-employer issue comes before the Agency. Between January 1, 2013, and December 31, 2017, the five-year period before the Board began rulemaking on this issue, joint-employer relationships were only alleged in 1.39% of the Board's cases. 83 FR 46693; 85 FR 11232. Accounting for repetitively alleged joint-employer relationships in these cases, the Board identified 823 separate joint-employer relationships involving an estimated 1,646 employers, .028% of all 5.9 million business firms, large and small, 83 FR 46693, which the Board deemed ''very few employers,'' 83 FR 46695.

Using the same methodology, the current majority found that, during the four-year period between January 1, 2018 and December 31, 2021, a total of 75,343 representation and unfair labor practice cases were initiated with the Agency. In 772 of those filings, the representation petition or unfair labor practice charge asserted a joint-employer relationship between at least two employers, which accounts for 1.02% of the Board's cases.[553] Accounting for repetitively alleged joint-employer relationships in these filings, the Board has identified 467 separate alleged joint-employer relationships involving an estimated 934 employers.[554] Accordingly, the joint-employer standard most directly impacted approximately .015% of all 6,140,612 business firms (including both large and small businesses) over the four-year period. And, the Board is unaware of any cases between 2018 and 2021 that were determined by contractually reserved or indirectly exercised control, and no public comments have directed us to one.

This data belies the dissent's assertion that this rule will make ''many'' small businesses joint employers for the first time or ''dramatically increase'' the number of entities deemed joint employer since the new standard is so closely aligned with the pre-rulemaking standard, under which a similar number of employers were alleged as joint employers. In fact, since a large share of our joint-employer cases involve two large employers, the Board expects that an even lower percentage of small businesses have been and will be most directly impacted by the Board's application of the rule.

As discussed in the NPRM, irrespective of an Agency proceeding, the rule may be more relevant to certain types of small employers because their business relationships involve the exchange of employees or operational control.[555] 87 FR at 54660. In addition, labor unions, as organizations representing or seeking to represent employees, will be impacted by the Board's change in its joint-employer standard. Thus, the Board identified the following five types of small businesses or entities as those most likely to be impacted by the rule: contractors/subcontractors; temporary help service suppliers; temporary help service users; franchisees; and labor unions.[556]

(1) Businesses commonly contract with vendors to receive a wide range of services that may satisfy their primary business objectives or solve discrete problems they are not qualified to address. And there are seemingly unlimited types of vendors that provide these types of contract services. Businesses may also subcontract work to vendors to satisfy their own contractual obligations—an arrangement common to the construction industry. Businesses that contract to receive or provide services often share workspaces and sometimes share control over workers, rendering their relationships subject to application of the Board's

[550] U.S. Department of Commerce, Bureau of Census, 2020 Statistics of U.S. Businesses (''SUSB'') Annual Data Tables by Enterprise Employment Size, *https://www.census.gov/data/tables/2020/econ/susb/2020-susb-annual.html* (from downloaded Excel Table entitled ''U.S. & States, 6-digit NAICS'' found at *https://www2.census.gov/programs-surveys/susb/tables/2020/us_state_6digitnaics_2020.xlsx.* ''Establishments'' refer to single location entities—an individual ''firm'' can have one or more establishments in its network. The Board has used firm-level data for this IRFA because establishment data is not available for certain types of employers discussed below. Census Bureau definitions of ''establishment'' and ''firm'' can be found at *https://www.census.gov/programs-surveys/susb/about/glossary.html* (last visited June 2, 2023).

The proposed rule references the Census Bureau's 2019 Statistics of U.S. Businesses (''SUSB'') data tables, the most recent data available at the time of publication. Because the 2020 SUSB data tables are now available, the FRFA uses that updated data. However, the changes are not statistically significant, as the joint-employer standard will continue to most directly impact the same percentage of businesses large and small.

[551] The Census Bureau does not specifically define small business but does break down its data into firms with 500 or more employees and those with fewer than 500 employees. See U.S Department of Commerce, Bureau of Census, 2020 SUSB Annual Data Tables by Enterprise Employment Size, *https://www.census.gov/data/tables/2020/econ/susb/2020-susb-annual.html* (from downloaded Excel Table entitled ''U.S. & States, 6-digit NAICS''), found at *https://www2.census.gov/programs-surveys/susb/tables/2020/us_state_6digitnaics_2020.xlsx.* Consequently, the 500-employee threshold is commonly used to describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS), which we set forth below.

[552] Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB* v. *Fainblatt,* 306 U.S. 601, 606–607 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of $500,000 or more. *Carolina Supplies Cement Co.,* 122 NLRB 88 (1959). But shopping center and office building retailers have a lower threshold of $100,000 per year. *Carol Management Corp.,* 133 NLRB 1126 (1961). The Board asserts jurisdiction over nonretailers generally where the value of goods and services purchased from entities in other states is at least $50,000. *Siemons Mailing Service,* 122 NLRB 81 (1959). See also supra fn. 104.

The following employers are excluded from the NLRB's jurisdiction by statute: federal, state and local governments, including public schools, libraries, and parks; Federal Reserve banks, and wholly owned government corporations, 29 U.S.C. 152(2); employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery, 29 U.S.C. 152(3); and employers subject to the Railway Labor Act, such as interstate railroads and airlines, 29 U.S.C. 152(2).

[553] This includes initial representation case petitions (RC petitions) and unfair labor practice charges (CA cases) filed against employers.

[554] Since a joint-employer relationship requires at least two employers, we have estimated the number of employers by multiplying the number of asserted joint-employer relationships by two. Some of these filings assert more than two joint employers, but, on the other hand, some of the same employers are named multiple times in these filings. Additionally, this number is certainly inflated because the data do not reveal those cases where a joint-employer relationship exists but the parties' joint-employer status is not in dispute.

[555] The Board acknowledges that there are other types of entities and/or relationships between entities that may be affected by this change in the joint-employer rule. Such relationships include but are not limited to lessor/lessee and parent/subsidiary. However, the Board does not believe that entities involved in these relationships would be impacted more than the entities discussed below.

[556] Comments received in response to the 2022 IRFA did not reveal any other categories of small entities that would likely take a special interest in a change in the standard for determining joint-employer status under the Act or indicate that there is a unique burden for entities in these categories. 85 FR 11234.

joint-employer standard. The Board does not have the means to identify precisely how many businesses are impacted by contracting and subcontracting within the United States or how many contractors and subcontractors would be small businesses as defined by the SBA.[557]

(2) Temporary help service suppliers (NAICS #561320) are primarily engaged in supplying workers to supplement a client employer's workforce. To be defined as a small business temporary help service supplier by the SBA, the entity must generate receipts of less than $34 million annually.[558] In 2017, there were 14,343 temporary service supplier firms in the United States.[559] Of these temporary service supplier firms, 13,384 had receipts of $29,999,999 or less. Since the Board cannot determine how many of the 117 firms with receipts between $30 million and $34,999,000 fall below the $34 million annual receipt threshold, it assumes that these are all small businesses as defined by the SBA. Therefore, for purposes of this FRFA, the Board assumes that 13,501 temporary help service supplier firms (94.1% of total) are small businesses.

(3) Entities that use temporary help services to staff their businesses are widespread throughout many industries. The Census Bureau's 2020 Annual Business Survey revealed that of the 2,687,205 respondent firms with paid employees, 94,930 of those firms obtained staffing from temporary help services in that calendar year.[560] This survey provides the only gauge of employers that obtain staffing from temporary help services, and the Board is without the means to estimate what portion of those are small businesses as defined by the NAICS. For that reason, and because no other comments were received on this topic, the Board assumes for purposes of this FRFA that all users of temporary services are small businesses.

(4) Franchising is a method of distributing products or services in which a franchisor lends its trademark or trade name and a business system to a franchisee, which pays a royalty and often an initial fee for the right to conduct business under the franchisor's name and system.[561] Franchisors generally exercise some operational control over their franchisees, which potentially renders the relationship subject to application of the Board's joint-employer standard. The Board explained in the NPRM that it does not have the means to identify precisely how many franchisees operate within the United States or how many are small businesses as defined by the SBA. The Census Bureau's 2020 Annual Business Survey revealed that, of the 130,492 firms that operated a portion of their business as a franchise, 125,989 had fewer than 500 paid employees.[562] Based on this available data and the fact that the 500-employee threshold is commonly used to describe the universe of small employers, we assume that 125,989 (96.5% of total) are small businesses.

(5) Labor unions, as defined by the NLRA, are entities ''in which employees participate and which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'' [563] By defining which employers are joint employers under the NLRA, the final rule impacts labor unions generally, and more directly impacts those labor unions that organize in the specific business sectors discussed above. The SBA's small business standard for ''Labor Unions and Similar Labor Organizations'' (NAICS #813930) is $16.5 million in annual receipts.[564] In 2017, there were 13,137 labor union firms in the U.S.[565] Of these firms, at least 12,964 labor union firms (98.6% of total) had receipts of under $15 million and are definitely small businesses according to SBA standards. Since the Board cannot determine how many of the 49 labor union firms with receipts between $15 million and $19,999,999 fall below the $16.5 million annual receipt threshold, it assumes that these are all small businesses as defined by the SBA. For the purposes of the IRFA, the Board assumes that 13,013 labor union firms (99% of total) are small businesses.

Based on the foregoing, the Board assumes that 13,501 temporary help supplier firms, 125,989 franchise firms, and 13,013 union firms are small businesses; and it further assumes that all 94,930 temporary help user firms are small businesses. Therefore, among these four categories of employers that are most interested in the final rule, 247,433 business firms are assumed to be small businesses as defined by the SBA. The Board believes that all these small businesses, and also those businesses regularly engaged in contracting/subcontracting, have a general interest in the rule and would be impacted by the compliance costs, discussed below, related to reviewing and understanding the rule. But, as previously noted, employers will only be most directly impacted when they are alleged to be a joint employer in a Board proceeding. Given the Board's historic filing data, this number is very small relative to the number of small employers in these five categories.

Throughout the IRFA, the Board requested comments or data that might improve its analysis, 87 FR at 54659–61, but no additional data was received regarding the number of small entities to which the rule will apply.[566]

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[557] Though the Board has previously solicited input on the number of contractors and subcontractors that qualify as small businesses, 83 FR 46694 fn. 56, 85 FR 11234, 87 FR 54660, it has received no responsive comments.

[558] 13 CFR 121.201. Between the publication of the NPRM and the final rule, changes in the Small Business Size Regulations increased the total number of potentially affected entities by 166 firms across all five categories. Though that change is statistically insignificant, the Board chose to include the most updated figures in this FRFA.

[559] The Census Bureau only provides data about receipts in years ending in 2 or 7, so the 2017 data is the most recent available information regarding receipts. See U.S Department of Commerce, Bureau of Census, 2017 SUSB Annual Data Tables by Establishment Industry, NAICS classification #561320, *https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx.*

[560] U.S. Department of Commerce, Bureau of Census, 2020 Annual Business Survey—Characteristics of Businesses, *https://www.census.gov/data/tables/2020/econ/abs/2020-abs-characteristics-of-businesses.html* (from downloaded Excel Table entitled ''Type(s) of Workers Employed by Sector, Sex, Ethnicity, Race, and Veteran Status,'' found at *https://data.census.gov/cedsci/table?q=ab1900%2a&tid=ABSCB2019.AB1900CSCB01&hidePreview=true&nkd=QDESC~B20*).

[561] See International Franchising Establishments FAQs, found at *https://www.franchise.org/*faqs-about-franchising.

[562] U.S. Department of Commerce, Bureau of Census, 2020 Annual Business Survey—Characteristics of Businesses, *https://www.census.gov/data/tables/2020/econ/abs/2020-abs-characteristics-of-businesses.html* (from downloaded Excel Table entitled ''Businesses Operated as a Franchise by Sex, Ethnicity, Race, Veteran Status, and Employment Size of Firm,'' found at *https://data.census.gov/cedsci/table?q=ab1900%2a&tid=ABSCB2019.AB1900CSCB04&hidePreview=true&nkd=QDESC~B06*).

[563] 29 U.S.C. 152(5).

[564] 13 CFR 121.201.

[565] See U.S Department of Commerce, Bureau of Census, 2017 SUSB Annual Data Tables by Establishment Industry, NAICS classification #722513, *https://www2.census.gov/programs-surveys/susb/tables/2017/us_6digitnaics_rcptsize_2017.xlsx.*

[566] Job Creators Network Foundation argues that the proposed rule is so vague and amorphous that the Board could not possibly identify all business that would be impacted. Rachel Greszler objects to the Board's determination that the issue of whether two entities were joint employers only involved 934 employers, or 0.15% of all business firms, over the four-year period. However, neither commenter provided any concrete data for the Board to consider.

5. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities.[567] Thus, the RFA requires the Agency to determine the amount of ''reporting, recordkeeping and other compliance requirements'' imposed on small entities.[568] In providing its FRFA, an agency may provide either a quantifiable or numerical description of the effects of a rule or alternatives to the rule, or ''more general descriptive statements if quantification is not practicable or reliable.'' [569]

The Board concludes that the final rule imposes no capital costs for equipment needed to meet the regulatory requirements; no direct costs of modifying existing processes and procedures to comply with the final rule; no lost sales and profits resulting from the final rule; no changes in market competition as a result of the final rule and its impact on small entities or specific submarkets of small entities; no extra costs associated with the payment of taxes or fees associated with the final rule; and no direct costs of hiring employees dedicated to compliance with regulatory requirements.[570] The final rule also does not impose any new information collection or reporting requirements on small entities.

Small entities, with a particular emphasis on those small entities in the five categories with special interest in the final rule, will be interested in reviewing the rule to understand the restored common-law joint-employer standard. We estimate that a human resources or labor relations specialist at a small employer who undertook to become generally familiar with the proposed changes may take at most one hour to read the text of the rule and the supplementary information published in the **Federal Register**.[571] It is also possible that a small employer may wish to consult with an attorney, which we estimated to require one hour as well.[572] Using the Bureau of Labor Statistics' estimated wage and benefit costs, we have assessed these labor costs to be between $208.60 and $227.98.[573]

As to the impact on unions, the Board anticipates they may also incur costs from reviewing the rule. The Board believes a union would consult with an attorney, which is estimated to require no more than one hour of attorney time costing $169.11 because, like labor compliance professionals or employer labor-management attorneys, union counsels would already be familiar with the pre-2020 standard for determining joint-employer status under the Act and common-law principles.[574]

The Board does not find the estimated $227.98 cost to small employers and the estimated $169.11 cost to unions to review and understand the rule to be significant within the meaning of the RFA. In making this finding, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected.[575] Other criteria to be considered are the following:

—Whether the rule will cause long-term insolvency, *i.e.,* regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;
—Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector, or (c) exceed five percent of the labor costs of the entities in the sector.[576]

The minimal cost to read and understand the rule, $227.98 for small employers and $169.11 for small unions, will not generate any such significant economic impacts.

In the NPRM, the Board requested comments from the public that would shed light on any potential compliance costs, 87 FR 54659, and considered those responses in the comments section above.

6. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities was Rejected

Pursuant to 5 U.S.C. 604(a)(6), agencies are directed to examine ''why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.'' In the NPRM, the Board requested comments identifying any other issues and alternatives that it had not considered. See 87 FR 54651, 54662. Two commenters suggest that the Board consider alternatives but do not provide any suggestions.[577] Several comments suggest that the Board withdraw the proposed rule and leave in place the 2020 rule, an alternative that the Board

[567] See *Mid-Tex Electric Cooperative,* 773 F.2d at 342 (''[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities.'').

[568] See 5 U.S.C. 604(a)(4).

[569] 5 U.S.C. 607.

[570] See SBA Guide at 37.

[571] Data from the BLS indicates that employers are more likely to have a human resources specialist (BLS #13–1071) than to have a labor relations specialist (BLS #13–1075). Compare Occupational Employment and Wages, May 2022, 13–1075 Labor Relations Specialists, found at *https://www.bls.gov/oes/current/oes131075.htm,* with Occupational Employment and Wages, May 2022, 13–1071 Human Resources Specialists, found at *https://www.bls.gov/oes/current/oes131071.htm* (last accessed July 3, 2023).

[572] In the NPRM, the Board asserted that an experienced labor relations specialist or labor relations attorney would not expend more than an hour to read and understand the rule, which returns to the pre-2020 rule standard and incorporates the common-law definition of ''employer'' that already applies in most jurisdictions throughout the nation. Therefore, the Board's initial direct compliance costs were one hour of time for the human resources or labor relations specialist to read the rule and one hour of an attorney's time for a consultation. The Board did not receive any comments that provided evidence or support for the assertion that employers or labor relations attorneys would need any additional time to read and understand the final rule. However, the comments persuaded the Board to add an additional hour of time for an employer's human resources or labor relations specialist to attend the attorney's consultation.

[573] For wage figures, see May 2021 National Occupancy Employment and Wage Estimates, found at *https://www.bls.gov/oes/current/oes_nat.htm.* The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2021, average hourly wages for labor relations specialists (BLS #13–1075) were $42.05. The same figure for a lawyer (BLS #23–1011) is $78.74. Accordingly, the Board multiplied each of those wage figures by 1.4 and added two hours for the labor relations specialist and one hour for the lawyer to arrive at its estimate.

These average hourly wages, which are based on the BLS's May 2022 figures released on April 25, 2023, are $5 to $7 higher than those reported in the IRFA when the most updated BLS figures were from May 2020. See 83 FR 54662. The increase is not statistically significant. While some commenters asserted that the wage rates for an attorney were at least $300/hour, none of the comments provided any evidence to which the Board could cite. Therefore, the Board continues to rely on the BLS wage figures.

[574] The Board's revised compliance cost for unions covers the cost of a one-hour consultation between the union's labor relations specialist and legal counsel, which totals $169.11 per the formula described in fn. 573 above.

[575] See SBA Guide at 18.

[576] Id. at 19.

[577] Comments of McDonald's USA, LLC; SBA Office of Advocacy.

considered and rejected for reasons stated in the NPRM and reiterated above.[578] One comment suggests simply modifying the 2020 rule by, for example, broadening the list of terms and conditions of employment that may demonstrate joint-employer status.[579] Or, in the alternative, the comment suggests that the Board could leave the rule untouched and examine its application through subsequent caselaw, which would reveal any deficiencies in the standard.[580] As discussed in Section IV.K above, the Board has considered each of these alternatives, and several others, and has provided a detailed rationale for rejecting the status quo and revising the joint-employer standard through the rulemaking process.

In the NPRM, the Board considered exempting certain small entities and explained why such an exemption would be contrary to judicial precedent and impracticable.[581] Two commenters suggested that the Board reconsider an exemption but did not address the Board's previously stated concerns with such an exemption or provide any further detail on how such an exemption would function.[582] Accordingly, the Board again rejects this exemption as impractical because such a large percentage of employers and unions would be exempt under the SBA definitions, thereby substantially undermining the purpose of the final rule. Moreover, as this rule often applies to relationships involving a small entity (such as a franchisee) and a large enterprise (such as a franchisor), exemptions for small businesses would decrease the application of the rule to larger businesses as well, potentially undermining the policy behind this rule. Additionally, given the very small direct cost of compliance, it is likely that the burden on a small business of determining whether it fell within a particular exempt category would exceed the burden of compliance. Further, Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers.[583] As the Supreme Court has noted, ''[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.'' [584] As such, this alternative is contrary to the objectives of this rulemaking and of the NLRA.

The purpose of considering alternatives is to determine whether they could minimize the compliance burdens on small businesses. SBA Guide at 36. But an agency may select a course that is more economically burdensome than a proposed alternative if there is evidence that the proposed alternative would not accomplish the objectives of the statute. See *AML International* v. *Daley,* 107 F. Supp. 2d 90, 105 (D. Mass. 2000). None of the alternatives proffered and considered accomplish the objectives of issuing this rule while minimizing the familiarization cost on small businesses. Accordingly, the Board believes that promulgating this final rule is the best regulatory course of action.

B. Paperwork Reduction Act

In the NPRM, the Board explained that the proposed rule would not impose any information collection requirements. Accordingly, the proposed rule is not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521. See 87 FR 54662–63. No substantive comments were received relevant to the Board's analysis of its obligations under the PRA.

C. Congressional Review Act

The provisions of this rule are substantive. Therefore, the Board will submit this rule and required accompanying information to the Senate, the House of Representatives, and the Comptroller General as required by the Small Business Regulatory Enforcement Fairness Act (Congressional Review Act or CRA), 5 U.S.C. 801–808.[585]

Pursuant to the CRA, the Office of Information and Regulatory Affairs will designate this rule as a ''major rule'' because it will have an effect on the economy of more than $100 million during the year it takes effect. 5 U.S.C. 804(2)(A). Accordingly, the rule will become effective no earlier than 60 days after its publication in the **Federal Register**.

Final Rule

This rule is published as a final rule.

List of Subjects in 29 CFR Part 103

Jurisdictional standards, Election procedures, Appropriate bargaining units, Joint Employers, Remedial Orders.

For the reasons stated in the preamble, the National Labor Relations Board amends 29 CFR part 103 as follows:

PART 103—OTHER RULES

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

Subpart D—[Removed and Reserved]

■ 2. Remove and reserve subpart D, consisting of § 103.40.

■ 3. Add subpart E, consisting of § 103.40, to read as follows:

Subpart E—Joint Employers

§ 103.40 Joint employers.

(a) An employer, as defined by section 2(2) of the National Labor Relations Act (the Act), is an employer of particular employees, as defined by section 2(3) of the Act, if the employer has an employment relationship with those employees under common-law agency principles.

(b) For all purposes under the Act, two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment.

(c) To ''share or codetermine those matters governing employees' essential terms and conditions of employment'' means for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment.

(d) ''Essential terms and conditions of employment'' are

(1) Wages, benefits, and other compensation;

(2) Hours of work and scheduling;

(3) The assignment of duties to be performed;

(4) The supervision of the performance of duties;

(5) Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;

(6) The tenure of employment, including hiring and discharge; and

[578] See, *e.g.,* comments of U.S. Chamber of Commerce.

[579] Comments of U.S. Chamber of Commerce.

[580] Id.

[581] 87 FR 54662.

[582] Comments of IFA; Rachel Greszler.

[583] However, as mentioned above, there are standards that prevent the Board from asserting authority over entities that fall below certain jurisdictional thresholds. This means that extremely small entities outside of the Board's jurisdiction will not be affected by the final rule. See 29 CFR 104.204.

[584] *NLRB* v. *National Gas Utility District of Hawkins County, Tennessee,* 402 U.S. 600, 603–604 (1971) (quotation omitted).

[585] Several comments note that the proposed rule did not include a CRA analysis. See comments of Colorado Bankers Association; Elizabeth Boynton; National Association of Convenience Stores; U.S. Chamber of Commerce. Such an analysis is included in final rules rather than in proposed ones. See 5 U.S.C. 801–808.

(7) Working conditions related to the safety and health of employees.

(e) Whether an employer possesses the authority to control or exercises the power to control one or more of the employees' essential terms and conditions of employment is determined under common-law agency principles. For the purposes of this section:

(1) Possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether control is exercised.

(2) Exercising the power to control indirectly (including through an intermediary) one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether the power is exercised directly.

(f) Evidence of an entity's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles and that do not bear on the employees' essential terms and conditions of employment is not relevant to the determination of whether the entity is a joint employer.

(g) A party asserting that an employer is a joint employer of particular employees has the burden of establishing, by a preponderance of the evidence, that the entity meets the requirements set forth in paragraphs (a) through (f) of this section.

(h) A joint employer of particular employees

(1) Must bargain collectively with the representative of those employees with respect to any term and condition of employment that it possesses the authority to control or exercises the power to control, regardless of whether that term or condition is deemed to be an essential term and condition of employment under this section for the purposes of establishing joint-employer status; but

(2) Is not required to bargain with respect to any term and condition of employment that it does not possess the authority to control or exercise the power to control.

(i) The provisions of this section are intended to be severable. If any paragraph of this section is held to be unlawful, the remaining paragraphs of this section not deemed unlawful are intended to remain in effect to the fullest extent permitted by law.

Dated: October 20, 2023.

Roxanne L. Rothschild,

Executive Secretary, National Labor Relations Board.

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